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CARSKADDON v. CITY OF SOUTH BEND
et al.

(Supreme Court of Indiana. June 14, 1895.)
REFORMATION OF CONTRACT—MISTAKE OF ONE PARTY.

A resolution of the city council "that the mayor be instructed to purchase" plaintiff's property cannot, at plaintiff's suit for specific performance, be amended by parol, on the ground of mistake, so as to express a completed purchase, especially where the mistake was not mutual. 39 N. E. 667. affirmed.

On petition for rehearing. Overruled.
For former opinion, see 39 N. E. 667.

HACKNEY, J. One insistence of appellant's learned counsel is that, with reference to a memorandum, made for compliance with the statute of frauds, the rule as to ordinary contracts, requiring mutuality of obligation, does not obtain. Another is that we were in error in holding that such memorandum could not be amended by parol to express the intention of the parties. As to the first of these propositions, it may be said that it is probably too much to say that such a memorandum may not be unilateral, or that a suit cannot be maintained to enforce performance of a written promise orally accepted, and that acceptance given renewal by the suit. However, that conclusion does not render it necessary to reverse the ruling of the lower court, since it must be true in every instance that the mistake which may be corrected in equity must be mutual. Here there is no mutuality in the alleged mistake. The mistake alleged, and the only possible mistake, was that the intention of the mover of the resolution was to express a completed purchase instead of a direction to purchase, and not a mistake of the common council. But the rule held in *Baldwin v. Kerlin*, 46 Ind. 426, is that "it is not sufficient that one of the parties should have been mistaken." This rule would seem to deny the right to reform, as against the party making it, a memorandum merely unilateral. How the two parties to an oral agreement, of which the memorandum is but the evidence, could, by mutual mistake, omit from a memorandum by but one of such parties an essential element thereof, would not appear

possible. The present memorandum not only omits the statement of a completed purchase, but to make it do so would flatly contradict the expressed intention of the council to direct a purchase. While perhaps it is going too far to say that no contract of sale or for the sale of real estate inter partes may be reformed to express the intention of the parties, we think it clear that equity will not insert in an unilateral memorandum, not embodying the intention to buy or to sell, that very essential feature, the omission of which left the memorandum as so much waste paper. The case of *Lee v. Hills*, 68 Ind. 474, in principle, so decides. A like case is that of *Banks v. Manufacturing Co.*, 20 Fed. 667. In 2 *Reed, St. Frauds*, § 487, is stated even a much broader doctrine: "The weight of authority, in spite of or consistently with what has already been said, is probably that the omission of a term from a writing, though done by fraud or mistake, will not, without more, allow oral proof of the contract, unless there be an estoppel arising from a change in his situation made by the party setting up the oral contract; and it has been held that mistake in the substance of a written contract will not be corrected on oral evidence." And further: "The principles which are to determine this question are tested best by the consideration of the point as to whether or not the rule of admission of oral proof on the ground of fraud or mistake is merely a weapon of defense, or whether chancery, upon oral proof, will correct the mistake or fraud, and decree the contract as reformed. Much of the contradiction which is to be found in the decisions may be reconciled by observing this distinction, and of those which still conflict many will be those in which the oral evidence was admitted because there was estoppel or part performance. As a general rule, it may be said that oral evidence of fraud or mistake will not be admitted on behalf of a plaintiff seeking specific enforcement of the contract as established by the oral evidence." It is said in *Wood on Frauds* (section 345, p. 657): "The object of the statute in requiring a note or memorandum in writing to be made is to prevent disputes as to what the parties had agreed to and intended, and therefore the

memorandum or note supersedes the prior parol agreement, and excludes all proof as to what was said by the parties, or even to show a mistake in the writing itself." We need not accept the broad doctrine announced by these authors. It is enough when we hold that there may be no reformation where it would result in a contradiction of the memorandum, and would introduce an element not agreed upon by the parties, and not omitted by the mistake of the party sought to be charged, or by the mutual mistake of such party and the party who would enforce the memorandum, if reformed. The petition is overruled.

(141 Ind. 618)

FRENCH v. STATE ex rel. HARLEY.

(Supreme Court of Indiana. June 13, 1895.)

STATE PRISON DIRECTORS — MANNER OF APPOINTMENT — CONSTITUTIONAL LAW.

Const. art. 5, § 1, vesting the executive powers of the state in the governor, does not preclude the legislature from passing an act making the governor, auditor, treasurer, secretary of state, and attorney general a board for the selection of prison directors.

Appeal from circuit court, La Porte county; Lucius Hubbard, Judge.

Action by the state, on the relation of Charles Harley, to oust James W. French from the office of prison warden. Judgment was rendered for relator, and defendant appeals. Affirmed.

G. V. Menzies and John R. Wilson, for appellant. W. A. Ketcham, for appellee.

HACKNEY, J. On the 12th day of March, 1895, the governor appointed and commissioned Henry A. Barnhart, Monfort D. Yontz, and Henry A. Root members of the board of prison directors for the prison North, of the state of Indiana. After taking an oath of office and executing bonds, the gentlemen named organized as such board, and on the 19th day of March, 1895, selected and appointed appellant to the position of warden of said prison. The appellant qualified, gave bond, and continued in the possession and discharge of the duties of said position, he having served in said position the two years immediately preceding said appointment. By the second section of the act of the general assembly of March 7, 1895, the governor, auditor, treasurer, secretary of state, and attorney general were constituted a board for the selection of prison directors. That board, on the 12th day of March, 1895, appointed Enos H. Nebeker, Robert S. Foster, and Henry Van Voorst as members of the board of prison directors for said Northern prison; and, after qualifying and giving bonds and taking an oath of office, they organized as the board of prison directors, and on the 19th day of March, 1895, appointed the relator, Charles Harley, as warden for said prison. The relator, having qualified and given bond, demanded from the appellant the position,

books, and records of such warden; and, the appellant having refused said demand, the relator brought this suit to oust the appellant from and to establish himself in said position. The sufficiency of appellee's petition and the sufficiency of appellant's answer, to which the lower court sustained the appellee's demurrer, raise the question for decision in this court.

The constitutional validity of said section 2, p. 160, Acts 1895, is challenged by the appellant. The section is as follows:

"Sec. 2. The said board of prison directors shall be elected by the governor, auditor, treasurer, secretary of state and attorney general, who are hereby constituted a board for the purpose. The said state officers shall meet on the 12th day of March, 1895, at 10 o'clock a. m. on said day, in the office of the auditor of state, and proceed to select and appoint the members of the said board of prison directors for each of said prisons, and every four years thereafter on said day for the said purpose; and in the case of a vacancy happening at any time on either of said boards of prison directors intermediate between the said quadriennial elections it shall be the duty of the auditor of state to convene said state officers in his office, by written notice served upon each of said officers fixing a time for such meeting, at which meeting the said state officers shall fill any vacancy, in accordance with the provisions of this act. A majority of the state officers, when in session for said purpose, shall constitute a quorum, and a majority of the quorum shall have power to make any appointment upon the said boards of prison directors."

The principal contention of appellant's learned counsel is that, under the constitution (section 1, art. 5), "the executive powers of the state" are "vested in" the "governor"; that appointment to office is an executive function; and that the constitution does not, expressly or by implication, deny the exercise of this function to the governor. If this power was so lodged, in violation of the constitutional authority, in the governor, it is insisted, and follows of necessity, that the appointment of the directors, and in turn their appointment of the relator, were invalid. The constitutional provisions upon which the issue rests, in addition to that vesting the executive power of the state in the governor, are as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of the departments shall exercise any of the functions of another, except as in this constitution expressly provided." Article 3, § 1. "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." Article 15, § 1.

In ascertaining the intention expressed in these sections, it will be necessary to examine other sections which will be set forth hereafter. Our first inquiry is directed to the question, was it intended by the constitution to confer upon the governor all appointing power? This inquiry need not be extended to the appointment of local administrative officers, nor to judicial officers, nor to the mere agencies by which various departments—legislative, executive, and judicial—perform their separate duties and functions, since that would carry our investigations over unnecessary and undisputed grounds. One method of answering the general inquiry is to ascertain if, by the constitution, it was intended to give the power of appointment in any instance to the legislative branch of the government. By section 18, art. 5, it is provided that “when, during the recess of the general assembly, a vacancy shall happen in any office, *the appointment to which is vested in the general assembly,*” etc.; clearly implying that there was some office or class of offices the appointment to which was vested in or intended should be made by the general assembly. By section 30, art. 4, it is provided that “no senator or representative shall, during the term for which he may have been elected, be eligible to any office, *the election of which is vested in the general assembly.*” If the word “election” is employed synonymously with “appointment,” this provision implies with equal force the existence of power in the general assembly to make appointments to office. If we conclude that the italicized words in these sections were put into the constitution without purpose and without meaning, we but engage in making over that sacred instrument, and we condemn its framers for creating a mere medley of words. This we could not do if we would, for it is the function of the judiciary to interpret, to expose the meaning within the words of the constitution, and not to put meaning into the words of the constitution, nor to eliminate sentences, phrases, or words, nor to add to the terms written. We find in the constitution no other provision to which the two provisions last quoted could have been directed, excepting that found in section 1, art. 15, *supra*. Without having been directed to some other provision supplying the offices to be filled by the general assembly, there is but one of two possible contingencies to be accepted,—the constitution is framed in meaningless and confused language, or the words of section 18, art. 5, “the appointment to which is vested in the general assembly,” and probably the same words from section 30, art. 4, had reference to the “officers whose appointments are not otherwise provided for in the constitution,” in section 1, art. 15. It is insisted, however, that section 1, art. 15, does not give the power to the general assembly to appoint, and that the language of the section “in such manner as

now is, or hereafter may be, prescribed by law,” simply confers the power upon the legislature to provide the manner of appointment, and not to make the appointment. The consistency of the appellant’s position requires the conclusion that all power to appoint to office is in the governor; that the legislature possesses only the power to provide the manner of appointment; and that such manner is limited to a provision that the governor shall make it. It would seem to have been a remarkable conception of a constitutional convention to have written it down that the legislature shall prescribe by whom appointments shall be made, but it shall be prescribed that the governor shall make them. This conception, if written in the constitution, would be no more absurd than to have written it in part, and left it in part to what the appellant insists is a necessary implication. This remarkable theory does not relieve us of the embarrassment of finding repeatedly the expressions of the convention, in the constitution, that there are “offices the appointment to which is vested in the general assembly.” Such a theory would strike these words from the constitution, or would render them barren and meaningless. We need not ascertain and define the limits and extent of the appointing power of the governor, nor is it necessary that we should take issue with the cases holding that the appointing power is naturally and properly an executive function. If the constitution has conferred upon the legislative department of the government functions which naturally and more properly belong to another, it is not for us to say that the people could not have done so, nor that the unwisdom of doing so will permit us to assign to the proper departments their proper functions, and thereby do correctly for the people that which the framers of the constitution did erroneously.

It is insisted that the former decisions of this court deny the power, under the constitution, of the general assembly to appoint to office and declare the power to appoint as existing in the governor. *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267; *State v. Hyde*, 121 Ind. 20, 22 N. E. 644; *State v. Denny*, 118 Ind. 382, 21 N. E. 252; *State v. Denny*, 118 Ind. 449, 21 N. E. 274; *State v. Peelle*, 121 Ind. 495, 22 N. E. 654; *State v. Gorby*, 122 Ind. 17, 23 N. E. 678. It is true that with sharp conflict of opinion these cases hold to the proposition that the power to appoint is an executive function. With this conclusion, as we have said, we have no present duty to agree or to disagree, further than to maintain that, if this conclusion is true, it could not prevent the people from making such distribution of that power as to them seemed wise or desirable. If this position is at variance with the holding of those cases, be it so. But further, as to those cases, it was said in *State v. Gorby*, *supra*, that the *Hyde Case* and the *Peelle Case* were

decided upon the question of the power to appoint officers made by the constitution elective by the people. This theory of those two cases was, as we think, correctly announced by the members of the court joining in the majority opinions in those cases. The conflict was not properly one between the executive and the legislative departments over the right to make the appointments, as it is here contended to be. In the three cases in 118 Ind. and 21 N. E. the primary question was one of local self-government, and incidentally the question of the power of the general assembly, under section 1, art. 15, to appoint certain boards of city control. In considering the latter question the reasoning of the judges leads them to a construction of section 1, art. 15, of the constitution, of which we will take notice hereafter. The case of *State v. Gorby*, supra, involved the right of the legislature to appoint to an office held to be elective by the people. If the office there in question was an elective office, and had not been filled by election, as contemplated, the power of the governor to appoint, not originally, as under section 1, art. 15, but to fill a vacancy, as under section 18, art. 5, of the constitution, was the real issue. The same may be said as to the other cases involving elective offices. Without suggesting as to whether the construction placed upon section 1, art. 15, by those cases, was obiter dictum, we pass to the consideration of the effect of the construction of that section, there made, upon the present case. The first of the cases, and that most clearly stating the views of the majority of the court (*State v. Denny*, supra), after quoting section 1, art. 15, proceeds: "This provision is evidently to be construed in the light of the laws in force at the time of its adoption. We think it would be impossible to ascertain its meaning in any other way. Other sections of the constitution make provision for appointments by the governor and for certain appointments by the general assembly, but there was still a large number of offices created by law for whose appointment no provision had been made. In view of this fact, section 1, art. 15, was inserted, providing that such officers should be appointed in such manner as then was or should thereafter be prescribed by law. It is disclosed by an examination of the laws then in force that the manner of appointing or electing state librarian, state printer, warden of the state prison at Jeffersonville, commissioners of the insane asylum, and, perhaps, some other officers for whose appointment no provision is made in the constitution, were elected or appointed by joint ballot of the two houses of the general assembly. This, at the time of the adoption of the constitution, was the manner prescribed by law for their appointment. This section provides that they shall continue to be so appointed unless a different mode is prescribed by law." The deduction from this argument is that, as to all of those offices ex-

isting and not provided for at the time of the adoption of the constitution, the general assembly may appoint. At a very early period, and extending through Rev. St. 1831 (page 512) and Rev. St. 1838 (page 572), the official management of the state's prison was by and through a superintendent, whose duties were assumed, not by appointment as to a political trust, but by contract in the nature of a lease, under which he supplied the needs, prescribed and enforced the discipline, received the labor of the prisoners, and made and preserved for the state records of the transactions of the prison. In 1843 (Rev. St. 1843, p. 100), under the constitution of 1816 (section 8, art. 4), providing that all offices which might be created by the general assembly should "be filled in such manner as may be directed by law," the general assembly named the offices to be filled by the vote of the two houses of the general assembly, and among them was that of prison superintendent, whose term of office was prescribed at five years. It may be observed that practically the same language as that employed in article 15, § 1, of the present constitution was, under the former constitution, construed by the general assembly, without question from the people, to mean that the general assembly might appoint, and not that it should be prescribed by the general assembly that the governor should appoint. Later, and in 1846 (Local Laws, p. 35), the office of warden was created, and it was expressly provided that his appointment should be by the general assembly. Here we have a like construction of the appointing power as conferred by the constitution of 1816. We find in these enactments the rule for the official control of state's prisons existing at the adoption of the present constitution, and, upon the reasoning of the case from which we last quoted, the rule adopted by the constitution; namely, through appointments by the general assembly. But it may be said that the Northern prison was not in operation before the adoption of the present constitution, and that its official control could not have been then provided by law. This is true, but the rule of control and the source of power to control were in existence, and, upon the reasoning of that case, belonged to the general assembly. It would not be a reasonable presumption that the framers of the constitution intended to separate the power of prison control so as to confer it upon the general assembly as to one prison and upon the governor as to another prison. The state's provision for the imprisonment of offenders was an institution of the state, and the two prisons are but branches of that institution, and are not different because located, for convenience, in remote parts of the state than if the last had been but an addition to the first. The control of the state's prison was a governmental function, which, by the rule of the case under consideration, was intrusted to the general assembly.

If we should err in the position that the rule for control of the prison North was in force when the constitution was adopted, and that instead it was by and through an independent office thereafter created, there is still another view of the question to be taken from the standpoint of the practical construction of the constitution. We do not sympathize with the eloquent and able appeal of the appellant's counsel against the doctrine of practical construction as the resort of cowards and a makeshift for avoiding the intention of the framers of the constitution. Upon the doctrine of practical construction and its legitimate scope, we will quote the following from the opinion in *Hovey v. Riley*, 119 Ind. 386, 21 N. E. 890, in which a majority of the court then sitting concurred: "Our own and other courts have, time and time again, adjudged that practical exposition is of controlling influence whenever there is need of interpretation. The language employed by the courts is strong, and the current of opinion is unbroken. In speaking of the effect of a practical exposition, it was said by an able court that 'it has always been regarded by the courts as equivalent to positive law.' *Bruce v. Schuyler*, 4 Gilman, 221. In adhering to long continued exposition, another court said: 'We cannot shake a principle which, in practice, has so long and so extensively prevailed.' *Rogers v. Goodwin*, 2 Mass. 475. But it is unnecessary to quote the expressions of the courts, for harmony reigns throughout the whole scope of judicial opinion upon the subject." The present case presents, as strongly as any in the state's history, a practical construction of our present constitution upon the question in review. Beginning with the session of 1855, when the first board of prison directors was created, and at the first session of the general assembly after the adoption of the constitution, when existing prison leases permitted, we find the general assembly assuming the appointing power as to officers of state's prison control. We find that in 1859 (the constitution not yet 10 years in force) the general assembly assumes and exercises the power of appointment of the state's prison directors for the Northern prison. We find that from session to session, from those periods to the session of 1893, this power was assumed and exercised by the general assembly without exception, doubt, or question of authority. The exercise by the general assembly, for nearly 40 years, of this power, without question from the people, and covering periods of the bitterest political history in the annals of our state and nation, is not the only fact giving strength to the construction favoring the existence of that power. In the early periods of that assumed authority there were in the general assembly, as members thereof, David Kilgore, Walter March, Walter E. Beach, Thomas D. Walpole, Henry G. Todd, Amzi L. Wheeler, Ezekiel D. Logan, Rodolphus Schoonover, John L. Spann, Samuel

J. Anthony, Jefferson Helm, John Mathes, Spencer Wiley, William F. Sherrod, George W. Moore, Hugh Miller, Isaac Kinley, Allen Hamilton, and possibly others who had also been members of the constitutional convention. Not only this fact, but the further fact that during the period of this long acquiescence in the construction of the constitution favoring the existence of the power of appointment in the general assembly sat, as governors of the state, men familiar with the constitution, its origin, and its intended reforms,—lawyers whose ability and fame are the just pride of our state, and including in the long list the names of Wright, Willard, Hammond, Lane, Morton, Baker, Hendricks, Porter, Gray, and Hovey. It is significant also that Gov. Hovey, in his numerous contests over the question of the proper lodgment of the appointing power, did not question the power of the legislature to appoint to the office of prison director, though such appointments were twice made during his service as governor. If we felt that the question as to the power of the legislature to make the appointment of prison officers, construing the constitution upon its letter and spirit, were doubtful, we should feel it our duty to submit to this practical exposition. But we do not regard it as doubtful, and are constrained to differ with the construction of section 1, art. 15, as held, or as the reasons given in the cases relied upon by the appellant imply, so far as they may be deemed authority against the right of the legislature to choose officers for the control of the prison North.

The principal decision upon which those cases rest, in so far as they discuss section 1, art. 15, is that in *State v. Kennon*, 7 Ohio St. 546. The provision of the constitution of Ohio considered in that case, and corresponding to that of this state, is as follows: "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; *but no appointing power shall be exercised by the general assembly*, except as prescribed in this constitution and in the election of United States senators." It was there held that under this provision the general assembly had no power of appointment to a certain office created after the adoption of the constitution. This conclusion is not remarkable, when we recall the words of the constitution, above italicized, denying the right of the general assembly to appoint, and when we observe that the power to prescribe is given with that expressed limitation upon it. In this view of the case it renders very little support to the construction of our constitution urged by appellant. Under this provision, however, it has been recognized in at least two instances, by the same court, that the general assembly is empowered to designate the person, body, or functionary to make

such appointments. *State v. Covington*, 29 Ohio St. 102; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, and 12 N. E. 829.

We have demonstrated very clearly, we believe, that the appointment to the office of prison director is not, by our constitution, intrusted to the governor alone. Conceding, then, for the sake of the inquiry, that the legislature's power was to prescribe the manner of appointment, and not to make the appointment, has it violated this privilege by naming the persons or functionaries to make the appointment? Having under consideration an appointive office, we do not consider to what extent the word "manner," as employed in section 1, art. 15, may include a choice by the general assembly as to whether a given office may be filled by an election, and we confine our consideration of the word in its relation alone to appointive offices.

From the appellant's contention his definition of "manner" is, necessarily, a direction to the governor to appoint. We have suggested already the fallacy of this position. Nor do we believe that "manner" was intended to permit simply the direction of the particular mental operation in arriving at a choice, nor the qualifications of the person to be chosen, nor character of commission, nor the duration of the term, nor the duties of the person or position, nor the time nor the place of appointing. All of these, save the first, are purely legislative functions, and the first is necessarily with the person chosen, and its direction is not essential to the performance of the privilege, and is not susceptible of legislative, executive, or judicial direction. "Manner," according to the appellant's theory, means the person or functionary to make the appointment. This is so by the case of *State v. Denny*, supra, where it was said that the manner of appointment of librarian, etc., before the constitution, was by the legislature, and that the same manner of appointment as to such offices is proper, since the constitution. Such is the effect, also, of the holding in *State v. Hyde*, 129 Ind. 296, 28 N. E. 186. In this we agree; not, of course, going to the extent of conceding that it means that, as to the office in question, the governor shall be that functionary. In the case of *State v. Hyde*, just cited, the controversy was as to the power of the governor to appoint to the office of state superintendent of oil inspection, as against the power of the state geologist to make such appointment, as given by the act of 1891; and it involved a construction of section 1, art. 15, supra. The judges, including Judges Coffey and Olds, who had concurred in the majority opinions in the 118 Ind. and 21 N. E. and 121 Ind. and 22 N. E. cases supra, Judge Elliott, who dissented in those cases, and Judges McBride and Miller, filling vacancies occasioned by the deaths of Judges Mitchell and Berkshire, after those cases were decided, all concurred in the following reasoning and conclusions by Mr. Chief Justice

Coffey: "In this case, however, we are met squarely with the question as to whether the general assembly possesses the power to confer on the state geologist the legal right to appoint to the office involved in this suit. If it possesses such power, the judgment of the circuit court must be affirmed; otherwise it must be reversed. The solution of the question presented for decision depends upon the nature of the office and the construction to be placed upon the provision of our state constitution. The office is not an administrative state office, whose incumbent is charged with the administration of a separate department of the state government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment; and, as the appointment of the incumbent is not provided for in the constitution, the case falls clearly within the provisions of section 1, art. 15. That section applies to such officers only as may be appointed, and for whose appointment no provision is made in the constitution. As the incumbent of the office in question may be appointed, and as no provision is made in the constitution for his appointment, the general assembly has the power to provide by law for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is generally the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive; for by the terms of section 1, art. 3, of the constitution, the executive department of the state includes the administrative. Of course, it was not the intention that any administrative state officer should perform any duty properly and necessarily belonging to the governor of the state; but it was, we think, the intention that such officers should have the power to perform such duties as should be required of them by law in the administration of the state government, where such requirement in no wise conflicted with the powers delegated to the governor alone. The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer; but the state geologist is an administrative state officer, elected by the people. * * * The office involved in this controversy does not belong to the class which must, of necessity, be filled by the governor, but it is an office created by statute, largely under the control of the legislature which created it, and falls within the constitutional provision which confers upon the general assembly the power to prescribe the mode or manner of selecting its incumbent."

To name the functionaries, therefore, was the privilege of the general assembly; and it only remains to inquire if, in doing so in this instance, the commingling of the executive

with the administrative officers in the performance of the duty to appoint has violated any provision of the constitution. Counsel urge that the power conferred constitutes an independent office, a board of appointment, and is not an addition of duties to offices already imposed; that "no one can be associated with the governor in the performance of executive duties," quoting from *Gray v. State*, 72 Ind. 578. We do not question the correctness of that holding, but, as we have already shown, the duty in question, while possibly in the nature of an executive duty, cannot, under our constitution, be classed as executive duty, since, by that instrument, the duty was intrusted to the legislative department for performance by it, or, for the purposes of this question, in the manner which it might prescribe. The contention that the association with the governor of administrative state officers, in the duty charged by the law in review, infringes his prerogative, as the executive head of the state, rests upon the proposition that the power of appointment in this instance is an executive function. We should not incline to the view that, if an executive function, the duties and responsibilities attending the exercise of that function could be shared by administrative officers. But, as we have shown, that is not the case before us. Nor do we find it necessary to our conclusion that while, by constitutional permit, the appointment may be made directly by the general assembly, it must be done so; for, by the plain language of the constitution, the manner is a matter of choice by the general assembly. This choice is not embarrassed by limitations or conditions, and, to render it invalid, it must be so exercised as to confer it upon some one or number, incapable of its performance. There is no expressed inhibition of our constitution to the discharge of this duty by executive or administrative officers, or by both classes of officers. It is the constitutional theory of our form of government, as evidenced by the association of the executive and the administrative in one department of the government (section 1, art. 3); by casting the duty upon the governor of seeing that the laws are enforced, by administrative officers, of course (section 18, art. 5); and by the provision that "the governor shall transact all necessary business with the officers of the government" (section 15, art. 5); that the relation of the executive and the administrative subdivisions are not to be so separated as to deny to the former all participancy in the affairs of the latter. Not only is there no expressed inhibition against the association of the governor with administrative state officers in the discharge of any duty not involving powers and privileges delegated by the constitution to either alone, or to some other department of the government; but, in our opinion, such association is proper, and within the spirit of the provisions of the constitution just referred to. Section 1, art. 3,

does not deny the idea of such association. It divides the powers of government into the legislative department, the executive department ("including the administrative"), and the judicial department; and it is enjoined that "no person charged with official duties under one of these departments shall exercise any of the functions of another." It will be observed that it is not forbidden that those assigned to one department shall exercise any of the functions of another within such department. While not agreeing that any matter intrusted by the constitution directly to either subdivision of the executive department may be exercised by the other, we think it entirely certain that the inhibition of the section of the constitution last referred to does not deny the exercise jointly by the members of both subdivisions of any function not so delegated to either alone, and consistent with the theory that the duty involves a function of government falling within that department. Under the old constitution, the legislature gave to the governor the duty of selecting a visitor to the state's prison. It is true that the visitor was not an officer, having a voice in the control of the prison, but he was given access to the prison, and an observation of its management, with a view to advising the executive of mismanagement, and enabling him to "see that the laws were faithfully enforced." The only official existing, at the adoption of the present constitution, having a voice in the control, and whose position was by political choice, was a warden, who was chosen by the legislature; and, at the same time, the institution was, necessarily, as it is now, one of the administrative agencies of the state, falling under the executive department of the government. Its management was not through purely executive agencies, nor were they legislative, and they were in no sense judicial. They were of the administrative agencies of the state, subject to executive authority only so far as executive duties required the laws to be enforced by the governor. Nothing exists in the present constitution to change this unity of interest in the institution, or to take it from the list of administrative agencies of the state.

This union of interest in like agencies, where the power of control is not directed by the constitution, has for many years and in many instances been the authority for associating the governor with administrative officers in the performance of governmental duties, and some of them are as follows: Commissioners of public printing: Governor, secretary, and auditor of state. Rev. St. 1894, § 7594. Appointment of monument commissioners (Acts 1887, p. 30): Governor, secretary, auditor, and treasurer. Regents of monument: Same officers. Acts 1895, p. 135. State board of education: Governor and various educational officers. Rev. St. 1894, § 5849 (Rev. St. 1881, § 4420). State board of health: Governor, secretary, and auditor constitute a board of

appointment. Rev. St. 1894, § 6711. Trustees of Purdue University: Governor, agricultural and horticultural boards. Rev. St. 1894, § 6176. State board of tax commissioners: Governor, secretary, auditor, and two citizens. Rev. St. 1894, § 8535. Board of election commissioners: Governor and two electors. Rev. St. 1894, § 6213. State board of charities: Governor and six citizens. Rev. St. 1894, § 3193. Executive council for purchase of supplies and repairs of state house: Governor, secretary, and treasurer. Rev. St. 1894, §§ 7783, 7789. State bank examiner, appointed by auditor, with approval of governor. Rev. St. 1894, § 2938. Schoolbook commissioners: Governor and others, the members of state board of education. Rev. St. 1894, § 5853. University visiting board: Governor and other officials. Rev. St. 1894, § 6076 (Rev. St. 1881, § 4577). Canvass of election returns: Secretary, with governor. Rev. St. 1894, § 6282 (Rev. St. 1881, § 4727). Board to examine treasury: Governor, secretary, and auditor. Rev. St. 1894, § 7670 (Rev. St. 1881, § 5643). Board of audit for female reformatory: Governor, auditor, and secretary. Rev. St. 1894, § 8256 (Rev. St. 1881, § 6163). This rule of associating the executive with administrative officers in the performance of supervisory administrative duties has obtained as to the president of the United States, and in the states of Alabama, Arkansas, California, Colorado, Connecticut, Dakota, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, Nevada, New York, North Carolina, Oregon, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Washington, and Wisconsin. In the states named, the governor is a member of from one to twelve boards of the character of those of which the governor of this state is a member, as above shown. In the case of *Gray v. State*, supra, the question involved was upon a statute, enacted in 1872, making the governor, attorney general, secretary of state, and treasurer of state jointly the agents of the state to scrutinize and pass upon the genuineness of certain bonds of the state, and to borrow money and pay off such bonds. It was held that the duty of these officers was not executive; and it was said: "The governor and other officers named in the act may well be regarded as constituting a board, organized by the legislature, for the performance of certain duties; and a mandate will lie against them to enforce the performance of the duties." The duties involved were ministerial and quasi judicial, but related to the administrative branch of the government. The statute there involved and the conclusion of the court, quoted above, recognize the right to associate the governor with administrative officers in the performance of duties pertaining to the administrative branch of the government.

We are not required, however, to find express authority in the constitution for this association of the officers of two subdivisions of one department of the government in the discharge of duties falling within that department, and not intrusted, by the constitution, to either alone. Nor is it necessary that we should find that such association is authorized from authority of the constitution necessarily implied. It is not essential to the existence of such right that the spirit of the constitution clearly admits it. Our inquiry must be, does it infringe any provision of the constitution? *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47; *Campbell v. Dwiggin*, 83 Ind. 473; *Railway Co. v. Geiger*, 34 Ind. 185; *Beauchamp v. State*, 6 Blackf. 299; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. In the last of these cases it was said (113 Ind. 516, 16 N. E. 192): "It is established law that an act of the legislature cannot be annulled by the judiciary in any respect unless it clearly contravenes some provision of the constitution. Doubt must be resolved in favor of the validity of the statute. Since this doctrine was announced by Chief Justice Marshall, early in the history of our country, it has been inflexibly adhered to by all the courts." It was further said by this court in *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698: "It devolves upon the party who assails a statute, on the grounds that it violates the constitution, to show a clear violation, and to point out the provision violated. Failing in this, his attack is unavailing." In that case this court quoted with approval, from *Kneeland v. City of Milwaukee*, 15 Wis. 454, the following conclusion: "That upon a constitutional question as to which we have no doubt we cannot follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the constitution." With our present conviction, that there is not even a doubt of the validity of the statute in question, we have but one duty and one privilege, and that is to uphold the law. The judgment of the circuit court is affirmed.

(142 Ind. 280)

CITY OF HUNTINGTON v. GRIFFITH.¹

(Supreme Court of Indiana. June 11, 1895.)

CHANGE OF GRADE — INJUNCTION AGAINST CITY — PRIOR ESTABLISHMENT OF GRADE — PLEADING AND EVIDENCE.

1. In a petition to enjoin a city from changing a grade without first assessing and paying damages as provided by Rev. St. 1881, § 3073 (Rev. St. 1894, § 3508), an allegation that, at a previous time, pursuant to an ordinance, stakes were set according to the established grade of said city, and the improvement was made and accepted in accordance therewith, is, on demurrer, a sufficient allegation of the maintenance of a prior established grade by the city.

2. In a suit to enjoin a city from changing a grade without first assessing and paying damages, as required by Rev. St. 1881, § 3073 (Rev. St. 1894, § 3508), evidence that an ordinance previously passed directed that the city engineer set the stakes to the established grade of such city,

¹ Rehearing denied. See 41 N. E. 589.

and that the "street be reduced to the established grade of the city," and evidence that at the time of the passage of such ordinance a grade was established, and a profile of the grade for the improvement then ordered made a part of the record, without evidence as to the filing of the profile, or that it was acted upon by the council, does not support a finding of an affirmative establishment of a prior grade recorded by the city engineer by direction of the common council, and of the acceptance, approval, and adoption of the grade by the common council.

3. Rev. St. 1881, § 3073 (Rev. St. 1894, § 3508), providing that a grade once established by a city shall not be changed until damages occasioned by the change have been assessed and tendered to the parties injured by the change, applies only in case of a change of grade established by a city.

4. Where the longhand manuscript of the evidence is made a part of a bill of exceptions, and the judge certifies that the bill contains all the evidence, and makes that contained in it part thereof, the evidence is in the record by bill of exceptions in proper form.

Appeal from circuit court, Huntington county; J. T. Cox, Special Judge.

Suit for an injunction by Eveline V. Griffith against the city of Huntington. From a decree granting the relief prayed, defendant appeals. Reversed.

Kenner & Lesh, for appellant. J. M. Hatfield, for appellee.

HACKNEY, J. The circuit court enjoined the appellant from establishing a grade, and improving, according to such proposed grade, a street in said city. The petition alleged that the town (now city) of Huntington had, by surveys, grade records, and ordinances, established a general grade for the said town, and a special grade for the street in question; that in the year 1873 said town was incorporated as a city, and thereafter, "to wit, on the 7th day of September, 1877, the common council of said city adopted an ordinance to grade and gravel part of North Jefferson street, and bowlder the gutters on each side of part of said street; that in said ordinance the city civil engineer was directed to set the proper grade stakes, and advertise for the execution of said work; that, in pursuance of said ordinance, on order of the common council, the city civil engineer did set the proper grade stakes in pursuance to the established grade of said city, and where the said lots abut on said Jefferson street, and the street was then and there improved as provided for in said ordinance, which improvement, when completed, was accepted by said city"; that still later, and in March, 1894, the appellant, by ordinance, survey, etc., sought to establish a grade for said street, the effect of which would be to reduce the existing grade in front of the appellee's lot five or six feet, to the injury of said lot and to her danger, all without the assessment, payment, or tender to appellee of any damages on account of such proposed grade. The petition is indefinite in its allegations of the former establishment of a grade for said street, and renders it difficult to determine the theory upon which the appellee claimed

the existence of a former established grade, whether by implication the former grade of the town was in force, or whether by the affirmative adoption the grade established by the town became the city grade, or whether a new grade was established by the city in the proceedings of September, 1877. The lower court rendered a special finding upon the theory that a former grade had been established by the appellant city, which had been adopted by it in its proceeding of September 7, 1877; but whether established by the adoption of another or by independent action would seem to make no difference, so that it was authoritative.

Accepting the construction of the petition by the lower court,—and this, we think, is the most reasonable theory presented by the pleading,—the demurrer was properly overruled, and all of the objections urged against the petition might have been cured upon motion to make more specific. It is true that a city is not liable for damages arising from the establishment of a street grade in conflict with a grade established by a former town corporation embracing the same territory. *City of Wabash v. Alber*, 88 Ind. 423. It is equally true, however, that a city may not change a street grade, legally established by it, without first assessing and paying or tendering the damages occasioned by such change to the abutting property owner. *Rev. St. 1881, § 3073 (Rev. St. 1894, § 3508)*; *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *City of Lafayette v. Wortman*, 107 Ind. 404, 8 N. E. 277; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1; *City of Anderson v. Bain*, 120 Ind. 254, 22 N. E. 323; *City of Valparaiso v. Adams*, 123 Ind. 250, 24 N. E. 107; *City of Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999.

The allegation that, pursuant to an ordinance, the stakes were set according to the established grade of said city, and the improvement made and accepted in accordance therewith, while general and subject to be made more particular, is, as we have said, sufficient as against a demurrer, and as alleging the maintenance of a former grade established by the city. It negatives the idea of a mere smoothing of the surface of the street preparatory to placing the gravel. This conclusion is not at variance with *Mattingly v. City of Plymouth*, 100 Ind. 545, which holds that "until proceedings are had by the common council directing that the grade of a certain street or streets or specified portions thereof shall be established, or that a grade already established is approved and adopted in some authoritative way by the common council, it cannot be deemed that the 'city authorities have once established' the grade of a street." Our conclusion rests upon the theory that the general allegation quoted and referred to implies necessarily some such authoritative action by the city. In the case of *City of Lafayette v. Wortman*, *supra*, the

allegation as to the former grade was "the common council of the city established the grade thereof in the manner following, viz.: 'Beginning at the grade of Earl avenue, and running down to Thompson avenue, in the shape of a depressed curve,'"—and is not an allegation of the proceeding by which the grade was established, and is, at most, a statement of the character of the grade. It is not, in our opinion, "a direct allegation as to the establishment of a prior grade," in the sense of setting up the manner of establishing it, as insisted by appellant's counsel.

The ruling of the circuit court upon the motion for a new trial is next presented. The court's third finding was as follows: "That on the 7th day of September, 1877, the common council of defendant adopted an ordinance to grade and gravel part of Jefferson street, including that part embracing plaintiff's premises, and to bowlder the gutters on each side of said street. In said ordinance it was ordained that said street should be reduced to the established grade of said city. *Prior to said date the city civil engineer of said city by the directions of the common council thereof, made, established, and recorded the grade of said North Jefferson street along said property, which grade was reported to said common council, and was accepted, approved, and adopted by said common council as the grade of said street.* The profile and specifications were at the time on file at the chambers of said common council. That said street was so reduced to said grade, and gutters were constructed in accordance with said grade, and the street leveled, all to the acceptance of the city civil engineer, in accordance with said plans and specifications in said ordinance directed; and that this was all done after due notices had been given for sealed bids until October 5, 1877, and under contract with appellant." That part of the finding in italics is attacked as not supported by the evidence. We have carefully read the evidence, and have been unable to find in it a support for the finding that prior to the proceeding of September, 1877, the city established a grade for the street in question. Notwithstanding the appellant's challenge, the appellee has failed to point out any evidence supporting that finding. There was evidence tending to support the allegation that the town had established a grade for said street, but there was no evidence tending to support the possible theory that the grade so established was affirmatively adopted by the city prior to the proceeding of September, 1877; and it must be remembered that the finding is of an affirmative establishment of a grade by direction to the engineer, and by such grade established and recorded, "reported to said common council, and accepted, approved, and adopted by said common council as the grade of said street." The direction to the engineer in the ordinance of September, 1877, to set the stakes to the established

grade of said city, or that the "street be reduced to the established grade of the city," might suggest the possible inference of a previously established grade; but it does not authorize a finding as an independent fact that the council had directed the establishment of a grade; that the engineer had designed the grade, had recorded the same, and had reported the fact to the council, and which report had been "accepted, approved, and adopted by said common council." There is evidence also tending to support the theory that in and by the proceeding of 1877 a grade was established. This, however, is not the establishment of the grade as found by the court to have been made "prior to said date." This evidence is not complete, since it is partly oral; and, while stating abstractly the action of the council, it is nowhere shown what were the contents of any lost paper or record. It is true that the record presents a profile of the grade for the improvement of 1877, but it is not shown when it was filed, or that the council ever considered it or took any action with reference to it. The record is not satisfactory in its presentation of the evidence. It commingles oral and documentary evidence, without regard to the order of time, and in some instances by interrogatories addressed to and answered by the witnesses from points upon plats or diagrams not disclosed by the record. If the able and careful judge who presided during the trial was not deceived by the evidence, the record certainly is incomplete, and does not present to us all of the evidence upon which he acted.

By the authorities we have cited, it must appear that the change must be of a grade established by the city. As said in *Mattingly v. City of Plymouth*, supra, in speaking of the statute permitting damages for such change: "It is plainly inferable that the grade, the establishment of which is here referred to, and which cannot be changed without the assessment and tender of the damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street or specified portion thereof; and such grade, when established, must be approved and adopted in some way by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep; and the proceedings of the council should in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved, so as to make it authoritative." The evidence discloses no establishment of grade upon any of the theories possible under the complaint. Appellee suggests that the evidence is not in the record by bill of exceptions in proper form. The original bill is embodied in the record, and it makes, by incorporation and adoption,

the longhand manuscript of the evidence a part of the bill. The judge certifies that the bill contains all of the evidence, and he makes that contained in the bill a part thereof. This is sufficient, though the manuscript may purport to have been copied from shorthand by a stenographer. Elliott, App. Proc. § 821, and authorities there cited. The judgment of the circuit court is reversed, with instructions to sustain appellant's motion for a new trial.

(141 Ind. 584)

YOST v. YOST.

(Supreme Court of Indiana. June 18, 1895.)

DIVORCE—ALIMONY.

Rev. St. 1894, § 1057 (Rev. St. 1881, § 1045), provides that the court shall give such alimony as the circumstances render proper; and section 1054 (section 1042) provides that, pending divorce, the court may make such orders as to the expenses as will insure the wife an efficient preparation of her case, and, on decreeing a divorce in favor of the wife, shall require the husband to pay all reasonable expenses of the wife. *Held*, in divorce where the wife prevailed, that it was error to allow only \$100 for alimony, counsel fees, and reasonable expenses, where the defendant's property, accumulated before marriage, was valued at about \$3,000, and the parties were married 9 years, were, respectively, 65 and 68 years old, and the wife was without any other means of support.

Appeal from circuit court, Cass county; D. B. McConnell, Judge.

Action by Catherine Yost against John Yost for divorce and alimony. There was a judgment for plaintiff, but she appeals therefrom, on the ground that the amount awarded to her as alimony was insufficient. Reversed.

Magee & Funk, for appellant. Fransler & Mahoney and Kistler & Kistler, for appellee.

JORDAN, J. This was an action by appellant against appellee for a divorce and alimony, upon the grounds of cruel treatment. Appellee appeared, and filed his answer in denial, and also a cross complaint, whereby he sought a divorce from appellant, his wife, for alleged cruel treatment. Upon the issues joined, a trial was had, which resulted in the court's finding in favor of appellant, and granting to her a divorce, and awarding her \$100 alimony. There was a finding against appellee upon his cross bill. Appellant thereupon moved for a new trial, and, among other things, assigned as a reason therefor that the finding of the court as to the amount of alimony fixed is not sustained by the evidence, and that the same is contrary both to the law and the evidence, and is insufficient in amount; that the finding of the court, in refusing to allow the appellant a sum sufficient to cover reasonable expenses in the prosecution of her action, and in refusing to allow her any sum for attorney's fees in the prosecution of her petition, is contrary to law and the evidence. This motion was overruled, and excepted to, and a judgment

rendered in favor of appellant upon the finding. Appellant then moved the court to modify that part of the judgment awarding her \$100 alimony, and render the same for an amount in excess of that sum, and also to allow and order that the defendant pay the sum of \$75 to plaintiff on account of attorney's fees incurred by her in the prosecution of her action. This motion was overruled, and the proper exception was reserved.

The errors assigned and argued by the learned counsel for appellant are the overruling of the motion for a new trial, and of that to modify the judgment. In fact, the only questions presented by her counsel, in their brief, are those relative to the insufficiency of alimony, and the action of the court in refusing to allow attorney's fees. It appears from the evidence in the record that the parties had been married, and lived together as husband and wife, for a period of nine years; that the wife is 65 years of age, and the husband 68; that at the time of their marriage appellant was a widow, and appellee a childless widower; and that no children were born unto them by virtue of said union. It also appears that the married life of these parties was not, strictly speaking, happy or congenial. There is evidence tending to show that the appellant was actuated, upon her part, in accepting the appellant as her husband, through pecuniary motives; and appellee, upon his part, in taking appellant as his wife, was induced by his desire to obtain a housekeeper or servant. At the time of their marriage he had property, but she had no property or means whatever. The evidence also shows cruel treatment upon the part of appellee, and a neglect or refusal to discharge the conjugal duties incumbent upon him as a husband. Upon one occasion, appellee choked and otherwise maltreated the appellant, and compelled her, at a late hour at night, to leave his home, and seek refuge with friends. The evidence also establishes that the appellee is the owner, in fee simple, of real estate, improved and unimproved, situate in the city of Logansport, Ind., ranging in value from \$2,200 to \$3,750, and on one piece of this realty there is situated a business building, the rental value of which appears to be about \$375 per annum. All of this property was accumulated by the appellee before he and appellant were married. The latter has no means or property whatever, and has to support herself by doing washing and performing other domestic work. Appellee introduced a witness, who was an attorney at law at the bar of the Cass circuit court, who fixed as a reasonable attorney's fee for the prosecution of the action the sum of \$100. There was no evidence contradictory to that given by this witness. After the commencement of the suit, and before the trial, the court, upon application of appellant, ordered and required appellee to pay the sum of \$25 to appellant.

This was all the allowance made in said cause. The question arises, upon the evidence before us, did the trial court exercise a sound discretion in awarding the appellant but \$100 as alimony, and, upon decreeing the divorce in her favor, refusing to allow her any sum to defray her reasonable expenses, including her attorney's fees? Section 1057, Rev. St. 1894 (section 1045, Rev. St. 1881), provides "that the court shall make such decree for alimony in all cases contemplated by this act, as the circumstances of the case shall render just and proper." By the first clause of section 1054, Rev. St. 1894 (section 1042, Rev. St. 1881), it is provided that, pending a petition for a divorce, the court or judge may make such orders relative to the expenses of such suit as will insure to the wife an efficient preparation of her case, etc. The second clause of this section provides: "And on decreeing a divorce in favor of the wife or refusing one on application of the husband, the court shall by order to be enforced by attachment require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the petition when such divorce has been refused." The temporary allowance authorized by the first clause in the above section is commonly denominated "suit money," and is for the purpose of insuring to the wife an efficient preparation of her case, and a fair and impartial trial thereof. *Davis v. Davis* (at this term) 40 N. E. 803; *Musselman v. Musselman*, 44 Ind. 106; *Harrell v. Harrell*, 39 Ind. 185. In the case last cited this court said: "It is made the imperative duty of the court, in decreeing a divorce to the wife, or refusing one to the husband, to make an allowance sufficient to cover all reasonable expenses of the wife in the prosecution or defense of the action. The language of the statute is, that the court shall make such orders, etc." The court, however, in making this final allowance to the wife, should take into consideration any other allowances that were made to her during the pendency of the action, under the first clause of this section. *Harrell v. Harrell*, supra. The evidence of the witness to which we have referred fixed as a reasonable attorney's fee for the prosecution of this action \$100, or \$75 after deducting the \$25 paid by appellee pending the action. This was not contradicted by appellee, and his failure to do so ought to be regarded as an admission on his part that the amount of the attorney's fee, as stated and fixed by the witness, was reasonable. *Musselman v. Musselman*, supra. The "reasonable expenses" of the wife include her attorney's fees. *McCabe v. Britton*, 79 Ind. 224. We recognize the fact, under the repeated decisions of this court, that the amount allowed to the wife under this section of the statute is a matter of sound discretion upon the part of the trial court, and that this court will not interpose, upon an appeal, except where there is an abuse of this discretion. We must presume

that, when the court awarded the appellee \$25 during the pending of her petition, he did so for the purpose of enabling her to make an efficient preparation for trial, as provided by the statute. It is obvious, we think, that prior to the trial the court could not be fully apprised or informed as to what would be the amount of the reasonable expenses that the wife would incur during the trial of the cause. The allowance made pendent lite is made regardless of the merits of her petition, or as to what the result of the trial may be. The final determination by the court of the reasonable expenses that ought to be allowed to the wife, under all the evidence and circumstances in each particular case, under this second clause, is a matter which must necessarily be postponed until the ultimate decree is rendered. In the event that the wife is the petitioner, and her prayer for a divorce be denied, the court cannot exercise any power under this clause of the statute. But when the trial is concluded, and the wife succeeds upon her petition, or the husband has been defeated upon his application, the entire cause, with all of its attending events and circumstances, including the length of the trial, and the character of the contest, together with other matters which are or may be proper for the court to consider in order to determine what are, in the particular case, the "reasonable expenses" of the wife, in the prosecution or defense of the action, have all come under the immediate observation of the court, or may be properly and fully presented. In fact, the trial court cannot, generally speaking, be apprised or fully informed of such matters as will enable it to make its ultimate order upon this question until the pendency of the action has terminated. We are of the opinion that the action of the court in refusing to make an additional allowance to appellant, at least for the reasonable fees of her counsel, incurred by her, under the evidence and facts herein, cannot be sustained.

The next and only remaining question to be considered is that arising upon the action of the court in its award of alimony, the amount of which, counsel for appellant insist, is wholly unjust, and palpably insufficient. By the terms of section 1057, supra, the court is required to give alimony to the wife in such a sum as the circumstances of each case shall render just and proper. We yield adherence to the well and firmly settled rule that the question of what amount shall be decreed in any case is a matter of judicial discretion, within the province of the trial court, and depends upon the facts and circumstances, under the law, in each particular case; and this court will only interfere when it is apparent that this discretion has been abused. It is also manifest that no infallible or inflexible rule can be laid down for the guidance of the court in its award of the sum which the husband shall pay to the wife whom he has injured, by rea-

son of the wrongs and grievances of which she has complained, and which she has sustained by the evidence upon the trial. For the purpose of determining what amount, if any, shall be adjudged against the husband in a particular case, the court has a right, and it is its duty, to inquire into the condition of each party to the action, and ascertain the amount of property owned and held by the husband at the time; the source from whence it came; how accumulated; and whether or no the wife, by her industry and economy, has contributed to the accumulation of the same; the ability of the husband to pay, by reason of his financial status, his income, his ability to earn money, or inability to do so, by reason of old age, ill health, or other causes,—and upon a full investigation of these matters, and others that may arise and are germane to this issue, make such an allowance as will be just and proper. *Hedrick v. Hedrick*, 128 Ind. 522, 28 N. E. 768. The principal reason or object of the law, in granting to the wife, upon divorce from her husband, the rights of alimony, is that the sum allotted to her shall be in lieu of her interest in his estate, and of the support which he, as such husband, is bound to provide. *Musselman v. Musselman*, supra; *Hills v. Hills*, 94 Ind. 438. The conduct of the husband, and the wrongs perpetrated by him upon the wife, are matters that may be considered against him by the court, in fixing the amount to be allowed. *Ifert v. Ifert*, 29 Ind. 473. It is said by an eminent author: "No one should be permitted to suffer in purse from the wrongs of another; hence, alimony, when given to an innocent and injured wife, should be in a proportion to leave her at least as well off, peculiarly, in noncohabitation as she would be in cohabitation." 2 Bish. Mar. & Div. § 468. As we have seen, in the case at bar the court divorced appellant upon the grounds of cruel treatment at the hands of appellee. It is undisputed that appellee is the owner of real estate, and that he is virtually free from indebtedness. The testimony of his own witnesses fixes the value of the same to be at least \$2,200, or from that sum to \$2,500, while, upon the other side, that of appellant's witnesses fixes it, we believe, from \$2,500 to \$3,750. Appellant has no property or means, and for her support in her old age she must rely upon her labor, or the charity of her friends. She appears to have served the appellee, in the capacity of his wife, for a period of nine years; and if her statements, with those of others, are to be accepted as true, she submitted to and endured many grievances arising out of the acts of appellee. We, however, recognize that, under all the facts and circumstances in the case at bar, it is not one that invokes a very liberal award of alimony. But, however, we cannot yield judicial sanction to the contention of appellee's learned counsel that the lower court exercised a sound discretion in only allowing

the sum in question. We do not think, under the facts, and within the meaning and spirit of the law, it was "just and proper" for the court, upon decreeing a divorce to appellant on account of the wrongs of appellee, to bid her depart from the forum of justice with the small amount in controversy as the sum total to be allowed in her favor. In this, and also in refusing to allow the reasonable expenses in question, we are of the opinion that the learned judge presiding at the trial did not exercise a proper judicial discretion, and therefore erred. As this court, in the exercise of appellate jurisdiction, has the power to so mold its judgments and mandates as to secure the proper relief or justice to the party or parties entitled thereto, we should much prefer to exercise that power, in order to provide a way by which this result might be obtained without disturbing that part of the decree divorcing the parties. But as the value of the property owned by appellee may have changed since the judgment was originally rendered, and likewise the circumstances and conditions of both parties, it will be proper and right, and better, perhaps, we think, subserve the ends of justice, for the lower court to hear and consider the entire case *de novo*. It is therefore ordered that the judgment be reversed, and that the court grant appellant's motion for a new trial upon all issues, and for further proceedings in accordance with this opinion.

(141 Ind. 593)

GUENTHER v. STATE.

(Supreme Court of Indiana. June 14, 1895.)

CRIMINAL LAW—BILL OF EXCEPTIONS—SIGNING—APPEAL.

1. Burns' Rev. St. 1894, § 1916 (Rev. St. 1881, § 1847), providing that a bill of exceptions in a criminal case must be signed by the judge and filed by the clerk, is mandatory, and both of these facts must be shown by the record before the bill will be considered on appeal.

2. Burns' Rev. St. 1894, § 1916 (Rev. St. 1881, § 1847), provides that "all bills of exceptions in a criminal prosecution must be made out and presented to the judge at the trial, or within such time thereafter as the judge may allow, not exceeding 60 days from the time judgment is rendered." *Held*, that time in which to file a bill of exceptions could not be allowed after judgment was rendered.

3. Where a bill of exceptions does not contain all the evidence in the cause, questions based upon evidence will not be considered on appeal.

Appeal from circuit court, Randolph county; Benjamin F. Marsh, Special Judge.

Henry Guenther was convicted of rape, and appeals. Affirmed.

Walker, Smith & Garrett, for appellant. W. A. Ketcham and Clarkson L. Hutchins, for the State.

McCABE, J. The appellant was found guilty by the jury, on a trial of the charge of rape, in the circuit court, his punishment being fixed at confinement in the state prison for one year. The court rendered judgment

on the verdict. The only proper assignment of error here is the action of the trial court in overruling his motion for a new trial. The grounds therefor stated in such motion are that the circuit court erred (1) in overruling his motion for a continuance; (2) in overruling his motion for a change of venue from the county; (3) in instructing the jury as in a certain specified instruction. These and other grounds specified in the motion, of a similar nature, as well as that the verdict is contrary to law and the evidence, require a bill of exceptions to present them. There is incorporated in the transcript what purports to be a bill of exceptions, incorporating what purports to be the longhand manuscript of the evidence as taken by the official shorthand reporter at the trial; but there is no statement or showing anywhere in the record, or in the transcript of the clerk, that such bill of exceptions was ever filed in the office of the clerk of the trial court.

Objection is made on behalf of the state, by the attorney general, to the consideration or decision of any of the questions raised by the motion for a new trial, because they are not presented to us for our consideration and decision, for want of a bill of exceptions in the record presenting them. Our Criminal Code provides that a bill of exceptions "must be signed by the judge and filed by the clerk." Burns' Rev. St. 1894, § 1816 (Rev. St. 1881, § 1847). It has been held—and correctly so, we think—by this court, under this statute, that, "when * * * these facts are shown by the record, then, and not before, can the bill be considered here as constituting a part of the record." Stewart v. State, 113 Ind. 505, 16 N. E. 186. To the same effect is Henderson v. McAllister (at this term) 40 N. E. 1071. In the former case it was there held that the statute is mandatory as to both requirements.

Besides, the motion for a new trial was overruled on the 29th day of April, 1895, whereupon the judgment was rendered on the same day. After the judgment was rendered the court made the order allowing 30 days to file the bill of exceptions. The trial judge certifies that he signed the bill of exceptions on the 14th day of May, following. The statute cited provides that "all bills of exceptions in a criminal prosecution must be made out and presented to the judge at the trial, or within such time thereafter as the judge may allow, not exceeding 60 days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk." It has been held, under the statute, that time cannot be allowed in which to file a bill of exceptions after the judgment is rendered. Hunter v. State, 101 Ind. 406, and cases there cited; Id., 102 Ind. 428, 1 N. E. 361; Bruce v. State (at this term) 40 N. E. 1069. So that, if even we should treat the transcript as showing that the bill of exceptions had been properly filed in the clerk's office, it was not made and presented to the

judge as the time of the trial; and as no valid order was made, allowing time thereafter for so presenting and filing the same, it is not presenting a part of the record, for that reason. Moreover, the bill of exceptions does not purport to contain all the evidence in the cause, but the judge states, over his signature, "that it contains a full, true, complete, and impartial transcript and report of all the evidence of said witnesses, to wit, John Born, Karoline Born, and Jacob Born." This is far from a compliance with the rule, long established, that the bill of exceptions must show that it contains all the evidence in the cause. When the bill fails to affirmatively show that it contains all the evidence in the cause, this court cannot and will not consider and pass upon questions which are based upon the evidence. Garrison v. State, 110 Ind. 145, 11 N. E. 2; Beatty v. O'Connor, 106 Ind. 81, 5 N. E. 880; Kleyla v. State, 112 Ind. 146, 13 N. E. 255; Central Union Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922, and 12 N. E. 136; Railroad Co. v. Barnum, 79 Ind. 261; Insurance Co. v. Galahan, 75 Ind. 168; Barley v. Dunn, 85 Ind. 338; Bender v. Wampler, 84 Ind. 172; Feltenzer v. Van Valzah, 95 Ind. 128; Ingel v. Scott, 86 Ind. 518; Railroad Co. v. Nickless, 73 Ind. 382; Henderson v. McAllister, supra.

There is in the transcript what purports to be another bill of exceptions, containing certain instructions given, and exceptions thereto, and certain others refused, and exceptions thereto; also certain other matter, containing exceptions to other rulings, and signed by the judge on the same day. But there is nothing to show that it was ever filed in the clerk's office, or that time was allowed the appellant in which to present and file the same. Neither of these bills of exceptions, therefore, forms any part of the record of the cause in this court, and their contents cannot be considered in determining the questions raised by the motion for a new trial. That leaves the record without anything to show affirmatively that there was error, and the presumption being that the judgment is correct, until the contrary is affirmatively shown by the record, the judgment is affirmed.

MONKS, J., did not participate in the decision of this cause.

(13 Ind. App. 10)

LOUISVILLE, N. A. & C. RY. CO. v. HENDRICKS.

(Appellate Court of Indiana. June 12, 1895.)

MALICIOUS PROSECUTION—EVIDENCE OF ACQUITTAL—OBJECTIONS.

Where defendant in an action for malicious prosecution allowed plaintiff to prove the termination of the prosecution by parol evidence, he cannot urge on appeal that the record of the acquittal was the only competent evidence of that fact.

On rehearing. Overruled.

For former opinion, see 40 N. E. 82.

GAVIN, J. Counsel for appellant very courteously, but with much zeal, urge that the court was in error:

1. Because no malice was shown. As to this proposition, we need add nothing to what was said in our original opinion, which, in our judgment, fully meets the objection of counsel.

2. It is insisted that the evidence was insufficient, because it was essential that appellee should prove the termination of the prosecution; and that, although there was parol evidence that he was tried on the charge in the circuit court, and acquitted, yet the record was the best and only evidence, and, in the absence of the record, the fact was not established. The proof was made by the evidence of the prosecuting attorney, without objection by appellant. While the record was undoubtedly the best evidence, yet when a fact provable properly by writings is permitted to be proved by parol, it is nevertheless established. The objection should have been made when the evidence was offered. *Pennsylvania Co. v. Stanley* (Ind. App.) 37 N. E. 421; *Graves v. State*, 121 Ind. 357, 23 N. E. 155. Moreover, no such question was made on the original hearing. On the contrary, it is expressly stated in appellant's brief in the statement of facts, at pages 4 and 5: "Thereafter, and at the March term of the circuit court, an information was filed pursuant to the statute, whereon appellee was tried in the circuit court, and acquitted. Upon the acquittal of appellee he brought this suit." Petition overruled.

(12 Ind. App. 666)

LOUISVILLE & N. R. CO. v. CROMBACK.
(Appellate Court of Indiana. June 12, 1895.)

ACTION AGAINST RAILROAD COMPANY—INJURY
TO PERSON ON TRACK—CONTRIBUTORY
NEGLIGENCE.

1. Employés in charge of a moving train have a right to presume that a person walking on the track will step off in time to avoid injury.

2. A person reasonably active, and not defective in sight or hearing, who steps on a railroad track immediately in front of an engine headed in the direction he is going, and under steam, and walks along the track in front of it for about 300 feet without looking back or listening to ascertain whether the engine is moving, there being nothing to prevent his hearing or to obstruct his view, is negligent.

Appeal from circuit court, Gibson county;
W. W. Medcalf, Special Judge.

Action by Jacob Cromback, administrator of Henry C. Cartmell, deceased, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Iglehart & Taylor, L. C. Embree, John H. Miller, and F. P. Leonard, for appellant. Buskirk & Brady and G. V. Menzies, for appellee.

DAVIS, J. This action was instituted by appellee to recover damages on account of

the death of the decedent, Henry C. Cartmell. The complaint was in two paragraphs. The verdict was limited to the first paragraph. Omitting the formal parts of the pleadings, about which there is no dispute, it is alleged that on the 15th day of March, 1892, defendant operated a railroad, which passed through and within the corporate limits of the city of Mt. Vernon, with its main track laid over Eleventh street, and over what would be the continuation of that street to the western corporation line of the city, where it crossed a public highway; that from where the main track crossed the main street of the city, thence to the public highway on the west, for more than 20 years prior to the 15th of March, 1892, and on that day, the public, with the knowledge and consent of the defendant, had and were using that part of the main track above described as a thoroughfare in passing on foot to and from Main street, in said city, to the highway on the west; that on said day the decedent lived near where the main track intersected the highway on the west, and in the forenoon of that day started on foot from defendant's station house to his home, passing, as he left the station house, onto the main track leading to the highway, and to his home, which was and had been for the time and in manner stated in general use by the public as a passway; that as decedent stepped onto the main track one of defendant's engines was standing still on the main track, headed west, with three cars attached; that defendant's servants were at that time engaged in setting off cars on a side track of the defendant by means of a switch located a short distance west of the engine, and that in the proper management of said engine there was no occasion for the engine to go on the main track west of the switch, and where the decedent was then walking; that a person such as an engineer or fireman, then standing at an elevated place on the engine, could look west on the main track, which was straight for a quarter of a mile, with nothing to interfere with the view, or prevent the decedent, who was then walking west with his back to the engine, from being seen; that the servants of the defendant then in charge of the engine saw the decedent, who was in plain view, and knew decedent was walking westwardly on the main track, towards the public highway; that with decedent in plain view, and knowing that he was not aware that said engine was about to be started, and when he was some yards west of the switch, those in charge of the engine carelessly, negligently, and suddenly, without giving any warning or making any signal, caused the engine to be started ahead, at the rate of 20 miles per hour, towards the decedent; that after the engine and the attached cars were put in motion, and before the switch was reached, the rear car was cut off, and the engine and remaining cars were moved forward at an increased speed

towards the decedent, without sounding the whistle, ringing the bell, or making any warning signal; that the engine and cars, from some cause, making no noise or sound, the decedent at this time not hearing any noise from the moving engine or cars, or knowing that same were moving rapidly towards him, ignorant of the approach of the same, and being in plain view of those operating the cars, the employees carelessly and negligently ran the engine upon him, etc.; that at that time decedent was without fault, etc. It is not alleged that appellant's employees in charge of the engine saw the decedent, or that they in fact became aware of the danger to which he was exposed, after the engine was started. There is an allegation, in substance, that the employees of appellant in charge of the train suddenly started the engine at a high rate of speed, in violation of a city ordinance, for the purpose of making a running switch, knowing that the intestate was ignorant that the engine was so put in motion, and that he was in plain view of those operating the cars; but there is no averment that, when the engine and cars were negligently moved towards and against him, they saw him, or knew that he was not aware that the engine was coming behind him.

Among the interrogatories and answers thereto are the following: "(27) Was not the defendant's engine running westward on defendant's main track at the time it collided with Cartmell? Answer. Yes. (28) Was not Cartmell walking westward between the rails of defendant's main track at the time he was struck by defendant's engine? Answer. Yes." "(31) Was there anything in the way to prevent Cartmell from seeing the engine at the time he went upon the main track, or any time thereafter before he was struck by the engine, if he had looked in the direction from whence it came? Answer. No. (32) If you answer the next preceding interrogatory in the affirmative, state what there was to obstruct or prevent Cartmell from seeing the engine? Answer. Nothing. (33) Had not Cartmell walked past the engine by which he was injured while it was on the defendant's main track, headed west, immediately before he went upon the track in front of it? Answer. Yes. (34) Did not Cartmell know that the engine that ran over him was on the track, headed west and under steam, when he went upon the track in front of it? Answer. Yes. (35) Was Cartmell in any wise deficient in his senses of sight or hearing on the day he was injured? Answer. No." "(38) Was not Cartmell about forty-nine (49) years old, and reasonably active, at the time of the injury? Answer. Yes. (39) Was there anything to prevent Cartmell from stepping off the track, and avoiding collision with the engine, if he had looked for its approach? Answer. No. (40) Was there anything to prevent Cartmell from stepping off of the track, and avoiding collision with the engine, if he

had listened for its approach? Answer. No. (41) If there was anything to prevent Cartmell from stepping off of the track, state what it was. Answer. Having no knowledge of the engine's approach." "(56) Was there not on the 15th day of March, 1892, a space between the defendant's main track and its side track suitable for a footway, extending from the depot at Mt. Vernon, Ind., westward, to the lower New Harmony road? Answer. Yes." In addition to these, other answers of the jury set forth that the killing of appellee's intestate occurred on the appellant's main track, near a tool house which stood about 300 feet west of the depot at Mt. Vernon, and between the depot and the lower New Harmony road, which crossed the main track some 1,200 feet west of the depot.

The verdict was upon the paragraph of the complaint charging negligence, and in their answers to interrogatories the jury expressly returned that the injury was not purposely inflicted. The facts of the case as shown by the evidence, construed most strongly in favor of appellee, are, substantially, that on and for some years before the 15th day of March, 1892, the decedent, Henry C. Cartmell, lived at Mt. Vernon, Ind., in the immediate neighborhood of the appellant's tracks and switching yard, west of its depot. He had been for a time a section hand on appellant's road, and was well acquainted with the tracks at the place of his injury, and the use of them by the appellant. About 7 o'clock in the morning of the day in question one of appellant's freight trains, traveling west, was at its depot in Mt. Vernon, engaged in switching and moving cars. Cartmell had been at a saloon east of the depot, and was on his way from the saloon, westward, towards his home. As he proceeded from the saloon to the place where he was killed, he walked the entire length of the depot platform, stepped upon the ground at the west end of the platform, proceeded a short distance westward, between the main track and a switch just south of it, turned and went upon the main track, and continued to walk westward, between the rails, for a distance of about 300 feet, on and along appellant's right of way,—not upon any street, highway, or public crossing. The railroad was built over ground that had been used as a pass-way, and along the line of the track were houses, cooper shops, brick yards, etc. Near the track was a grove used by the public for picnics, barbecues, political meetings, camp meetings, etc., and also in that vicinity were the county infirmary and a racing stable. The appellant had run excursion trains for public gatherings at this grove, landing its passengers at its station, knowing that the excursionists would walk west on its track to the grove. For 20 years the public had passed to and fro along this track. On this occasion the freight train, with the engine attached to at least part of its cars, was

standing on the main track, beside the platform, headed west, and likely to move in that direction at any moment. The front of the engine was a few feet west of the west end of the platform, and, in walking, the intestate was compelled to pass within six or eight feet of it. He was 49 years old, reasonably active, and not defective in sight or hearing. Under these conditions the decedent entered upon the track, immediately in front of the engine, and deliberately walked thereon until the engine started forward, overtook and collided with him. He could have walked alongside the track in safety. He did not look to discover the approach of the engine. There is no evidence that he listened. He made no effort to leave the track. The ground was covered with snow, which may have, to some extent, deadened the sound made by the wheels of the engine on the track; but there was nothing to prevent his hearing its other noises, if he had listened, or to obstruct his view of it, if he had looked around. These are essential facts, so far as they relate to the conduct of the appellee's intestate.

The errors assigned are (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling the motion for judgment on the special findings of the jury in their answers to interrogatories, notwithstanding the general verdict; (3) that the court erred in overruling the motion for a new trial.

The first assignment calls in question the sufficiency of the complaint as an entirety, but it has not been discussed in a manner requiring us to decide it. In the second paragraph it is charged that the killing of the intestate was done purposely. In this connection, however, we will briefly refer to some of the principles applicable to cases of this character: In *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, Judge Hackney, speaking for the supreme court, says: "In every case involving actionable negligence, there are necessarily three elements essential to its existence: (1) the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad, or the evidence insufficient." *Thiele v. McManus*, 3 Ind. App. 132, 23 N. E. 327; *Railroad Co. v. Griffin*, 100 Ind. 221. In *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807, the late Judge Mitchell says: "To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." We quote again from an opinion written by Judge Hackney:

"Willfulness does not consist in negligence. On the contrary, as illustrated by the cases of *Bryan* and of *Mann*, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness. Indeed, this court has so often denied the claim which attempts to distinguish between degrees of negligence that authority or further statement in denial should not be deemed necessary." *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504. In a recent case Judge Reinhard says: "Actionable negligence consists in the failure of the defendant to discharge some duty or obligation resting upon the defendant towards the plaintiff, from which injury has resulted. * * * If, for example, the appellee was a mere trespasser upon the appellant's property, the latter owed him no such duty as would require him to provide safeguards around the open elevator shaft. If he was a licensee,—that is, if he was permitted to come upon the premises by mere sufferance of the proprietor,—the latter still owed him no duty which would render him liable for leaving the opening unprotected. It is only when the injured party came upon the premises of the owner or proprietor by invitation, express or implied, that the latter assumed the obligation of providing safe and suitable means of ingress and egress and of moving about the premises." *Iron Works v. Larger* (Ind. App.) 39 N. E. 209. See, also, *Railway Co. v. Adair*, Id. 672. Assuming, therefore, without deciding, that the first paragraph is sufficient on the theory of negligence, and that the second is sufficient on the theory of willfulness, we will briefly consider the questions discussed. It should be remembered that the verdict of the jury was in favor of appellant on the second paragraph of the complaint.

The jury, by their general verdict, have presumably found every material allegation of the first paragraph of the complaint to have been proven; and that presumption conclusively prevails in this court, unless the contrary is clearly shown by the answers to the interrogatories. The special findings overrule the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered. *Railway Co. v. Ott* (Ind. App.) 33 N. E. 842; *Railway Co. v. Smock*, 133 Ind. 415, 33 N. E. 108; *Matchett v. Railway Co.*, 132 Ind. 339, 31 N. E. 792; *Pennsylvania Co. v. Smith*, 98 Ind. 44; *Cox v. Ratcliffe*, 105 Ind. 377, 5 N. E. 5; *Railway Co. v. Creek*, 180

Ind. 142, 29 N. E. 481; Railroad Co. v. Lewis, 119 Ind. 223, 21 N. E. 660. Assuming, for the purposes of this decision, that appellant is shown to have been guilty of actionable negligence, and waiving the question as to whether appellant was entitled to judgment on the answers of the jury to the interrogatories, we are of the opinion that the evidence fails to show that said Cartmell was free from fault. Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32, and authorities there cited; Railway Co. v. Stephens (Ind. App.) 40 N. E. 148; Railway Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Cones v. Railway Co., 114 Ind. 328, 16 N. E. 638; Smith v. Railroad Co. (Ind. Sup.) 40 N. E. 270; Railroad Co. v. Graham, 95 Ind. 286. This case, in all essential respects, is very much like the case of Pennsylvania Co. v. Meyers, supra. It is ordinarily true that one whose negligence has contributed to an accident from which he has sustained an injury will not be debarred the right to recover if the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary care, have prevented the mischief which followed. Evans v. Express Co., 122 Ind. 362, 23 N. E. 1039. Assuming there is evidence in the record tending to prove that appellant's servants knew of the presence of Cartmell on the track in front of the moving train in time to have stopped it before the collision, they had the right to presume that he would step off the track in time to avoid injury up to the last moment before he was struck. Pennsylvania Co. v. Meyers, supra; Railroad Co. v. Lohges, 6 Ind. App. 288, 33 N. E. 449. In the light of this presumption, there is no evidence, either direct or circumstantial, in our opinion, authorizing the inference that they had reasonable ground to believe, before the engine struck him, that Cartmell was unconscious of his danger, or that he was unable to avoid it. On the contrary, they may well have presumed that Cartmell knew before the engine reached him that it was moving towards him, and that he would step from the track before he was overtaken. Railway Co. v. Judd (Ind. App.) 36 N. E. 775. It is true, appellant's servants had the opportunity to see Cartmell on the track in front of the engine, and, in the exercise of ordinary care, they ought to have given a signal of warning to him; but he had an opportunity to see or hear the engine, and he ought to have looked and listened, to ascertain whether the track was clear. The danger was open and obvious to him, if he had given any attention to his surroundings. Levey v. Bigelow, 6 Ind. App. 677, 34 N. E. 128. It appears from the evidence, and is found as a fact by the jury, that after passing the engine, which was standing on the track, ready to move at any moment, he walked on and along the track in front of it for a distance

of 300 feet or more, and neither looked nor listened to see whether it was moving. Railway Co. v. Bennett (Ind. App.) 35 N. E. 1033. The facts and circumstances of this case do not bring Cartmell within the exception recognized in Railroad Co. v. Cox, 8 Ind. App. 29, 35 N. E. 183. If the verdict had been based on the issue tendered by the second paragraph of the complaint, the question as to whether he was guilty of contributory negligence would not be material. Barr v. Railroad Co. (Ind. App.) 37 N. E. 814. In relation to the use of the track by the public for 20 years, see Carger v. Fee (Ind. Sup.) 39 N. E. 95, and Davis v. Railway Co., Id. 495. As to licensees by sufferance or permission, see, also, Railway Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121, and Railroad Co. v. Goldsmith, 47 Ind. 43. The judgment is reversed, with instructions to sustain appellant's motion for a new trial.

(13 Ind. App. 1)

TERRY v. PROVIDENT FUND SOC. OF NEW YORK.

(Appellate Court of Indiana. June 12, 1895.)

INSURANCE AGENT—AUTHORITY—RATIFICATION OF ACTS.

1. The acceptance by the insurer of an application forwarded through a person assuming to act as its agent, the applicant being ignorant of his want of authority, is a ratification of the acts of such agent in soliciting and contracting for the insurance within the scope of his apparent authority.

2. Where insured pays the agent of an insurance company soliciting the insurance, on delivery of the policy, a portion of the premium, credit being given the insured by the agent for the balance, which constitute the commissions the agent is entitled to, the insurer is bound by the payment, though the policy provide that it shall not take effect until the money is paid at the home office of the insurer, and that no waiver of the provisions of the policy shall be claimed by reason of acts of any person unless such acts are specially authorized in writing over the signature of the president of insurer, and though the insurer cancel the policy for nonpayment of the premium before the loss, failing, however, to notify insured of such cancellation until after the loss.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by Elias A. Terry against the Provident Fund Society of New York. There was a judgment for defendant, and plaintiff appeals. Reversed.

Brooks & Brooks, for appellant. John Alexander, for appellee.

REINHARD, C. J. This is a suit on an accident insurance policy. The cause was tried by the court. Special findings were made by the court, with its conclusions of law thereon. The appellant excepted to the conclusions of law, and unsuccessfully moved for judgment on the findings. The court rendered judgment for appellee. The appellant's assignments of error are: "(1) The

court erred in its conclusions of law on the special findings of fact. (2) The court erred in overruling appellant's motion for judgment on the special findings of fact."

These alleged errors may be considered together. The policy contains the following provision: "This insurance shall not take effect until the first advance quarterly premium call shall be paid at the home office in New York, for which a receipt shall be given over the name of the president, showing the date and hour of payment"; also the following: "No waiver shall be claimed by reason of the acts of any person, unless such acts shall be specially authorized in writing over the signature of the president of the society." It is not claimed that the first quarterly premium (which amounted to five dollars) was paid at the home office in New York. The appellee's contention is that the same was never paid to the company or any authorized agent of the same. The appellant contends that he paid one-half the premium to the agent who procured the insurance to be written, and that as to the other half, which was said agent's commission, the agent gave the appellant credit for the same. The facts found specially show that about December 10, 1893, one R. H. Carpenter, who lived near Huron, in Lawrence county, solicited the appellant to take a policy of accident insurance in the appellee's company. Carpenter, who had previously solicited appellant in that behalf, had in his possession one of said company's blank applications, which he filled out and got appellant to sign. He forwarded the application to one E. F. Sutherland, at Mitchell, Ind., and he to Dorman N. Davidson, the appellee's general agent for the state of Indiana, at Indianapolis, who, in turn, forwarded the same to the appellee's home office in New York City, where it was duly received, and marked "Accepted," and a policy issued thereon on the 18th day of December, 1893. At the same time a receipt for the first premium call of five dollars was signed by the president of the company, which, together with the policy, was transmitted by mail to said Davidson, with instructions to deliver the policy and receipt to the applicant on the receipt of the five dollars. Sutherland was not a commissioned agent of the company, but had some of its blank applications, and used them for persons desiring insurance in appellee's company. When filled out and signed, he sent such applications to Davidson, who forwarded them to the home office. Carpenter was unknown to the company or the state agent. When it was ascertained that Carpenter had taken the application, the words "R. H. Carpenter" were written on the margin thereof but only as a memorandum to designate the person who had taken the application. At the time Sutherland sent the application to Davidson, he requested the latter to send him (Sutherland) the policy, and hold the receipt for the money until he (Sutherland) had

sent the same to Davidson. In accordance with this request, Davidson sent the policy to Sutherland, who handed or sent the same to Carpenter. About January 1, 1894, Carpenter delivered the policy to the appellant, who paid Carpenter \$2.50 in cash, and the latter gave appellant credit for \$2.50 additional, saying that it was his commission for securing the policy, which was true. Carpenter at the same time also delivered to the appellant a blank of said company for making proof of loss in case of accident. On the 8th day of January, 1894, appellant was injured, and in consequence thereof was disabled for a period of 16 weeks, for which, if properly insured, he would have been entitled to receive indemnity from the company, at the rate of \$10 per week. Carpenter resided six miles from Huron, where the appellant lived, and the latter had known Carpenter for 15 years. Appellant, when he made the application, was able to read; and, on the night of the day upon which he received the policy, he read all its conditions and provisions, including the ones hereinbefore alluded to, and the further one that "the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance of this certificate and to its validity and enforcement, and no waiver shall be claimed," etc., as heretofore stated. The court further finds that "the said plaintiff trusted entirely to Carpenter"; that Davidson held said receipt at Indianapolis, waiting for the money to pay the said first premium, until about December 31, 1893, and, not having received the same, returned the receipt to the home office, with advice that the said premium had not been paid, when, on January 3, 1894, the policy was canceled by the company, and the word "Canceled" stamped on said application. The company or its agents never notified appellant of the cancellation of the policy until after notice of said injury. On January 16, 1894, the state agent, Davidson, was informed by Sutherland that Carpenter had paid him \$2.50 on and for the appellant's advance premium, and asked instructions as to what should be done with the money, and was informed by Davidson that the policy had been forfeited for nonpayment of the advance premium January 3, 1894, who instructed him to return the money to appellant or Carpenter; and it was so tendered by Sutherland, but refused, and Sutherland still holds the money subject to the orders of the appellant or Carpenter. On the 8th day of January, 1894, appellant made proof of his injury on the blank given him by Carpenter; and appellant forwarded said proof to the home office of the appellee, where it was duly received on January 12, 1894; and the company notified appellant, denying any liability, and informing him of the cancellation of the policy. Appellant, after reading the policy, never went to see Carpenter to learn why he had

not given him a receipt for the money paid him, signed by the president of the company, showing the amount, date, and hour of payment, nor did he ever demand such a receipt, nor inquire whether Carpenter had the same, or had any written authority from the company to transact its business. If there was any limitation on Carpenter's authority to act as agent, appellant had no knowledge of the same, except as the same was disclosed by the policy. When it received notice of the injury, the company denied all liability under the policy and for said injury, and has denied all liability ever since. The policy had, among other indorsements upon it, the following:

"\$5.00. Dec. 18, 1893. Received of E. A. Terry five dollars of first advance quarterly annual premium call on policy No. 6,082, this Dec. 18, 1893. A. N. Lockwood, President.

"This receipt is void unless dated on the day of actual payment, and at that time countersigned by D. N. Davidson."

The following indorsement was across the face of the policy: "Payment having been made after the date of expiration of assessment, no indemnity will be allowed for injuries received between the date of expiration and time of payment;" also the following indorsement across the face, in blue pencil: "Canceled. D. N. Davidson. 12/18/93. 1/3/94." The application is stamped across its face "Canceled," and beneath this word is written in red ink: "January 3, 1894, non-payment advance premium call;" also the following, in red ink: "Accident Department. Application accepted at 5 p. m., this 18th day of December, 1893. Secy."

We think, under the facts found, it must be conceded that Carpenter had authority to deliver the policy upon condition of the prepayment of the advance premium according to the terms of the policy. This is true, as we conceive, from the fact that the execution of the policy is not denied under oath, and that the risk was accepted by the company upon the appellant's application. The failure to deny the execution of the policy and the acceptance of the application amount to a ratification of the acts of the agent in soliciting the insurance, the receiving of the application, and the conditional delivery of the policy. *Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Kerlin v. Association*, 8 Ind. App. 628, 35 N. E. 39, and 36 N. E. 156.

The only reason urged for the cancellation of the policy was the failure of the applicant to send the advance premium to the home office; for it cannot be denied, we think, that if the appellant had sent the money to the home office or paid it to Davidson, or the company's recognized agent, Sutherland, the delivery of the policy through Carpenter could not be successfully disputed. The company could, of course, have repudiated the acts of Carpenter entirely, and refused to recognize his authority as its agent to contract for the insurance. But it cannot be

heard to ratify the acts of Carpenter in part and repudiate them in part. When it recognized the regularity of the application and the legitimacy of the channel through which it came, it placed Carpenter upon the same foundation with other agents of the company for soliciting and contracting for insurance. He had just as much authority in that behalf as a regularly commissioned agent would have had. Had such commissioned agent been sent by the appellee to the appellant to solicit this insurance, without instructions except to comply with the terms of the application and policy, there would be just as much reason for disputing his authority to deliver the policy except upon payment of the premium as there was here on the part of Carpenter. But the authorities above cited firmly establish the rule, we think, that where the applicant is ignorant of any limitation upon the agent's authority, as it is found was the case here, and the applicant acts in good faith, and relies upon the acts and statements of the agent, within the scope of his apparent authority, the principal will be bound by the agent's statements and acts; and this, we think, includes a waiver of the condition that the advance premium must be paid at the home office, and a receipt procured for the same. In the case of *Kerlin v. Association*, supra, it was said by Davis, J., speaking for this court: "So if, at the time the application is made or the insurance is contracted, circumstances or conditions exist which are in conflict with the terms and conditions of the application or policy, and the agent of the company knew of this existence, and agreed that as to them the conditions of the application should not be effective, the insurer cannot take advantage of their existence to defeat a recovery after loss has occurred." In the present case, of course, the company is not subject to the criticism of having waited till the injury had occurred before asserting its defense. It canceled the policy before such injury, because it had not received the premium. But if the premium was paid to its agent, as we must hold that it was, it is in effect the same as if it had been paid at the home office, and the fact that the money was not accounted for by the agent before the injury cannot be made a cause for forfeiting the policy. It seems to us that the question before us is narrowed to the inquiry whether the insured shall be made to suffer for the misconduct of the company's agent. Under the circumstances, we think the appellee is estopped to deny the payment of the premium to the home office, the agent Carpenter having waived the same, and accepted it in cash, less his commission, which he had a right to remit. To quote again from the case of *Kerlin v. Association*, supra: "In our opinion, * * * the agent of the company had the right, on the occasion in question, to do all that could have been done in relation to such matter by the offi-

cers of the company at the home office." Indeed, the conduct of the secretary or other officers at the home office was such as to lead to the conclusion that it was not the intention that the money should be paid at the home office. The receipt for the advance premium was sent with the policy to the general agent at Indianapolis. But whether such was the intention or not is immaterial if the requirement to pay at the home office was waived. As said by Mitchell, J., in *Insurance Co. v. Gilman*, supra: "It is well settled that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary; and, unless a policy so delivered is avoided by showing bad faith or collusion, it is enforceable. * * * If the company has been credited with the premium in account by its agent, or if credit has been extended by the agent to the assured, or if it has, in fact, been paid to him, no doubt it is a sufficient payment to the company to support the policy." In *May on Insurance* (section 360) it is said: "If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent." See, also, *Behler v. Insurance Co.*, 68 Ind. 347; 11 Am. & Eng. Enc. Law, 308, 336; *Insurance Co. v. Jenks*, 5 Ind. 96. Moreover, in the case in hand the appellee must have known that the application was taken by Carpenter, as the words "Credit R. H. Carpenter" were written on the back of the application after it had passed from appellant's possession, and without his knowledge. Whatever knowledge this implied was possessed by the appellee when it received the application and indorsed it as accepted. Even if Carpenter was but a broker, he was still authorized to deliver the policy and receive the premium. *Insurance Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, and 32 N. E. 814. There is no contention that \$2.50 was not the correct amount coming to the appellee after deducting the commission. In fact, as already intimated, the only complaint appears to be that Carpenter did not promptly turn over the money to the company. If, however, he was its agent for the purpose of delivering the policy and collecting the premium, as we think we have demonstrated he was, then the appellee is bound by the payment made to him, and the policy was in force when the appellant was injured. We, therefore, think the court erred in its conclusions of law, and in not rendering judgment in favor of the appellant. Judgment reversed, with instructions to the trial court to restate its conclusions of law in accordance with this

opinion, and to render judgment thereon in favor of appellant for \$160 and interest from the 9th day of February, 1894.

(12 Ind. App. 686)

CHILDER v. LOUISVILLE, N. A. & C. RY. CO.

(Appellate Court of Indiana. June 11, 1895.)

RAILROAD COMPANIES—KILLING STOCK.

Under Rev. St. 1894, § 5323 (Elliott's Supp. § 1077), requiring railroad companies to fence in their right of way, and section 5312, Rev. St. 1894 (section 4025, Rev. St. 1881), making a railroad company liable when it fails so to do for stock which get on its track and are killed by its cars or locomotives, recovery cannot be had unless the death or injury was caused by contact with the cars or locomotive. *Gavin and Lotz, JJ.*, dissenting.

Appeal from circuit court, Monroe county; R. W. Myers, Judge.

Action by George Childer against the Louisville, New Albany & Chicago Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

East & Miller, for appellant. E. C. Fields and W. S. Kannan, for appellee.

ROSS, J. Appellant brought this action against the appellee to recover for injuries to stock which entered on its right of way at a point where its fence was out of repair. The stock, after they got upon the right of way, became frightened at one of appellee's trains, and, running along the railroad track, jumped into a trestle, and were injured. They were not struck by the locomotive or cars. It is insisted by the appellant that the appellee's failure to maintain a fence along its right of way, as required by statute, constituted negligence; and if his stock escaped by reason of appellee's neglect of duty, and was injured, the company is liable to him therefor. At common law, every man is bound to keep his stock upon his own premises, and is a wrongdoer if they are permitted to escape upon the lands of another. Our statute (section 2831, Rev. St. 1894; section 2637, Rev. St. 1881) changes the common law in so far that stock may be permitted to run at large if the board of commissioners have made an order allowing them to do so. It is also provided by section 5323, Rev. St. 1894 (section 1077, Elliott's Supp.), that railroads shall fence their right of way; and by section 5312, Rev. St. 1894 (section 4025, Rev. St. 1881), that if they fail to build and maintain a fence, and stock gets upon the railroad track, and is killed by the locomotive or cars, the company is liable therefor. The right to recover for stock killed or injured which escape upon the railroad track by reason of the company's failure to maintain fences accrues by virtue of the statute, and the statute (section 5312, supra) provides that the company shall be liable when the stock is killed or injured by its locomotive or cars. The supreme court, in construing this stat-

ute, have uniformly held that, in order to recover, there must be evidence that the stock was struck by the locomotive or cars. *Railroad Co. v. Cole*, 41 Ind. 331; *Railway Co. v. McBrown*, 46 Ind. 229; *Railroad Co. v. Thomas*, 60 Ind. 107; *Croy v. Railway Co.*, 97 Ind. 126; *Railway Co. v. Thomas*, 106 Ind. 10, 5 N. E. 198; *Railroad Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403. In the last case cited, the court, in construing the act of 1885 (section 5323, supra), said: "It is argued under the above act, and the language above quoted, there may be a liability although the animal may not be struck by the cars or engine; but it is not suggested just how the damage to the animal may be done by the engineer, etc., except by running a train of cars upon it. The above-quoted language of the act is confused and uncertain, but, after much thought upon the whole subject, we think that it was not the intention that railway companies shall be held liable for the injury or killing of animals, unless they are injured or killed by the cars or engines." The complaint is not good as stating a cause of action for a negligent killing, and we cannot agree with appellant's counsel that because the facts found tend to sustain the allegations of the complaint, and the court having overruled a demurrer to the complaint, judgment should have been rendered in his favor. True, the court below overruled the demurrer to the complaint, but that fact is not conclusive that it states a cause of action. We have read the complaint, and are convinced that it does not state a cause of action for a negligent killing, and the facts fail to establish one under the statute for a failure to fence. Judgment affirmed.

DAVIS, J. (concurring). The owner is not necessarily a wrongdoer when, without fault on his part, stock escapes from his premises. *Railway Co. v. Ousler* (Ind. App.) 36 N. E. 290; *Railway Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297. Ordinarily, my opinion would be that if the duty to fence, as required by statute, is negligently violated, and the violation of the duty is the proximate cause of the injury, the right of action of the owner of the stock is clear and complete. Rev. St. 1894, § 5323; *Railway Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58. The courts, however, have held that, under the act of 1885, there could be no liability for the death or injury of an animal unless the same was killed or injured by an actual touching by the engine or cars or other carriages. *Railroad Co. v. O'Keefe*, 4 Ind. App. 249, 30 N. E. 916; *Railroad Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403. If an animal, by reason of the failure to fence, strays upon the track, and is not struck by the locomotive or cars, there can be no recovery unless the killing or in-

juring was willful. *Railroad Co. v. O'Keefe*, supra. The only negligence charged in the complaint is the failure to maintain the fence. It is not alleged that the killing was willful. Prior to 1885 the statute did not positively enjoin upon railway companies the duty of fencing their tracks. *Railroad Co. v. Dunlap*, supra. The act of 1885 enjoined this duty. Rev. St. 1894, § 5323, supra. It was, however, expressly provided in this act that it should not in any manner affect the liability of railroad corporations for stock killed or injured, but such liability should exist and be governed by the laws then in force, the same as if said act had never been passed. Rev. St. 1894, § 5320. The leading purpose of the act of 1885 was to give the owner of adjoining inclosed and improved lands the right and the power to have fences built and maintained, either by or at the expense of the railway company, between his inclosed and improved lands and railways. Rev. St. 1894, §§ 5324, 5325. With some hesitation, therefore, I concur in affirming the judgment of the trial court.

GAVIN, J. (dissenting). I am of opinion that, since the act of 1885 directly and explicitly imposes upon the railroad company the duty of fencing its roads at certain places, its failure to do so is negligence, for which a common-law right of action arises in favor of one injured thereby who is himself without contributory fault. The statutory liability for animals killed is, indeed, limited to cases where the animals are injured by the cars or locomotives. By the act of 1885, the then existing laws as to the liability of such companies for such killings are not affected. Until this act there was no duty or obligation resting upon railroad companies to fence. There was only a liability for certain resultant injuries if they failed to fence. There was no question of negligence or contributory negligence. It may be conceded that by the latter enactment no additional statutory liability is created, but the statute creates an imperative duty, and the application of common-law principles adds the liability which before did not exist because there was no common-law duty. That there might be a common-law liability where there was a violation of duty is recognized in *Railroad Co. v. O'Keefe*, 4 Ind. App. 249, 30 N. E. 916. The cases of *Graham v. Canal Co.*, 40 Hun, 386, and *French v. Railway Co.*, 72 Hun, 469, 25 N. Y. Supp. 229, are, it seems to me, directly in point. The subject under consideration in *Railroad Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403, was the statutory liability; and, in my judgment, the statements of the learned judge should be limited to the matter in hand.

LOTZ, J., concurs in this opinion.

(146 N. Y. 407)

ANTHONY et al. v. AMERICAN GLUCOSE CO.

(Court of Appeals of New York. June 14, 1896.)

CORPORATIONS—CONSOLIDATION—ACTION FOR NEW STOCK—PARTIES—DEFENSES.

1. Where several corporations transferred their entire property and business to a new corporation, which accepted the same subject to an agreement between the members of the original corporations that payment for the transfer should be made by an issuance of stock of the new company to the several original incorporators, respectively, in exchange for the old stock held by each, an original stockholder could sue the new company to compel it to issue to him the number of its shares conceded to be his proportion.

2. The fact that defendant in such suit had issued to the corporation, of which plaintiff was a member, the amount of new stock due such corporation's shareholders, including plaintiff, without such corporation's consent, or acceptance of the stock, was no defense.

3. The original corporations, or members thereof, who had received their proportion of the new stock, were not necessary parties to such suit, there being, unallotted, new stock in the new company's treasury beyond the amount demanded by plaintiff.

4. It was no defense to such suit that plaintiff refused to pay his share of the debts of the original corporation, of which he was a member, in the absence of a showing that payment thereof was an agreed condition precedent to his right to his proportion of the new stock, or that he was assessed for such payment, or that there was a lien for such payment on the new stock due him.

Appeal from supreme court, general term, Fifth department.

Action by Susan B. Anthony and another against the American Glucose Company, to compel the issuance of stock, and to recover dividends and earnings. From a judgment of the general term (21 N. Y. Supp. 667) reversing a judgment entered on the report of a referee dismissing the complaint, defendant appeals. Affirmed.

John G. Milburn, for appellant. John Van Voorhis, for respondents.

FINCH, J. There are two theories of the facts of this case,—one technically true, but substantially an error; the other really true, but formally open to criticism,—and upon our choice between them will be quite certain to depend the ultimate conclusion. One theory interposes between the parties really interested and actually contracting the corporate entities of the five original companies, and, behind that legal shelter, seeks to protect the company in default to its stockholders, and turn them over for relief to their own original company, after, by agreement, all its functions had ceased, although possibly it may not be altogether and hopelessly dead. The defense is not meritorious. It simply attempts to substitute circuitry of action for direct responsibility, and requires us to blind our eyes with the theoretical abstraction, so as to shut out the obvious and undoubted truth. We have of late refused to be always and utterly trammelled by the logic derived from corporate existence, where it only

serves to distort or hide the truth, and I think we should not hesitate in this case to reject the purely technical defense attempted; for nothing is plainer than that the transfer of the property and business of the five original companies to the new company to be organized was upon an agreement between the corporators of them all that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new company not reserved for the use of the treasury. That agreement is not denied by anybody, and every word and every act of all the companies, and of each and all of the corporators, have proceeded upon that assumption. The companies, as corporate entities, could not, alone, and without the consent of their constituent members, make a transfer which was intended to end their whole practical business existence; and it was agreed by such companies, when they made the written contract among themselves, that the refusal of any one corporator in any one company to give his consent to the transfer should turn the proposed sale into a mere lease. The authority of the corporations to sell, and to make a valid agreement of sale, to which the new company could become a party, was upon the explicit and understood condition that the new stock should be issued in exchange for the old stock to the several corporators, and the necessary consent of the stockholders was given upon that express condition. How fully and perfectly this was understood is obvious from the fact that the offers of the new company to issue its stock to the plaintiffs were always coupled with the condition that the latter should surrender their old stock, and cease to be stockholders in the old companies at the moment when they became such in the new. Anthony swears that when he gave his consent to the sale the Hamlins agreed that he should have the 125 shares that he claimed as his due proportion of the glucose company stock, and that he gave his consent on that basis and upon that condition. None of the Hamlins carry their denial beyond the question of amount. They dispute that, and that only. William Hamlin, in his letter of April 11, 1888, explicitly admits mailing 90 shares to Anthony, as being those agreed upon between the parties. There is nowhere a word said by anybody looking to an issue of shares to the corporations, instead of to their stockholders. Armed with this limited and conditional authority from their corporators, the companies took up their first duty, which was to agree among themselves as to the proportion of stock to be allowed to each as the gross share to which, under the existing parcel agreement, their individual members, in proper proportions, would be entitled. For that purpose the written contract was made. It did settle the gross share of the Firminich corporation, and the amount of stock to remain unissued, and the amount to

go to the corporators of the four Hamlin companies in the lump of 100,000 shares, but left unsettled the gross proportion of each of the latter, and so, necessarily, the share of each individual corporator. The reason of this omission is evident. The Hamlins were the only stockholders in two of the companies, and almost the sole owners of stock in the other two. The only necessary distribution would be to fix the shares of Locke, Easton, and Anthony, which, it was assumed, could be done by agreement, and so the gross share of the four Hamlin companies was allotted to them in one amount. "Allotted" is the word used in the contract, instead of "issued" or "paid." It was consistent with the fundamental and existing parol agreement among the corporators. It did not mean, in violation of that agreement, and in contempt of the specific authority conferred, that the new stock should be issued to the old companies. It could not mean anything so absurd. They were powerless to surrender the stock of their shareholders in exchange; and to say that the new stock was to be issued to the shells of corporations, having no stockholders to whom it could distribute it unless to the new glucose company itself, which alone would possess the surrendered certificates, is to say that the individual corporators meant to throw away, and utterly waste, their rights. Nothing of the kind was meant, and the word "allotted" was fitly used to fix the gross share of the four companies, and not to authorize, in violation of the fundamental agreement, a payment or issue to them as partners or tenants in common, or in any manner whatever.

When the glucose company came into existence, it had made no contract, and was bound by no obligation. It was free to buy out the five companies on any terms it could secure, but chose to adopt those offered by such companies and their corporators. It knew accurately what those terms were, in all their details. Almost every member of the board had been a party to the arrangement, and participated in framing it; and so, with full knowledge, it adopted the contract offered, completely and as a whole. It formally accepted the preliminary contract made between the companies, knowing that it vested only on condition of an issue of stock to the corporators, and in buying later the plant at Tippecanoe it formally agreed to give its stock to the persons interested. It is thus a mistake to say that the glucose company dealt only with the five corporations. It dealt also, and necessarily, with the individual corporators whose consent it required, and obtaining it on condition of payment to them, and with full knowledge of that condition, became obligated to each stockholder to issue to him his due and proportionate share of glucose company stock.

If we admit that the defendant may not have been bound to decide proportions

among individuals, the result is not changed. No dispute about them arose until it sprang up between the Hamlins, on one side, and Anthony, on the other. The latter claimed 1,250 shares on the original and 125 shares on the reduced capital, as payable to him. The former insisted that only 900 shares on one basis, and 90 on the other, were due to Anthony; and it is now fully conceded that the plaintiffs are entitled, on a proper distribution, to at least 90 shares of the stock of the new company, as their due and just proportion. That question, as against the glucose company, is settled. It is true that Anthony claimed more, but that the just proportion is at least 90 shares nobody disputes, or has ever disputed. It was clearly error to refuse the plaintiffs that, except upon the theory that the glucose company came under no contract obligation to the individual stockholders. I think it did, not only by reason of the primary contract of the stockholders whose benefits it secured and took, but also because, by its own conduct, it has recognized and adopted that contract. It has issued its stock to every individual stockholder in all the five companies, and never to either one of the companies, or by their corporate direction; for there has been, since the sale, no corporate action of either, and its own construction of its own duty should be conclusive. But it chose to obey the Hamlins. Naturally enough, for it was Hamlin all through. Cicero was president, William was treasurer, Harry seems to have been superintendent, Locke was counsel, and Almy secretary; and these five, a majority of the nine, owned the bulk of the stock. And so the company, instead of remaining neutral, chose to obey the Hamlins, and to accept their dictation. It distributed the assumed Leavenworth allotment of glucose stock, just as they said, and wholly to them, leaving only 90 shares to Anthony; filling out a certificate for so much to him; entering him as stockholder of those shares on their books; sending notices to him as such; declaring dividends to his credit; and finally confiscating those dividends by paying them over to the Hamlins; and then, when sued, denying that they owed any stock to Anthony, or had issued any to him, or were bound to him by any contract obligations whatever.

Let us examine the defense interposed somewhat more closely. It is said the glucose company bought solely of the corporate entities, and, as matter of law, was bound only to pay them. That might have been. If the corporations alone could have made the contract,—if the individual stockholders had no privity of contract with the glucose company,—the contention would have been sound, at least in a court of law. But none of those conditions exist, as I have already sought to show; and the glucose company did owe a contract duty directly to the cor-

porators, and stands before us claiming to have tendered full performance of that very contract duty.

It is said that the glucose company issued its allotted stock to the Leavenworth Company, and that ended its contract obligations. The proof relied upon is a formal certificate, No. 11, of 99,400 shares issued to the four Hamlin companies, as partners or holders in common. It was wholly unauthorized. The companies, as I have said, had no right to a share of that stock. They never requested its issue, they never accepted it, and never had it at all. William Hamlin, secretary of the new company and of four of the old ones, all-powerful and multiform and multitudinous of office as he was, nevertheless was not the Leavenworth Company. Its board of directors never met to give a direction about the issue of stock to it, or to any one in its behalf; to accept a tenancy in common creating, possibly, an unlawful partnership; to receive payment of what was not due to it; to surrender shares it did not have; to return a certificate of which it knew nothing; or to decide what stockholders were entitled to new stock, and in what proportions. All this, the power of William Hamlin, secretary, and, as such, authorized to keep the minutes of meetings which had ended, assumed to do. He had no such authority, and the glucose company obeyed him at its peril. But certificate No. 11 was never a payment or issue of stock, effectively, at all. It was merely a temporary setting aside or allotment of shares, out of which, in due season, the actual issue by way of payment was to be made to the individual corporators concededly entitled to receive that payment. William Hamlin, secretary, surrendered it to William Hamlin, secretary, and then told William Hamlin, secretary, to whom the Hamlins directed it to be issued, which was to the Hamlins, mainly, except the 90 shares. And so the glucose company obeyed its masters. I do not mean to complain of or criticize that action. These gentlemen, who so controlled their corporation, practically owned it, and had an honest right to dictate, but the company must take the consequence of its obedience.

It is said that the four companies and the Hamlins should have been made parties defendant. I do not see that the corporations have the slightest interest in this controversy. The general term thinks them dissolved and dead. I do not go so far; but, if the hollow and empty shells had life enough to stand up before the court as parties defendant, at least they had no interest in the dispute, and are in no manner affected by its results. Nor were the Hamlins necessary parties. They have received their full shares of stock. Giving 90 shares to the plaintiffs will not affect the admitted proportions of a single stockholder, all of whom have their shares, and at least 90 are left,

and there is treasury stock much beyond any amount claimed. The only interest of the Hamlins has sprung from the collusion with them of the company to force Anthony, by withholding the certificate, to pay an alleged private debt to them. That defense was suggested on the argument, and pressed as a justification for refusing a delivery to plaintiffs, and was that they ought to pay to the Hamlins about \$11,000, as their part of the burden of the debts of the Leavenworth Company. There were such debts, but there is no finding of their amount, nor who paid them, nor that they have been paid at all, nor that the Hamlins made such payment. The debt may be wholly unpaid, or canceled in the process of consolidation, or assumed and paid by the glucose company out of earnings. And even if the plaintiffs are, or ought to be, bound for the payment claimed, there is neither plea, finding, nor proof that it was an agreed precedent condition of plaintiffs' right to their due proportion of stock in the consolidated company, nor that any assessment had been lawfully made against the Anthonys, or that there was any lien upon the stock due them.

Equally without foundation is the contention that a certificate to the plaintiffs for 90 shares of the glucose stock was delivered to the Leavenworth Company for them, and that such company was alone in default for the withholding of the stock. There is no proof and no finding that such certificate was ever delivered to the Leavenworth Company, or received or accepted by it, or that it became in any manner possessor of the stock. On the contrary, the finding is that it was delivered to William Hamlin, without specifying any representative or official character. That he held it as agent of the glucose company, and tendered it as such agent, is made certain by his letter inclosing it, in which he says "we" have just been able to issue the stock, and "we" will change its form, if necessary. "We" can only mean the glucose company, and the certificates in Hamlin's hands were still held by that company, and tendered by it to the plaintiffs. And, besides, the certificates, if they had been handed to the Leavenworth Company, were clogged with an unlawful condition, which the glucose company had no right whatever to impose.

We think, therefore, that the order of the general term was right, and should be affirmed, with judgment absolute for the plaintiffs, upon the stipulation. We are all of opinion, however, that, under the peculiar and exceptional circumstances of the litigation, final judgment can only be for the 90 shares, and the dividends and interest thereon. The referee denied plaintiffs' right wholly. The general term affirmed such right only as to the 90 shares, and left the balance finally defeated. We affirm that order, on the same theory, holding that plaintiffs' claim, as we sustain it, is limited

to the 90 shares; and the judgment absolute must recognize what has been decided to be the plaintiffs' right.

Order affirmed, with judgment absolute against the defendant on its stipulation. All concur, except GRAY and HAIGHT, JJ., not voting. Ordered accordingly.

(146 N. Y. 348)

PEOPLE v. COWAN et al.

(Court of Appeals of New York. June 11, 1895.)

SUPPLEMENTARY PROCEEDINGS—FORFEITED RECOGNIZANCE—APPEARANCE BEFORE JUDGMENT.

The word "appearance," as used in Code Civ. Proc. § 2458, providing that, in order to entitle a judgment creditor to maintain supplementary proceedings, "the judgment must have been rendered upon the judgment debtor's appearance, or by a personal service of the summons upon him," means voluntary submission to the jurisdiction, and after entry of judgment on a forfeited recognizance such proceedings may be instituted, though defendant was not served with summons, the signing of the recognizance being equivalent to a voluntary appearance. 32 N. Y. Supp. 162, reversed.

Appeal from common pleas of New York city and county, general term.

Supplementary proceedings by the people of the state of New York against Thomas G. Cowan, principal, and John Cahill, surety, on a forfeited recognizance. An order of the special term setting aside an order requiring defendant Cahill to appear was affirmed by the general term (32 N. Y. Supp. 162), and plaintiff appeals. Reversed.

Forbes Hennessey, for the People. Benjamin Yates, for respondents.

FINCH, J. We are of opinion that the order for the examination of the judgment debtor in proceedings supplementary to execution was properly granted, and should not have been vacated. The ground taken by the courts below is that such an examination is prevented by the limitation of the Code (section 2458) that "the judgment must have been rendered upon the judgment debtor's appearance or by a personal service of the summons upon him." The purpose and scope of that limitation is quite plain. There are cases in which a formal judgment is rendered in which, nevertheless, the apparent debtor is not generally and personally liable for the lack of appearance or service of a summons, as actions begun by attachment or against joint debtors where some only have been served, in which the liability is confined to some specific property, and does not end in a general execution. Manifestly, in such cases the defendant, affected only by the lien upon the specific property charged, and not personally liable beyond that, should not be subjected to the supplementary proceedings. But the limitation was not intended to protect a judgment debtor who is liable personally and generally, against whom a general execution issues, and all whose property is bound by it.

There is no reason for a discrimination among debtors of that class and character. The peculiarity of a judgment on a recognizance in New York City does not make it one entered without appearance or service of a summons. These describe the two modes by which a court acquires jurisdiction of the person. One is voluntary, the other compulsory. In one the party, by his consent, submits himself to the jurisdiction; in the other he is brought into court against his will. To say that one who has neither submitted to the jurisdiction nor been subjected to it by a service of a summons may yet be liable to a personal judgment at the hands of the court would be to make judicial authority boundless. By the word "appearance," as used in section 2458, is meant the voluntary submission to the jurisdiction, in whatever form manifested; and not the mere narrow and technical meaning, well enough in its place, indicated in section 421. That relates to an appearance after service of the summons, and does not describe one which is altogether voluntary. One who confesses a judgment does not "serve a notice of appearance or copy of an answer or demurrer," and yet he certainly appears by his voluntary consent to the entry of the judgment. We have held that the law permitting judgment to be entered upon a recognizance in the city of New York after an order of forfeiture constitutes a part of the undertaking signed by the party contracting as if explicitly written out in it, and that by signing it the defendant consents that in case of forfeiture judgment may at once be perfected thereon upon which a general execution may issue. *People v. Quigg*, 59 N. Y. 88. Such written consent to the entry of judgment constitutes a voluntary appearance in the action, and submission to the jurisdiction, and does not exclude the right of the creditor to institute supplementary proceedings. The original order should stand, and the order vacating it, and the affirmation by the general term be reversed, with costs. All concur. Ordered accordingly.

(146 N. Y. 317)

LAMB et al. v. LAMB.

(Court of Appeals of New York. June 11, 1895.)

RENT—LIABILITY OF WIDOW—TRIAL—ISSUES SUBMITTED—GUARDIAN—ALLOWANCE FOR WARD'S SUPPORT—AMOUNT—EVIDENCE—BIAS OF WITNESS—THREATS.

1. Where a widow, with the consent of her children's guardian, lives with them in the home formerly occupied by herself and husband, and which, after his death, belonged to the children, subject to her dower right, she is not liable to the children for rent, in the absence of a promise by her to pay the same. 27 N. Y. Supp. 575, affirmed.

2. Where, in an action by minor children against their widowed mother for rent of premises belonging to the children, and in which they live with defendant, the complaint sets out the value of the reasonable use of the premises at a

certain sum, and defendant's answer alleges that she had resided in the premises pursuant to an agreement with the guardian of plaintiffs that she was not to pay rent, but was to provide a home for plaintiffs, and pay one-third of the taxes and repairs; and the guardian testifies that no agreement was made to pay any specified rent, but that defendant promised to pay such rent as might be fixed by the surrogate; and defendant testifies that the agreement between her and the guardian was that he should allow her \$1,000 annually for the support of the children, and that she should also have the use of the house until the youngest child became of age on payment by her of taxes, etc., and the judge charges that, in order to hold defendant, there must be shown either an express or implied agreement on her part to pay rent, and that it was for the jury to say whether the story as given by the guardian or by defendant was true,—the issues submitted were not only whether there was an agreement by defendant to pay rent, but whether it was not agreed that she should not pay any rent, so as to relieve her from liability as one who occupied the premises without any right to do so.

3. On an issue as to whether an agreement by a guardian to allow the mother of the minors a certain amount for their support in a city was such a reasonable one as to be binding on the minors, evidence of the cost of boarding the minors in the country for the summer months is not admissible.

4. Where a guardian of children who, with his permission, resided with their mother, a widow, in a house belonging to them, after allowing the mother to reside in the house for six years without asking for rent, caused a suit on behalf of the children to be brought against her for the six years' rent, it was proper to admit evidence that just before the suit was brought he threatened defendant that where he as guardian had saved her cents he would make her pay out dollars in more ways than one.

Appeal from supreme court, general term, Third department.

Action by Edith M. Lamb and others against Jessie M. Lamb for rent. From a judgment of the general term (27 N. Y. Supp. 575) affirming a judgment in favor of defendant, plaintiffs appeal. Affirmed.

E. Countryman, for appellants. Matthew Hale, for respondent.

PECKHAM, J. James Lamb died in January, 1885, leaving him surviving the defendant, his widow, and the plaintiffs, being his three infant children, of the ages of five years, three years, and one year, respectively. The deceased left property, real and personal, of the amount of about \$75,000. At the time of his death he was living in his own house in Cohoes, with his wife and children. Some time in the summer of 1885, James White was, upon the petition of the defendant, appointed the general guardian of the infants by the surrogate of Albany county. Soon after his appointment as guardian, he and the defendant had a conversation, the particulars of which, in some respects, they do not agree upon in their testimony in this case; but they do agree in the statement that the guardian was to allow Mrs. Lamb, the defendant, a total of \$1,000 a year for the three children, for their maintenance and clothing. The defendant and her children continued to live in the house from the time

of the death of Mr. Lamb, and no demand had ever been made upon the defendant for the payment of any rent for the occupation thereof until the writing of a letter a few days before the commencement of this action. The defendant has in the meantime taken care of the children, and acted towards them as their natural guardian. On or about January 29, 1891, Mr. White wrote Mrs. Lamb a letter, in which he said that recent events had led him to make an investigation as to the defendant and the estate of Mr. Lamb, and of his rights and duties as general guardian of the property of his children, and he said that he was advised, and that it appeared to be his imperative duty as such guardian, to charge and collect from her a reasonable rent for the house and grounds belonging to the estate and occupied by the defendant since the death of her husband. The defendant refused to pay any rent for the time during which she, with her children, had occupied the house, and Mr. White then, by order of the county judge, was appointed guardian ad litem of the infants, and commenced this action in their name, by himself as such guardian ad litem.

The complaint alleges that the plaintiffs, since January 18, 1885, have been the joint owners of the premises, which, since the last of February, 1885, had been used and occupied by the defendant as a residence, and that such use and occupation was reasonably worth the sum of \$600 per year, no part of which had been paid, although the defendant had been requested so to do by the general guardian of the property and of the plaintiffs. The complaint further alleged that the plaintiffs were under the age of 14 years, and that James White had been duly appointed their guardian ad litem by the county judge of Albany county before the commencement of this action. Judgment was demanded that plaintiffs recover of the defendant the sum of \$3,575, with interest as stated. The defendant answered, and, after alleging the general facts which have been above stated, alleged further that the general guardian, James White, advised this defendant to continue to reside in the dwelling house with her children, and consented to such residence on her part, and that he had never asked or required the defendant to pay any rent, and that she had occupied the premises since the death of the intestate, her husband, in pursuance of an agreement with the general guardian, by which she was not to pay rent, but was to provide a home for the plaintiffs, and pay one-third of the taxes and assessments and one-third of the repairs to be made upon the house; and she denied that she had occupied the house under or in pursuance of an agreement with the general guardian by which she was to pay any rent.

Upon these pleadings the parties went to trial. It will be seen that the suit is somewhat extraordinary in character. The three children of the defendant living with her in

the house in which their father and the defendant's husband died, the children being still very young (all of them under the age of 14 years), are yet, in form, suing their mother to obtain the payment of rent for her use and occupation of this house, where the plaintiffs have been cared for and nourished by the defendant, their mother. The trial of the case developed the reason for its existence. It appeared that the general guardian, a short time before the writing of the letter above alluded to, had a personal misunderstanding with the defendant in relation to matters having no connection with this subject in dispute, and immediately thereafter he receives this light in regard to his duty as guardian, and writes the letter above mentioned, making demand for rent; and, upon the refusal of the defendant to pay it, he procures himself to be appointed guardian ad litem, and commences this action in the names of these infant daughters of the defendant. There can be no doubt as to the real motive for the action. While it may have no bearing upon the questions of law which are involved herein, it is proper to state the fact, because of the exception taken by the plaintiff to the ruling of the court which allowed the defendant to prove a quarrel, and the remarks that were made by the general guardian to the defendant at that time. It will be seen that the action, so far as it is shown by the complaint, is one for use and occupation, although there is no allegation therein of any agreement on the part of the defendant to pay rent. The fact is alleged that the plaintiffs are infants under the age of 14 years, and that James White has been appointed their guardian ad litem. Upon the facts which have been stated, and which are substantially all the material ones which were proved, the learned trial judge held that there must be some agreement, either expressed or implied from the circumstances, to pay rent on the part of the defendant; and, if there were no such agreement, no recovery could be had. The court submitted to the jury the question whether or not such an agreement had been proved, and it permitted them to infer an agreement to pay rent from the circumstances proved in the case, if they thought such inference were a proper and natural one. The jury found for the defendant, thus negating the existence of any agreement to pay rent, either expressed or implied. So far as the complaint should be held to be one to recover rent for the use and occupation of these premises in the technical sense of that expression founded on the statute, the action cannot be maintained without proof of some agreement to pay rent, either expressed or implied from the possession of the lands and other circumstances, so that the conventional relation of landlord and tenant may be said to have existed between the parties. *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114; *Pres-ton v. Hawley*, 139 N. Y. 290, 34 N. E. 906.

The plaintiffs, however, argue that there is stated in the complaint enough to allow of a recovery in the nature of one for use and occupation founded upon the fact of an entry upon the lands of the infants by one who had not the legal right to occupy as against them, and who, therefore, was to be regarded as entering in the character of a guardian or bailiff of the infants, and liable to account for the rents and profits of the land while so in possession. We assume that, if the plaintiffs proved a state of facts from which an illegal entry or intrusion upon the lands of the infants would follow, an action might be maintained by the infants upon their arrival at age, or by their guardian before such time, against the person thus intruding, for the recovery of the rents and profits; or, in other words, for the value of the use and occupation of the lands thus intruded upon. The cases cited in the very learned and exhaustive brief of the plaintiffs' counsel would seem to prove this beyond all controversy, and, indeed, we should say that it was quite a plain proposition. It might be questionable whether the complaint set forth any such cause of action. Aside from the question of pleading, however, we do not think the facts proved and found show any such case. Upon the death of James Lamb, the intestate, these infant plaintiffs and their mother, the defendant, continued living in the house where they had all resided up to his death. The mother was entitled to dower. They were helpless infants. Their mother was their natural guardian. She remained in the house after her husband's death, protecting, caring for, and supervising them. Upon such facts we might well hold there was no wrongful, illegal, or improper intrusion or entry upon the lands of these infants. They were themselves in actual occupancy of the house, having the benefit thereof, and the title thereto; the defendant caring for and protecting them in such occupancy, and not in fact converting any profits to her own use, or receiving anything as profits of an adverse occupation and possession. There are other facts, however, and it is unnecessary to decide upon the legal effect of the above in the absence of any agreement whatever. Upon defendant's petition, Mr. White was appointed the general guardian of the infants, and in that petition the fact was stated that they were residing in this house, and that no rent arose therefrom. This fact was known by the proposed guardian, and from the time of his appointment he had acquiesced in the defendant's residence in that house while taking care of and maintaining the children, and such acquiescence continued until a short time subsequent to the quarrel above mentioned, when the demand for rent was for the first time made. The guardian during this time not only acquiesced in, but consented to and advised, such residence, and by the finding of the jury, taking into consideration the issues made by the

answer of the defendant and the testimony of Mr. White and the defendant, and the manner in which the question was submitted to the jury, it can be stated and maintained that he not only consented to such occupation, but that he agreed affirmatively that no rent should be charged, and that the \$1,000 allowed, taken in connection with the occupation of the house, should be the allowance to the defendant out of the property of the infants for their care, clothing, and board. The plaintiffs' counsel alleges that the question whether such agreement existed was not submitted to the jury, and that the only question submitted was whether there was an affirmative agreement on the part of the defendant to pay rent, or whether, from the circumstances proved in the case, the jury should imply one. I think such is not the limitation to be given to the charge of the court. The affirmative agreement was set up in the answer. The guardian and the defendant were both sworn upon the trial. They both testified to a certain conversation taking place in regard to these children, and to the amount which should be allowed for their maintenance, and upon the subject of rent. The guardian testified distinctly that in that conversation there was no agreement to pay any specified sum for rent, but he alleges that from the course of the conversation it was assumed and stated that the question of rent was one to be submitted to or decided by the surrogate, and that the defendant would pay whatever the surrogate decided was proper. The defendant, in testifying in regard to that conversation, and assuming to give its substantial import, stated that the agreement was that she was to have \$1,000 annually for the support of the three children, and that she should keep the children, and should have the use of the house until the youngest child came of age, on payment by her of the taxes, insurance, and repairs; and he advised her to stay there on those terms. While the learned court charged that there must be found either an express agreement to pay rent, or an implied agreement arising from the circumstances submitted to the jury, he left it to the jury to say which of these stories as given by the guardian and the defendant they believed. The testimony of the defendant was not a mere denial of that of the guardian, but it was a positive statement as to what the agreement was; and as defendant stated it her evidence was not alone totally inconsistent with and contradictory to that given by the guardian, but it stated an affirmative agreement as to the rent. So, when the testimony of the guardian and of the defendant on this point was submitted to the jury, and it was left to them to say which of the two witnesses they were to believe, it was in substance and effect a submission of the question as to what was the agreement, and a verdict for the defendant involves a finding not only that there was no expressed agreement to pay rent, and that there was

no implication of an agreement arising out of the circumstances, but a finding that the defendant's evidence was true, and that evidence proved the agreement relied on by defendant. The agreement, as testified to by the defendant and found by the jury, was inconsistent with the idea of any unlawful intrusion upon the lands of the infants, or any liability to pay rent therefor. We think the plaintiffs' claim that the testimony was contradictory as to the agreement to pay rent, and that the question of the agreement as sworn to by defendant had not been submitted to the jury, is not justified by the charge of the judge; and the argument of plaintiffs, which is based upon such claim, must fall. Under such circumstances, the continuation of the mother in the house furnishes no basis of a claim for use and occupation. It is further urged that this agreement, even if made, was one which would not bind the infants, unless it were a reasonable one, and that evidence addressed to the question of the reasonable character of the agreement offered by the plaintiffs was excluded by the court upon the objection of the defendant. The evidence which the counsel for plaintiffs claims should have been admitted upon this point was that which he offered for the purpose of showing that the defendant had, on some occasions, taken these children with her to the country, and obtained board for them at rates of \$3, and even as low as \$2.50, per week for each of them. It appeared that the mother upon all these occasions, with one exception, accompanied her children for the purpose of taking care of them. We think the fact, if proved, was wholly immaterial, and had no bearing whatever upon the question of the reasonable character of the agreement which the defendant alleges was made between herself and this guardian. That she was enabled for a short time in each summer to obtain board for herself and her children at a small rate in the country had no proper bearing upon the question.

The court permitted the defendant, under the plaintiffs' objection, to testify to a quarrel between the defendant and the guardian just prior to the time when he wrote the letter making his demand for rent. The defendant testified that in that quarrel the guardian made threats against her, and said that where he as guardian had saved her cents he would make her pay out dollars in more ways than one. It was objected to on the ground that the quarrel and dispute between these parties had no relation to his guardianship or administration of the estate. We think the evidence was admissible upon the well-grounded principle that it is always proper to show the feeling of a witness towards the party against whom he testifies, and for the purpose of thereby affecting the credibility of his testimony. It was particularly proper in this case. His evidence and that of the defendant were dia-

metrically opposed, and to such an extent that it was quite plain neither could be honestly mistaken. It has frequently been held that such evidence is proper. *Starks v. People*, 5 Denio, 116; *Schultz v. Railroad Co.*, 89 N. Y. 242. On the whole, we think the judgment is right, and it should be affirmed. All concur. Judgment affirmed.

(146 N. Y. 296)

ROARTY v. McDERMOTT et al.

(Court of Appeals of New York. June 11, 1895.)

EXECUTOR'S MORTGAGE—VALIDITY—FORECLOSURE—CONCLUSIVENESS OF JUDGMENT.

1. An executrix, having power to sell or mortgage for the benefit of the estate, sold land to pay incumbrances. The grantee subsequently reconveyed to her, and she mortgaged the land to another to pay a legacy, the grantee taking her bond for the price originally paid by him, secured by second mortgage on the same land, and by mortgage on the land in suit. *Held*, that the facts that the reconveyance was in form to the executrix individually, and that the bond was not signed by the executrix in her official capacity, did not render either mortgage void, as being given to secure the executrix's personal debt.

2. A complaint in foreclosure alleged that one of the defendants gave, as executrix, the mortgage in suit on land belonging to the estate, in pursuance of a power in the will to sell or mortgage. The power was to sell or mortgage only for "the benefit of my said estate." *Held* that, since the allegation that the mortgage was given under the power, was, in effect, an allegation that it was given for the benefit of the estate, it was open to defendants to show the contrary, and hence a judgment of foreclosure precluded defendants, and those claiming under them, from afterwards asserting that the mortgage was given to secure a personal debt of the executrix. 32 N. Y. Supp. 853, reversed.

Appeal from supreme court, general term, First department.

Action by James Roarty against Edward C. McDermott and others for partition. There was a judgment for partition, and a sale of the premises. From an order of the general term (32 N. Y. Supp. 853), reversing an order requiring the purchaser, Frank J. Walgering, to pay the balance of the price, plaintiff appeals. Reversed.

William H. Hamilton, for appellant. Clemens J. Kracht, for respondent.

O'BRIEN, J. This was an action to partition certain real property in the city of New York. The final judgment was executed by a sale of the property, under the direction of a referee, and Frank J. Walgering became the purchaser of a house and lot, No. 441 West Forty-Fifth street, for \$15,800, he being the highest bidder at the sale. Subsequently he refused to complete the purchase on the ground that the title tendered was not a marketable one. His objections to the title were overruled by the court at special term, and he was required to pay the balance of the purchase money upon tender of the referee's deed. This order, however, was reversed by the general term. The plaintiff having appealed to this court, the question

to be determined is whether, upon the facts appearing, there is such a reasonable doubt concerning the marketable character of the title tendered as to warrant the court below in discharging the purchaser from his contract obligations. It is conceded that Thomas McConnell, who died August 24, 1871, leaving a will, was seised of the premises in fee. His widow and executrix mortgaged the house and lot to Charles Devlin on the 21st of June, 1873. This mortgage was foreclosed by decree entered in the supreme court May 24, 1877, and a sale had thereunder, which is the basis of the title which was tendered. If the sale upon this judgment bound the three infant children of Thomas McConnell, then, unquestionably, the title tendered is good, and the purchaser is bound to perform his contract.

In order to appreciate the question, it is necessary to get a clear view of the facts connected with the execution and foreclosure of this mortgage. By his will McConnell gave to his wife, after paying debts, all his real and personal estate during her natural life. This provision was, however, subject to an absolute gift to his eldest son of one-fourth of the estate, after deducting what the widow would be entitled to by way of dower, this one-fourth to be paid to him in cash on arriving at the age of 21 years. The remainder of the estate was given to the three younger children, after the death of the mother, and in such proportions as she might by will direct. His widow, Ann McConnell, was appointed executrix, with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions of my will, or whenever, in her judgment, it may be for the best interest of my estate, applying the proceeds thereof to the benefit of my said estate." The will was proved and letters testamentary issued to the widow September 14, 1871. The real estate left under this will was all incumbered, and in danger of being wasted or sacrificed, unless means could be provided to pay obligations due or about to become due. On the 13th of June, 1872, the widow, acting under the power of sale in the will, conveyed, as executrix, to Charles Devlin, for the consideration of \$9,000, a house and lot on Twenty-Ninth street. She received from him \$6,000 in cash, and the balance of \$3,000 in a bond and mortgage executed to her as executrix. The \$6,000 thus received was applied by her to paying off incumbrances on the estate, and thus far there cannot be the slightest question as to her power or as to the regularity of her proceedings. About a year afterwards the eldest son became of age, and he having demanded the share of the estate left him by the will, it became necessary to raise more money. The widow arranged with Devlin to take back the Twenty-Ninth street house, and to cancel his bond and mortgage, in order to enable her to give a first mortgage thereon for \$5,000, to raise

that sum to pay to the son in discharge of his interest in the estate. Devlin, who seems to have been a friend of the family, assented to this, and deeded the house to the widow, and had his bond and mortgage canceled, and she subsequently raised the money on it by first mortgage to pay off the son's claim, and took from him a release of all his interest in the estate. But, though Devlin had reconveyed the title, he had not yet been paid the \$6,000 which he had advanced to the widow a year before, and which she had used for the benefit of the estate. That was not paid to him, but he elected to treat it as a loan to the executrix, and to secure its payment she gave to him a bond for that amount, secured by a second mortgage on the Twenty-Ninth street house and another second mortgage on the Forty-Fifth street house in question. It is this last mortgage that we are now concerned with. That was executed to Devlin by the widow as executrix, and it recited the power in the will, and that the bond which accompanied it was executed by her as executrix, under the same power. It is now said that this mortgage was void, though executed by the widow as executrix, and this proposition is based upon the sole ground that the bond was not signed by her in her official capacity, and from this omission it is argued that the mortgage on the Forty-Fifth street house was given to secure the widow's personal bond or personal debt. This position is sought to be re-enforced by the circumstance that the reconveyance by Devlin of the Twenty-Ninth street house was to the widow individually, and that the title vested in her. This assumption, even if material, is not warranted by the facts. The widow could convey none of the real estate devised by her husband, except through the exercise of the power in his will, and she could not convey to herself, since she could not be both seller and purchaser, and she could not accomplish indirectly what she could not do directly. Therefore she could not and did not acquire title to any of the land for her personal benefit by conveying to Devlin under the power and then taking a deed from him. Whatever form the transaction took, she must be deemed to have acted officially, and the property was in her hands for the benefit of the estate if the personal representative so elected to treat it. There can be no doubt that the deed to Devlin was a good exercise of the power, and if the parties subsequently desired to change an absolute conveyance into a mortgage, it was competent for them to do so. All that was necessary was to cancel the bond and mortgage given by Devlin for the \$3,000, and to stipulate in writing that the deed should stand as security for the \$6,000 which he had advanced. But the necessities of the widow, and the estate which she represented, were such that she required a more substantial advantage, and that was the postponement of Devlin's claim

to another lien which she desired to put upon the premises, and hence the conveyance to her. All this was but a method of changing a deed to a mortgage and raising more money on the land. It thus became incumbered for all that it was worth, as subsequently shown by the foreclosure sale; so, in any view, the widow could derive no personal benefit from the conveyance to her of the Twenty-Ninth street house. But, after all, the question whether the widow did or did not get the title to this house in her individual capacity is not very material. The real question is, whether the mortgage which she gave, as executrix, on the Forty-Fifth street house, was given to secure her own debt, or for the benefit of the estate, under the power in the will. The fact that she omitted to add her official title to her signature to the bond is of no consequence. She might have omitted to give any bond, but the incontestable fact remains that it was given to secure the money which Devlin had advanced to her a year before, every dollar of which she had used in paying off incumbrances upon the rest of the real estate. Thus the case stands upon the proofs appearing on this motion, and they are not contradicted.

It remains only to inquire whether any of these facts, having any material bearing on the question of title, were left open to contest by the judgment which Devlin subsequently obtained in the action to foreclose his mortgage. No one claims that there is any defect in that judgment, except the present purchaser. He does not suggest any possible claim or right existing in behalf of any one, except the three infant children, the residuary devisees of Thomas McConnell. Whether these children, or any of them, or any of their descendants, are still alive, does not appear, as the only affidavit in opposition to this motion was made by the attorney for the purchaser, stating what he claims to be defects in the judgment as it appears of record. The widow, as executrix and individually, was made a defendant in the foreclosure suit. So were the three children, who were represented by guardian, and interposed the usual answer, putting in issue the facts stated in the complaint. The referee reported that all the facts stated in the complaint were established, and the judgment which followed in terms adjudges that the defendants, and all persons claiming through or under them, be forever barred and foreclosed from all right or claim in or to the premises or any part thereof. It is plain, therefore, that if the complaint was broad enough in its scope to embrace the facts stated, they must be deemed to be determined by the judgment, and not open to further contest. It alleges that Ann McConnell, the widow, gave her bond to Devlin for \$6,000, to secure the payment of that sum, with interest, at the times stated; that default had been made in the payment of the principal, which became due

June 21, 1876, less \$50 paid thereon. It also alleges the execution and delivery by the widow, as executrix, to Devlin, of a mortgage on the Forty-Fifth street house to secure the payment of the bond, and in connection with this allegation, the following facts are stated: (1) That the house so mortgaged was part of the real estate of which McConnell died seised; (2) that he died August 24, 1871, leaving a will which was duly proved; that letters had been granted to the widow, and that the will contained the power to sell or mortgage; (3) that the mortgage was executed in pursuance of that power and authority; (4) that the three infant children of the deceased, giving their names, have or claim to have some interest in the premises, which, however, was subsequent to the mortgage and subordinate to it. The statement that the mortgage was executed under and in pursuance of the power was, in substance and legal effect, equivalent to an allegation that it was given to secure a debt for the benefit of the estate, or to raise money for that purpose. If it was given to secure the personal debt of Ann McConnell, it was not given under or in pursuance of the power, but contrary to its terms and manifest purpose. It was, therefore, open to the children, under these pleadings, to show, if they could, what this purchaser now urges, that the mortgage was given to secure the personal debt of the widow, and hence the judgment must be deemed to have conclusively determined, as against all the defendants in the action, or their privies, that the mortgage was executed under and pursuant to the power, and was a valid lien upon the Forty-Fifth street house. It is not now open to any of the children, or any one claiming under them, to assert, what is obviously untrue in fact, that the mortgage was given to secure the personal debt of the executrix. That question was involved in the issues in the foreclosure suit, and has been forever set at rest by the judgment.

The order of the general term should be reversed, and that of the special term affirmed, with costs. All concur, except GRAY, J., not voting. Ordered accordingly.

(53 Ohio St. 32)

LEWIS et al. v. BANCROFT.

(Supreme Court of Ohio. May 14, 1895.)

JUSTICE OF THE PEACE—JURISDICTION AS TO BILL OF EXCEPTIONS.

Unless the party requiring time to prepare a bill of exceptions in a trial before a justice of the peace informs the justice during the trial that he requires such time, and the justice thereupon appoints a time when the same shall be settled and signed, not more than five days from the day of trial, the justice loses jurisdiction, and cannot thereafter, within the five days, on application of the party, sign and allow such bill of exceptions.

(Syllabus by the Court.)

Error to circuit court, Portage county.

Action by Henry Bancroft against Addison

Lewis and another. Plaintiff had judgment, and defendants bring error. Reversed.

Henry Bancroft brought an action against Addison Lewis and Mary Lewis for the recovery of \$50 before a justice of the peace. Trial was had, and the justice instructed the jury to bring in a verdict for the defendants, which was done. After the entry of judgment on the docket on the 2d day of October, 1891, the docket entries are as follows: "Plaintiff gives notice to file bill of exceptions. No time agreed upon. October 3, 1891, plaintiff appeared by his attorney and gives notice that he would file a bill of exceptions, October 7, 1891, at 5 o'clock p. m. October 7, 1891, 5 o'clock p. m., plaintiff appeared by his attorneys and filed the following bill of exceptions. Attorney for defendant not present." Then follows a bill of exceptions signed by the justice of the peace. On petition in error the court of common pleas reversed this judgment, and returned the case for trial as upon appeal, to which defendants excepted. Plaintiff filed his petition in the common pleas, and defendants failing to plead, a jury was waived, trial had to the court, and judgment rendered in favor of plaintiff for the sum of \$40 and costs. Thereupon defendants below filed their petition in error, claiming that the court of common pleas erred in reversing the judgment of the justice of the peace, and as ground of error alleged that the pretended bill of exceptions was not allowed by the justice so as to make it a part of the record. The circuit court affirmed the judgment, and thereupon a petition in error was filed in this court to reverse the judgment of the circuit court, as well as the judgment of the common pleas, and to affirm the judgment of the justice of the peace.

George P. Hunter, for plaintiffs in error.
B. A. Derthick, for defendant in error.

PER CURIAM. Section 6565, Rev. St., provides as follows: "In all cases before a justice of the peace, whether tried by a jury or by the justice, either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception, it shall be the duty of the justice to sign a bill containing such exceptions, if truly alleged, with the point decided, so that the same may be made a part of the record in the cause; and whenever either party during the trial shall require time to prepare his bill of exceptions, the justice shall appoint a time when the same shall be settled and signed, not more than five days from the day of trial." The docket entry does not show that plaintiff below, during the trial, or even at the close thereof, required time to prepare his bill of exceptions, and no time was appointed by the justice when the bill of exceptions should be settled and signed. In such case the justice

has no further jurisdiction, after the close of the trial and the departure of the parties, to afterward settle and sign a bill of exceptions, and a bill of exceptions so signed and filed does not become a part of the record, and should be disregarded by the reviewing court. Without the bill of exceptions there was no error in the judgment of the justice of the peace, and that judgment should have been affirmed. The judgments of the circuit court and of the court of common pleas are, therefore, both reversed, and the judgment of the justice of the peace affirmed. Section 6565 was again amended (90 Ohio Laws, 358), but this opinion is based upon the statute as it stood before said amendment. Judgment reversed.

(53 Ohio St. 1)

SNYDER et al. v. CHAMBER OF COMMERCE et al.

(Supreme Court of Ohio. May 14, 1895.)

CORPORATIONS—CONSTRUCTION OF CHARTER—LIABILITY OF DIRECTORS.

The declaration in the articles of incorporation of a chamber of commerce, that it "is formed not for profit," is not inconsistent with a provision for capital stock, nor with a declaration that it is intended to promote the prosperity of the city in which it is located; and the trustees or directors of such corporation are personally liable for all its debts by them contracted.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

Action by one Snyder and others against the chamber of commerce of the city of Findlay and others. From the judgment rendered, plaintiffs bring error. Reversed.

The plaintiffs in error, who are partners, brought suit in the common pleas court of Hancock county, against the chamber of commerce of Findlay, Ohio, a corporation under the laws of the state of Ohio, and 25 other defendants, who were joined as trustees of the chamber of commerce, which was alleged to be a corporation not for profit, to recover the amount due on a bill for fireworks sold to the board of trade. Two of the defendants, the chamber of commerce and C. C. Howell, did not answer. The other defendants filed separate answers, in substance denying the averments of the petition generally, and specifically denying that they had contracted the obligation, and in one of the answers it is alleged that the chamber of commerce is a corporation organized for profit, having a capital stock of \$50,000, divided into shares of \$100 each, of which \$10,000 had been subscribed. On the trial, evidence was offered by the plaintiff, tending, as to some of the defendants at least, to show that they had participated in the meeting to promote the "Celebration of the Application of Natural Gas to the Mechanical Arts," at which the fireworks were used, and had otherwise promoted the celebration under the auspices of the chamber of commerce. The plaintiffs also introduced the

articles of incorporation of the chamber of commerce containing the following statement of its purposes: "First: The name of the said corporation shall be 'The Chamber of Commerce of the City of Findlay.' Second: The location of said chamber of commerce shall be the said city of Findlay, where its principal business is to be transacted. Third: The said the chamber of commerce of the city of Findlay, of the county of Hancock, and state of Ohio, is formed, not for profit, but for the purpose of effecting an organization to be composed of the merchants, business men, and others interested in the welfare of said city of Findlay, in its progressive growth, in the advancement of its business, in providing a place of common resort during business hours of those interested in the mutual prosperity of the said city, and of the people residing and doing business therein, and for the interchange of opinions, the conduct of commercial affairs, the transaction of daily business in such a hall as may be erected and provided for the use of said chamber of commerce, and for the doing of all other things that will enhance the interests of said city and promote the convenience and welfare of all business men trading therein, and for the doing of and carrying out the purposes for which such organizations are usually organized within and under, and so far as the same may not conflict with, but which may be in accordance with, the laws of the state of Ohio. Fourth: The amount of the capital stock of the said the chamber of commerce of the city of Findlay shall be fifty thousand (\$50,000) dollars, divided into shares of one hundred (\$100) dollars each, which same shall be issued to all members who may choose to become such, and adopting its constitution, rules and by-laws may avail themselves of the privileges afforded them by the said the chamber of commerce." The constitution of the corporation showed: Article 1, § 1: "This association shall be known as the 'Chamber of Commerce of the City of Findlay.'" Article 2, § 1: "The objects of the Findlay chamber of commerce are to collect, preserve, and circulate valuable and useful information relating to the business of Findlay, and especially the facts relating to its manufacturing interests; to encourage wise and needful legislation, and to oppose the enactment of laws likely to be prejudicial to the manufacturing and commercial interests; to study the workings of our system of transportation, upon which our commercial prosperity so largely depends, and endeavor to remedy, by all proper means, the defects and abuses existing therein; to secure fair and equitable rates of freight to and from the city, the discontinuance of vexatious and unjust overcharges, and prompt settlement of damages on goods shipped; to facilitate the adjustment of differences, controversies, and misunderstandings between its members and others; and to strive in all ways to promote the manufac-

turing, commercial, and other industrial interests of Findlay." Article 3, § 1: "Any person, if recommended by a member of the association, and elected by the board of directors, may become an active member of the association upon the payment of the fees and dues prescribed by the by-laws." Evidence was also introduced to show that 10 per cent. of the capital stock was subscribed, and an organization effected by the election of the defendants as directors. The purchase of the articles mentioned in the petition, and the liability of the corporation to pay therefor, were admitted.

The plaintiffs requested the following instructions: "First: 'In this case we request the court to charge as a matter of law that the defendant corporation is a corporation created for purposes other than profit.' Which request the court refused to give to the jury, and to which refusal to so charge the plaintiffs at the time excepted. Second: 'If you find from the evidence that the defendant corporation was formed, not for profit, but for the purpose of effecting an organization to be composed of the merchants, business men, and others interested in the welfare of the city of Findlay, in its growth, in the advancement of its business, in providing a place for resort during business hours of those interested in the mutual prosperity of the city of Findlay, and of the people residing and doing business therein, and for the interchange of opinions, the conduct of commercial affairs, the transaction of daily business in such hall as may be erected and provided for the use of said chamber of commerce, and for the doing of all other things that will enhance the interests of said city and promote the convenience and welfare of all business men trading therein, and for the doing of and carrying out of the purposes for which such organizations are usually organized within and under and so far as the same may not conflict with, but which may be in accordance with, the laws of the state of Ohio, then you must find the defendant corporation to be a corporation created for purposes other than profit.' Which request, also, the court refused to give to the jury, to which refusal to so charge the plaintiffs at the time excepted. Third: 'A corporation created for purposes other than profit may have a capital stock, and if you find from the evidence that the defendant corporation had a capital stock, that fact of itself will not be sufficient to relieve the defendants from personal liability for a debt of the corporation by them contracted.' Which request, also, the court refused to give to the jury, to which refusal to so charge plaintiffs at the time excepted." The court gave, with others of like tenor, the following propositions: "First: 'The records of the chamber of commerce, produced and read in evidence, conclusively show that said corporation was organized with a capital stock with a long list of

subscribers thereto, and a board of directors and other officers, and that it was, in fact, so organized for business purposes and for profits, either directly or indirectly, notwithstanding the defect in its name and the statement in its charter that it is a corporation not for profit.' To which charge the plaintiffs at the time excepted. Second: 'It is therefore, upon the face of the records and papers produced, to be deemed and held as a matter of law to be a business corporation, controlled by its board of directors under section 3248, Rev. St., and not by trustees.' To which charge, also, plaintiffs at the time excepted." The jury returned a verdict in favor of all the defendants except the corporation and Howell. A motion for a new trial was overruled, and judgment entered upon the verdict. This was affirmed by the judgment of the circuit court, and the reversal of both judgments is sought here.

Frank A. Davis, John F. Alford, and J. M. Platt, for plaintiffs in error. A. Blackford, E. T. Dunn, and H. F. Burket, for defendants in error.

SHAUCK, J. (after stating the facts). The claim of the plaintiffs is that the defendants are liable in this action under the provisions of section 3261 of the Revised Statutes: "The trustees of a corporation created for a purpose other than profit shall be personally liable for all debts of the corporation by them contracted." The view of the trial court, as indicated by the instructions given and by its refusals to instruct as requested, was that, although the articles of incorporation of the chamber of commerce declared that it was "formed not for profit," that declaration is not entitled to controlling effect, because of the provision for capital stock, and because of the declaration in the articles that the corporation was formed for the purposes of doing such things as would "enhance the interests of the city and promote the convenience and welfare of all business men trading therein." By the provisions of section 3332, corporations of this character are authorized to acquire such real estate as may be for their interest, which would require capital, and certificates of stock would be convenient evidence of the interests of the several members therein. That the existence of capital stock does not conclusively indicate that the corporation is for profit is made clear by the provisions of section 3262: "A corporation for profit, after its original capital stock is fully paid up, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which its capital stock is divided." This provision of the statute makes it clear that the proposition of law contained in the third request is sound. Nor was the view of the trial court justified by the fact that the corporation was intended to promote the growth and prosperity of the

city, and thus to confer incidental benefit upon its members and officers, in common with others owning property in the city or doing business therein. The corporation, though authorized to own or lease real estate for its general purposes, was not authorized to deal therein, nor could it transact any business out of which profits payable as dividends could be realized. The ownership of stock was not necessary to membership in the corporation, nor to official participation in its management. Since those who, as directors or trustees, incur the debts that may be incident to the management of a corporation of this character, do not necessarily bear the liability which the statute imposes upon stockholders, they are within the provisions of section 3261 of the Statutes. Corporations for profit, within the meaning of the statute, are those which are formed for the prosecution of business enterprises with a view to realizing gains, to be distributed as dividends among the shareholders in proportion to their contributions to the capital stock. For error in the instructions given and in refusing to instruct as requested, the judgments of the circuit court and court of common pleas are reversed.

BURKETT, J., having been of counsel, did not sit.

(53 Ohio St. 136)

STAHL v. VAN VLECK.

(Supreme Court of Ohio. June 11, 1895.)

OIL AND GAS LEASE—CONSTRUCTION.

1. A party of the first part, being the owner of three adjoining tracts of land, each containing forty acres, leased one acre thereof, to be designated by himself, to a party of the second part; and in the lease it was "agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate forty acres of the balance of said premises on the same terms as above." *Held*, that the forty-acre tract out of which the one acre was thereafter selected by party of the first part is the forty acres to be operated under the contract. *Walsh v. Ringer*, 2 Ohio, 328, *Ounningham v. Harper*, Wright, 366, and *Hay v. Storrs*, Id. 711, followed and approved.

2. In said contract it was further "agreed that, if second party or their assigns do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void." *Held*, that a test well at that place having been commenced and completed in ninety days, whereby the existence of oil at that point was ascertained, such performance supplied a sufficient consideration for the contract of lease, even though the test well was immediately plugged and casing withdrawn.

3. The party of the first part having selected the one acre upon which such well was to be drilled, and the second party having acted thereon, the first party is bound thereby, and has no right to make a second selection.

4. It being agreed that such lease should "continue and be in force for five years from the date thereof," and the second party, having commenced operations in good faith to drill for oil in ample time to complete a well within said term

of five years, was wrongfully enjoined by the lessor, and the injunction kept alive until after the expiration of the term of five years, *held*, that the second party is entitled at the close of the litigation to as much time in which to perform his contract as still remained of his term when he was first enjoined.

(Syllabus by the Court.)

Error to circuit court, Wood county.

Action by Arie E. Stahl against George H. Van Vleck. From the judgment rendered, plaintiff brings error. Affirmed.

The controversy between the parties arose out of a duly-acknowledged written instrument, which was recorded in the records of Wood county, in the words and figures following:

"Contract, executed this 15th day of December, A. D. 1886, by and between Arie E. Stahl, of Wood county, Ohio, as first party, and O. W. Manahan, Jr., and A. K. Detwiler, of Toledo, Ohio, witnesses: That the said first party, for the consideration hereinafter stipulated and agreed upon, does hereby grant to said second parties, or their successors and assigns, the right to enter upon the following lands and premises now owned by said first party, and situated in Perry township, Wood county, Ohio, to wit: A tract to be designated by first party of one acre on the following described premises: The south half of the northeast quarter of section two (2), in town three north, of range twelve (12) east; also the northeast quarter of the southeast quarter of said section two, in township and range aforesaid, containing forty acres of within described premises,—for the purpose and with the exclusive right in and upon said premises to drill and develop oil, gas, and other valuable substances, and the exclusive right of way to said second party, or their successors and assigns, to convey over, upon, and through said premises any and all oil, gas, and other valuable substances. In consideration whereof, it is hereby agreed: First. If oil be found and developed upon said premises in paying quantities, the said first party is to receive as his royalty the one-eighth part thereof of the oil in pipe lines to credit of first party, at the well. Second. Should gas be found and developed upon said premises, said first party is to have the right to use and consume, for lighting and heating his dwelling, such amount as may be necessary therefor, and the additional sum of three hundred dollars per annum for each gas well, when and as soon as the same is marketed and utilized. Third. From and after the expiration of twenty-four months from the date hereof, and until second party enter upon said premises and exercise the rights and privileges hereby granted, the said second party will pay to said first party, during the continuance of this contract, the sum of fifty cents per acre per year, upon each acre herein contracted for, to be paid out of the first moneys realized or received by said second party from the development of gas or oil. It is further agreed by and between said

parties, their successors and assigns, that this contract and the rights and privileges therein granted and conferred shall continue and be in force for five years from the date hereof, or so long as oil, gas, or other valuable substances be found and developed upon said premises in paying quantities. It is also agreed that the second party or their successors and assigns shall have the right and privilege of necessary roads to and from all wells or mines developed upon said premises, and the right to remove all machinery, fixtures, and buildings placed by them upon said premises. It is further agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate the balance of said premises on the same terms as above. In case said second party, its successors and assigns, shall not commence operations upon said premises within five years from the date hereof, then this contract shall be void. It is agreed that if second party, or their assigns, do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void. Signed and executed by the parties hereto, the day and year first above written. Arie E. Stahl. C. W. Manahan. A. K. Detwiler.

"Signed and executed in the presence of G. H. Baker. L. C. Winchell."

By the assignments duly recorded, this contract became the property of defendant in error, George H. Van Vleck. On the 8th day of August, 1891, plaintiff in error, also plaintiff below, filed his petition in the court of common pleas, seeking to enjoin defendant from going upon said premises, erecting any derrick, placing any timber thereon, drilling any wells, or removing any oil or gas therefrom, and for a reformation of said agreement, its cancellation, and for equitable relief. This injunction and relief was sought upon the alleged ground that the conditions of said instrument had not been performed, and no rental had been paid; no test oil or gas well had been commenced at Rising Sun or vicinity within the time specified; that no consideration was paid for said contract; that the same was without consideration; that only 40 acres of land were included in the contract, but by mistake the whole 120 acres were included in the written instrument; that said instrument was not acknowledged; and that the same is a cloud upon his title. The defendant, by his answer, averred that the test well at Rising Sun was commenced and drilled to completion within 90 days from the date of said contract; that thereby it was demonstrated, at great expense, that oil does exist in said lands; that he was about to drill a well on plaintiff's lands, and offered to pay any rental due under said contract, when stopped by this suit; and asks to be

protected in his rights, and for other proper relief.

After trial in the common pleas, the case was appealed; and, on trial, the circuit court made the following finding of facts and law: "That on the 15th day of December, A. D. 1886, the plaintiff, Arie E. Stahl, executed and delivered to C. W. Manahan and A. K. Detwiler the written contract, or oil lease, a true copy of which is set forth in the answer of the defendant, George H. Van Vleck, herein, except the next to the last stipulation. Said stipulation, being the second one above the words 'signed and executed,' etc., when said contract was executed and delivered, read as follows, to wit: 'It is further agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract or on lands adjoining the same premises, of which the foregoing one acre described embraces a part, said second party shall have the right to operate "40 acres of" the balance of said premises on the same terms as above.' The court finds that in the said contract, as originally executed and delivered, the words '40 acres of' were interlined at the place where they occurred, and that the recorder in recording said instrument overlooked the interlineation, which had become somewhat blurred and obscure, so that the said contract or instrument appears upon the record precisely as set forth in defendant's answer, or rather as set forth in the exhibit which defendant has attached to his answer herein; but the said clause as it appears in said answer and in the record should be corrected and reformed so as to contain the words '40 acres of,' in order to conform the same to the instrument as it was when executed and delivered; that said lease when executed and delivered did not confer upon the defendant the right to operate the whole of the farm in case gas or oil was found on the one acre designated in the lease, but upon only 40 acres thereof, if gas or oil was so discovered, and was so interlined in the original instrument, which was assigned to Van Vleck, and taken into his possession at the time of his purchase thereof. And the court further find that said contract of lease, by written assignments duly made and acknowledged, has been transferred to, and now belongs to, the defendant, George H. Van Vleck; that by virtue of such assignment the defendant, George H. Van Vleck, has become entitled to all of the rights and privileges granted and conveyed by said lease to the original grantees, C. W. Manahan and A. K. Detwiler; that the said George H. Van Vleck was not aware when he purchased said lease that any error had intervened in the record thereof, nor did he have personal knowledge that the words '40 acres of' were in the said lease or instrument (although they had been interlined therein at the time of its execution) until the day of the trial of this cause in this court; that said George H. Van Vleck pur-

chased said lease in good faith, and paid a valuable consideration therefor. And the court also find that Manahan & Detwiler, the original grantees in said lease, commenced a test well in the vicinity of Rising Sun within 90 days after the execution of said contract of lease, and in accordance with the terms thereof; that said well was not situated on plaintiff's land, and was about one and one-half miles therefrom; that said Manahan & Detwiler in due time drilled said well down to the oil-bearing rock, and for a sufficient distance therein to determine the character of the land; that oil was found in said well, and the existence of a deposit of oil at that point was ascertained; that, immediately after the completion of the drilling of the well as aforesaid, the said Manahan & Detwiler plugged the said well, drew the casing, and did not further operate the same; that said lease was assigned to and became the property of defendant, Van Vleck, on the 30th day of March, A. D. 1887; that no operations were commenced by any one, under said lease upon the lands of plaintiff, until about two weeks previous to the commencement of this action, and no rent was paid thereon; that, at the date last aforesaid, the defendant, through one Graham, his agent, requested the plaintiff to designate the acre of land upon which he desired to have a well located; that plaintiff thereupon designated a location for said well upon the southwest quarter ($\frac{1}{4}$) of the northeast one-fourth ($\frac{1}{4}$) of section 2, mentioned in the petition; that pursuant to such designation by plaintiff, and prior to the commencement of this action, defendant in good faith, and with the intent to drill for oil under said lease, commenced placing material at the point so designated for the purpose of drilling; that soon afterwards the plaintiff notified the defendant's agent that he had changed his mind, and that, if any of said land was to be operated for gas and oil, he desired to have the operations begun, and carried on, on the tract of 40 acres described as the northeast quarter of the southeast quarter of section two (2), town three (3) north, range (12) twelve east, in Wood county, Ohio; that, soon after receiving said notice, the agent of the defendant drew other loads of derrick lumber, and deposited it on the 40-acre tract so as aforesaid first designated by the plaintiff, and was about coming on the same land with another load when the plaintiff informed him that if the defendant insisted that his said lease gave him the right to operate the whole farm, which contained 120 acres of land, in case he was successful in finding gas or oil on the premises, that he would not permit him to commence operations upon said land at all, but would enjoin him. To this the agent of the defendant answered that he did not know how much land the defendant claimed a right to operate, but would write to the defendant, and let the plaintiff know, and then deposited another load of lumber prepared for the purpose and

intended to be used in the construction of a derrick on the land last mentioned and first designated by the plaintiff. The defendant at that time claimed a right under his said lease to operate the whole farm of one hundred and twenty acres in case he found gas or oil upon any one acre of land mentioned in the lease and designated by the plaintiff, and supposed that this right was vested in him by the terms of his lease. No other work or operation had been commenced or done on said land up to the date of the commencement of this action, and nothing has been done since. Upon the facts so found, the court find the equity of this case to be with the defendant, George H. Van Vleck, as to the forty-acre tract, described as the southwest quarter of the northeast quarter of section two (2), town three (3) north, range (12) twelve east, in Wood county, Ohio, and with the plaintiff as to the eighty acres, constituting the balance of the tract or farm described in the petition, and that each is entitled to have his title quieted accordingly. It is thereupon ordered, adjudged, and decreed by the court that the defendant, George H. Van Vleck, have and hold the rights to enter upon and operate for gas and oil upon the forty-acre tract described as the southwest quarter of the northeast quarter of section two (2), town three (3) north, of range twelve (12) east, in Wood county, Ohio, in all respects as granted and conferred by the contract or oil lease set forth in defendant's answer herein, and as claimed in said answer, free from all interference of plaintiff herein; and that, as to the balance of the tract described in plaintiff's petition herein, the title of plaintiff thereto is quieted, and defendant is forever enjoined from asserting any rights or claims thereon by virtue of said oil lease or otherwise. And it is further ordered that each party pay one-half of the costs in both courts in this case to be taxed." Proper exceptions having been noted, a petition in error was filed in this court seeking to reverse the judgment of the circuit court.

Dodge & Canary, for plaintiff in error.
James O. Troup, for defendant in error.

BURKET, J. (after stating the facts.) Plaintiff in error urges that the contract is void as to all except the one acre, for the reason that it is said to be indefinite and ambiguous, and that there is no description of the forty acres sought to be conveyed. In Texas it is held that a grant by the owner of a certain number of acres in a particular tract will authorize the grantee to locate it in any part of the tract. *Wofford v. McKinna*, 23 Tex. 36. In Illinois such a description is held to be so vague and uncertain as to convey no title. *Shackleford v. Bailey*, 35 Ill. 391; *Lafin v. Herrington*, 16 Ill. 304; *Hughes v. Streeter*, 24 Ill. 647. In this state, at an early day, courts undertook to carry out the intention of the parties, and held

that a deed conveying a certain number of acres out of a designated corner of a certain tract of land was a good conveyance of that number of acres in a square form out of the designated corner; and this was carried so far as to hold that a grant of 51 acres in the northeast part of a certain tract was good as a conveyance of 51 acres in a square form in the northeast corner of the tract. *Walsh v. Ringer*, 2 Ohio, 327; *Cunningham v. Harper*, *Wright*, 386. In *Hay v. Storrs*, *Id.* 711, there was excepted out of a conveyance of a tract of land half an acre opposite where Mr. Harvey formerly resided. The exception was held good and sufficiently definite to enable an officer to find and locate it. The court say: "There can be no doubt of the intention of the grantor to reserve to himself, by exception from his deed, one-half an acre. Where does it lie? Find where Harvey lived. If it be opposite the corner of the 184-acre tract, it lies in the corner, in a square form. If so far from the corner that the lines of the half acre would not reach it in a square form, then a line from the center of the residence of Harvey would be the center of the half-acre tract on the street, and the tract would be laid out in a square form by parallel lines, making that the base." Plaintiff in error owned three tracts of forty acres each, and, by selecting the one acre upon which the well was to be drilled, he thereby designated that the forty-acre tract out of which the one acre was so selected should be the forty acres to be operated under said lease in case gas or oil should be obtained. If the number of acres contracted to be operated in case gas or oil shall be found is the same as a subdivision of a section, say, 10, 20, 40, 80, or 160 acres, it will be held that the subdivision of the section upon which the well is located is the land intended to be operated under the lease. Otherwise the land to be operated is to be taken in a square form with the well as its center, unless the well is so near a line of the land as to make this impossible, in which case the land to be operated will be in a square form including the well, and extending to such line. If gas or oil is found on adjoining lands, the tract to be operated must be ascertained in the same manner in which the half acre was ascertained in *Hay v. Storrs*, *supra*.

Next, it is urged that the contract was void, and remained so to the time of the commencement of the action, for the reason that upon its face it is without consideration. The contract is expressed to be upon the consideration thereafter stipulated and agreed upon. There are many stipulations and agreements thereafter contained, founded, however, upon the contingency that oil or gas be found and developed upon said premises. There is also a stipulation to the effect that, if operations upon said premises be not commenced within 5 years, the contract shall be void. There is also an agree-

ment that, if the second party shall not commence a test oil or gas well at Rising Sun or vicinity in 90 days, the lease shall be void. So far the stipulations and agreements are contingent, but there is a further and positive agreement, to the effect that after 24 months the second party will pay to the first party the sum of 50 cents per acre per year, "to be paid out of the first moneys realized or received by said second party from the development of gas or oil"; not from the development of gas or oil on these premises, but from the development of gas or oil generally. Such a promise made by a party in the gas or oil business is as certain as the promise of a farmer to pay out of his next year's crops. But, aside from this agreement to pay 50 cents per acre, the contingent stipulations and agreements, with part performance, and an offer of full performance before the commencement of the action, furnish ample consideration for the contract. Grant that the parties of the second part were not originally bound to commence a test oil or gas well at Rising Sun within 90 days, yet having commenced the well within that time at that place, and in that regard performed their part of the contract, such performance is itself a sufficient and completed consideration, and thereafter the lessor cannot be heard to aver want of consideration. Performance by the party not originally bound supplies the consideration, and thereafter the other party is as fully and firmly bound as he would have been in case there had originally been ample consideration expressed in the contract. *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; *Phelps v. Townsend*, 8 Pick. 392; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; 1 Pars. Cont. 451.

Again, it is urged that there was a lack of performance as to the drilling of the test well at Rising Sun within 90 days. The circuit court found that the test well was commenced within 90 days, duly drilled to completion, and the existence of oil at that point thereby ascertained, that the well was not operated, but was plugged, and the casing withdrawn. This fully complied with the terms of the contract. The lease did not stipulate for the operation of the well, and the court cannot make a better contract for the plaintiff than he made for himself. As the test well was not on plaintiff's land, he had no interest in the profits to be derived from its operation, unless it should have been indirectly, and such indirect benefits arising from operations upon the lands of another, to be available, must be expressly stipulated for, as they cannot be implied.

Lastly, it is urged that, under the circumstances of this case, plaintiff should have had the privilege of making a second location of the place for the drilling of the well on his land, and that, as the five years had elapsed at the time of the trial, the lease had expired by its own limitation, and judgment should

have been given in favor of plaintiff. As a general rule, only one location is permitted, and we see nothing in this case to warrant a departure from this rule. The defendant had commenced acting upon the selection made, and he had a right to insist that there should be no change. If a second selection had been granted, a third might have been demanded. The circuit court was right in holding him to his first location. As to the expiration of the five years, the rule is that, where a party is prevented from performing his contract by injunction wrongfully obtained, he shall, at the end of the litigation, have as much time in which to perform as still remained at the date of the injunction, the rights thereafter to be the same as they would have been in case no injunction had been issued. In short, the time between the issuing of the wrongful injunction and the ending of the litigation is not regarded and cannot be counted to the detriment of the enjoined party. To hold otherwise would permit a man to profit by his own wrong. This principle has been carried so far as to estop a party from availing himself of the statute of limitations. *Treasurer of Brown County v. Martin*, 50 Ohio St. 197, 33 N. E. 1112.

But it is urged that as defendant in error claimed the right to operate all of the three 40-acre tracts in case oil or gas should be found, when in fact he was entitled to operate only one of them, he was in the wrong in his claim, and that, for aught that appears, the injunction would not have been applied for or granted in case he had claimed only 40 acres. The findings of fact show that defendant in error did not know of this interlineation as to the 40 acres, and supposed that he was entitled to the whole 120 acres, as shown by the record. Plaintiff in error had full knowledge of the fact that only 40 acres were granted, and he was first in the wrong by making his claim for an injunction too broad. Had he truly stated the facts in his petition as to the 40 acres, and thus called the attention of defendant to the error in the record, it is not likely that any defense would have been made, and the well would have been drilled within the five years. The litigation and consequent delay were therefore caused by plaintiff in knowingly and wrongfully covering too much territory by his injunction, and not by the defense thus made without knowledge of the mistake in the record. There is therefore nothing to take the case out of the general rule in such cases. Judgment affirmed.

(156 Ill. 183)

HAPP v. HAPP et al.

(Supreme Court of Illinois. May 15, 1895.)

VENDOR AND VENDEE—SURRENDER OF TITLE—LACHES.

1. Where the grantee in an unrecorded deed surrenders to the grantor his interest in the land,

1 Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

and returns the deed, the grantor is thereby invested with such an equitable interest as will be a good defense to a suit by the grantee to establish title.

2. A delay of 30 years in asserting title to land under an unrecorded deed is such laches as will bar the suit where the delay was with full knowledge of the facts, and the adverse party had possession and paid taxes during that time.

Appeal from superior court, Cook county; Phillip Stein, Judge.

Petition by Simon J. Happ against John P. Happ and others. Defendants obtained a decree. Complainant appeals. Affirmed.

Harbert & Daley, for appellant. W. A. Hamilton, for appellees.

ORRIG, J. This was a proceeding in the superior court of Cook county, brought by appellant, Simon J. Happ, under the burnt-record act, to establish title to certain premises in Cook county, described in the petition. The defendants put in an answer, and also filed a cross petition, praying that the title to the premises be confirmed in them. On the hearing, upon the pleadings and evidence and report of the master the court entered a decree in favor of defendants in the cross petition, to reverse which the complainant appealed.

It appears from the record that John Happ, father of petitioner, was originally the owner in fee of the premises in controversy; that he claimed title thereto by mesne conveyances from the government. On the 3d day of September, 1856, John Happ and his wife, Gertrude, executed a deed, which purported to convey the premises to Simon J. Happ, the petitioner, who was then about 16 years of age. Whether this deed was ever delivered to the grantee is a question left in doubt from the evidence. The deed was, however, never placed on record. In 1858, Simon Happ became very anxious to go to California, and called on his father to furnish him money to make the journey. After much persuasion the father consented, and gave the young man \$300 in gold. It is claimed by the defendants that petitioner, upon receiving the \$300 from his father, agreed to surrender all title he held to the land in controversy, and in pursuance of this agreement the deed was surrendered and canceled; while, on the other hand, petitioner claims that he turned over a horse and wagon, carpenter tools, some cord wood, and a few pigs for the money advanced, and that he left the deed in the hands of his mother for safe-keeping. Upon receiving the money, petitioner went to California. John Happ remained in possession of the land in dispute until May 25, 1863, when he died. Before his death he made a will, in which he devised the premises to his wife, Gertrude. The will having been probated, Gertrude Happ went into the possession of the premises, and continued in possession until August, 1876, when she conveyed a portion of the premises to her sons John and Bertrom Happ, and in September,

1877, she conveyed the remainder to Bertram Happ. These grantees, and those claiming under them, have held the possession of the premises ever since. It is conceded in the argument of the petitioner that he, at the time he went to California, in 1858, surrendered to his father his interest in the premises, although no deed was executed by him reconveying to his father. The surrender of his interest and return of the deed made to him would be sufficient to invest the father with an equitable interest in the premises, and preclude a recovery by petitioner; and this seems to be in harmony with the law as laid down by this court in *Sanford v. Finkle*, 112 Ill. 146. The real question, then, in controversy between the parties is whether the petitioner, in 1858, received from his father \$300, and in consideration of the money so received surrendered his deed and claim to the property.

The first witness who testified in regard to the arrangement between the petitioner and his father was John Happ. He testified that he was present when the deed was made; that it was retained in the possession of the grantor for the reason, he thought, the grantee was too young to be intrusted with the custody of a deed. He further testified: "My father kept that deed in his own possession. I have seen it different times. I saw it five or six years after my father had it in his possession. Simon came to Chicago to learn the carpenter trade, and it was hard times, and he could hardly make enough to pay his board. And finally there were a lot of young fellows going to California, and Simon wanted to go, and teased father a couple of months for \$300. That was all the money my father had, and that was all the land he had. And father didn't like to give him the money, because he was too old to work; but he didn't give up till father gave him \$300 in gold. I was present at the time, and father then said: 'Now, Sam, you ain't going to have this land if you take that money. I have got to keep that land to myself.' Sam replied: 'Well, I am satisfied with the money, to go out to California, because I know I can do better in California than I can do here.' That was in 1858. I was present at the time. My father would never do anything without asking my permit,—what I thought of it. This conversation took place about two weeks before Simon went away. They talked about the same matter afterwards. Sam went to California, and was there eight years, and he came back, and was here eight years, and never opened his mouth about the land. I can't say that they talked about it again before Simon went to California. My father gave Simon \$300 in gold about two weeks before he went to California. Simon was then about eighteen years old. After Simon went to California, I have heard father say he was going to keep that land, and will it to my mother, so that she would have some-

thing to depend on." In addition to the evidence of this witness it appears that a short time before Simon Happ started for California he visited his sister, Catherine Peterman, and while there she and her son, John Peterman, testify that Simon stated that he had received \$300 from his father, and that he had nothing further to do with the land. There was also other evidence in corroboration of the testimony of the three witnesses. On the other hand, the petitioner, in his evidence, denied making the statements in reference to the money and the land proven by defendants, and, in addition to this, he called as a witness Joseph Happ, who in substance testified that petitioner left with his father certain articles of personal property to be turned into money in payment of the \$300 received from the father. He also testified that Simon told his father he would leave the deed with him until he returned, and his father said he would take care of the land. The master in chancery, in his report, found "that the plaintiff gave the deed to his parents, intending thereby to accept \$300 in full payment therefor"; and we are inclined to the opinion, after a careful consideration of all the evidence in the case, that the finding is sustained by a preponderance of the evidence.

Moreover, the long delay and laches of petitioner in asserting title to the premises may be regarded as a bar to the relief claimed in the petition. John Happ, the father of the petitioner, went into the possession of the land in 1858. From that time on he continued in the possession, asserting title, and paid all taxes each year on the land until his death, in 1863. After his death, his widow, Gertrude, to whom the land was devised, entered into the possession, and paid the taxes each year until 1876 or 1877, when she conveyed, and her grantees have held the land and paid all taxes ever since. The bill was not filed in this case until 1893. Here was a period of over 30 years in which the complainant, with a full knowledge of all the facts, has suffered John Happ and those claiming under him to possess and control the land as absolute owners, without asserting title to the property. This long delay may be regarded as a complete bar to the relief claimed in the petition. The decree of the superior court will be affirmed. Affirmed.

(154 Ill. 194)

OSGOOD et al. v. CITY OF CHICAGO.¹
(Supreme Court of Illinois. Nov. 27, 1894.)²
TRIAL—VIEW OF PREMISES—LOCAL IMPROVEMENTS
—DAMAGES—EMINENT DOMAIN.

1. In an action of trespass for damages to land the court may permit the jury to view the premises in charge of an officer, even though the

¹ Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

² Rehearing denied March term, 1895.

condition of the property has changed since the trespass complained of. *Springer v. City of Chicago*, 26 N. E. 514, 135 Ill. 552, followed.

2. The measure of damages to property alleged to be injured by, but not taken for, a public improvement is the depreciation in the fair market value of the property, caused by the construction of the improvement.

3. Loss of rent, caused by obstruction of access to the property during the construction of the improvement, is not damage to the property for which compensation must be made.

Appeal from circuit court, Cook county.

Action on the case by Algernon S. Osgood and others against the city of Chicago. Defendant obtained judgment, which was affirmed by the appellate court. 44 Ill. App. 532. Plaintiffs appeal. Affirmed.

Matz & Fisher, for appellants. H. Rubens, for appellee.

BAKER, J. This was an action on the case to recover damages alleged to have been caused to the property of appellants by the construction of the Jackson street bridge and viaduct and the approaches thereto on Canal street. The work was commenced on October 29, 1887, and completed August 25, 1888. Before and at the time of this improvement appellants were the owners of a lot on the northwest corner of Jackson and Canal streets, having a frontage of about 160 feet on Jackson street and 140 feet on Canal street. Upon this lot were buildings variously estimated by witnesses to be worth from \$10,000 to \$18,000, which had rented for 15 years prior to the commencement of the improvement at an average annual rental of \$11,133. June 1, 1889, they leased this property for a term of 99 years to Hibbard J. Lehman for an annual rental of \$6,000 for the first 5 years, \$8,000 for the second 5 years, \$10,000 for the third 5 years, and \$12,000 for the remainder of the term. The lessee erected a brick building on the premises at the cost of about \$200,000, and in February, 1890, purchased the fee from appellants, paying therefor the sum of \$200,000. Appellants received for rent of the premises from November 1, 1887, to June 1, 1889, \$3,206. On the trial the jury found for the city, and judgment was entered on the verdict. The appellate court affirmed the judgment of the circuit court.

There is no complaint as to the manner in which the improvement was made, or the skillfulness with which the labor upon it was performed. The damages, therefore, recovered in this action must be estimated under the same rules that they would have been upon a petition by the city to condemn the property. There is no claim that any of appellants' property was taken. The only claim is for damages thereto by reason of the improvement. At the instance of appellee, the jury were permitted, in charge of an officer, to go upon and view the premises, and this ruling, it is contended, was erroneous. This question was raised in the same manner it is now presented in the case of *Spring-*

er v. City of Chicago, 135 Ill. 552, 26 N. E. 514, and decided against the present contention. The practice was again approved in the late case of *Vane v. City of Evanston* (Ill. Sup.) 37 N. E. 901, with a modification of the language used in the *Springer Case* as to weight to be given by the jury to their view of the premises. It is contended that, as the conditions of the premises in this case have been changed after the improvement was finished, and before the trial, by tearing away an old house and erecting a new one, the case is not decisive of the question as presented now. But it was expressly decided in that case that, inasmuch as the condition of the property at the time of the trial was a proper question to be brought to the attention of the jury by proof, the court might properly allow it to view the premises at that time. While changes in the condition of the property alleged to have been damaged might render the view of the jury less satisfactory in applying the testimony, such change could not affect the power of the court to allow such view. Counsel for appellants contend that the measure of damages in this case is the value of the buildings on the premises at the time the work on the improvement was commenced, and the loss to them of rent of that building by being obstructed in its use from that time to June 1, 1889, when it was torn down, and that any benefits accruing to the premises by reason of the improvement cannot be properly set off against such damages. This position finds no support in law. On the contrary, by the repeated decisions of this court, the true measure of damages in every such case is the depreciation in the fair market value of the property, caused by the construction of the improvement. If there is no depreciation, there is no damage. As said in the *Springer Case*, supra: "In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had." The damage is the difference in the value of the property as a whole before and after the improvement. *Railway Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291. Clearly, under this well-established rule for estimating damages, benefits may always be set off against damages, no matter what may be the amount of those damages. This case well illustrates the soundness and justice of the rule. Damages are here claimed for an injury to private property not taken. Before the improvement, taking into consideration the buildings, the premises were worth perhaps \$125,000. Conceding the buildings were wholly destroyed, still, the value of the lot having been increased by the improvement to an amount greatly exceeding the value of the buildings, how can it be said the property has been damaged? The claim set up for loss of rent by reason of obstructions to access to and from the building during the

progress of the work cannot be sustained. That is not damage to property not taken, within the meaning of the constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made. As said by the appellate court: "To construe the constitution as giving compensation for all temporary obstructions necessary when streets are being repaired, etc., even though thereby access to abutting property is for a time cut off, would be unreasonable." In our opinion, the evidence applied in this case to the proper rule for ascertaining the damages is so clearly against plaintiffs' right of recovery that no other result could have been lawfully reached than that announced by the jury in its verdict. We have, however, given due consideration to the points made against the rulings of the trial court upon evidence and instructions, and find no substantial error in these rulings. On the whole record the judgment of the circuit court is right, and was properly affirmed by the appellate court. The judgment of the latter court is affirmed. Affirmed.

(156 Ill. 229)

GLOS et al. v. SWIGART.¹

(Supreme Court of Illinois. May 15, 1895.)

REVIEW ON APPEAL—DECREE BY DEFAULT—SUFFICIENCY OF EVIDENCE—TAX SALE—DELIVERY OF DEED—INJUNCTION.

1. A defendant who has made default cannot question on appeal the sufficiency of the proof to support the decree.

2. A bill which shows that at a tax sale of complainant's land the county collector sold all the land to defendant, although plaintiff's agent bid the amount due for taxes for a small part of the land, shows ground of action for enjoining the delivery of a tax deed to defendant.

3. The fact that a decree grants relief not strictly within the prayer of the bill is no ground for reversal on appeal by a defendant, who is not affected thereby.

Appeal from appellate court, First district.

Bill by Charles F. Swigart against Henry L. Glos and others. Complainant obtained a decree, which was affirmed by the appellate court. Defendant Glos appeals. Affirmed.

This was a bill filed by appellee, in which he set up that he was the owner of the east half of a certain lot in Cook county, being about 40 acres; that on August 28, 1893, at a tax sale for delinquent taxes for the year 1892, made by Charles Kern, county collector, through one William Batterman, said property was offered for sale, and Rollo M. Davis, acting for the complainant, bid for the taxes, costs, and interest then due upon the same for one-vigintillionth thereof, and which was the lowest bid thereof; that, notwithstanding such bid was made, said Batterman "intentionally and fraudulently, and in collusion

with one Henry Glos, who was represented at the sale by Henry F. Meyer, and who did the bidding for Glos, refused to accept the bid of Davis, claiming he did not hear him make it"; that he did hear the same, but for the purpose of favoring Glos and Meyer, and without allowing or permitting any lapse of time or opportunity on the part of other bidders to make any other or better bid than that of Meyer, attempted to and pretended to immediately knock down and sell the whole tract to Meyer, and in his name, but really for the benefit of Glos; that complainant was ready to pay the taxes, interest, and costs in accordance with the bid of Davis, and offered then and there to pay the same, which last offer was first accepted by Batterman, but subsequently refused by him. An offer was made by the bill to pay the full amount of the taxes, interest, and costs in accordance with the bid of Davis. It also charges that the acts and doings of Batterman and Meyer in and about the sale were in accordance with a prior understanding and agreement on their part to deprive complainant or his representative of bidding in the property. Henry Wulff, county clerk, Charles Kern, county treasurer, Henry F. Meyer, Henry Glos, and Batterman were made defendants, the prayer being for an injunction restraining each of them from making and delivering to Meyer and Glos or any person on their behalf, and them from receiving, a certificate of purchase of said property; also for a decree requiring Kern to make and deliver to complainant a certificate of purchase in accordance with the bid of Davis. A temporary writ of injunction was issued, and served on all of the defendants. Glos and Meyer, these appellants, made default, and a decree pro confesso was entered against them. Wulff and Kern answered, admitting the tax sale of August 28, 1893, as alleged in the bill, but denying all knowledge of the bid by Davis, and of any fraud or collusion as charged. The action was dismissed as to Batterman. A general replication being filed to the answer, the cause was referred to James R. Mann, master in chancery, to take the proofs. On December 26, 1893, he reported the evidence taken by him, together with his conclusions. To this report these appellants, having been previously defaulted, made no objection, either before the master or the court. Kern and Wulff filed certain objections to the same before the court, but none before the master. Their objections were all overruled, and the report approved, and a decree accordingly entered, finding the allegations of the bill to be true, and perpetually enjoining the defendants Wulff and Kern from issuing to Glos or Meyer a certificate of purchase for said property. Also finding that complainant did, on said August 28, 1893, offer to pay the taxes for 1892 levied and assessed on said premises, and that he has kept that offer good, and brings the sum of \$1,042.68, being the full amount of taxes

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

of 1892 and costs accrued thereon to the date of sale, and enjoining these appellants "from demanding or receiving from said Kern or Wulff any certificate of sale of said premises," and ordering the clerk to receive said sum of money to be delivered to the defendant Charles Kern at his request, to be in full payment of said tax of 1892, and the property freed from said sale of August 28, 1893. The appellate court affirmed this decree. 54 Ill. App. 316.

H. S. Mecartney, for appellants. W. A. Phelps, for appellee.

WILKIN, C. J. (after stating the facts). On the record as presented to us the first question which naturally arises is, what are the rights of appellants in this court? "The rule is well settled that a defendant in chancery cannot, on error, object to the sufficiency of complainant's proof, when the bill is taken for confessed." *Gault v. Hoagland*, 25 Ill. 266. The rule thus announced has never been departed from by this court. Therefore no question as to the sufficiency of the proof to authorize the decree below can be raised on this appeal. Appellants stand in the position of having confessed the truth of every fact well pleaded in the bill. It is true, the sufficiency of the bill to justify the decree may be questioned on error or appeal by any party thereto, even after being defaulted; but that right is of no avail to these appellants. It cannot be seriously contended here that the bill, on its face, does not show a clear right to the decree rendered against them, viz. restraining them from demanding or receiving a certificate of sale for complainant's property. That the bill shows on its face that the pretended sale to Meyer for Glos was irregular, fraudulent, and void cannot be denied. To hold that a bidder at a tax sale is entitled to a certificate of purchase under the facts set up in this bill would certainly be extraordinary. As stated by the master in his report: "The theory of tax sales is that the tax buyer will take as small a portion of the property as is equal in value to the amount of taxes due, and the owner is entitled to have a fair opportunity given to tax buyers to bid." Not only does the bill taken as confessed show that such an opportunity was not given at the sale in question, but the master so found from the proofs, his finding being approved by the court. It seems to be thought that appellants can question the decree below because it grants relief not strictly within the prayer of the bill. It grants no such relief against them. They have no interest in the question as to whether the money paid into court should be applied in payment of the taxes due. The public officers are making no complaint of the decree in that regard. The public demand is satisfied by it, and appellants have no right to complain. Their interest in the case ends

with the holding that they acquired no right at the tax sale. The object of sales for taxes is to collect the tax, and not to afford bidders an opportunity to acquire title to property, or receive penalties by way of redemption. While it is true that the owner cannot purchase his own property at a tax sale so as to gain an advantage over others, or in that way escape the payment of taxes, if he in fact pays the tax in full, even by bidding in the property, we are unable to see upon what principle one having no interest in the property or collection of the tax can complain. We entertain no doubt as to the correctness of the judgment of the appellate court, and it will be affirmed. Affirmed.

(156 Ill. 274)

MARTIN et al. v. DUNCAN.¹

(Supreme Court of Illinois. May 15, 1895.)

APPELLATE JURISDICTION — AMOUNT IN CONTROVERSY — ATTACHMENT — FRAUDULENT CONVEYANCE — CHATTEL MORTGAGE — INSTRUCTIONS.

1. Upon interplea in an attachment suit the value of the chattels attached, and not the amount of the attachment debt, constitutes the amount in controversy.

2. Defendant, being the owner of a stock of goods in the possession of his brother as his agent, gave the brother a bill of sale of the goods and took back from him an agreement to resell within 30 days. During that time the goods were attached by defendant's creditors. *Held* that, as the two instruments were in effect a chattel mortgage, it was error to charge that a bill of sale need not be recorded, and to refuse to charge that it was incumbent on the brother, in order to establish his title, to show that there had been a change in his possession so that he was no longer in possession as agent.

3. Where a sale from one brother to another is attacked by creditors, it is error to refuse to charge that while brothers may deal with each other, yet where the parties to a transfer are near relatives clearer proof of good faith is required than when they are strangers.

Error to appellate court, Second district.

Attachment by George H. Martin and Charles S. Dennis against George W. Duncan. There was an interplea by Robert Duncan. The interpleader obtained judgment, which was affirmed by the appellate court. 47 Ill. App. 84. Plaintiffs bring error. Reversed.

Rector C. Hitt and A. T. Lardin, for plaintiffs in error. Richolson & Seeley, for defendant in error.

MAGRUDER, J. The plaintiffs in error, George H. Martin and Charles S. Dennis, partners under the firm name of G. H. Martin & Co., brought suit upon a claim of \$322.50 against George W. Duncan, and on May 28, 1891, levied a writ of attachment upon a stock of goods in a store in Ottawa, as the property of George W. Duncan. The defendant in error, Robert Duncan, a brother of the debtor, interpleaded, under section 29 of the attachment act (1 Starr & C. Ann. St. p. 322),

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

and claimed to be the owner of the goods. The evidence tends to show that the goods in question were worth more than \$2,000. A trial was had in the circuit court before a jury upon the issue raised by the interpleader, which resulted in verdict and judgment for the claimant, the defendant in error herein. This judgment has been affirmed by the appellate court, and this writ of error is sued out for the purpose of reviewing the judgment of the latter court.

At the October term, A. D. 1894, a motion to dismiss the writ of error was made by the defendant in error, and allowed. A subsequent motion was made to set aside the order dismissing the writ of error and reinstate the cause. The latter motion was reserved to the hearing for further consideration. A majority of the judges of the appellate court have not given a certificate of importance.

It is claimed by defendant in error that the amount of the claim, to wit, \$322.50, for which the plaintiffs in error levied the writ of attachment in the suit against George W. Duncan, is the amount involved in the controversy. On the other hand, it is claimed by the plaintiffs in error that the controversy here is not between the plaintiffs in the suit and their debtor, George W. Duncan, but between the plaintiffs and Robert Duncan, as to whether the property levied upon is owned by Robert Duncan or by George W. Duncan, and that, therefore, the amount involved is the value of the property, which is shown by the evidence to be more than \$1,000. We are inclined to think that the plaintiffs in error are right in their contention, in view of the decision of this court in *Cummins v. Holmes*, 107 Ill. 552. In the latter case the plaintiffs, holders of a chattel mortgage given to secure about \$500, replevied the mortgaged property from the sheriff, who had levied an execution upon it for \$722, and costs, in favor of certain creditors. In the trial court the issues were found for the plaintiffs, the mortgagees, and an appeal was taken to the appellate court by the sheriff in the interest of the creditors. This court held in that case that its jurisdiction did not depend upon the amounts of the claims of the mortgagees and execution creditors, whether considered separately or in the aggregate, but upon the value of the property replevied, which exceeded the sum of \$1,000. We see no substantial difference between the case cited and the case at bar. In the *Cummins* Case, the property was levied upon by execution creditors; here it is levied upon by attaching creditors. There it was replevied by the mortgagee in a chattel mortgage; here it is claimed by a third party, interpleading for the purpose of establishing his claim. Where any person other than the defendant, claiming the attached property, interpleads, under section 29 of the attachment act, the court directs "a jury to be impaneled to inquire into the right of property." In such a proceeding, the issue being as to

the ownership of the property attached, and not as to the indebtedness of the attachment debtor to the plaintiffs in the suit, it would seem that the amount involved would be the value of the property attached, and not the amount of the claim sued upon. As such value exceeds \$1,000 in the present case, we think that we have jurisdiction to entertain the writ of error. The order dismissing the writ will, therefore, be set aside, and the cause is reinstated.

Coming to the merits of the case, we think that there was such error in the giving and refusal of instructions as requires a reversal of the judgment. It will first be necessary to notice some of the facts which the evidence tends to establish, and to which the instructions, as given and as refused, were intended to apply. George W. Duncan, against whom the suit was brought, lived in Dixon, and had two stores, one in Dixon and one in Ottawa. His brother, Robert Duncan, the defendant in error, lived in Ottawa, and managed the store in the latter place from September, 1888, down to May 16, 1891, when the transfer hereinafter mentioned is alleged to have been made. The defendant in error, in the management of the Ottawa store for his brother, George, sold goods, handled the money, made deposits, paid for goods, paid bills by checks, took out insurance, had no clerk, kept such books as were kept, and had an agreement that he was to receive for his services \$25 per month and his board. George Duncan came to Ottawa only occasionally, although the store was run in his name and advertised as his, and the stock levied upon is conceded to have been his until May 16, 1891. Up to that date Robert Duncan was merely the agent and representative of his brother, George, and his possession was, until then, the possession of George. On May 16, 1891, George executed to Robert a bill of sale granting, bargaining, and selling to the latter, for an expressed consideration of \$2,130.95, the stock of goods in the store at Ottawa. At the same time, an agreement was executed by Robert Duncan by which he agreed to resell the said stock of goods to George Duncan, upon the payment of \$2,130.95 within 30 days, together with expenses and salary in the meantime; Robert keeping account of goods bought and sold, moneys collected, and expenses incurred, and accounting to George. The testimony of defendant in error tends to show that his brother, George, owed him the amount named in the instrument of transfer for money loaned and for unpaid salary.

In the first place, the bill of sale and the agreement, being executed at the same time, constituted a chattel mortgage. There was no absolute sale of the goods to defendant in error, but only a conditional sale, such as is ordinarily evidenced by a chattel mortgage,—a pledge of the goods for the security of a specified amount to be paid within a specified time. In its instructions to the jury the trial court treated the instrument executed by

George Duncan to defendant in error as an absolute bill of sale, and told them that, if they believed from the evidence that there was a bona fide purchase and delivery of the goods by George to Robert, the latter would have a good and valid title to them as against any subsequent attachment lien or claim. We are inclined to regard the instructions as erroneous in this respect. The interest of a mortgagor in mortgaged chattels may be attached or levied upon, subject to the mortgage. *Durfee v. Grinnell*, 69 Ill. 371; *Gaar v. Hurd*, 92 Ill. 315. Here the writ of attachment was levied on May 28, 1891, before the lapse of the 30 days limited for the payment of the debt secured, and before condition broken, so that the title of the mortgagee was yet only a defeasible one. In the instructions given, the court treated the bill of sale as a separate and independent instrument, entirely apart from its connection with the agreements, and, in refusing some of the instructions asked by plaintiffs in error, declined to present to the jury any consideration of the two instruments, as related to each other. Treating the bill of sale as an absolute transfer, one of the instructions told the jury that it is not necessary to acknowledge and record a bill of sale. This is true, but it was a misleading statement, under the facts of this case. If we are correct in regarding the bill of sale and agreement, considered together, as a mortgage security, then it is not true that acknowledgment and recording were unnecessary. Where the possession of goods covered by a chattel mortgage remains with the mortgagor, want of acknowledgment and failure to record make the mortgage void as to attaching creditors. It is otherwise where the mortgagee takes possession of the mortgaged property before levy or attachment by other creditors. It was, therefore, important in this case, as sustaining the validity of the transfer to defendant in error, to show that he was in possession when the property was attached,—that there had been a change of possession. Up to May 16th defendant in error had been in possession as agent of his brother, and if, on May 28th, he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual, and visible signs as could be seen and known to the public, or persons dealing with the goods. *Clafin v. Rosenberg*, 42 Mo. 439. Instructions to this effect, asked for the plaintiffs below, were refused. When the known and previously recognized agent of an alleged vendor remains in possession, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. *Flanagan v. Wood*, 33 Vt. 332. The court below was also asked, in behalf of plaintiffs, to instruct the jury that, while it is not unlawful for brothers to deal with each other, yet where the parties to a transfer are near relatives, clearer and more convincing

proof is required of the good faith of the transaction than where they are strangers. We can see no good reason why this instruction should not have been given. The fact of a relationship is a circumstance to excite suspicion, though not in itself proof of fraud. *Wightman v. Hart*, 37 Ill. 123; *Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078. In case of a conveyance by an insolvent debtor, if a near relationship exists between the grantor and grantee, "more vigilant and jealous scrutiny will be excited, and clearer and more convincing proof required, than when the transaction is between strangers." *Lehman, Durr & Co. v. Greenhut*, 88 Ala. 478, 7 South. 299.

For the reasons stated, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(156 Ill. 88)

ILLINOIS CENT. R. CO. v. CITY OF CHICAGO (No. 35.)¹

(Supreme Court of Illinois. Nov. 27, 1894.)²

EMINENT DOMAIN—EXTENSION OF STREET ACROSS RAILROAD—EVIDENCE—COMPENSATION.

1. Rev. St. 1893, c. 24, art. 5, § 1, par. 89, which declares that "the city council shall have power by condemnation or otherwise to extend any street over or across any railroad track, right of way, or land of any railroad company," authorizes the extension of streets across land used as a "railroad yard." *Illinois Cent. R. Co. v. City of Chicago*, 30 N. E. 1044, 141 Ill. 586, followed.

2. Where extension of a street is made across a railroad right of way 200 feet wide, of which only 60 feet is occupied by tracks, it is error to exclude evidence of the value to the railroad company of the residue of the land for the purpose of erecting thereon permanent structures for railroad purposes other than tracks, since the use of the land for the street will necessarily exclude its use for such structures. *Magruder, Wilkin, and Phillips, JJ.*, dissenting.

Appeal from superior court, Cook county; Theodore Brentano, Judge.

Condemnation proceedings by the city of Chicago against the Illinois Central Railroad Company. There was judgment of condemnation. Defendant appeals. Reversed.

This proceeding was instituted by the city of Chicago in the superior court of Cook county for the ascertainment of the compensation and damages due to the Illinois Central Railroad Company for the land taken or damaged in opening and extending Eighty-Second street and Ninetieth street across its railroad tracks and right of way. The company entered its motion to dismiss the proceeding on the ground that the parts of the right of way proposed to be condemned are parts of the continuous line of the railroad, and that the streets will extend across the railroad and the railroad yard, and so impair the usefulness of the railroad that it could

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied June 15, 1895.

not carry on and perform its duties as a common carrier. In support of this motion it offered to introduce in evidence the testimony before that time taken in certain causes wherein the company and the city were parties. No objection to the evidence on account of its form, or because it was secondary, was raised, but its introduction was resisted by the city on the sole ground that it was irrelevant; and on that ground it was excluded, and the motion overruled. Another ground set up in the motion to dismiss was that the extension of the street across the yard and tracks of the company was without authority in law, and in violation of the charter of the company, and of the constitution and laws of the United States. A trial by jury was waived, and the cause heard by the court; and a judgment rendered awarding one dollar to the company as just compensation; and from that judgment the company prosecutes this appeal.

It appeared from the evidence that the right of way of the company was 200 feet in width, and the streets proposed to be opened each 66 feet wide; that only about 60 feet of the 200-foot strip was occupied and taken up by the railroad tracks, and that there were left wholly unoccupied a strip 50 feet wide west of the tracks, a strip 30 feet wide east of the tracks, and a strip 66 feet wide between the fourth and fifth tracks. It was proposed to prove by the witness L. H. Peirce the value to the railroad company of these unoccupied strips of land for the purpose of erecting thereon permanent structures for railroad purposes and uses other than tracks. And the witness L. P. Morehouse was offered to prove that he had been for a long time in the employment of the company; that he was a man of great experience in railroad matters; that the parts of the right of way embraced within the lines of the right of way, and not occupied by tracks, and lying to the east and to the west of the tracks are adapted to the construction and maintenance of different kinds of structures for railroad purposes other than railroad tracks, and are available for such purposes; and that the use of those particular parts of the land for streets will necessarily exclude and prevent their use for those purposes and for such structures as are commonly used by railroad companies in the operation and management of their roads. And it was also proposed to show by said witness the value of said strips of land for grain elevators, or for warehouses, or for depots, or for other such structures for railroad purposes, the erection of which upon the grounds would render their use for streets impossible; and to show that they are adapted to such railroad uses as are inconsistent with their use as streets, and hence that the company is deprived of their use; and also to show the value of said lands for the purposes of erect-

ing thereon the aforesaid structures for railroad uses. To the introduction of all and every of this evidence, the city objected, and the objections being sustained, the company duly excepted.

In connection with this proposed evidence, the appellant requested the court to hold the following proposition of law: "Second. That where it appears from the evidence that the use of said land or right of way, or any part thereof, for the purposes of the street, will wholly exclude said company from the erection and use thereon of such houses, structures, and improvements other than railroad tracks which said company might now or might at any time hereafter desire to erect and use for the purposes of its railroad business, then the court will also assess as damages such sum as shall equal the value of such land to said company for the erection and use of such structures." But the court refused to hold said proposition of law, to which action of the court the appellant duly excepted.

C. V. Gwin and Sidney F. Andrews, for appellant. John S. Miller and Charles C. Gilbert, for appellee.

BAKER, J. The case of Illinois Cent. R. Co. v. City of Chicago, 141 Ill. 586, 30 N. E. 1044, in which the same extension of these streets was involved, fully sustains the ruling of the court below in denying the motion of appellant to dismiss the proceeding. In that case, among other things, it was said: "So far as the extension of Eighty-Second and Ninetieth streets is concerned, the language of paragraph 89 is broad enough to authorize the extension across the railroad 'yard,' as well as across the tracks or right of way." And, since the motion to dismiss was inadvisedly filed, it necessarily follows that all evidence offered in support of it was properly excluded.

The exclusion of the offered testimony of the witnesses Peirce and Morehouse presents a more troublesome question. When the streets are extended across the right of way, the city will not have the exclusive use of those parts of it within the lines of the streets where no tracks are laid. Its rights over those parts will be no greater than its rights are in respect to the parts where the tracks are laid. The company may still go on, notwithstanding the extensions of the streets, and put down additional tracks upon the now unoccupied parts of the right of way, or use such parts for any other railroad purposes that would be consistent with a joint use by itself and the city. But at the same time the fact that such parts were used for public streets would necessarily prevent their being used for erecting thereon depots, warehouses, grain elevators, or any like structures for railroad purposes. And there can be no question but that the Company, under its charter, has the right to locate upon the parts of its right of way sought to be taken

for the streets not only structures such as are mentioned above, but any "other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation" of its railroad. Laws 1851, p. 61, § 8. The extension of the streets across the right of way, then, deprives the company in part of its property rights in respect to portions of the land within the lines of the streets. The constitution of the state provides that "private property shall not be taken or damaged for public use without just compensation." In *Rigney v. City of Chicago*, 102 Ill. 64, this court said: "Property, in its appropriate sense, means that dominion or indefinite right of use and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution." It is to be noted that the lands here sought to be condemned for the streets are devoted to a special use, and therefore have no market value. In *Lake Shore & M. S. Ry. Co. v. Chicago & W. L. R. Co.*, 100 Ill. 21, we said that, although the right of way is limited to the use of the land for the construction, maintenance, and operation of a railroad upon it, yet this limited use is property, and as much so as if the use were an absolute one; and further said that the land was devoted to a special use, and that estimates of its value with reference to such use by those competent to speak in that regard should have been received. In *Railroad Co. v. Kirby*, 104 Ill. 345, it was said that the value of land consists in its fitness for use, present or future, and that before it can be taken for public use the owner must have just compensation. In *Railroad Co. v. Jacobs*, 110 Ill. 414, it was held, citing *Haslam v. Railroad Co.*, 64 Ill. 353, that reference may be had not merely to the uses to which the land is actually applied, but that its capacities may also be taken into consideration. In *Johnson v. Railroad Co.*, 111 Ill. 413, the rule was formulated by the late Chief Justice Scholfeld thus: "If property has a special value, from whatever cause, that special value belongs to the owner of the property, and he is entitled to be paid it by the party seeking condemnation. In determining the value of real property in such cases to the owner, witnesses may give their opinions, and any special circumstances upon which those opinions are founded, for what they are worth." In *Dupuis v. Railway Co.*, 115 Ill. 97, 3 N. E. 720, this court held that if lands are devoted to some particular use, and in consequence of such use have an intrinsic value, the owner, in order to get just compensation, is entitled to receive whatever they are worth for the use or purpose to which they may be devoted. And in *Railway Co. v. Moore*, 124 Ill. 329, 15 N. E. 764, it was held that if the fact that the lots there in question were located with a frontage on the river, at a place where they could at some

future time, when demanded, be made available as dock property, enhanced their present value, then such fact would be competent and proper to be shown, and be considered by the jury in estimating the damages. And it was there said that it can make no difference that there might be no present demand for docks upon these lands. The logic of the law and of our former decisions leads irresistibly to the conclusion that in the case at bar the trial court erred in excluding the proffered testimony of the witnesses Peirce and Morehouse. And see, in this connection, the late case of *Lake Shore & M. S. Ry. Co. v. City of Chicago*, 151 Ill. 359, 37 N. E. 880.

It is urged that when it is considered that the strips of ground sought to be condemned for the streets are but parts of the continuous right of way of the railroad company, it is apparent that the evidence sought to be introduced was clearly fictitious and speculative. We do not see how we could arrive at any such conclusion as matter of law. If the parts of the land not occupied by tracks and proposed to be taken for the streets are but portions of the continuous right of way of the company within the limits of the city, and are no better adapted on account of particular locality, or from other causes, for depots, warehouses, engine houses, shops, or other structures for railroad purposes, than are the other unoccupied parts of the continuous right of way, then that presents a question of fact, and is a matter for the consideration of the jury or trial court in determining the amount of the compensation or damages. As we understand the second proposition of law that was tendered by appellant, it involves the same question that arose in regard to the evidence of Peirce and Morehouse. This being so, it was error to refuse to hold the same.

Other objections are raised by appellant to the judgment and to the rulings of the trial court, but like objections have been overruled by this court in numerous recent cases, and it is not deemed necessary to restate the grounds of those decisions. It is not considered that anything held in this case is in conflict with the decisions of this court in *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, and subsequent cases of like character. For the errors indicated herein, the judgment of the superior court is reversed, and the cause remanded. Reversed and remanded.

WILKIN and PHILLIPS, JJ., dissent.

MAGRUDER, J. I dissent from this opinion. It is inconsistent with the recent decisions of this court adopted after mature reflection, known as the "Grade Crossing Cases." In my opinion, every railroad company takes its charter and its right to lay tracks, or to have a right of way at all, subject to the right of the people to extend their streets and highways across such tracks and right of way.

(156 Ill. 112)

ILLINOIS CENT. R. CO. v. CITY OF CHICAGO. (No. 48.)²

(Supreme Court of Illinois. Nov. 27, 1894.)

Appeal from circuit court, Cook county: Frank Baker, Judge.

C. V. Gwin and S. F. Andrews (James Fentress, of counsel), for appellant. Harry Rubens, John S. Miller, and Charles C. Gilbert, for appellee.

BAKER, J. This was a proceeding by the city of Chicago, in the Cook circuit court, for the ascertainment of the compensation and damages due to the Illinois Central Railroad Company for the land and property taken or damaged in the opening and extension of Seventy-Second street and Seventy-Ninth street across the land and railroad of said company. By stipulation it was agreed that the questions in regard to the extension of both streets, inasmuch as they were exactly alike, should be tried as one cause. The questions involved in this appeal are substantially the same as those involved in the case of *Illinois Cent. R. Co. v. City of Chicago*, 41 N. E. 45 (appeal from the superior court of Cook county). For the reasons stated in the opinion filed in that case, the judgment herein of the circuit court is reversed, and the cause is remanded. Reversed and remanded.

WILKIN and PHILLIPS, JJ., dissent.**MAGRUDER, J.,** dissents for the reasons stated in the dissent to the opinion this day filed.

(156 Ill. 25)

WEARE COMMISSION CO. v. DRULEY
et al.¹(Supreme Court of Illinois. Jan. 15, 1895.)²**GROUND FOR ATTACHMENT — FRAUDULENT CONVEYANCE — JUDGMENT AGAINST EXECUTOR — REVIEW ON APPEAL — HARMLESS ERROR.**

1. The statute allowing attachments where a debtor has fraudulently conveyed or assigned his effects so as to hinder and delay his creditors, does not authorize attachments where the debtor has, without fraudulent intent, made a conveyance which is only constructively fraudulent. 54 Ill. App. 391.

2. The administrator of an insolvent decedent cannot question on appeal the validity of a judgment against him in his representative capacity on a debt which has been allowed without objection by the probate court, since such judgment adds nothing to his obligation.

Appeal from appellate court, First district.

Attachment by the Weare Commission Company against William M. Druley and Albert A. Druley. Plaintiff obtained judgment for its debt, but the attachment was dissolved. This judgment was affirmed by the appellate court (54 Ill. App. 391), and the plaintiff appeals. Affirmed.

Osborne Bros. & Burgett, for appellant. W. S. Coy, J. H. Breckenridge, and Geo. S. House, for appellees.

BAILEY, J. On the 3d day of September, 1890, the Weare Commission Company commenced its suit in assumpsit, by attachment, as against William M. Druley and Albert A.

Druley. The grounds for the attachment, as stated in the affidavit, were: (1) That the defendants had, within two years then last passed, fraudulently conveyed or assigned their effects, or part thereof, so as to hinder and delay their creditors; (2) that they had, within two years last past, fraudulently concealed or disposed of their property so as to hinder and delay their creditors; and (3) that they were about fraudulently to conceal or dispose of their property or effects so as to hinder and delay their creditors. William M. Druley, at the date of the writ, was in his last illness, and on September 5, 1890, which was two days thereafter, he died. It appears from the return to the writ that the sheriff, on September 5, 1890, the day of William M. Druley's death, attached a tract of land in Cook county, containing two acres, the land then being, or shortly prior to the date of the writ having been, the individual property of William M. Druley, and that, after his death, the sheriff also summoned certain insurance companies, who, as it was claimed, were then indebted to William M. Druley individually, as garnishees. No personal service of the attachment writ was had on either of the defendants. The plaintiff, in its original declaration, declared against the defendants as copartners under the firm name of Druley Bros., upon six promissory notes payable to the order of the plaintiff,—two for \$2,500 each, and one for \$1,000,—signed by Druley Bros., and by William M. Druley individually. On the 17th day of October, 1890, Albert A. Druley entered a special appearance, and suggested on the record the death of William M. Druley, and also filed his affidavit, stating, in substance, that the firm of Druley Bros. was composed of William M. Druley and the affiant, and was formed for the purpose of carrying on a grain trade or business in Will county; that William M. Druley, at the time of his death, was a resident of Cook county, the affiant being a resident of Will county; that neither had been served with process, and that no property, rights, or credits belonging to the affiant, or in which he had any interest, had been attached under the attachment writ directed to the sheriff of Cook county; that neither the affiant nor the late firm of Druley Bros. had any property in Cook county; and that all the property, rights, and credits seized under the writ were the individual property of William M. Druley. Upon this affidavit, Albert A. Druley moved to dismiss, and quash the writ of attachment. This motion was overruled by the court, and at the same time the plaintiff discontinued its suit as to Albert A. Druley, and by leave of the court amended all the papers and proceeding in the cause by striking out the words, "copartners as Druley Brothers," wherever they occurred. It was also ordered that Mary A. Druley, the administratrix of the estate of William M. Druley, deceased, be substituted as defend-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.² Rehearing denied June 15, 1895.

ant in place of her intestate, and also that Jesse Druley and Ralph Druley, the heirs at law of William M. Druley, be made parties to the attachment issue only, and be summoned as such. The plaintiff also, by leave of the court, filed a new affidavit in attachment, setting up the indebtedness sued for as being from William M. Druley, in his lifetime, to the plaintiff, and since his death as being due and owing from his administratrix to the plaintiff, and setting up, as against William Druley individually, the same grounds for an attachment alleged in the original affidavit. The administratrix afterwards appeared specially, and moved the court to quash the attachment, which motion was overruled. Summons having been served on her, she appeared generally, and filed a plea of non assumpsit, and certain special pleas to the declaration, and also a plea traversing the affidavit for attachment. Issues being formed on these pleas, a trial was had before the court and a jury, at which the court, after the evidence had been heard, instructed the jury to find the issues formed by the plea traversing the attachment affidavit in favor of the defendant. The jury thereupon returned their verdict finding the issues upon the merits of the action in favor of the plaintiff, and assessing the plaintiff's damages at \$13,500, and finding the issues upon the attachment affidavit in favor of the defendant; and the court, after overruling a motion by the plaintiff for a new trial, gave judgment in favor of the plaintiff for the amount of the damages assessed by the jury and costs, but setting aside and quashing the attachment writ. That judgment has been affirmed by the appellate court, and this appeal is from the judgment of affirmance.

The principal controversy, as presented here, turns upon the propriety of the peremptory instruction to the jury to find the issues upon the attachment affidavit for the defendant. If that instruction, and the consequent verdict and judgment, are sustained, it is manifestly immaterial whether the court erred in refusing to quash the attachment on motion of Albert A. Druley, or on the subsequent motion of the administratrix. At the trial, evidence was introduced tending to show the following facts: Some time about the year 1885, Jesse Druley, William M. Druley's father, sold a farm in McLean county, and of the proceeds loaned to William M. Druley, or put into his business, about \$18,000. William M. Druley afterwards advanced to his father and mother various sums of money, and about March 10, 1887, a settlement was had between them, at which it was found that William M. Druley was indebted to his father in the sum of \$10,000. For this sum William M. Druley, with his father's consent, executed his promissory note, dated March 10, 1887, payable to Jane Druley, his mother, five years after date, with interest at the rate of 6 per cent. per

annum, payable quarterly. This note remaining wholly unpaid, William M. Druley, some weeks prior to his death, but whether in payment of or as security for the note is left by the evidence somewhat in doubt, signed and acknowledged a deed conveying the two-acre tract of land upon which the attachment writ was afterwards levied to Jesse Druley, his father, in trust for Jane Druley, his mother. This deed was executed as the result of considerable negotiations between William M. Druley and an attorney representing Jesse and Jane Druley, such negotiation resulting in an agreement that the deed should be executed, but that, if William M. Druley recovered from his illness, he should have the land back, or that the deed should be returned to him. The deed, after it was signed and acknowledged, remained in the possession of the grantor about two weeks, and he then handed it to his brother, Edwin P. Druley, who was attending and taking care of him in his illness, saying to him that he should take it, and carry it in his pocket, and that if he, the grantor, got well, he should return it to him, but that, if he did not, he should put it on record. On the 2d day of September, 1890, Edwin P. Druley, having learned that the firm of Druley Bros. was about to fail, or supposing that it had failed, put the deed on record, and about six weeks afterwards he got it from the recorder's office, and delivered it to his father and mother. This deed, and the circumstances attending its execution, constituted the only evidence given by the plaintiff in support of the grounds for an attachment alleged in its attachment affidavit.

It is urged, and with some show of reason, that the deed was never delivered so as to become effectual as a conveyance. The contention is that Edwin P. Druley took and held the deed merely as agent of the grantor, and that by delivering it to him with instructions to keep it in his pocket, and return it to the grantor in case of his recovery, and to record it only in case of his death, the grantor did not, and did not intend to, absolutely yield dominion over it, but that it remained, down to the time of his death, subject to his control, and liable to be recalled by him at any time. And it would seem that, if the deed was never delivered, it has no tendency to prove the charge of fraud made by the attachment affidavit. But, without determining the question of delivery, we prefer to place our decision upon another ground.

Even if the deed is to be regarded as having been effectually delivered, it must be conceded that there is no evidence of express fraud, or what is usually termed "fraud in fact." There is no evidence of any actual intention on the part of the grantor to hinder or delay his creditors. But the evidence tends to show that the deed, though absolute on its face, was intended by the parties as a mortgage to secure the \$10,000 note given by the grantor to his mother, and the rule is

supported by many authorities that a conveyance of lands, absolute on its face, but intended as a mortgage or security for a debt, is fraudulent and void as against existing creditors, although there may have been no actual intent to defraud. Among the authorities so holding, the following may be consulted: *Sims v. Gaines*, 64 Ala. 392; *Watkins v. Arms*, 64 N. H. 99, 6 Atl. 92; *Gregory v. Perkins*, 4 Dev. 50; *Halcombe v. Ray*, 1 Ired. 340; *Coolidge v. Melvin*, 42 N. H. 510; *Winkley v. Hill*, 9 N. H. 31; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Harris v. Sumner*, 2 Pick. 129. See, also, *Bank v. Godfrey*, 23 Ill. 579. But we do not wish to be understood as expressing any opinion upon the question whether a deed absolute on its face, but intended as a mortgage, is constructively fraudulent or not.

The question thus arises whether, under our statute, an attachment will issue where the fraud charged is a legal or constructive fraud only, as contradistinguished from express or intentional fraud, usually denominated "fraud in fact." This question, so far as we are advised, has never been decided by this court, but it has received consideration by the appellate courts in several cases, and in each case it has been decided in the negative. It first arose in the Second district, in *Shove v. Farwell*, 9 Ill. App. 250, and there the court said: "The law does not allow a creditor to ignore the process of the common law in the collection of his debt, and resort to a summary seizure of the debtor's property upon mesne process, for the fact alone that the debtor has, within two years, sold his property, or any part of it, or has secured some other creditor by mortgaging or pledging it, even though the attaching creditor should be hindered or delayed in the collection of a just debt. Another element must exist in the transaction,—the fraud of the debtor; and, in our opinion, the statute contemplates that this fraud shall be one of fact, as contradistinguished from a legal or constructive fraud. If a man has shown himself to be dishonest by making a conveyance of his property, designing thereby to delay and hinder his creditors, and such effect is produced, then, for the space of two years, the statute permits the creditor to treat him as one who may repeat the fraud, and authorizes its prevention by a seizure of his property upon mesne process, and hold it to answer any judgment that may be rendered in the action." The same question arose in the same district in *Bank v. Kurtz*, 22 Ill. App. 213, where the same conclusion was again announced. So in the First district the same conclusion was announced in *Dempsey v. Bowen*, 25 Ill. App. 192, and in *Rhode v. Matthai*, 35 Ill. App. 147. The decision of the appellate court in the present case is merely an application of what has become a settled rule of law in that court. In *Spencer v. Deagle*, 34 Mo. 455, an attachment writ was issued under a statute apparently identical

with ours, and it was held to be error for the court to refuse to instruct the jury that, to render the deed of trust there in question fraudulent as to the defendant's creditors, it must appear that it was executed for that purpose; that it was not enough that the effect of the deed was to delay his creditors, but it must have been executed with that purpose and intent. While some decisions perhaps may be found in other states supporting the contrary view, we are disposed to think that the interpretation put upon our statute by the appellate court is the correct one. It seems to be the policy of our attachment law to give creditors the right to seize the property of their debtors on original or mesne process, and holding it for the satisfaction of such judgments as may be subsequently recovered, in those cases where the situation or conduct of the debtors is or has been such as to raise a reasonable apprehension that the ordinary common-law processes of the court will be thwarted, and thus rendered unavailing. The Revised Statutes of 1845 authorized attachments for only the first five of the nine causes for attachment specified in our present attachment act, viz.: (1) Where the debtor is not a resident of the state; (2) where he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; (3) where he has departed from the state with the intention of having his effects removed from the state; (4) where he is about to remove from the state with the intention of having his effects removed from the state; and (5) where he is about to remove his property from the state, to the injury of the creditor suing. Rev. St. 1881, p. 123. Here the writ was given only where the debtor was already a nonresident, and so beyond the reach of the ordinary processes of the law, or where there was an affirmative intention and design on his part to place his person and property, or his property alone, beyond the reach of those processes. The writ was given for the purpose of seizing the property so as to forestall its threatened removal, and to hold it as security for the judgment to be recovered. It cannot be doubted, we think, that when the statute was so amended as to add the three causes for attachment set up in this case, the legislature was acting in furtherance of the same general intention expressed in the original act. The writ was not given for the purpose of enabling the creditor to attack a transaction which is only constructively fraudulent, but to enable him to seize the property of his debtor in cases where fraud has been committed or contemplated of such character as to raise a reasonable apprehension that by further fraudulent acts the debtor will put his property and effects beyond the reach of legal process. But such apprehension does not arise from the commission of a mere legal or constructive fraud. There evil intention, moral turpitude, and actual dishonesty are wanting. Equity, it is true, will set such

transactions aside, in a proper proceeding, at the instance of creditors; but no inference arises that the debtor will attempt, by any dishonest disposition of his property, to interfere with his creditors in the assertion of their just rights. We are of the opinion, then, that granting writs of attachment in cases where only legal or constructive fraud is shown is outside of the general scheme and purpose of the attachment law. It is apparent that any other construction of the statute would often lead to consequences extremely oppressive. Thus a sale of goods, where possession has not actually been delivered to the purchaser, though valid as between the parties, is constructively fraudulent as to the creditors of the seller, and the goods may be seized by them on execution as his goods, however honest he may have been in the transaction. In contemplation of law he has made, or attempted to make, a disposition of his property which is constructively fraudulent, and, if attachments may issue for constructive frauds, he has thereby subjected himself, however innocent he may have been, to all such attachment writs as his creditors may see fit to sue out against his property for the period of two years. So, if a debtor, in perfect good faith, executes a chattel mortgage to secure an honest debt, but fails to have it executed, acknowledged, and recorded in all respects as required by the statute, the transaction is constructively fraudulent and void, as against his creditors. But can it be said that he thereby subjects himself, for a period of two years, to attachments by any of his creditors? Other similar illustrations without number will suggest themselves. In view of these various considerations, it seems to us to be very clear that the legislature, in authorizing writs of attachment in cases where the debtor has fraudulently assigned his property so as to hinder or delay his creditors, could have had in mind only such conveyances or assignments as are fraudulent in fact, and that it was not their intention to grant this writ where the debtor acts honestly, and with no fraudulent purpose or design. It follows that the instruction to the jury to find the issues upon the attachment affidavit for the defendant was properly given.

The administratrix, by cross errors, seeks to attack the judgment on the merits. Without pausing to investigate the points thus raised, it is sufficient to say that no practical benefit can result to her, or to the estate which she represents, by a reversal of the judgment. It seems to be admitted on all hands that the estate is insolvent, and it also appears that the promissory notes for which the judgment was rendered were, sometime prior to the trial of this case, presented to the probate court as a claim against the estate, and that they were duly allowed as such, and there is no suggestion that the allowance of the claim is now called in question by any one. It thus appears that the administra-

trix is conclusively bound to pay the claim in due course of administration, and its being evidenced by a judgment of the circuit court adds nothing to her obligation in that respect. The judgment of the appellate court will be affirmed. Judgment affirmed.

(156 Ill. 44)

HAAS et al. v. STERNBACH et al.

SPIEGELBERG v. SAME.¹

(Supreme Court of Illinois. Oct. 29, 1894.)

FRAUDULENT CONVEYANCE — UNRECORDED MORTGAGE — ATTORNEY AND CLIENT — NOTICE.

1. The fact that a mortgagee, at the mortgagor's request, refrains from recording the mortgage, does not render it fraudulent as to the mortgagor's creditors. 50 Ill. App. 476, affirmed.

2. Where an attorney is retained by an insolvent debtor for the purpose of securing liens on his property in favor of some of his creditors, and such creditors afterwards ratify the attorney's acts in their behalf, they are chargeable with notice of an unrecorded mortgage, of which the attorney had at the time actual notice. 50 Ill. App. 476, affirmed.

Appeal from appellate court, First district. Bill by Charles Sternbach against Henry Leopold and others. Defendants obtained a decree, which was reversed by the appellate court. 50 Ill. App. 476. Defendants appeal. Affirmed.

J. E. Munroe, Cratty Bros., and Jarvis & Cleveland, for appellants. S. H. Wright and Isham, Lincoln & Beale, for appellees.

WILKIN, C. J. This litigation arose upon a bill to foreclose a real-estate mortgage, filed by appellees against appellants and others, in the circuit court of Cook county. The controversy between the parties to this record is as to which is entitled to the prior lien upon the premises described in the mortgage sought to be foreclosed. The facts material to a determination of that question are substantially as follows: On and prior to the 8th of February, 1890, Leopold Bros. & Co. were engaged in the business of manufacturing and selling clothing in the city of Chicago. For many years, Herman Sternbach & Co., of New York, carried on a business of importing and selling goods, and the two firms had had large dealings with each other. Some months prior to the date named, M. L. Leopold, a member of the Chicago firm, residing in New York, and managing the business of his firm in that city, and who was on intimate and friendly terms with Charles Sternbach, the managing member of Herman Sternbach & Co., died, and thereupon Henry Leopold, the senior member of Leopold Bros. & Co., applied to Charles Sternbach for financial aid for his firm by way of loans and advancements of money. The result of that application and subsequent negotiations was that on said 8th of February,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Henry Leopold and wife executed and delivered to Charles Sternbach the mortgage in suit to secure the payment of \$60,000, then and thereafter to be loaned and procured by the firm of Herman Sternbach & Co. to and for the firm of Leopold Bros. & Co. The mortgage conveyed a certain lot 4 and a certain block 7 in the city of Chicago. At the time of its execution there was an understanding between the parties (the evidence of which will be noticed later) that this mortgage should not then be placed upon record, and it was not recorded until the 5th day of November, 1890. In the meantime the mortgagors, Henry Leopold and wife, conveyed the same lot and block as follows, viz.: Lot 4, by trust deed, to Francis B. Peabody, October 28, 1890, recorded the next day, to secure a debt of \$15,000. The undivided one-fourth of block 7, by quitclaim deed, to Lehman Spiegelberg, October 30, 1890, recorded the same day. (These two conveyances are not in question.) Lot 4, by mortgage to Samuel Cole, to secure a debt of \$13,000. The same to Isaac Haas, to secure a debt of \$10,000. The undivided three-fourths of block 7, by mortgage to Lehman Spiegelberg to secure a debt of \$4,500. The same by mortgage to Carrie B. Leopold, to secure a debt of \$7,000. The same by mortgage to Herman Sternbach & Co., to secure a debt of \$35,000. These mortgages were made October 29, 1890, and all recorded on the 30th, except the first, which was recorded the 31st. All interest in block 7, by quitclaim deed, to Lehman Spiegelberg, November 1, 1890, recorded on the 3d. On the 31st of October, 1890, the firm of Leopold Bros. & Co. confessed judgment in the superior court of Cook county, as follows, viz.: In favor of Emma Leopold for \$15,000, of William Goodheart for \$6,500, of Louis Mayer for \$20,000, of Lehman Spiegelberg for \$15,188.50, of Carrie Spiegelberg for \$10,150, of the firm of Gitterman & Wedeles for \$7,000, of Gustave Hartstein for \$2,150, and of Louis Pappé for \$10,000. In the month of October, 1890, the firm of Leopold Bros. & Co. proved to be hopelessly insolvent, and in view of that fact Henry Leopold consulted with D. K. Tenney, of the law firm of Tenney, Church & Coffeen, the result being the execution of the mortgages and the confession of the judgments above set forth. The purpose of giving those liens, Mr. Tenney's connections therewith, and his knowledge at the time of the existence of the \$60,000 mortgage, is shown by the following communications sent out by the firm:

"Chicago, October 29th, 1890. Herman Sternbach & Co., New York City, N. Y.—Gentlemen: The failure of Leopold Bros. & Co. will occur on the day this reaches you. We have advised them, and such is the fact, that the mortgage given you by Mr. H. Leopold, and which has been kept from record by agreement, is wholly ineffectual as security to you, and is fraudulent as to the subsequent creditors. Our opinion is that the

mortgage should never be asserted or mentioned. The courts have lately held that where such a mortgage is given and withheld from record, a new one, to take the place of the old one, is also fraudulent. Be that as it may, Mr. Leopold is anxious to secure you on his individual property, to the extent possible, in justice to some others to whom he is also under confidential obligations. * * * Your prompt attention is necessary to make the security valid. Please regard this information for the present as confidential. Respectfully, Tenney, Church & Coffeen."

"Messrs. Stern & Kingsbury, 40 Wall Street, New York—Gentlemen: We write you at the request of Mr. Stern, of Stern & Adams, this city. Mr. Henry Leopold gave to your clients, Herman Sternbach & Co., last winter, so we are informed, a mortgage on his individual real estate, to secure a lien of accommodations, which by agreement between the parties was to be kept off the record, so as not to injure the credit of Leopold's firm. A few days since, when the firm was about to get into hot water, Mr. Leopold informed us of this mortgage, and we told him such a mortgage would afford no security whatever to the mortgagees, as against creditors whose debts were contracted after its date, but as to that it would be fraudulent. Nearly the entire indebtedness of the firm has been contracted since that time; consequently we regard that security as of no value whatever, and so informed Mr. Leopold, and that, if his firm was about to fail, that he had better consider the situation carefully, the same as if that mortgage had not been given, and make such just and equitable preferences among his confidential creditors as he thought the circumstances attending each called for. He has done so, and has secured your clients by a mortgage on the undivided three-fourths of a block of ground at the corner of Calumet avenue and 51st street, opposite the Washington Park, to the extent of \$35,000, subject to two prior mortgages, one of \$4,500, and one of \$7,000. The property we suppose to be ample security for the three mortgages. Immediately following that came vast numbers of confessions of judgments. We wrote your clients to ratify our act in accepting this mortgage, so as to make it valid, and they promptly did so through Mr. Stern here. We do not expect to represent them in any other respect, unless they should wish us to, as we are the attorneys of Leopold Bros. & Co. Respectfully, Tenney, Church & Coffeen."

There was a direct employment of Tenney, Church & Coffeen by appellants Lehman and Carrie Spiegelberg and Mayer and Goodheart, at the time the judgments were confessed in their favor, though the papers for that purpose had all been prepared by Tenney in advance of such employment. Neither Tenney nor his firm was employed by ap-

pellants Cole, Haas, or Carrie B. Leopold in person, until after the execution of the several mortgages in their favor; nor had they any knowledge of the fact that such instruments were to be executed until they were delivered to them by Tenney; but they were accepted by them, and returned to him to be placed on record. It clearly appears from the testimony of Mr. Tenney, that, while Henry Leopold designated the creditors which he wished to prefer, the plan and method of doing so was recommended by himself as attorney, and consented to by the firm of Leopold Bros. & Co. and Henry Leopold. The circuit court held each of the parties in whose favor these liens were given chargeable with notice of complainants' mortgage "from the fact that Henry Leopold and his attorney acted for them in that behalf, though without in fact informing them of the existence of that mortgage." That court decided, however, that the \$60,000 mortgage was fraudulent in law and void, as against those parties, as to so much of their respective debts as were contracted after its execution, because it had been withheld from record by agreement of the parties thereto, and decreed accordingly; thus giving \$6,500 of this \$13,400 secured to Cole, and \$5,387.21 of the \$10,000 to Haas, and each of the confessed judgments in full as to lot 4, and each of the judgments in full as to the undivided three-fourths of block 7, priority over complainants' mortgage. By its decree, the whole of the debt of Carrie B. Leopold and the remaining portion of those due Cole and Haas were made junior to the lien of each of the confessed judgments. The \$25,000 mortgage in favor of complainants was held void, and a decree of foreclosure on the \$60,000 mortgage entered, subject to the liens found entitled to priority as above stated. From that decree the complainants in the original bill, Charles Sternbach et al., Isaac Haas, et al., holders of the mortgage of October 29th, and Lehman Spiegelberg et al., in whose favor judgments had been confessed, each appealed to the appellate court of the First district. There, on a hearing of the several appeals as one, it was held the circuit court had erred in deciding that withholding complainants' mortgage from record was a fraud in law, and postponing it to the lien of said junior mortgages and judgments, and in that respect the decree below was reversed, but affirmed in all others, the cause being remanded, with directions to the circuit court to correct its decree by adjudging the mortgage to Charles Sternbach for \$60,000 a valid lien upon the premises described therein, as against the parties in whose favor the junior mortgages were executed and judgments confessed. From that judgment this appeal is taken.

Complainants in the original bill insisted in the appellate court not only that their first mortgage was a valid prior lien, but that the one for \$35,000 made on the 29th of October,

was also valid. Haas, Cole, and Carrie B. Leopold assigned cross errors in that court, questioning the correctness of so much of the decree of the circuit court as postponed the mortgages in their favor to the judgments confessed October 31, 1890. Both these contentions are reviewed here. These, with the question whether the mortgage of February 8, 1890, is entitled to priority over the mortgages and judgments in favor of Haas, Cole, and Carrie B. Leopold, and Carrie Spiegelberg, Mayer and Goodheart (the two appeals being treated as one), form the issues in this court. The argument of counsel is mainly directed to the last of these questions, and it will be first considered. In its decision two considerations arise: First, was the senior mortgage fraudulent and void as to liens created to secure debts contracted after its execution, because of its concealment; and, second, if valid, should holders of the junior liens be charged with notice of its existence when they took their liens?

The contention of appellants in support of the first of these propositions is based upon the rule announced in *Hungerford v. Earle*, 2 Vern. 261, and later cases, that "a deed not at first fraudulent may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money." It is very earnestly contended that, as between these parties, appellees' mortgage is, within that principle, fraudulent, both in fact and in law. We said in *Lawson v. Funk*, 108 Ill. 502: "The authorities clearly establish two distinct grounds upon which conveyances and other contracts will be based fraudulent as against creditors: First, such as are entered into with a fraudulent intent; and, second, such as from the terms of the agreement, or the nature of the transaction itself, are deemed so as a mere inference of law, without regard to the motives or actual intention of the contracting parties. In the first class of cases the fraudulent intent is always a question of fact, to be established by extrinsic proof. In the latter, the agreement, under the circumstances shown, is deemed fraudulent, although the parties may have acted in the best of faith." Actual fraud is "a deception practiced in order to induce another to part with property, or to surrender some legal right, and which accomplishes the end designated." *Cooley, Torts*, 474. See 1 *Story, Eq. Jur.* 186, 187. "By constructive frauds are meant such acts or contracts as, though not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done *mallo animo*." 1 *Story, Eq. Jur.* 258. The circuit court found and recited in its decree that the

withholding of the mortgage in question from record was without fraud in fact, and the members of the appellate court, though divided upon another feature of the case, unanimously concurred in that finding. While the unsworn answer of Henry Leopold sets up conversations between himself and Charles Sternbach relative to keeping the mortgage off record, and concealing it from others, which, if true, would establish a wicked conspiracy to defraud creditors, by giving a false credit to himself and his firm, his own testimony does not support those allegations. We have gone over his entire testimony, as well as that of Charles Sternbach and Oscar M. Stern, who testified to a conversation with Leopold on the subject of making the mortgage, about the time it was executed, and we are unable to find sufficient evidence to establish a fraudulent design or purpose on the part of complainant or Charles Sternbach in withholding the mortgage from record. The testimony of Sternbach, corroborated by that of Stern, is to the effect that it was so withheld at the request of Leopold, as a favor to him, with the understanding that the mortgaged property would shortly be sold, and the indebtedness liquidated. Unless that testimony is willfully false, Sternbach at that time believed the Leopold Bros. & Co. perfectly solvent, without reference to this individual property of Henry Leopold; and the latter does not deny that he then told him that the firm was abundantly good for all its liabilities, though he denies telling him, as he swears, that it was worth \$300,000 over all its debts. In determining the question of actual fraud the fact that the mortgaged premises were the individual property of the mortgagor, and not that of the firm, is entitled to at least some consideration. There was no agreement or promise to keep the mortgage secret, but simply that it would not then be recorded; and there is an entire absence of proof that Charles Sternbach or his firm did or said anything other than withholding the mortgage from record, which could have misled others as to its existence. We are not disposed to disturb the finding of the courts below upon the question of actual fraud.

To our minds, there is much less reason, in view of our decision in *Field v. Ridgely*, 116 Ill. 424, 6 N. E. 156, for holding that mortgage fraudulent in law. In the case cited one of the acts of fraud relied upon by the appellants was the failure of the appellees to put their mortgage on record, and in passing upon the question so raised we said: "We are aware of no principle, outside of self-interest and prudence in business, that requires the holder of a mortgage to put it on record at any particular time. By not doing so promptly, he runs the risk of having it postponed to junior liens, and even of losing the benefit of it altogether. As to subsequent purchasers and creditors without notice, such securities take effect from the time

of filing for record only." The correctness of this statement of the law in view of our statute cannot be seriously questioned. No one will contend that the recording of a mortgage is, in this state, necessary to its validity. Recording such instruments serves but one purpose, and that is to make them valid as against creditors and subsequent purchasers without notice. Section 31, c. 30, Rev. St. provides that they shall take effect as to such persons from the time of filing for record, and not before. No time is fixed within which the filing for record must take place in order to give such an instrument validity. It cannot, therefore, be said that the mere omission to record is fraudulent per se as to subsequent creditors or purchasers from the mortgagor.

But it seems to be thought that the motive, or cause of such failure may render the omission fraudulent as a matter of law; that is to say, while the holder of a mortgage may negligently, or even intentionally, of his own motion, withhold a mortgage from record, and be guilty of no fraud, yet if he does so at the request of the mortgagor, the law will charge him with fraud, no matter how innocent may have been his motive for yielding to such request. This position we regard as untenable. If to not record a mortgage is fraudulent in law as to third parties, it must be because as to them there is a duty on the part of the mortgagor to record, the failure to perform which tends to mislead them to their injury. The fraud in that case and consequent injury would result from a failure to record, regardless of the motive or reason for such failure. Therefore, if withholding an instrument from record is fraudulent because of an agreement or other reason for so doing, it is not so per se, but in fact. In other words, whenever the motive is involved, the question becomes one of intention,—actual fraud as distinguished from fraud in law,—and so the question has generally been presented and disposed of. *Walt, Fraud. Conv.* § 235; and cases quoted from. Of the many cases cited by counsel for appellants as sustaining the view that the withholding of an instrument from record by agreement is fraudulent per se, most, if not all, in view of the statutes of the states in which they were rendered, are reconcilable with the views we have here expressed. In much the larger number of those cases the question was treated as one of fact. But, if it were otherwise, we regard the question as free from doubt in the light of our statute. Certainly the fact that a promise is made not to record an instrument properly admissible to record, whereby it becomes constructive notice of its existence, is a fact strongly tending to prove a fraudulent intent, and in some cases has been held sufficient of itself to defeat or postpone the instrument to subsequent conveyances or liens. In other cases on such a promise, attended by a different state of

facts, the court have decided that they were not fraudulent. *Magovern v. Richard*, 27 S. C. 272, 3 S. E. 340; *Sawyer v. Turpin*, 91 U. S. 114; *Folsom v. Clemence*, 111 Mass. 273; *Thouron v. Pearson*, 29 N. J. Eq. 487; *Scott v. McMurran*, 7 Blackf. 284; *Scott v. Alford*, 53 Tex. 82. Our conclusion, then, is that complainants' mortgage must be treated in all respects as though the failure to record it had been the result of mere negligence on the part of the mortgagee.

On the finding of the circuit court that the mortgage of complainants was fraudulent in law as to subsequent creditors of the mortgagor, its decree giving preference to so much of the debts secured by the junior liens as were contracted after that mortgage was executed, but postponing them as to so much thereof as existed at that time, was perfectly consistent and in conformity with the law. If that mortgage was void in law because of the agreement to withhold it from record, it was only so as to debts of the mortgagor contracted after it was made, but to that extent its invalidity in no way depended upon the absence of notice of its existence. The appellate court, however, having reversed the finding of that court as to its being fraudulent in law, and affirming its finding that it was not fraudulent in fact, in both of which conclusions we concur, the question between the parties as to the priority of their respective liens is resolved into one of notice; that is, if the senior mortgage was neither fraudulent in law or fact, it must be treated like any other unrecorded mortgage, and be given priority over all subsequent liens taken with notice of its existence, but postponed as to all others.

It remains to be seen, then, whether at the time appellants took their mortgages and judgments they were chargeable with notice of the prior mortgage to appellees, and the determination of that question may, we think, be made to depend upon whether notice to D. K. Tenney was in law notice to appellants. If, as a matter of fact, he acted solely as the attorney of Henry Leopold, procuring these mortgages and judgments, and in his interest alone to procure an extension of time on appellants' claims, or if he simply performed the ministerial act of executing these liens,—both of which positions are insisted upon by counsel for appellants,—his knowledge of the senior mortgage could not be imputed to appellants, even though they derived a benefit from his services. The evidence does not, however, as we understand it, support either of these contentions. That of Tenney himself, and the letters written by his firm to appellees and their attorneys in New York, as well as that of Henry Leopold, clearly show that the sole object and purpose of his employment was to defeat the mortgage of appellees to the extent of giving appellants a preference over it. He was, for all practical purposes, the attorney of these appellants, though em-

ployed by Henry Leopold. "If one without authority assume to act as the agent of another, and the latter take the benefit of the unauthorized act, by claiming rights under it, or otherwise ratify the act of his self-appointed agent, he must take such benefit charged with notice of such matters as appear to have been within the knowledge and recollection of the agent at the time of the transaction." Wade, Notice, 691. The foregoing rule is deduced from the decision in *Horey v. Blanchard*, 13 N. H. 145. To the same effect, see *Brotherton v. Hatt*, 2 Vern. 573. Mechem, in his work on Agency (section 167), says: "By ratifying the unauthorized act, the principle assumes and adopts it as his own, and, as has been seen, this adoption extends to the whole act. It goes back to its inception, and continues to its legitimate end. Subject, therefore, to an exception to be immediately noticed, it is the universal rule that, as against the principal, the ratification is retroactive, and equivalent to a prior authority; or, to use the language of a distinguished judge: 'No maxim is better settled in reason and law than the maxim, "Omnia rati habitio retrotrahitur et mandato priori aequiparatur," at all events when it does not prejudice the right of strangers.'" He also quotes from Field, J., in *Cook v. Tullis*, 18 Wall. 332: "The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except when the rights of third parties have intervened between the act and the ratification." We fully concur in the reasoning and conclusion of Justice Waterman of the appellate court upon this branch of the case. The dissenting views of Mr. Justice Shepard, are, in our opinion, based upon conclusions of facts not authorized by the evidence. As we have, in effect, said, D. R. Tenney though retained by Henry Leopold, was employed in the interest, and acted for appellants. He performed not merely ministerial duties, but used his professional skill and discretion in their behalf. To allow them the full benefit of his services, and at the same time relieve them from the legal effect of notice to him of the existence of the instrument he was seeking in their interests to defeat, would be unjust, and, in our opinion, contrary to authority. The circuit court erred in giving the confessed judgments preference over the mortgages of appellants Haas, Cole, and Carrie B. Leopold. The mortgages were recorded on October 30th, but the judgments were not entered until the 31st. No reason is shown why the former should be held subject to the latter. As to the contention of appellees that the \$35,000 mortgage in their favor is valid, we concur in the conclusion reached by both the circuit and appellate courts. That mortgage was executed and intended to secure a part of the same indebtedness secured by the one for \$60,000. Both cannot stand. The judgment of the ap-

pellate court will be affirmed, but its remanding order will be modified so that the mortgages of Cole and Haas and Carrie B. Leopold shall be given preference over the confessed judgment of October 31, 1890. Affirmed.

PHILLIPS, J., dissenting.

(164 Mass. 127)

RICH v. JORDAN.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

CHARTERER OF VESSEL—POWER TO BIND OWNER.

While the charterers of a ship have entire control thereof, they cannot bind the owner for bait supplies furnished, though the owner has reserved the right to terminate the charter party at any time.

Appeal from superior court, Suffolk county.

Action by Albert F. Rich against William H. Jordan, as sole owner of the schooner James A. Garfield, of Gloucester, Mass. From a judgment for defendant, plaintiff appeals. Affirmed.

The case was submitted on the following agreed statement of facts: The plaintiff furnished and delivered 2,000 herring and 11 barrels for bait to said schooner on or about February 18, 1893. The purchase price of said herring and barrels was \$62.75, and was a fair price for said goods, and was agreed upon at the time of said sale and delivery. Said goods were ordered of the plaintiff by Samuel Bartell, the master of said schooner. The plaintiff supposed the captain was acting as agent of the owners of said schooner, and delivered said goods to said schooner, and charged them on his books to said schooner and her owners. There was, in fact, an agreement in writing between said Bartell and the other members of the crew of said schooner and the defendant, which was made without the knowledge of the plaintiff, and said master and crew were in possession of said schooner, and said schooner was engaged in a fishing business under said agreement during the time specified. The plaintiff did not make any inquiries of the owner or master of said vessel as to the master's authority, or as to the terms under which the vessel was employed, and had no notice or knowledge of the same. Said goods were furnished in Boston, and were purchased and used for bait, and for that purpose were necessary to allow said schooner to perform her voyage. Said Bartell had no express authority from the defendant, who was the sole owner of said schooner, to purchase said bait, other than expressed in said agreement. The plaintiff duly demanded said purchase price of the defendant, but has not received any portion thereof, and he never intended to sell said goods, or any part of them, to said master and crew.

Eugene P. Carver and Edward E. Blodgett, for appellant. John J. Flaherty and Robert T. Babson, for appellee.

LATHROP, J. Under the contract of charter made between the owner of the vessel and Bartell and others the latter became the owners of the vessel pro hac vice, and had the entire control and management of her for six months, subject to the right of the general owner to cancel and terminate the charter party by taking possession of the vessel at any time wherever the vessel might be found. While Bartell and his associates remained in control, none of them had any authority to bind the general owner for bait, or was for this purpose the agent of the general owner. *Urann v. Fletcher*, 1 Gray, 125; *Baker v. Huckins*, 5 Gray, 596; *Tucker v. Stimson*, 12 Gray, 487. The plaintiff, however, contends that the right to cancel and terminate the charter at any time takes the case out of the general rule. But it is clear that until the right is exercised the general owner has no control, and the charterers are not his agents, except so far as he may have specially constituted them such. *Cutler v. Winsor*, 6 Pick. 338. Judgment for the defendant.

(164 Mass. 16)

HILDRETH v. D. S. McDONALD CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 19, 1895.)

INJUNCTION—IMITATION OF WRAPPERS.

Where plaintiff had been putting up molasses candy in a certain kind and color of paper, folded in a certain way over the ends, with the words "Velvet" in red script letters on the middle and ends of the wrappers, and afterwards defendant, in putting up molasses candy, used the same paper and style of wrapper, with the word "McDonald" in red Roman letters on the middle of the wrappers, and the use of the paper and style of wrapper was not original with plaintiff, it was proper to enjoin defendant from printing any name or word in red ink on the wrappers covering its candy whereby it should be caused to resemble that of plaintiff.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Action by Herbert L. Hildreth against the D. S. McDonald Company to restrain defendant from selling candy put up in imitation of that put up by plaintiff. The court found for plaintiff, and, at defendant's request, reports the case to the full court. Decree affirmed.

The decree rendered was as follows: "This case came on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof, it is ordered, adjudged, and decreed that a writ of injunction now issue to restrain said defendant, the D. S. McDonald Company, its officers, servants, agents, and attorneys, from printing, or causing to be printed, in red, upon yellow wrappers, adapted to be used in putting up molasses candy, substantially in the size, shape, and manner in which said plaintiff, Herbert L. Hildreth, puts up and offers for sale the molasses candy made by him, the name 'McDonald,' or any other name, word, mark, or device whereby any candy sold or

offered for sale by the defendant shall be caused to resemble in its dress and appearance said candy of the plaintiff, and also from putting up, offering for sale, or selling any molasses candy or candy similar thereto put up in yellow wrappers, with the red printing thereon, substantially like Exhibit B annexed to the bill of complaint herein."

Alexander P. Browne and Berry & Upton, for plaintiff. J. E. Maynadler, for defendant.

ALLEN, J. There is no question of trade-mark in this case. The only question is whether the plaintiff is entitled to an injunction on the ground that the defendant company was passing off its molasses candy as and for molasses candy made by the plaintiff, and thus injuring the plaintiff by unfair competition. On the report it would seem that others before the plaintiff had made molasses candy of the same size and shape, and wrapped the pieces in the same kind and size of paper, with twisted ends. To this combination, which was not original with the plaintiff, he added the printing of the word "Velvet," in red script letters, upon the middle and ends of the wrappers. The defendant company used the same combination of size and shape of the candy, and the same kind and size of paper and manner of wrapping, all of which it had a right to do. But to this it added the printing in Roman letters, instead of script, of another word, viz. "McDonald," in red ink, upon the middle of the wrappers, but not upon the ends. It is found that the public is thereby in fact deceived into believing that the defendant's goods are the plaintiff's goods, and that the resemblance was not accidental. It is not expressly stated, but we must assume, that the public who are deceived are persons of ordinary caution and prudence. The injunction which was granted was expressly limited to the printing in red letters upon wrappers of the same kind as those used by the plaintiff, to be used for pieces of molasses candy of the same size and shape.

There are decisions to the effect that color alone cannot become a valid trade-mark, and that a red label on a yellow wrapper or a white label on a red box cannot be registered. In *re Landreth, Browne, Trade-Marks*, § 89d; *Payson's Indelible Ink*, in *Browne, Trade-Marks*, §§ 271, 272; *Manufacturing Co. v. Rouss*, 40 Fed. 585; *Philadelphia Novelty Manuf'g Co. v. Blakesley Novelty Co.*, Id. 588; *Fleischmann v. Starkey*, 25 Fed. 127; *Faber v. Faber*, 49 Barb. 357; In *re Hanson's Trade-Mark*, 37 Ch. Div. 112. But where, for the purpose of presenting his goods to the public, a manufacturer has adopted a particular combination of features in part old and in part new, he may be entitled to protection against a palpable imitation. The case of the plaintiff is not very strong on the facts; yet he seems to be entitled to the carefully limited injunction which was

granted. The case of *Lever v. Goodwin*, 36 Ch. Div. 1, is in point upon the principle involved; though the facts there were stronger for the plaintiff than the facts here. See, also, *Fischer v. Blank*, 133 N. Y. 244, 33 N. E. 1040; *Pillsbury v. Flour Mills Co.*, 12 C. C. A. 432, 64 Fed. 841; and the note stated at the end of *Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105; *Reddaway v. Banham* [1895] 1 Q. B. 286, 294, per Lopes, L. J. In the opinion of a majority of the court, the entry must be, decree affirmed.

(164 Mass. 180)

STRAUSS v. UNITED TEL. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

ACTION ON CONTRACT—BURDEN OF PROOF—NEGOTIABLE INSTRUMENT.

1. In an action for interest on a bond containing an absolute promise to pay it on certain days specified, and reciting that "if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so," the burden of proof is upon defendant to show that payments could not be made upon the dates named.

2. Gen. St. c. 53, § 6 (Pub. St. c. 77, § 4), provides that a bond issued by a corporation payable to bearer shall be negotiable in the same manner and to the same extent as a promissory note. *Held*, that a corporation's bond payable to the bearer thereof is negotiable, and one who bought the bond after it had been issued to another may maintain an action thereon in his own name.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Action by Isaac M. Strauss against United Telegram Company to recover interest on bonds. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

O. B. Mowry, for plaintiff. William M. Stockbridge and R. D. Weston-Smith, for defendant.

LATHROP, J. This is an action of contract in 18 counts, in each of which the plaintiff seeks to recover the interest alleged to be due on 18 \$500 bonds of the defendant corporation, on January and July 1, 1893, and on January 1, 1894. The plaintiff is not the person to whom the bonds were originally issued, but he is a holder for value, and is also a registered holder. The bonds are under seal, are signed by the president and secretary of the corporation, and are of the following tenor: "Know all men by these presents, that the United Telegram Company, a corporation duly organized and existing under the laws of the state of New Jersey, for value received, is indebted to the bearer in the sum of five hundred dollars lawful money of the United States, which sum it hereby promises to pay to the bearer hereof, or, if it be registered, to the registered holder thereof, thirty years after the date hereof, at its office or agency in the city of Boston, Massachusetts, with interest thereon at the rate of five per cent. per annum, payable semi-

annually, the first days of January and July in each year, the first payment to be made on the first day of January, A. D. 1891. Said interest shall be cumulative, and if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so. In the event, however, of the nonpayment of any interest due on this bond, and if such default shall continue for nine months after maturity and demand of payment, then the principal of this bond shall, at the option of the holders of a majority of this issue, become due and payable, and it shall be lawful for the holders of a majority of the total issue of these bonds to enter into and upon all and singular the property owned by said company, and to take possession thereof and to sell and dispose of the same at public auction for the benefit of all bondholders. This bond is one of a series of four hundred bonds of like amount, tenor, and date, numbered consecutively from one to four hundred, inclusive, and, while in the nature of an income bond, shall be a first lien on all the property of the said company; and the said company hereby agrees with the holder hereof that it will not issue any mortgage or other lien on its property, or any obligation that shall constitute a lien prior to this on the assets of the company. No suit, either at law or in equity, except to enforce the payment of interest as heretofore set forth, is to be brought on this obligation against the corporation during the term for which this bond is to run. In case, however, this corporation is adjudged to be insolvent or bankrupt by due process of law, then the principal of this obligation is to become at once due and payable. This bond shall not become valid or obligatory until the certificate authenticating the same, which is indorsed hereon, shall be signed by Theodore L. Cuyler, Jr., of the city of New York, as registrar, or by his successor duly appointed. In witness whereof the United Telegram Company has executed and attested this bond by its president and secretary, and has caused its corporate seal to be hereunto affixed at Jersey City, state of New Jersey, this first day of July, A. D. 1890."

Neither of the parties in this case offered any evidence in the court below as to the ability or inability of the defendant to pay interest on the bonds, or whether sufficient income had been earned or not. If the bonds in question had contained simply a promise to pay interest out of the income earned, it may be conceded that the promise would be merely conditional, and the burden would be on the plaintiff to show that sufficient income had been earned to warrant the payment of interest. *Corcoran v. Canal Co.*, 1 McArthur, 358. But the bonds in question contain an absolute promise to pay interest on certain days specified. The words which follow: "Said interest shall be cumulative,

and if any of the payments cannot be made on the dates named, all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so,"—may afford a defense to the company if it can show that income has not been earned, but cannot be regarded as constituting the earning of income a condition precedent to the maintaining of an action, or as imposing the burden of proof upon the holder of a bond. The case is very similar in this respect to that of *Marlor v. Railway Co.*, 19 Fed. 867, before the circuit court of the United States for the Southern district of New York. The bond in that case contained an absolute promise to pay interest annually, and contained a recital that it was secured by a mortgage of certain lands, which constituted a lien upon the net income of a part of the railway. Then followed this clause: "And in case such net earning shall not in any one year be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for such interest." It was held that, as there was an absolute promise to pay, the plaintiff, by proving his ownership, made out a *prima facie* case; and it was said by Judge Wallace: "The fact whether the net earnings of the defendant's railway are sufficient in any one year to pay the interest or not is one peculiarly within its knowledge, and it is not incumbent upon a holder of a bond to assume the burden of proving the negative." See, also, *Id.*, 22 Blatchf. 464, and, on appeal, *nom. Railway Co. v. Marlor*, 123 U. S. 687, 689, 8 Sup. Ct. 311. We are of opinion that on this point the judge in the court below rightly ruled in favor of the plaintiff.

The remaining question in this case is whether these bonds are negotiable, so that the plaintiff may maintain an action thereon in his own name, although he was not the person to whom they were originally delivered, and no consideration moved from him to the defendant. In 1852, an act was passed by the legislature of this commonwealth in the following words: "All bonds and other obligations, under seal for the payment of money purporting to be payable to the bearer, or some person designated, or bearer, or payable to order, which have been or hereafter shall be issued by any corporation or joint-stock company, are hereby made negotiable in the same manner and to the same extent as promissory notes are now negotiable." St. 1852, c. 76. This was re-enacted in Gen. St. c. 53, § 6, and in Pub. St. c. 77, § 4, where it reads as follows: "A bond or other obligation under seal issued by a corporation or joint-stock company for the payment of money, if purporting to be payable to order, to bearer, or to a person designated or bearer, shall be negotiable in the same manner and to the same extent as a promissory note." While the language just quoted differs slightly from that of the statute of

1852, the meaning is undoubtedly the same. This statute has been liberally construed, and the negotiability of bonds has been maintained where the language did not fall within the terms of the statute. In *Chapin v. Railroad*, 8 Gray, 575, the defendant issued bonds in 1849 payable to —, and purporting on their face to be secured by a mortgage. This mortgage was subsequently ratified by the legislature. St. 1850, c. 233. In an action on one of the bonds the court held that the bond did not come within the terms of the statute, but it was also held that it was clearly the intention of the defendant, in issuing the bonds, that they should pass from hand to hand and be negotiable, and the court said: "It is therefore fairly to be presumed, and indeed it is an unavoidable implication from all their proceedings, that they consented that any bona fide holder of one or more of these bonds, for value, might perfect the contract by inserting at his own pleasure his name as obligee of the bond in the blank space which had been left in it for that purpose. And this is undoubtedly one of the things which it was the object and design of the statute to ratify and confirm." The opinion in the case last cited rests partly upon the ratification of the mortgage by St. 1850, c. 233, but it may be questioned whether there is anything in the language of the statute to justify the last sentence quoted, or whether the legislature intended anything more than to ratify a mortgage the power of the defendant to make which was in doubt. In another action on one of the same bonds, which was finally determined in favor of the plaintiff by the supreme court of the United States, no reference was made to the effect of the statute of 1850, and the decision was put upon the broadest ground. Mr. Justice Nelson said: "As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practices of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question." In *Haven v. Railroad Co.*, 109 Mass. 88, 96, an interest warrant payable to bearer, detached from a bond, was held to be negotiable, so that it could be enforced by a holder for value. No reference is made in the opinion to the statute. In *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492, 21 N. E. 962, coupon bonds were issued by the plaintiff, a corporation, payable to the defendant, trustee, or bearer, on November 1, 1896, and were expressly made subject to the conditions of an agreement between the parties, whereby a sinking fund of not less than \$50,000 nor more than \$100,000 was to be applied each year to the purchase or drawing at par of said bonds, and the whole issue might be

drawn at par on November 1, 1891, or any coupon day thereafter. These bonds were held to be negotiable "by virtue of Pub. St. c. 77, § 4, as well as by custom, notwithstanding the conditions referred to in them." On these authorities, we are of opinion that the bonds in question are negotiable bonds, and that the plaintiff may maintain an action upon them in his own name. Any other conclusion would make the bonds a fraud upon purchasers in good faith. There is nothing upon the face of the bonds to show to whom they were originally issued. They were undoubtedly intended by the original parties to them to be negotiable, and if the plaintiff cannot recover in his own name, he is without remedy. See 1 Walt, Act. & Def. 688, and cases cited; *Carr v. Le Fevre*, 27 Pa. St. 413, 418; *Bunting v. Railroad Co.*, 81 Pa. St. 254; *Society for Savings v. City of New London*, 29 Conn. 174.

Exceptions overruled.

(164 Mass. 13)

COMERFORD v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts.

Middlesex. June 19, 1895.)

DISCHARGE OF EMPLOYE—REMEDY—SLANDER—VARIANCE.

1. An action of tort does not lie against an employer for discharging a servant.

2. A count which sets forth no words as having been spoken cannot be maintained as one for slander.

3. One cannot maintain an action of slander for words spoken in the presence only of himself.

4. Proof that the words, "I have authority to discharge you both for misuse of checks," were spoken, will not warrant a recovery for slander, even if the words are defamatory, the words alleged in the complaint being, "He is discharged * * * for the misuse of checks."

Exceptions from superior court, Middlesex county.

Action for slander by one Comerford against the West End Street-Railway Company. Judgment for defendant. Plaintiff excepts. Exceptions overruled.

J. W. Pickering, for plaintiff. W. B. Sprout, for defendant.

LATHROP, J. In *Fogg v. Railroad Corp.*, 148 Mass. 513, 20 N. E. 109, it was held that "a corporation is liable in damages for the publication of a libel, as it is for its other torts"; and it was said: "To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed." See, also, *Howland v. Manufacturing Co.*, 156 Mass. 543, 81 N. E. 656. Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable; but, if they are uttered by an agent or servant in the course of the business in which he is employed, it is at least question-

able whether the corporation is liable. We are aware of no case in which this has been held. For the purposes of this case we assume, without deciding, that the rule is the same in slander as in libel.

We proceed to consider the counts relied upon at the trial. These are the third, fourth, and fifth. The third count sets forth the circumstances under which the alleged slander was uttered, among which are that the plaintiff was a starter in the defendant's employ, part of whose duty it was to hand transfer checks to persons leaving the defendant's cars at Allston, which entitled them to ride in other cars of the defendant to certain points in and beyond Allston, and alleges that the defendant, "falsely and wickedly pretending that the plaintiff had illegally appropriated, embezzled, stolen, and converted to his own use a quantity of said checks, and that the same was the ground of his said discharge, publicly, falsely, and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff in relation to his said discharge, substantially as follows: 'He is discharged from the employ of this company for the misuse of checks.'" The fourth count alleges that, under the circumstances set forth in the third count, "and at the time of discharging him, as therein set forth, the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of embezzlement, by words spoken of the plaintiff in relation to his said discharge, substantially as follows: 'He is discharged from the employ of this company for the misuse of checks.'" The fifth count alleges that under the circumstances set forth in the third count the defendant wantonly and recklessly dismissed and discharged the plaintiff from its employ, and falsely and publicly charged him with being dishonest therein. The answer is a general denial, and we assume, in favor of the plaintiff, that the defense that what was said was a privileged communication was not open on the pleadings. *Goodwin v. Daniels*, 7 Allen, 61. The case does not fall within the rule laid down in *McLaughlin v. Cowley*, 127 Mass. 318, and *Howland v. Manufacturing Co.*, 156 Mass. 543, 567, 81 N. E. 656.

The fifth count may be considered first. If it is to be construed as a count for discharging the plaintiff from its employ under such circumstances as to impute to him a charge of dishonesty, the count must fail. An action of tort does not lie against an employer for discharging a servant. Nor can it be maintained as a count for slander, for no words are set forth.

The plaintiff was not entitled to go to the jury on the third and fourth counts. The words alleged are, "He is discharged from the employ of the company for the misuse of checks." At the first interview between the superintendent and the plaintiff, no one else was present, and for what was then said the plaintiff cannot maintain an action of slan-

der, even if the words were defamatory, which we do not mean to imply. The superintendent was then asked to wait until the plaintiff could bring one Roberts there. The superintendent waited, and Roberts was brought. After some conversation, in which nothing was said against the plaintiff, he asked the superintendent what his authority in the matter was, and the superintendent said, "I have authority to discharge you both for misuse of checks." The plaintiff answered, "Thank you, I have no further use for you." If these words uttered by the superintendent can be considered defamatory,—which we do not intend to imply,—they are not, in substance, those alleged. It is not the same thing, in substance, to say, "I have authority to discharge you both for misuse of checks," as to say, "He is discharged from the employ of this company for the misuse of checks." There was, therefore, a variance between the allegations and the proofs. Exceptions overruled.

(164 Mass. 37)

SMITH et al. v. BUTLER.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1895.)

SHIP'S HUSBAND—ACTION FOR DISBURSEMENTS—ACCOUNTING.

A ship's husband cannot sue one of several joint owners of the ship for his share of disbursements made by the husband over the earnings of the ship during a series of voyages, the remedy being an action for an accounting against all the joint owners.

Report from superior court, Suffolk county.

Action by Smith and others against Butler for defendant's share of disbursements made by plaintiffs as ship's husbands. Judgment was ordered for plaintiffs, and the case was reported to the supreme judicial court. Judgment set aside.

Eugene P. Carver and Edward E. Blodgett, for plaintiffs. Chas. Theo. Russell and Arthur H. Russell, for defendant.

HOLMES, J. This is an action brought by ship's husbands against a part owner to recover from him his share of disbursements made by the plaintiffs over and above the ship's earnings. One of the plaintiffs, Smith, was also a part owner during the time of the disbursements, although he had sold his share before this action was brought. The disbursements were made in foreign commerce during a series of voyages, and covered whatever was necessary for the transaction of the business. Nothing more specific appears as to their nature. We understand from the report that there are other part owners not settled with.

Under such circumstances the only proper remedy is a bill for an account joining all the part owners who are interested in the decision as to the sums to be paid by them severally. Undoubtedly, part owners of a vessel are not partners in the vessel, and it may

be, as has been held in England, that an advance by a ship's husband, distinctly appearing to have been made for the outfit of the vessel alone, ought to be treated as a loan to the several owners individually. *Helme v. Smith*, 7 Bing. 709. Very possibly there are other cases where a ship's husband can sue the part owners individually, or be sued by them. But even in England it has been held that repairs for a particular adventure may, if not must, be brought into the account as a quasi or true partnership charge. *Green v. Briggs*, 6 Hare, 395, 405, 406; *Alexander v. Simms*, 5 De Gex, M. & G. 57, 65; *Japp v. Campbell*, 57 Law J. Q. B. 79, 81. And we believe that there is a general agreement that, subject to some possible exceptions, the sum to be paid between several part owners in respect of a particular adventure must be settled in equity. We are of opinion that this case falls within that principle. *Starbuck v. Shaw*, 10 Gray 492; *Maguire v. Pingree*, 30 Me. 508; *Hardy v. Sproule*, 33 Me. 508; *Dodge v. Hooper*, 35 Me. 536; *Bovill v. Hammond*, 6 Barn. & C. 149; *Vanner v. Frost*, 39 Law. J. Ch. 626; *Macl. Shipp*. (4th Ed.) 106.

This objection to the maintenance of the present action was not pleaded formally as such, but the fact that there were other owners interested in the account alleged, and the inability of a court of law to deal with the case, is a manifest consequence of that fact. This inability remains unchanged by legislation. See *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744.

Judgment set aside.

(164 Mass. 42)

GRAHAM v. BADGER et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. June 20, 1895.)

MASTER AND SERVANT—DEFECTIVE MACHINERY— NEGLECT.

In an action by an employé for injuries by the breaking of a rope at a place where it had been spliced, the weight attached to the rope not being sufficient to break it if it was in proper condition, a charge that if the rope was defective while in defendant's care, that fact was evidence which, unexplained, would warrant a finding that defendant was negligent, was proper, though there was evidence for defendant that the rope caught in a wheel.

Exceptions from superior court, Norfolk county.

Action by Graham against Badger and others for personal injuries. From a finding for plaintiff, defendants except. Exceptions overruled.

John D. Long and Walter S. Pinkham, for plaintiff. John Lowell, Jr., George W. Wiggin, and Samuel H. Smith, for defendants.

HOLMES, J. This is an action of tort to recover for personal injuries caused by the falling of an iron block from a derrick upon the plaintiff, who was working in the

defendants' employ. The fall was due to the breaking of a rope at a point where it had been spliced. The weight attached to the rope was not sufficient to break or to endanger the apparatus, if in proper condition. The main question is whether the judge before whom the case was tried was right in refusing to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendants, and in instructing the jury that if they found that the rope was defective while in the defendants' care, that fact was evidence which, unexplained, would warrant them in finding that the defendants were negligent.

We are of opinion that the instruction was correct. "*Res ipsa loquitur*," which is merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence. See *Doyle v. Railroad Co.*, 145 Mass. 386-388, 14 N. E. 461; *Howser v. Railroad Co.* (Md.) 30 Atl. 908.

It may be true that a rope properly spliced is stronger at the splice than elsewhere. But the jury might infer from the breaking that this rope had not been spliced properly. One witness who examined it testified that so far as he could see or understand the splice drew apart. At all events, the rope broke at the place where it had broken before and had been spliced, and it was for the jury to say what they would infer from that fact. Of course, they were not bound to believe the testimony for the defense if it seemed to them incredible. We cannot say that they were wrong in rejecting the explanation that the rope probably kinked and caught in a wheel. Neither can we assume that the defect, if there was one, was hidden. If the jury were of opinion that defects in ropes, great enough to make them break under a strain slight in proportion to the normal power of rope generally, can be discovered by proper inspection, we know nothing to the contrary. It might be otherwise in the case of an iron chain.

We cannot say that the plaintiff was negligent. He had a right to expect due care from the defendants as to their permanent appliances. There was evidence that he was employed to do what he was doing, his

position was seen by one of the defendants, and it may be that to do his work called on him at moments to be nearly under the block. *Snow v. Railroad*, 8 Allen, 441, 450; *Hackett v. Manufacturing Co.*, 101 Mass. 101; *Spicer v. Iron Co.*, 138 Mass. 426; *Kilroy v. Foss*, 161 Mass. 138, 36 N. E. 746.

Exceptions overruled.

(164 Mass. 142)

WELLINGTON v. INHABITANTS OF TOWN OF BELMONT.

(Supreme Judicial Court of Massachusetts. Middlesex. June 21, 1895.)

TAXATION—MACHINE FOR BREAKING STONE—WHERE TAXABLE.

A machine for quarrying and breaking stone for macadamizing roads and similar purposes, is not employed in a branch of manufacture, within Pub. St. c. 11, § 20, cl. 2, providing that all personal property shall be assessed to the owner in the city or town where he is an inhabitant on May 1st, except all machinery employed in any branch of manufactures, which shall be assessed where it is situated or employed.

Report from superior court, Middlesex county.

Action by one Wellington against the inhabitants of the town of Belmont, to recover an alleged excessive tax paid. Judgment for defendant.

H. Wardwell, for plaintiff. J. S. Goodrich and J. S. Richardson, for defendant.

MORTON, J. The plaintiff was an inhabitant of Belmont, and was assessed there for the building and machinery as personal property. She was also assessed for them as personal property in Salem, where they were situated. If any part of the property, assuming it all to be personal, was property taxable to her in Belmont, this action cannot be maintained. In such a case the remedy of the party aggrieved is by an application for abatement, and not by a suit at law to recover the alleged excess. *Bourne v. City of Boston*, 2 Gray, 494; *Richardson v. City of Boston*, 148 Mass. 508, 20 N. E. 166. It is admitted in substance that the plaintiff was taxable in Belmont, unless the building and machinery were employed in manufacturing, within the meaning of Pub. St. c. 11, § 20, cl. 2.¹ The business carried on was "that of quarrying and breaking stone to be used in macadamizing roads and for other similar purposes" and the building and machinery were used in it. We do not see that the business of quarrying stone and breaking it up for use on roads and other similar purposes is any more a manufacturing business than mining coal and breaking it up into merchantable sizes, or farming and cutting ice.

¹ Pub. St. c. 11, § 20, cl. 2, provides that all personal property shall be assessed to the owner in the city or town where he is an inhabitant on May 1st, except all machinery employed in any branch of manufactures, which shall be assessed where it is situated or employed.

Byers v. Coal Co., 106 Mass. 131; *Hittinger v. Westford*, 135 Mass. 258; *Ingram v. Cowles*, 150 Mass. 155, 23 N. E. 48. Quarrying and dressing granite could hardly be said to be manufacturing it, though moulding clay into different sizes and shapes and then burning it fairly may be said to be manufacturing brick. Still less could simply crushing granite into smaller and smaller pieces be said to constitute manufacturing, as that word is ordinarily used, though there is a remote sense in which it may be true. We think that the ruling of the court was right, and that according to the report there must be judgment for the defendants, and it is so ordered.

(184 Mass. 150)

MANNING v. REYNOLDS et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1895.)

EXAMINATION OF POOR DEBTORS.

1. The discretion given to a magistrate by Pub. St. c. 162, § 18, to postpone the examination of a poor debtor, is not affected by section 68, providing that if the creditor, or some one in his behalf, does not attend such examination, the debtor shall be discharged, where such postponement was granted upon the previous request of the creditor's counsel.

2. Where a debtor appears for examination, and his counsel enters a general appearance, the fact that the citation is not in court does not justify the debtor in departing without leave.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Petition by William E. Manning for a writ of prohibition against John F. Reynolds and others. Dismissed.

Pub. St. c. 162, § 18, provides that the examination of a poor debtor "may be postponed or continued from time to time at the discretion of the magistrate." Section 68 provides that "if the creditor, or some one in his behalf, does not attend the examination, the defendant or debtor shall * * * be discharged from arrest or imprisonment."

P. J. Casey, for plaintiff. Barry & Blanchard, for respondents.

HOLMES, J. 1. The magistrate, in pursuance of a previous request of the creditor's counsel, postponed the examination of the debtor. This he had a right to do. The discretion given him by Pub. St. c. 162, § 18, is not cut down by section 68, at least so far as this case is concerned. See *May v. Foote*, 7 Allen, 354.

2. We do not perceive the need for the presence of the citation at the hearing. The debtor had been ordered to appear, and was in court, and his counsel entered a general appearance.

After this general appearance the magistrate's record shows that "the debtor departs without leave." No fact appears in the record or outside of it to justify the departure. It is not necessary to go into any further considerations.

Petition dismissed.

(164 Mass. 38)

Petition of MINOT.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1895.)

CONSTRUCTION OF WILL.—PROVISION FOR UNBORN CHILD.

1. Testator, after making a bequest to his wife, gave the rest of his property to a trustee, to pay the income to his wife during life, and the reversion to those who would then be his heirs at law by blood. When he made the will he knew that his wife was pregnant. *Held*, that the provisions of the will were intended to include the child, and that there was no omission to provide for his children, within Pub. St. c. 127, § 21, giving a child born after the making of the parent's will, and not provided for therein, the same share of his estate as if the parent died intestate.

2. Testator and his wife joined in the mortgage of her land to secure their joint and several note for \$20,000, the proceeds going into the general funds of testator, who expended over \$35,000 in building a house and stable on the land and in purchasing furniture therefor. The husband apparently owned some real estate and personal property. The contract for the construction of the buildings and the purchase of the furniture were made in the sole name and on the sole liability of the husband. Testator left to his wife all his articles of household and personal use or ornament and \$10,000 in money and a life interest in the residue of his estate, and he knew that she would have their unborn child to support. *Held*, that testator intended to assume the mortgage note as his own debt.

Case reserved from supreme judicial court, Suffolk county; Oliver W. Holmes, Judge.

Petition of William Minot, executor of George R. Minot, for instructions. The case was reserved, and reported on the pleadings to the full court at the request of all the parties.

Blach & Rackemann, for Wm. Minot. Sigourney Butler, for Agnes Minot. Frank Brewster, for sisters and brothers. Marcus Morton, guardian ad litem, for Francis R. Minot.

ALIEN, J. 1. By Pub. St. c. 127, § 21, it is provided that "when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to, if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional and not occasioned by accident or mistake." This statute applies to children born in the testator's lifetime, but after the making of the will. *Bancroft v. Ives*, 8 Gray, 367. At the time the will was made, the testator's son was not born, and we are not informed whether he then or ever had any other child. After a bequest to his wife, he gave the whole of the rest of his property to a trustee, who was to pay the whole income to the testator's wife during her life, and the reversion was to go to those persons who would then be his heirs at law by blood; that is, to his children, if any should then be living. He knew that his wife

was pregnant, and the above provision was no doubt intended to include the child, and there was therefore no omission to provide in his will for his children, if there should be any living at his death. The case is to be distinguished from *Bowen v. Hoxie*, 137 Mass. 527, where, after the testator's death, a child was born, which it would seem that the testator did not have in mind at the time of making his will. In the case now before us the provision of the will apparently had reference to such children as might be born after the making of the will. *Buckley v. Gerard*, 123 Mass. 8; *Peters v. Siders*, 126 Mass. 135.

2. When a husband and wife join in a mortgage of her land to secure a debt of the husband, her estate is considered only as a security for the debt, for which the husband and his estate are primarily liable; and the wife or her heir, after the death of the husband, will be entitled to have it exonerated out of the estate of the husband. *Savage v. Whitman*, 15 Gray, 453, 455; *Deane v. Caldwell*, 127 Mass. 242, 246. It is therefore to be determined as a question of fact whether the note for \$20,000 signed by the husband and his wife and secured by mortgage of her land, is to be deemed the debt of the husband or of the wife. There is nothing to negative the ordinary inference, when a house is built by one person on land of another, that the house and stable, when erected on her land, became hers. *Webster v. Potter*, 105 Mass. 414. If, therefore, the debt was his, it would imply that he intended to bear the expense of erecting the buildings for the family establishment, leaving the whole real estate to stand in her name. It seems clear that the furniture was bought with the husband's funds, and there is nothing to negative the inference that it was his property. It appears to be included in the bequest to her of "all my articles of household and personal use or ornament." The cost of the furniture alone is not stated. It is said "he expended over \$35,000 in the construction of a house and stable upon said real estate, and in purchases of furniture for the same." Upon this statement, we should hardly suppose that the cost of the furniture would be as much as \$15,000, though it might be so. If less than that amount, then certainly a portion of the husband's expenditure must have been upon the buildings, even if she is held bound to pay the note for \$20,000. It appears by inference from the terms of the will that the husband was possessed of some means. Apparently he had some real estate, and also securities to more than the value of \$10,000. The fact of such an establishment costing over \$35,000 besides the land, warrants an inference of some means or income with which to maintain it. But we are not informed otherwise than by inference from the terms of the will what property or income he had, or whether she had any means whatever with which to pay the interest, amount

ing to \$900 a year; on the note, or the note itself when due, in September, 1896. It is stated that the contracts for the construction of the buildings and the purchases of furniture were made in the sole name and as the sole liability of the husband, and that all debts incurred thereunder were exclusively his personal debts. The date of the will was March 23, 1891, and the date of the note and mortgage September 15, 1891. At the time of giving the latter, the husband knew that under the will she would receive but \$10,000 in ready money which would be available for paying the interest or principal of the note, provided she would continue in the home which they were then establishing; but the income which she would receive under the will is not stated. He also knew that in case of his death she would have their child to support if it should live, as he had made no provision for its immediate support otherwise than by his provisions for her. On the whole, the somewhat meager facts which are stated, with the inferences which may be drawn from them, seem rather to point to the conclusion that the testator intended to assume the payment of the mortgage note as his own personal debt.

(164 Mass. 155)

HALL v. JUSTICES OF MUNICIPAL COURT OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

EXECUTION AGAINST THE PERSON — DISCHARGE IN INSOLVENCY.

A person does not lose his right to the benefit of Pub. St. c. 157, § 83, providing that a debtor, after his discharge in insolvency, shall be forever thereafter "exempt from arrest" for any demand provable against his estate, though, in an action against him for debt, he fails to plead his discharge, and suffers judgment by default.

Petition by Frank E. Hall for a writ of prohibition against the justices of the municipal court of Boston. Granted.

Samuel L. Powers and Russell A. Sears, for petitioner. J. W. Keith, for respondent.

HOLMES, J. The petitioner suffered judgment by default on a debt for necessities. He had a discharge in insolvency before the action was brought. The debt was provable, but was not proved, in the insolvency proceedings, and therefore was not discharged. Pub. St. c. 157, §§ 26, 84. But by section 83 the debtor, after obtaining his certificate of discharge, "shall be forever thereafter discharged and exempt from arrest or imprisonment in any suit or upon any proceeding for or on account of a debt or demand provable against his estate." The words could not be stronger or more explicit. They apply to an arrest in the suit on which judgment was recovered against the petitioner. *Everett v. Henderson*, 150 Mass. 411, 414, 23 N. E. 318. This is not denied, but it is argued that the petitioner lost his right by not pleading the

discharge. The statute does not say so, but, on the contrary, gives the protection in absolute terms. No doubt, when a discharge is a bar to a judgment, it is proper to plead it. But, as pleadings are addressed to the judgment, not to the execution, as in this case the plaintiff was entitled to judgment, and as a judgment for a debt commonly says nothing about arrest, or the modes by which it is to be enforced, there is not even a technical ground for the argument. The petitioner was not called on to move until an attempt was made to arrest him. When that attempt was made, the discharge was brought to the attention of the court on the record, and thereupon it had notice of a fact which had ended its power to authorize an arrest.

Writ to issue.

(164 Mass. 129)

REED v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

INJURY TO EMPLOYEE.

In an action for personal injuries, where plaintiff, a servant of defendant, was sent to help B. move a lot of iron castings standing upon the floor of defendant's building, and in attempting to place one of them upon a truck tipped it over against the truck, when the jarring of the floor caused the other castings to fall down, and injure him, to hold defendant liable it is necessary to prove that the castings were in a dangerous position, and that defendant knew or ought to have known it.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Action of tort by Moses W. Reed against the Boston & Albany Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

J. Winthrop Pickering, for plaintiff. Woodward Hudson, for defendant.

LATHROP, J. We are of opinion in this case that the plaintiff's offer of proof fails to show any negligence on the part of the defendant. There were a lot of iron castings standing upon the floor of a building owned by the defendant, which weighed from 250 to 300 pounds apiece. The plaintiff was sent to help one Bishop move them. Bishop and the plaintiff attempted to place one of these castings upon the truck; and for that purpose took hold of it, and tipped it over against the truck, when the jarring of the floor occasioned thereby caused the other castings to fall down in the direction of the truck; and the plaintiff was injured. The plaintiff also offered to show that he was in the exercise of due care, and that "the floor was old, broken, and decayed in some places." There was no offer to show that there was any structural defect or weakness in the building, or that the floor was in bad condition near the place of the accident. The offers of proof were very vague and indefinite. It cannot be contended that the defendant

was bound so to construct and maintain its building that the floor would not jar, under any circumstances, or under the weight tipped over upon it in this case. The cause of the accident was the falling over of the castings. If it was a proper thing to tip over a casting upon the truck, then it was an improper thing to place other castings in such a position that they would fall over upon being jarred. But there is no offer to prove who put them there, or how long they had been there. Presumably they were put where they were by the fellow servants of the plaintiff. To hold the defendant responsible, there should have been an offer to prove that they were in a dangerous position, and the defendant knew it, or that they had remained in this position so long a time that it ought to have known it. Exceptions overruled.

(142 Ind. 357)

WALSH, County Treasurer, et al. v. STATE
ex rel. SOULES, County Auditor.¹

(Supreme Court of Indiana. June 22, 1895.)

INVALID STATUTE—AMENDMENT—EFFECT—COUNTY OFFICERS' SALARIES.

1. Though Act 1891, p. 424, in so far as it provides for the salaries of the county treasurers of all counties in the state except Shelby county, is in conflict with Const. art. 4, § 22, prohibiting local acts in relation to salaries except so as to grade the compensation of officers in proportion to the population, and article 4, § 23, providing that in all cases where a general law can be made applicable all laws shall be general and of uniform operation, the objections to the act were cured by Act 1893, p. 142, amending the same by providing a salary for the treasurer of Shelby county. Hackney, J., dissenting. *State v. Bolce* (Ind. Sup.) 39 N. E. 64, overruled.

2. Act 1893, p. 142, repealed the act of 1879, providing for fees of county treasurers.

McCabe and Hackney, JJ., dissenting.

Appeal from circuit court, Vigo county; D. N. Taylor, Judge.

Action by the state on the relation of James Soules, auditor of Vigo county, against John L. Walsh, county treasurer of Vigo county, and others on the treasurer's bond. A demurrer to the complaint was overruled, and defendants appeal. Affirmed.

Lamb & Beasley and John R. Wilson, for appellants. W. A. Ketcham and Saml. M. Huston, for appellee.

JORDAN, J. This action was commenced by the state in the lower court on the relation of the auditor against the appellant, Walsh, treasurer of Vigo county, and his co-appellants, who are sureties upon his official bond. The breach of the bond, as alleged in the complaint, was the failure of said appellant, as such treasurer, to pay over certain moneys, and a conversion of the same to his own use, upon the claim and contention that under the provisions of the act of 1879 (Acts 1879, p. 130) he was entitled to receive and retain for his own use, as compensation, 1

per cent. upon the first \$100,000 of taxes collected by him, and one-half of 1 per cent. upon the residue collected in excess of \$100,000, and in addition thereto 6 per cent. upon all delinquent taxes collected by him, as provided by section 30 of the act of 1879. Appellants unsuccessfully demurred to the complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action, and the decision of the court in overruling the demurrer is the only error assigned. The gist of the contention of appellants' learned counsel is that, inasmuch as the salary provisions as fixed by the act of 1891 (Acts 1891, p. 424) have been declared unconstitutional by this court in the case of *State v. Bolce*, 39 N. E. 64, these are thereby eliminated from that act; that this being true, the only remaining provisions of the law of 1891 in respect to the treasurers' compensation are the fees provided and allowed by sections 120 and 122, and hence it is contended that as this act now stands, since the decision of this court in the *Bolce* Case, supra, there is no conflict in regard to the compensation of county treasurers between it and the act of 1879, and that therefore this last act, in this respect, is not repealed by the former, and consequently appellant Walsh is entitled to the compensation and fees allowed by the provisions of the act of 1879. In the case of *Henderson v. State* (Ind. Sup.) 36 N. E. 257, the principal features and scope of the law of 1891 were by a majority of this court at the time held to be constitutional and a valid exercise of legislative power. While, in the judgment of the writer of the opinion in the case at bar, speaking individually for himself, and not for the court, the result reached in case last cited may be in some respects questionable, however, that decision, and also the one of *State v. Krost* (Ind. Sup.) 39 N. E. 46, are still adhered to and approved by a majority of the members of this court, as new constituted, and the questions therein involved and decided must be deemed and held, at least so far as the act of 1891 is concerned, as settled. In the case of the *State v. Bolce*, supra, it was held by this court that by reason of the fact that the fee and salary law of 1891 in section 93 omitted to provide salaries for certain officers of Shelby county, that of treasurer being among the number, it was unconstitutional, upon the grounds that the act was thereby in conflict with article 4, § 22, of the state constitution, prohibiting local laws except those which grade the compensation of officers in proportion to population and the services required, and also that it was in conflict with article 4, § 23, by reason that it was not of a general and uniform operation throughout the state.

At the very threshold of the consideration of the cardinal questions involved in this appeal we are confronted by the proposition, or rather request, upon the part of the state's able and learned attorney general, to consider the validity and effect of the legislative act

approved February 25, 1893 (Acts 1893, p. 142), amending section 93 of the statute of 1891, which amendatory act supplied the omissions of the section as it was originally enacted by providing compensation for the auditor, treasurer, and recorder of Shelby county. His contention is that this amendment was a valid exercise of power upon the part of the legislature, and that thereby the objectionable features of the statute, and its constitutional infirmities as adjudged to have existed against it in the case of *State v. Boice*, were eliminated by supplying the provisions which made the law in question conform to the requirements of the constitution, and that thereby its invalidity was cured, and the salary provisions thereof, as a whole, rendered operative in the future. This is an important question, under this contention, for the determination of this court. We have given this question such consideration and deliberation as time would permit, and have arrived at the conclusion that this contention of the attorney general must be sustained, and is decisive in this appeal. It appears from the facts alleged in the complaint that appellant, Walsh, was elected treasurer of Vigo county in 1892, and that his official term began, and he assumed the duties of his office, on August 22, 1893. The laws of 1893, and along with them the amendatory act in controversy, went into force and effect May 18, 1893, and hence, if this act resulted in curing the constitutional infirmities that existed against the statute of 1891, its effect, or results, are applicable to and controlling in the case now before us; for, as heretofore stated, appellant was elected after the taking effect of the law of 1891, and also went into office subsequent to the taking effect of the amendatory act in controversy. Section 93, as it appears from the printed acts to have been originally adopted, is as follows: "Sec. 93. In the county of Shelby the annual salary of the clerk of the circuit court shall be twenty-three hundred and fifty dollars, and of the sheriff twenty hundred and fifty dollars." The act of 1893 by which this section was amended was entitled, "An act to amend section 93, of an act fixing the compensation, prescribing the duties of certain state and county officers, and providing penalties for the violation of its provisions, approved March 9th, 1891," and is as follows: "Section 1. Be it enacted by the general assembly of the state of Indiana, that section 93 of the above entitled act be and the same is hereby amended so as to read as follows: Sec. 93. In the county of Shelby the annual salary of the clerk of the circuit court shall be twenty-three hundred (2,300) dollars, of the auditor twenty-five hundred and fifty (2,550) dollars, of the recorder thirteen hundred (1,300) dollars, of the treasurer twenty hundred and fifty (2,050) dollars, and of the sheriff twenty hundred and fifty (2,050) dollars." It is evident and undisputed that where a statute or any part thereof is invalid by reason of

an absence of power in the legislature, in the first instance, under the constitution, to enact the law, it would not be possible for that body to confirm or render the same valid by amendment. But where the obnoxious features of the statute may be removed, or essential ones supplied by a proper amendment, so that it can be held that, had the law been primarily so molded or framed under its title and within its scope as it has been by the amendment thereto, it would have been free of the objections existing against it as it originally stood, and also within the power of the legislature to enact it, then, and in that event, the statute may be rendered valid by amendment, so far as its future operations may extend. See *State v. City of Cincinnati* (Ohio Sup.) 40 N. E. 508. The act of 1891, it must be remembered, was not held to be invalid as an entirety, but only as to a part of its salary provisions. The act of 1893 does not attempt or profess to amend the entire act of 1891; it only supplied certain provisions in which section 93 was deficient. This section, as we have seen, made provisions alone for the compensation of the clerk and sheriff of Shelby county, and to this extent it was constitutional, under the decision of *Henderson v. State*, supra. Being constitutional, then so far as it concerned the salaries of the clerk and sheriff it was subject to amendment in like manner as sections of other statutes. The only limitation placed upon the legislature was not to extend it by the amendment beyond the subject of the original act and matters properly connected therewith. *Suth. St. Const.* § 132. Strictly speaking, an amendatory act is not regarded as an independent statute, and it may be framed so as to amend certain parts of the law and to add such supplementary sections as might be embraced under the title of the original act. *State v. Bowers*, 14 Ind. 195; *Brandon v. State*, 16 Ind. 197; *Shoemaker v. Smith*, 37 Ind. 122.

It is firmly settled that where a section in an existing law is amended in the mode prescribed by the constitution it ceases to exist, and the section as amended supersedes the original and becomes incorporated in and constitutes a part of that act. *Blakemore v. Dolan*, 50 Ind. 194; *Feibleman v. State*, 98 Ind. 518. A statute amending a former act operates as to matters thereafter occurring precisely as if the amendatory act had been added to the original act at the time of its adoption, and the two acts must be construed together and as one statute. *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, Id. 385; *Kamerick v. Castleman*, 21 Mo. App. 587; *End. Interp. St.* § 295; *Ely v. Holton*, 15 N. Y. 595; *State v. Ranson*, 73 Mo. 88. In the case of *State v. City of Cincinnati*, supra, where the question of curing an unconstitutional statute by an amendment was before the supreme court of Ohio, it was said: "Where one or more sections of a statute are amended by a new act, and the

amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections, as amended, must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act as it stands after the amendatory sections are so introduced. *McKibben v. Lester*, 9 Ohio St. 627. And, it may be added, the other sections are to be interpreted in connection with, and in view of, the amended section or sections, and, in its application to cases arising after the amendment has been made, the whole statute must have the same operation and effect as if it then had been re-enacted, in terms. Hence, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution." This power of rendering valid a statute unconstitutional in part was exercised by the legislature of this state prior to the amendatory act of 1893. In the case of *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, this court held that the tax statute was unconstitutional so far as it authorized boards of review to add property to the list of a tax payer, without giving him notice. Immediately following this decision the legislature of 1889 amended the law by providing for the required notice. Acts 1889, p. 367. This act of legislative authority in supplying this omission in the statute as to notice was not to our knowledge controverted. The constitutional question upon which the decision in the *Boice* appeal was based was not because of any infirmity in section 25 of the act of 1891, which provided compensation for the officers of Benton county, but was solely for the reason that section 93 omitted to name and fix the salary for the treasurer of the county of Shelby. The court did not deny that the legislature had the right and power in the first instance to have embraced within said section and provided for the compensations of the treasurer, auditor, and recorder of that county, in like manner as was provided for the other 91 counties of the state, but, adhering to the rule laid down in the case of *Henderson v. State*, supra, virtually affirmed the constitutional power of the general assembly to have so provided. Possessing and being vested, then, with this power originally, in view of the authorities to which we have herein referred, and by force of the reason and logic thereof, how can it in reason be said that the legislature cannot exercise it by a proper amendatory act, adopted in conformity to the constitution?

This curative principle or power finds support, by analogy at least, in the decisions where it is held that whenever a thing is wanting, or which had been omitted in the proceedings of boards or other officials, by

reason of which such proceedings or action are thereby rendered invalid, and that the thing wanting or which had been omitted was something that the legislature might have dispensed with by a prior statute, then and in that event that body may validate the proceedings by a curative act. *Sithin v. Board*, 66 Ind. 109; *Johnson v. Board*, 107 Ind. 15, 8 N. E. 1; *End. Interp. St.* §§ 291, 293. In fact, this doctrine seems to have been applied in broad terms by the supreme court of the United States in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, wherein was said that where congress removed the obstacle which rendered a prohibitory law of a state invalid or inoperative as to intoxicating liquors imported and sold in the original packages it was not necessary thereafter to re-enact such prohibitory statute in order to make it operative upon such liquors in the future. Being impressed with this view, for the reasons herein stated we are constrained to hold that the act of 1893, amending section 93 of the statute of 1891, served the same purpose and had the same effect after going into force on the 18th day of May, 1893, as though it had been written in *haec verba* in the act of 1891, and from the date last mentioned the law of 1891 was, as the result of the amendment in question, freed of the constitutional invalidity held to exist against it as originally enacted. From and after that time the salary features or provisions thereof were by the amendment made to apply to all the treasurers, auditors, and recorders in the 92 counties of the state, and these provisions in the act as amended would thenceforward operate in controlling the compensation as therein provided of such auditors, treasurers, and recorders as do not come within the exception of section 136, until superseded by a subsequent law, in like manner and to a like effect as though the provisions incorporated into section 93, by the amendment, had been added thereto at the time of the passage thereof, and the two acts must be construed together as one statute. It would therefore follow as a necessary result that all laws and parts of laws in conflict therewith would be repealed to the extent of such conflict, as provided by section 137 thereof. As the provisions of the act of 1879, under which appellant claimed and retained the fees in controversy, are in conflict with the act of 1891, they must be deemed and held to be repealed, and he must look to the latter, and such other laws, if any, not in conflict therewith, to award him compensation for the discharge of his official duties. While it is true that the conclusion which we have reached, so far as the operation of the amendatory act in question is concerned, is at variance with the opinion of this court in the case of *State v. Boice*, the question at that time received but a cursory examination and a brief consideration by the court, and what was there said relative thereto was upon a mere suggestion upon the part of counsel for the

state, and without due deliberation, and so far as the decision in that case may conflict with this opinion it must be deemed and held, to that extent, as modified. Other constitutional questions are presented by counsel for appellant, but, in view of the conclusion which we have reached, they are not applicable.

The trial court did not err in overruling the demurrer, and the judgment is affirmed.

MCCABE, J., dissents, for the reasons stated in his dissenting opinion in *Henderson v. State*, supra.

HACKNEY, J. I dissent from the conclusion reached by the majority opinion for the reasons stated in the case of *State v. Boice* (Ind. Sup.) 39 N. E. 64, and for the reason, as stated in *Clare v. State*, 68 Ind. 17, that: "It is settled by the decisions of this court that an act to amend a law which has been repealed, or is invalid for any cause, is also an invalid and void law. *Blakemore v. Dolan*, 50 Ind. 184; *Ford v. Booker*, 53 Ind. 395; *Cowley v. Town of Rushville*, 60 Ind. 327." See, also, *Lawson v. De Bolt*, 78 Ind. 563; *McIntyre v. Marine*, 93 Ind. 193. Nor do I believe that two distinct and independent provisions, by two legislatures, may be brought together to constitute a valid enactment. In *State v. City of Cincinnati*, cited in the original opinion, the two provisions were brought together by the same legislature. The power to amend a valid act is not affected by my conclusion, nor does it, in my opinion, support the conclusion of the principal opinion.

(149 Ind. 1)

WILKEN et al. v. YOUNG et al.

(Supreme Court of Indiana. June 11, 1895.)

JOINT TENANCY—HOW CREATED—POWERS OF TENANT.

1. Under Rev. St. 1881, § 2922 (Rev. St. 1894, § 8341), providing that a conveyance to two or more shall create a joint tenancy when it appears from the instrument that it was so intended, a deed to a husband and his wife "in joint tenancy, their heirs and assigns, forever," creates a joint tenancy in the husband and wife.

2. Under Rev. St. 1881, § 1186 (Rev. St. 1894, § 1200), allowing a joint tenant to compel partition of the estate, one such tenant may mortgage his interest therein.

3. Rev. St. 1881, § 2556 (Rev. St. 1894, § 2726), providing that any person may devise any interest descendible to his heirs which he may have in lands, does not authorize him to devise his interest in a joint estate.

Appeal from circuit court, Allen county; C. M. Dawson, Special Judge.

Action by Mary M. Young and another against John H. Wilken and another to recover possession of and to quiet title to land. From a judgment for plaintiffs, defendants appeal. Affirmed in part, and reversed in part.

S. M. Hench and Homer C. Hartman, for appellants. W. G. Colerick and M. V. B. Spencer, for appellees.

JORDAN, J. Action by appellees in the lower court, wherein they sought to recover the possession of certain described real estate from the appellant John H. Wilken, and to quiet their title thereto against both of the appellants. A trial resulted in a judgment in favor of appellees, from which appellants prosecute this appeal, and assign numerous errors, whereby they assail certain rulings and decisions of the trial court, and the final judgment and decree thereof. At the request of the parties, the court found the facts specially, and stated its conclusions of law thereon. As this finding is supported in its material points by the evidence, and as the principal questions involved in this appeal are fully presented by said finding and conclusions of law thereon, we deem it only necessary to consider the alleged errors arising out of these conclusions.

The following are the material facts as found by the court: "In 1870 one Samuel Gordon married Phoebe Ginther, who had been prior to that time divorced from a former husband, one Peter Ginther. That appellees are the only children and heirs of said Phoebe, being the fruits of her former marriage to said Peter. That no children were born unto her by virtue of her marriage to Samuel Gordon. That said Samuel Gordon and said Phoebe lived together as husband and wife from the year 1870 until the death of said Samuel, which occurred at Ft. Wayne, Indiana, on the 14th day of April, 1886. That his said wife, Phoebe, survived him until June 22, 1890, at which date she died, intestate, leaving, surviving her, appellees, as her children and only heirs. That on November 23, 1878, one James B. White, who was then the owner, in fee simple, of the real estate in controversy, situated in Allen county, Indiana, for and in consideration of the sum of four hundred and fifteen dollars, together with his wife executed a warranty deed, whereby they conveyed to said Samuel Gordon and Phoebe, his wife, said real estate. That in said deed, immediately after the description of the premises, are the following words: 'To have and to hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns, forever.' This deed was acknowledged and recorded in the recorder's office of said county. On the 15th day of October, 1885, Samuel Gordon, the husband, executed to the appellant Herman Wilken a mortgage upon the said lands, to secure the payment of two hundred dollars, as evidenced by a promissory note. That his wife, Phoebe, did not join with him in the execution of said mortgage. On the 17th day of October, 1885, said Samuel Gordon executed a will, wherein he willed that at his death the said real estate should go to the

appellant John H. Wilken. After the death of Gordon, said will was duly probated in the circuit court of Allen county, Ind., at which county said testator died. That, after the death of Samuel Gordon, said John H. Wilken took possession of said real estate, and that the rental value thereof is \$60 per annum. The only right or title of the appellant John H. Wilken is under the devise to him in said will. The only right, title, and interest that appellant Herman Wilken claims in and to said real estate is under the mortgage executed to him by said Samuel Gordon, and for taxes assessed against the said land, and paid by him for the purpose of protecting his said mortgage lien. The only right or title in said real estate claimed by appellees is by inheritance thereof as the children and heirs of their deceased mother, Phoebe Gordon." Upon this finding the court stated its conclusions of law, substantially as follows: "First. That, under said deed, said Samuel Gordon and Phoebe, his wife, held the said real estate as tenants by entirety, and that at the death of her husband, Samuel, she became the sole owner thereof, and upon her death the same descended to appellees as her heirs. Second. That the mortgage executed by Samuel Gordon to Herman Wilken is void, because the said Phoebe, his wife, did not join in the execution thereof. Third. That the defendant John H. Wilken did not acquire or take any title to said real estate under the will of Samuel Gordon, for the reason that he (Gordon) had no interest in said real estate subject to be devised by will. Fourth. That said defendant John H. Wilken unlawfully holds possession of said real estate, to plaintiffs' damage in the sum of \$240." To each of these conclusions of law appellants each separately excepted. Over their exceptions and objections, the court, upon this finding, rendered judgment in ejectment against John H. Wilken, and quieted appellees' title against both of the appellants, and decreed that the mortgage of Herman Wilken was null and void, and that the devise of said real estate by Gordon to John H. Wilken was of no effect.

In this state a joint tenancy can only be created as provided by section 3341, Rev. St. 1894 (section 2922, Rev. St. 1881). Where lands are conveyed to husband and wife, and there are no words of limitation in the deed, or where it does not manifestly appear from the tenor thereof that it was intended to create an estate in joint tenancy, they will take as tenants by entirety. *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167, and authorities there cited. It is equally well settled that the general rule controlling in a conveyance of real estate to husband and wife may be defeated by conditions, limitations, or stipulations in the instrument of conveyance, when they clearly indicate an intention of the grantor to create in the grantees a different estate. A joint tenancy may be created to exist between husband and wife by the express

terms or tenor of the deed of conveyance. *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, and authorities there cited. This question being settled, we are next to determine what was the character of the tenancy created by the conveyance of White to Gordon and wife.

It is obvious and clear, we think, that the following expression or stipulation in said deed, namely, "to have and hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns, forever," brings the conveyance in question clearly within the provisions of section 3341, supra, and we are therefore constrained to hold that, by these express terms in the instrument, a joint tenancy was vested in Gordon and wife, and that they did not take and hold the realty so conveyed to them as tenants by entirety. *Thornburg v. Wiggins*, supra; *Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. 439; *Case v. Owen* (by this court) 38 N. E. 395. We may here add that the latter words, "their heirs and assigns, forever," are superfluous, and in no way affect the meaning or intent of the grantor. And we may further say that, there being no ambiguity in this deed, it follows that what the grantor or grantees understood by its terms, or in what manner they subsequently treated it, has no bearing upon the construction thereof.

The next points arising out of the special finding and conclusions of law relative thereto, and which are presented for our consideration, are as to the power of Samuel Gordon to mortgage and devise his moiety in the lands involved in this action. This will necessitate an examination, at least, of some of the features impressed by law upon these particular estates of joint tenancy, when they are once created. Tenants of this kind are said to hold individually and jointly, having one and the same interest, accruing through one and the same conveyance, commencing at the same time, and held by one and the same possession. Upon the death of of one joint tenant, there being no severance in the estate, his entire interest is cast upon the survivor or survivors, to the exclusion of the inheritance of the same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the interest of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. *Tied. Real. Prop.* § 238; 1 Washb. Real Prop. 682, cl. 22; 4 Kent, Comm. 460; 1 Prest. Est. 136; *Bevins v. Cline*, 21 Ind. 40; 6 Am. & Eng. Enc. Law, 892; 11 Am. & Eng. Enc. Law, 1092; *Duncan v. Forrer*, 6 Bin. 193. In the ancient language of the law, joint tenants were said to hold per my et per tout, or, in plain words, "by the moiety or half and by all"; the true interpretation of this phrase being that these tenants were seised of the entire

realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. *Prest. Est. supra*; 4 Kent, Comm. *supra*. Partition at common law could not be enforced by joint tenants, but under our statute partition of these estates may be enforced. Rev. St. 1881, § 1186 (Rev. St. 1894, § 1200). The interest of each tenant is subject to sale upon execution. *Thornburg v. Wiggins, supra*; *Freem. Ex'ns*, § 125. Having these rights and powers at least over his interest in the land so held, there can be no sufficient reason urged why the power of the joint tenant to mortgage the same should be denied. Any interest in real estate which a person may sell and convey he may also mortgage. *Jones, Mortg.* § 136. We are therefore of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion. This right of the tenant to mortgage is supported by the following authorities: *York v. Stone*, 1 Salk. 158; *Simpson's Lessee v. Ammons*, 1 Bln. 175.

It is settled by numerous authorities that the devise under the will of Samuel Gordon, of his interest in the lands in question to appellant John H. Wilken, was inoperative and void, and the latter acquired no title thereby. The reason for this rule is apparent. Unless there is a severance during the lifetime of the devising tenant, at his death the right of the survivorship immediately accrues; and, as the devise cannot take effect until after the death of the testator, the tenant is thereby disqualified for devising his moiety in lands so held; or in other words, as this paramount right of the survivor or survivors instantly prevails upon the death of the testator, there remains no estate of inheritance upon which the will can operate. *Swift v. Roberts*, 3 Burrows, 1488; *Duncan v. Forrer, supra*; 4 Kent, Comm. *supra*. A joint tenant, being disqualified to exercise this power at common law, is also disqualified by our statute of wills. Section 2726, Rev. St. 1894 (section 2556, Rev. St. 1881), provides that persons may devise any interest descendible to their heirs which they may have in any lands, tenements, etc. As we have seen that the interest of a joint tenant does not descend, it follows, therefore, that under this statute he has no right or power to devise the same by will. From the conclusions which we have reached herein, it is apparent that the court erred in holding, in its first conclusion, that the deed created a tenancy by entirety in Gordon and wife; that it also erred in holding, in its second conclusion, that the mortgage executed to appellant Herman Wilken by Samuel Gordon is void. The court did not err in stating its third and

fourth conclusions of law. As, under the special finding of facts, the ultimate judgment against John H. Wilken is right; therefore the intervening errors complained of by him must be deemed and held to be harmless. The judgment as against Herman Wilken is reversed, and the cause remanded, with instructions to the lower court to grant him a new trial, and leave to reform the issues if requested. The judgment as to John H. Wilken is affirmed. All concur.

(13 Ind. App. 35)

BEDFORD BELT RY. CO. v. BURKE.

(Appellate Court of Indiana. June 13, 1895.)

PAYMENT—WHEAT CONSTITUTES.

1. Where one, having an account with a bank, deposits in the bank a receipt for a debt due him by a corporation, whose treasurer is also president of the bank, without receiving any money, a credit of the amount of the debt to such person by the bank, at the instance of the president, without knowledge or consent of the depositor, will not constitute a payment of the debt, though such depositor may, not knowing the state of his account with the bank, have drawn a portion of the amount so credited.

2. The payment by a debtor of certain debts due by his creditor is not a payment of the debt to the creditor unless made by his consent.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by Michael C. Burke against the Bedford Belt Railway Company to recover for work performed and material furnished. From a judgment for plaintiff, defendant appeals. Affirmed.

F. M. Trissal and Watson & Giles, for appellant. Brooks & Brooks, for appellee.

GAVIN, J. The special findings of facts are as follows:

"(1) That under a contract with the defendant, plaintiff performed work and furnished material for defendant amounting at the contract price to the sum of \$906.39. (2) That the plaintiff executed a receipt to the defendant on the 20th day of April, 1893, for \$579.50, and on July 1, 1893, executed a receipt to the defendant for the balance of said work,—the sum of \$326.89." "(4) No money was paid to plaintiff by defendant at the time of the execution of either of said receipts. (5) I find that the first receipt, for \$579.80, was signed in the office of the auditor of said defendant, and was taken by the plaintiff, and delivered to W. C. Winstandley, secretary and treasurer of said defendant. That said Winstandley was also the president of the Bedford Bank, doing a general banking business in the city of Bedford. Plaintiff had an account with said bank, and had to his credit on said 20th day of April, 1893, the sum of \$451.07. That plaintiff, on said 20th day of April, 1893, drew on his check from said bank the sum of \$332.50, which sum he used in the payment of his laborers on the work which

was represented by this amount in said receipt, but received nothing from defendant on said receipt on said day. (6) On the next day—April 21st—plaintiff was credited on the books of said bank with the amount of said receipt, to wit, \$579.50. (7) Said credit and application was made by said Winsteadley and bank without the consent or knowledge of plaintiff. (8) That after the 20th day of April, 1893, plaintiff drew checks which were paid by said bank as follows: April 29th, \$50; April 25th, \$75; April 22d, \$10.80; April 25th, \$15; April 26th, \$5; April 27th, \$29.28; April 29th, \$50; May 6th, \$50; May 9th, \$25; May 16th, \$2.90; May 18th, \$6.95; May 19th, \$5; May 25th, \$6.95; May 27th, \$99.11. Plaintiff made a deposit in said bank on May 27, 1893, of \$100. (9) The bank book of the plaintiff was not in his possession from January, 1893, to the time of this trial. The same was not balanced until after the transactions herein set out; and his said checks canceled have never been returned to him. (10) The second receipt, for \$326.89, was executed and delivered to defendant, and defendant afterwards, at various times, paid to different parties sums in the aggregate to the amount of said receipt, and on debts for which plaintiff was liable. Robert W. Miers, Judge."

"I find as a conclusion of law that there is due the plaintiff from the defendant \$297.18. Robert W. Miers, Judge."

The only issue tendered by appellant upon which a defense is based was payment. Keeping in mind the settled rule that the special finding, when reasonably and fairly construed, must disclose all the facts essential to appellant's recovery either by direct finding or necessary inference. (Railway Co. v. Costello, 9 Ind. App. 462, 36 N. E. 299; Becknell v. Hosler, 10 Ind. App. 5, 37 N. E. 581), the facts set forth are insufficient to establish payment of the amount due upon either receipt. There is no direct finding of any amounts paid by the company to appellee, nor of any acts done which were intended for and accepted as payment. Nothing appears to connect the appellant with the credit on appellee's account with the bank. Were it found that the appellant had paid the bank the money, or made any arrangement with the bank by which it was to take up its vouchers, and that this arrangement was known to the appellee, a different question would be presented. The simple act of the bank in voluntarily placing to appellee's credit upon its books the amount of his receipt, without his knowledge or consent, could not operate as a payment. Appellee has a right to demand the money, or something which he agreed to accept as money. The mere fact that he continued to check upon the bank after this credit, but in ignorance of it, could not amount to a ratification of the credit. Knowledge is an essential element of ratification. Willi-

son v. McKain (Ind. App.) 39 N. E. 886. He may simply have intended to overcheck his account, expecting to make it good when he collected the money from appellant or from some other source.

As to the amount represented by the second receipt, there is an utter failure to find anything which would be equivalent to a payment. The payment of appellee's debts by appellant could not operate as payment of appellant's debt to appellee, unless authorized or ratified as such by appellee. It was appellee's right to control the disposition of his own funds. Had the payments been pursuant to his direction, or upon obligations which were liens upon appellant's property, then appellant's position might be supported. None of these things appear.

Some argument is made in favor of appellant's right to a new trial. As stated by appellant's counsel, "The real controversy was whether appellee had agreed to or did accept the credit at the bank instead of the cash." Appellee, in his evidence, insisted strenuously that he had done neither. Conceding that, as claimed by appellant, the preponderance of the evidence upon this point was with appellant, still it was the province of the trial court to pass upon this question; and its determination, where there was a conflict, cannot be reviewed by us. Judgment affirmed.

(12 Ind. App. 23)

ROGERS et al. v. SCHNEIDER.

(Appellate Court of Indiana. June 13, 1895.)

STOPPAGE IN TRANSIT—DELIVERY TO BUYER.

1. As affecting the right of stoppage in transitu on account of the insolvency of the vendee, it is a question for the jury whether the transit has ended when the vendee, being unable to pay the freight, was, to save demurrage, allowed by the railroad to unload the cars, and pile the goods in its yard until he could pay the freight.

2. The fact that the vendor took the notes of the vendee for the purchase money does not affect his right to stop in transitu.

Appeal from circuit court, Marion county; Thomas L. Sullivan, Judge pro tem.

Action by Louis Schneider against William A. Rogers and others for conversion of property mortgaged by the South Side Foundry Company to plaintiff. From a judgment for plaintiff, defendants appeal. Reversed.

S. Claypool and J. W. Claypool, for appellants. L. C. Walker and W. A. Van Buren, for appellee.

LOTZ, J. This action involves the right of a vendor of personal goods to stop and retake them while in transit to the vendee. It arises in an action to recover the possession of goods, brought by the appellee against the appellants. Rogers, Brown & Co. was a co-partnership engaged in selling iron. The South Side Foundry Company was a co-partnership engaged in manufacturing iron

in the city of Indianapolis. About the 20th of April, 1893, Rogers, Brown & Co. sold to the South Side Foundry Company 47 tons of pig iron. The sale was made on four months' time, and the South Side Foundry Company executed its notes, payable to the vendors, for the purchase price. The iron was shipped by rail from Ensley, Ala., to Indianapolis, and arrived on board two cars at the freight yards of the Pennsylvania Railroad Company in said city some time in the month of May, 1893. The cars containing the iron remained standing in the yards for a period of 51 days. The railroad company frequently made demands upon the consignee for the payment of the freight, but the freight was not paid. The railroad company also charged one dollar per day for each car, as demurrage or car service. Some time in the month of July the railroad company, at the request of the consignee, placed the two cars containing the iron at another place in its yards, being the place where it was customary to unload such iron; and the servants and employes of the South Side Foundry Company, with the permission and consent of the railroad company, did unload the cars, by throwing the iron upon the ground, and piling it up in the yards of the company near the railroad track. On the 12th of August, 1893, the South Side Foundry Company became and was insolvent. Rogers, Brown & Co., learning of such insolvency, on that day served notice upon the railroad company not to deliver the iron to the South Side Foundry Company, and directed it to hold the iron subject to further orders from them. On the same day the South Side Foundry Company, being indebted to the appellee, Louis Schneider, in the sum of \$800, for money borrowed, executed a mortgage on the pig iron to secure such indebtedness. This mortgage was duly recorded two days thereafter. On the 13th of August the South Side Foundry Company made a general assignment, under the laws of this state, for the benefit of its creditors. Rogers, Brown & Co. subsequently paid to the railroad company \$152.75 freight and \$102 demurrage,—in all, \$254.75,—and took possession of the iron, and removed it to the premises of their coappellant, the Indianapolis Foundry Company, which had possession of it at the time this suit was instituted. The notes executed by the South Side Foundry Company for the purchase price of the iron have never been paid, nor has the South Side Foundry Company ever paid therefor in cash. Nor did it ever pay the freight and demurrage. The appellee made a demand upon the appellants for the possession of the iron before this suit was instituted. All these facts are undisputed.

Thomas Markey, a member of the South Side Foundry Company, and a witness for appellee, testified as follows: "I went to see Mr. Perry, who is the agent of the railroad, and asked him to give me an order to throw the iron off. Perry gave me an order to

throw the iron off, and I took it down * * * to the yard master, and I gave the order to him, and we went up on the track, and located the cars. 'Now,' he says, 'you can throw it off here, or you can throw it off above,—just as you like.' It was the handiest place to unload it,—we can haul it out,—and I told him to set it there, and I could unload it. * * * I went up to the office in the afternoon, and sent four men down there to unload it; and afterwards, later on, I came by to see how they were getting along, and they were unloading it, and I remarked to them to keep it up close, because it was unloaded right between the driveway and the track. I told them to keep the iron up close. I knew the iron was there. I afterwards went there and saw it. I used generally to go around. * * * I used to go by and see when the iron was thrown off, [and] to see that they hauled it all away, and sometimes to see that none would take the iron out of the yards. Ques. What understanding or what agreement as to the payment of the freight to the [railroad company] was there, if any? Ans. There was none; no more than usual. We used to throw the iron off, and would then send a check down. * * * Ques. What, if any, agreement did you have with * * * Perry as to the railroad company's holding the iron? Ans. I went down to see * * * Perry. I asked him if I could throw that iron off for us; that he might hold it there until the freight was paid. He said, 'Yes, sir,' we might; and he gave me an order to the yard master to have it thrown off. That was the understanding. Ques. You may state * * * whether or not that had been your usual course of dealing with this railroad company at that time and place. Ans. Yes, sir." Mr. Perry, the freight agent of the railroad company,—a witness for the appellants,—in his examination in chief concerning the unloading of cars, testified as follows: "These cars, with the freight on them, were held by our company because the freight had not been paid. We declined to deliver it to the South Side Foundry Company unless the freight was paid. They not being able to pay the freight, the cars remained in our yards this length of time, and we made several attempts to collect the freight, sending word to Mr. Markey by telephone, and also by collector, and I think he finally came up. There were three cars in the yard,—one other car besides these two. He paid the freight on one car to the cashier, and came into my room, and said that he had paid for one car, but was not yet able to pay for the others. I told him that the car service was running up on it very heavily, and we needed the cars very badly, and he ought to make some arrangement; that it would be cheaper for him to borrow the money than to pay us that heavy rate of interest,—a dollar a day on each car,—and we needed the cars very badly. And then he said he acknowledged that he had imposed upon us somewhat, and said

that he was willing to unload this material on the ground, furnishing his own men, in order to release these cars; that he was not able to pay these bills. That is the way I came to issue this order to the yard master to set these cars where they could be unloaded, and also saw the yard master in person, and told him to be sure and set them some place where they would be under the eye of our watchmen night and day. There was nothing said about carrying the freight for him, or anything of that sort; * * * nothing said about storing these until he could pay the freight. We had no conversation about the payment of the freight. Ques. Was there any agreement of that kind,—that you would hold it until he paid the freight? Ans. No, sir; just exactly the contrary. We were trying to get him to take his freight. * * * Ques. What, if any, agreement was made between you and Mr. Markey about the possession of those goods? Ans. No agreement whatever; no agreement at all. Ques. What agreement, if any, was made between you and Markey about holding those goods in storage for them? Ans. None whatever; no agreement. Ques. State whether or not you gave them any permission to come and take the goods away. Ans. No, sir; on the contrary, I had very strict watch kept over them by watchmen, day and night, to see that they did not take them away. Ques. Why were they unloaded? Ans. They were unloaded to release the cars, and to stop the car service. Ques. Was there any other purpose for their unloading? Ans. No, sir; not so far as we were concerned." And on cross-examination this witness testified as follows: "Ques. All the control you claimed was simply to get your freight, was it not? Ans. That is, the carriage. Ques. You just wanted your freight? That is all you wanted? Ans. Yes, sir. Ques. And, whatever you did, you just took the necessary precautions to see that you didn't lose your lien for freight? Ans. Yes, sir. Ques. And you could claim the goods, as far as you were concerned, as carrier, for freight? That is all you were interested in? Ans. Yes, sir; I was interested for our company." And on re-examination the witness testified as follows: "Ques. That you could do at any time before the notice to hold the goods. Ans. Yes, sir; we were doing that every day. Ques. I will ask you whether or not you ever, recently, let this company take goods away from that yard without paying the freight? Ans. No, sir; I think not, for two years last past." At the conclusion of the evidence the plaintiff moved the court to instruct the jury to return a verdict in his favor. This motion was sustained, and a general verdict returned in his favor, on which judgment was subsequently rendered. This action of the court was one of the causes assigned for a new trial.

It is within the power, and it is the duty, of the court to direct the verdict, in a proper case. If the controlling facts are all admit-

ted, or are undisputed, and but one reasonable inference can be drawn, it is not error for the court to instruct the jury what the verdict should be. *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, and 10 N. E. 581. Was this rule of practice properly applied in this case? The right of a vendor of personal property to retake it before it comes into the actual possession of the vendee, upon the vendee's insolvency, or inability to pay therefor, is highly favored, on account of its intrinsic justice. One man's goods ought not to be taken to satisfy the debts of another. The vendor, if it be possible to do so, without violating any principle of law, should have the prior right to make himself secure out of the property which gave rise to the debt due him, and, to this end, he may retake the goods at any time before the transitus ends. A clear and unequivocal case of the termination of the transit should be made out by the evidence before the vendor should be deprived of this right. The transit does not necessarily end upon the arrival of the goods at the point of their destination, but continues so long as they remain in the possession and control of the carrier as such. It is true that the carrier may convert himself into an agent for the vendee, or receive and store goods as a warehouseman, and thus terminate the transit before the goods come into the actual possession of the vendor. This constitutes a constructive delivery to the vendee, and the vendor's right of stoppage in transitu is lost. *Benj. Sales*, § 1117; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Williams v. Hodgas* (N. C.) 18 S. E. 83. There are some cases which hold that when the carrier, by arrangement or agreement with the vendee, becomes his agent or warehouseman, the agreement, in order to terminate the transitus, must be supported by a consideration. *Farrell v. Railroad Co.* (N. C.) 9 S. E. 302; *Whitehead v. Anderson*, *supra*. On the other hand, there are cases which hold that any arrangement made between the consignee and the carrier by which the carrier becomes a bailee for the goods will end the transitus. We do not find it necessary to go to either of these extremes in this case. Whether or not the transitus had ended, or in what capacity the railroad company held the iron,—whether as carrier or bailee,—at the time the mortgage was executed, was a question of fact, to be determined from all the evidence in the case, and should have been submitted to the jury. If the evidence was conflicting upon these questions, or if it was undisputed, and two reasonable inferences arise therefrom, it was within the province of the jury to determine the conflict and to draw the inference, and these questions should not be arbitrarily taken from it. The evidence makes a strong impression upon our minds that the railroad company had not ceased to be a carrier, in relation to the iron, at the time the appellant exercised its right of stoppage in transitu. At all events, under the circumstances

of this case, the appellant was entitled to go to the jury on that question. Nor does the fact that the appellant took the notes of the South Side Foundry Company for the purchase money of the iron deprive it of its right of stoppage in transitu. *Benj. Sales*, § 1144. Judgment reversed, with instructions to sustain motion for a new trial.

(13 Ind. App. 294)

JEMISON et al. v. STATE ex rel. EBERSOLE et al.¹

(Appellate Court of Indiana. June 13, 1895.)

APPEAL—RECORD—CLERK'S CERTIFICATE—BILL OF EXCEPTIONS.

1. A record on appeal, bearing the clerk's certificate under a certain date to the correctness of all papers filed in the suit prior to that date, and to which is attached a bill of particulars, signed 30 days after the date stated, will not be considered.

2. A bill of exceptions, which was not filed in the clerk's office after being signed by the court, will not be considered on appeal.

Appeal from circuit court, Huntington county; Joseph W. Adair, Judge.

Action by the state, on the relation of Charles C. Ebersole and others, against Richard W. Jemison and others, on an administrator's bond. Judgment was rendered for plaintiff, and from an order denying a motion for a new trial defendants appeal. Affirmed.

Spencer & Branyan and Branyan & Branyan, for appellants. Sayler & Sayler, for appellee.

ROSS, J. This was an action brought in the name of the state of Indiana, on the relation of Charles C. Ebersole, Mary L. Ebersole, and Raphael E. Ebersole, against Richard W. Jemison, George W. Hamilton, and Theodore H. Pickle, on a bond given by said Jemison, as administrator of the estate of Mary Ebersole, deceased, to recover a balance alleged to be in his hands as such administrator, and for which he had not accounted. The questions presented on this appeal arise on the ruling of the court in overruling the appellants' motions for a new trial. To decide the questions urged requires us to examine and consider the evidence given on the trial of the cause. This we cannot do unless the evidence is properly in the record. The evidence in this case is not properly in the record. In the first place, the certificate of the clerk, attached to the record, and which bears date August 10, 1894, certifies to the correctness of all papers filed and proceedings had in the cause prior to that time, but it can be no authentication of the correctness of papers filed or proceedings had subsequent to that time. That which is attached to the record, and purports to be a bill of exceptions, was not signed by the court until September 17, 1894, more than 30 days after the record was certified to by the clerk. Again, the record fails to show that the bill of exceptions was

filed in the clerk's office after it was signed by the judge. The statute (section 629, Rev. St. 1881; section 641, Rev. St. 1894) provides that "when the record does not otherwise show the decision or grounds of objection thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause; if not true, the judge shall correct, sign and cause it to be filed without delay. When so filed, it shall be a part of the record." If the longhand manuscript has been filed within the time allowed by the court, then embodied into a proper bill of exceptions, and tendered to the court for approval and signature within such time allowed, the delay of the court in signing and filing shall not deprive the party presenting it of the benefit thereof. Rev. St. 1881, § 629 (Rev. St. 1894, § 641). But it must be filed with the clerk after it has been signed by the court, in order to become a part of the record. "Until filed, it is no part of the record, and, unless the filing is affirmatively shown by the proper record, there is no evidence of the fact upon which the appellate tribunal can act." *Horman v. Hartmetz*, 128 Ind. 353, 27 N. E. 731. In *Elliott*, App. Proc. § 805, it is said: "A bill of exceptions, although signed, is not part of the record until it is filed." The evidence not being in the record, the judgment will have to be affirmed.

(13 Ind. App. 39)

FARGO et al. v. REIGHARD.

(Appellate Court of Indiana. June 13, 1895.)

POWER OF ARBITRATORS—CHANGE OF AWARD.

While arbitrators, after making an award, cannot change it, though defective, except on a resubmission, yet, where an agreement of submission empowers the arbitrators to ascertain and state a person's interest in a land contract, which does not amount to an ownership of it, a statement made by them that the property is of a certain value is not an award, and they can make a further statement as to the value of the person's interest.

On petition for rehearing. Denied.

For former report, see 39 N. E. 883.

ROSS, J. Counsel for appellees ask a rehearing, and in argument assume that it was held by the court in the original opinion that the arbitrators had a right, after their award had been made, to change it or to withdraw it and make another without a new submission by the parties. Possibly the language used in the opinion does not leave this question free from doubt as to what we intended to hold, and for that reason we reaffirm that if the statement made by the arbitrators September 17, 1895, was an award, under the agreement of submission, although defective, it would nevertheless exhaust their powers, and could not be changed or withdrawn by them except upon a resubmission. We do

¹ Rehearing denied.

not question the correctness of the decisions on the many cases cited by the learned counsel wherein it is held that, when the arbitrators have made an award upon the question submitted to them, they have no further power to act, even though their award is defective. But until an award has been made upon the matters submitted to them they have power to act. The agreement of submission under consideration empowered the arbitrators to ascertain and state appellees' interest in a land contract, which it was apparently conceded did not amount to an ownership of the property. This interest did not equal the value of the property for the reason that the property was encumbered. The agreement limited the power of the arbitrators to the consideration and determination of appellees' interest therein. That was the power granted them. Any statement made or value fixed touching any matter not submitted to them was not binding either upon them or the parties. This is the view we take of the statement made September 17th. It was not an award of and concerning the subject-matter submitted to them, hence had no binding force or effect.

Petition overruled.

(13 Ind. App. 110)

PEOPLE'S NAT. BANK v. WINTON.

(Appellate Court of Indiana. June 14, 1895.)

ACCOMMODATION NOTE—NOTICE OF NONPAYMENT.

An allegation that at the time of the execution of a note sued on to defendant the latter indorsed it to plaintiff, who, for defendant's sole benefit and accommodation, paid to the maker its face value, is not sufficient to show that defendant was the party accommodated as between him and the maker, so that notice of dishonor was not necessary.

Appeal from circuit court, Daviess county; D. F. Hebron, Judge.

Action by the People's National Bank against Charles F. Winton, indorser on a note. From a judgment for defendant, plaintiff appeals. Affirmed.

James W. Ogdon and Ephraim Inman, for appellant. Gardner & Gardner and C. R. Tharp, for appellee.

GAVIN, J. The appellant sued the appellee, as indorser of a note payable to him or order at a bank in this state, and by him indorsed. A demurrer was sustained because the complaint failed to aver notice to appellee of the nonpayment. The note was, under our statute, negotiable as an inland bill of exchange. Rev. St. 1881, § 5506 (Rev. St. 1894, § 7520). Having, therefore, the character of the mercantile paper, the indorser would ordinarily be entitled to notice of nonpayment, in order to hold him. *De Pauw v. Bank*, 128 Ind. 553, 25 N. E. 705, and 26 N. E. 151. Counsel for the appellant claim, however, that the facts averred bring this case within a well-recognized exception to the

general rule, and that no notice was necessary. The complaint avers that the North Bedford Stone Company, by its note, etc., promised to pay appellee \$250, etc.; that at the time of the execution of the note the appellee indorsed it to appellant in consideration of its advancing and paying over to said stone company \$250 for him, and his sole accommodation; that at the time of the indorsement of said note the appellant did, at the request of the appellee, and for his sole use and benefit, and to accommodate the appellee, advance and pay over the money to said stone company, and that this sum so paid was the only consideration ever advanced or paid on said note. The exception to the rule of which appellant seeks the benefit is quoted by counsel from Story on Promissory Notes, as follows: "If the note be given for the accommodation of the indorser only, and he has the sole interest in its payment, and must eventually pay the same, notice to him of dishonor is not necessary." The law is thus laid down in *Rand. Com. Paper*, § 1212: "But, where the drawer is himself the party accommodated, he will not be discharged by want of notice of dishonor, inasmuch as, if he paid the bill, he would acquire no rights thereby against the acceptor, and therefore cannot be injured by want of notice." Again, at section 1205: "But an indorser for whose accommodation the paper has been given is not entitled to notice." The averments of the complaint are not broad enough to bring this case within these exceptions. The complaint does not disclose that, as between the maker and payee or indorser of the note, the payee was the party accommodated. Under these allegations we should conclude that, while the discounting or purchase of the note was done by appellant for the benefit and accommodation of appellee, the note, in its inception, was for the accommodation of the maker, who received the money. It does not appear but that it was simply a loan of his credit by appellee to the stone company, or, so far as is shown, appellee may have agreed to make to the stone company a loan of the amount, and, upon receiving its note, may have arranged with appellant to buy the note with his indorsement; and by his direction the appellant may have paid the money, as averred, to the maker of the note, in fulfillment of appellee's obligation to furnish or loan the maker that amount of money upon its note. It is clear to us that appellant may have discounted the note and paid over the money solely for the use and benefit and for the accommodation of appellee, and yet he may not have been the accommodated party, taking the entire transaction together. In truth, in a sense, whenever the holder and owner of a note procures it to be discounted by another, and assigns it to him, the money is paid by the assignee for the use and benefit of the indorser. To apply the rule as broadly as asserted by appellant would dis-

pense with the necessity of notice of dishonor in most cases. That the liability to appellant assumed by appellee on account of his indorsement is that of an indorser only, is not controverted. *Armstrong v. Harshman*, 61 Ind. 52; *Stack v. Beach*, 74 Ind. 571; *Armstrong v. Cook*, 30 Ind. 22; *Holton v. McComick*, 45 Ind. 411; *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594. In our opinion, the allegations are not sufficient to show that the stone company was only an accommodation maker, and that appellee was the principal debtor. 2 Rand. Com. Paper, § 472; *Byles, Bills*, 131; 1 Pars. Notes & B. 184. Judgment affirmed.

(13 Ind. App. 70)

WALSH v. BROCKWAY et al.

(Appellate Court of Indiana. June 14, 1895.)

On rehearing. Denied.

For prior report, see 40 N. E. 29.

DAVIS, J. Counsel for appellant, in their petition for rehearing, insist that the appeal should not have been dismissed, because the judgment from which Walsh appeals is not a joint judgment against him and Brockway; and, second, because the defect of parties was waived by appellees before the suggestion was made that the appeal should be dismissed. If it was conceded that counsel were correct on these propositions, an examination of the record discloses that a rehearing would not avail appellant. The only errors assigned bring in review the sufficiency of the complaint, and the action of the court in overruling appellant's motion for a new trial. The point is made by counsel for appellee that the evidence is not in the record. There is no entry, statement, or memorandum in the record showing that the bill of exceptions was ever filed. *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305. Appellant and Brockway jointly demurred to the amended complaint, and reserved a joint exception to the ruling. The complaint, in any view of the case, states a good cause of action against Brockway. There was no error in overruling the demurrer. An attempt has also been made to question the sufficiency of the complaint by an assignment of error, but the complaint is certainly good when attacked after verdict for the first time. Waiving all technicalities, and construing the record in the light most favorable to appellant, no error is presented that would justify a reversal of the judgment of the court below. The petition for a rehearing is overruled.

(13 Ind. App. 31)

WILSON v. SMELSER.

(Appellate Court of Indiana. June 13, 1895.)

EVIDENCE—SELF-SERVING DECLARATIONS—BREACH OF MARRIAGE PROMISE.

In an action by a woman for breach of marriage contract, declarations made by her dur-

ing and relative to the alleged engagement, in the absence of the defendant, if not uttered in connection with some act or conduct of the defendant showing his intention to marry plaintiff, are inadmissible.

Appeal from circuit court, Clinton county; Samuel H. Doyle, Judge.

Action by Centrilla Smelser against William Wilson for breach of marriage contract. From a judgment for plaintiff, defendant appeals. Reversed.

P. H. Dutch and Mr. Claybough, for appellant. Ralston & Keefe and W. A. Staley, for appellee.

REINHARD, C. J. This was an action for a breach of marriage contract, in which the appellee recovered a judgment for \$1,800. At the trial the appellee's counsel, while she was on the stand testifying in her own behalf, asked her the following questions: "During the time you were engaged to him, what statements, if any, did you make to your relatives about your prospective marriage to the defendant?" To this question the appellant, by counsel, objected, for the reason that any statements she may have made outside of the hearing of the appellant are not admissible, and that declarations made in a general way by the party, of her intentions to get married, and her prospects, in the absence of the appellant, are not proper. The court overruled the objection, and the appellant excepted. The witness, having stated that she did not understand the question, was then asked the following: "If, during the time that you were engaged to the defendant, you informed your parents or other relatives that you were engaged to him, you may state that fact to the jury." The appellant objected to this question "for the reason that, if any such statement was made, it was made in the absence of the defendant. It also presupposes the fact of the engagement, and evidence of this character is mere evidence manufactured by the plaintiff, being her own statements to persons outside, for the purpose of establishing a marriage contract, which cannot be done." The court overruled the objection, and an exception was reserved by the appellant. The counsel for appellee next asked her this question, she having answered the last question in the affirmative: "Now, what did you say to your parents or other relatives, in that connection, about your marriage to Mr. Wilson?" Appellant again objected for the reason that it was a statement made in the absence of the appellant. The court overruled the objection, and the appellant excepted. The witness answered, "That Mr. Wilson and I were to be married." Counsel then moved to strike this answer from the record, for the reason that it was not responsive to the question. This motion the court sustained, and the counsel withdrew the question. Subsequently, the appellee's counsel again asked her to state what she said to her

parents about their engagement, if anything, and the appellant objected for the reason that her statements in the absence of appellant were not competent testimony; but the court overruled the objection, and the appellant excepted. The witness then, over the objection and exception of appellant, proceeded to state that she had told her parents they were to be married the 1st of October. The appellant moved to strike out the question and answer for substantially the same reasons already urged, but the court overruled the motion, and permitted the witness to proceed with the testimony upon the line indicated, to all of which rulings the appellant reserved proper exceptions.

Mere self-serving declarations, made by a party in the absence of the other, are ordinarily not competent to be given in evidence by the party who made them. Such statements are classed among that branch of declarations denominated as "hearsay evidence," and are incompetent. *Meyer v. Bell*, 65 Ind. 83; *Olvey v. Jackson*, 186 Ind. 286, 4 N. E. 149; *Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 283; *Machine Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053. One of the exceptions to the rule that hearsay evidence will be excluded is that, when a declaration is made by a party during the performance of an act which is itself the subject of legitimate proof, such declaration is admissible as part of the *res gestae*. *Puett v. Beard*, 86 Ind. 104; *Shauver v. Phillips*, 7 Ind. App. 12, 34 N. E. 450. In an action for a breach of marriage contract, it is competent for the female plaintiff to prove her own consent to the alleged contract; and this may be done by evidence of her own conduct during the engagement, and before the estrangement between the parties, and her declarations accompanying the same. Such declarations, however, in the absence of any act of hers of which they could be explanatory, or to which they might give character, are not proper evidence. *King v. Kersey*, 2 Ind. 402; 2 *Lawson, Rights, Rem. & Prac.* § 696. Thus, the plaintiff's acts of preparation for marriage, and her declarations in furtherance of such acts, as a part thereof, and showing the matrimonial intent, are competent in her favor, although made in the defendant's absence. *Abb. Tr. Ev.* pp. 676, 677. It has also been held by this court that the declarations and manifestations of grief and disappointment on the part of the bride at the failure of the bridegroom to appear at the hour appointed for the marriage ceremony were competent testimony. *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. 745. In the case before us the declarations admitted were not made, and did not purport to have been uttered, in connection with or during the performance of any act of which they can be said to form part of the *res gestae*. The questions by which the testimony of the declarations was elicited clearly show that it was intended to prove only her bare statements to her parents and relatives, made in the absence of the appellant, relative

to the alleged future marriage or the engagement of the parties. Such declarations are clearly incompetent. *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363; *Cates v. McKinney*, 48 Ind. 562, 566. In the case first cited it was said by the supreme court: "The declarations would have been incompetent, had they been made before the alleged estrangement, for the reason that they were coupled with no act of the appellee indicating that she contemplated marrying the appellant. But had the declarations accompanied some act of the appellee which would have rendered them competent, if a part of the *res gestae*, having been made days after the estrangement, they were incompetent for any purpose." Of course, the objection that the declarations were made after the estrangement does not apply in the present case. But that they were made in connection with some act or conduct of the appellee indicating an intention to marry the appellant is not claimed. We have examined the record carefully, and are not able to concur with appellee's counsel in the view that the admission of this evidence, if erroneous, was harmless. The appellant was entitled to a new trial.

Judgment reversed.

(12 Ind. App. 696)

ACKER et al. v. MASSMAN.

(Appellate Court of Indiana. June 14, 1895.)

MECHANIC'S LIEN—PLEADING—WAIVER OF PRIORITY.

1. In an action to foreclose a mechanic's lien, and for judgment of foreclosure against a junior mortgagee, an answer which alleges that plaintiff informed the mortgagee that he released his lien, and thereby induced the mortgagee to advance money, and accept a mortgage on the property as security therefor, and that plaintiff, with full knowledge of all the facts, accepted, and still retains, a part of the money so advanced, is not demurrable.

2. Where the answer also alleges that at the time of the execution of the mortgage it was agreed between the mortgagee and plaintiff that the lien of the mortgage should be superior to any lien which plaintiff might have for material and labor, it is not demurrable.

Appeal from circuit court, Jackson county; Samuel B. Voyles, Judge.

Action by Anton Massman against the Bruning & Acker Mill Company for labor and materials, to foreclose a mechanic's lien, and for judgment of foreclosure against Anna M. E. Acker, a junior mortgagee. From a judgment sustaining demurrers to her answer, defendant Acker appeals. Reversed.

Applewhite & Applewhite and O. H. Montgomery, for appellant. W. T. Brannaman and Wm. K. Marshall, for appellee.

DAVIS, J. The appellee instituted this action against the Bruning & Acker Mill Company upon an account for work, labor, and materials and to foreclose a mechanic's lien, and made appellant, Anna M. E. Acker, a party defendant thereto, and asked for judg-

ment of foreclosure against her as a subsequent and junior mortgagee. She answered in three paragraphs, and the court sustained demurrers to the second and third paragraphs. These rulings are properly assigned as errors in this court. The theory of the second paragraph is that appellee, by his statements, acts, and conduct, is, and ought to be, estopped from asserting a lien superior to appellant's mortgage. Its principal averments are that Massman had performed all the labor and furnished all the material for which he claims a lien, and made full settlement with the corporation, Bruning & Acker Mill Company, before appellant's mortgage was executed; that, before making the loan evidenced by the note and mortgage of appellant, and before accepting the same, William Acker, the mortgagee, went to appellee, and informed him of what the company proposed to do in the way of making this mortgage loan, and that Massman expressed himself as satisfied, and further said that he released all claims to a lien on said property; that Acker would not have made the loan but for such statements, as appellee well knew, and, relying thereon, was induced thereby to, and did, part with \$5,000, and accept said note and mortgage; that appellee received and accepted a part of the money so obtained from appellant with full knowledge of all the facts, and still retains the same; that appellant purchased the said note and mortgage relying on the statements of appellee aforesaid, and otherwise would not have accepted the same; that said corporation is now insolvent, and its property not sufficient to pay both appellant and appellee in full. In the third paragraph, in addition to setting out the circumstances and inducements under which the mortgage was taken, and the fact of its assignment to appellant, it is averred that at the time of the execution of said note and mortgage and the acceptance of the same by William Acker it was agreed by and between the said William Acker and the appellee that the lien of said mortgage was to be, and should be, superior and senior to any lien which appellee might have for the material, work, and labor furnished and performed by him in rebuilding the mill mentioned in the complaint and mortgage. In our opinion, each paragraph of the answer was sufficient to withstand the demurrer. On the facts alleged, the appellee is estopped to assert priority of lien. *Jones, Mortg.* §§ 603, 608; *Jaqua v. Shewalter* (Ind. App.) 37 N. E. 1072. The appellee was entitled to priority of lien, but he had the right to waive such priority, and, having informed Acker that he released such lien, and thereby induced said Acker to part with his money and accept a mortgage on the property as security therefor, in the belief that such mortgage was the first and prior lien thereon, and having, with full knowledge of all the facts and circumstances alleged in the answer, accepted and retained a part of the money so loaned to said com-

pany by Acker, the appellee is, in equity and good conscience, estopped from asserting that his mechanic's lien, which he afterwards filed, is superior to the lien of appellant's mortgage. Judgment reversed, with instructions to overrule the demurrer to the second and third paragraphs of the answer.

(13 Ind. App. 67)

CRISWELL v. WHITNEY.

(Appellate Court of Indiana. June 14, 1895.)

CONFLICT OF LAWS—ASSIGNMENT OF INSURANCE POLICY—PROCEEDS OF INSURANCE—PAYMENT TO ONE NOT ENTITLED—RECOVERY BY BENEFICIARY—EXECUTION OF CONTRACT—EVIDENCE OF MISTAKE.

1. A judgment will not be reversed because a demurrer to one paragraph of the complaint was improperly overruled, where it is clear from the special findings that the judgment was rendered on other paragraphs.

2. An assignment of a life insurance policy is governed by the laws of the place where the assignment is made. *Insurance Co. v. Woods* (Ind. App.) 37 N. E. 180, followed.

3. It is no defense to an action for the proceeds of a life insurance policy belonging to plaintiff, which were collected by defendant, that plaintiff has a right of action on the policy against the insurance company.

4. Where findings are silent as to affirmative matters set up by appellant, they will be regarded as having been found against him.

5. On an issue as to whether, in signing the transfer of a life insurance policy, plaintiff knew that it was such transfer, she may testify as to how much she understood the policy to be for.

Appeal from circuit court, De Kalb county; S. A. Powers, Judge.

Action by Rebecca E. Whitney against John F. Criswell to recover the proceeds of a life insurance policy collected by defendant. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Marshall, McWagny & Clungston, for appellant. H. G. Zimmerman, for appellee.

GAVIN, J. The appellee sued to recover certain insurance money belonging to her, as the owner of the policy on her deceased husband's life, but collected by appellant. The complaint was in six paragraphs. Various answers, including the general denial, were filed. The trial was had, and a special finding made by the court, with its conclusions of law thereon, upon which judgment was rendered in appellee's favor.

It is urged that the demurrer to the first paragraph of complaint for want of facts ought to have been sustained. If this paragraph is properly construed by appellant's counsel, and is bad for want of the averments which they assert to be wanting, the error was harmless, because the judgment is clearly shown, by the special finding, to rest on the other paragraphs. *Doan v. Dow*, 10 Ind. App. —, 35 N. E. 709; *Tewksbury v. Howard* (Ind. App.) 37 N. E. 355; *Hill v. Pollard*, 132 Ind. 588, 32 N. E. 564. Vide, also, as bearing on the availability of the alleged

error when there is a special finding or verdict, *Woodward v. Mitchell* (Ind. Sup.) 89 N. E. 437.

It is also insisted that the demurrer to the third paragraph should have been sustained. Appellee was the beneficiary named in a policy for \$1,000 issued by the Union Central Life Insurance Company in 1882. The appellant's claim to the proceeds of the policy seems to have been based on an assignment made by appellee and her husband in 1885, which purports to assign the policy to "the legal representatives" of the husband. Subsequent to the husband's death the appellee signed a statement that appellant owned the policy, waiver of all interest therein, and receipt for the money, upon which the company paid the money to appellant. Numerous facts are set out to show that the original assignment was inoperative to divest appellee's right to the fund, and that the papers signed by her after her husband's death were executed without any consideration, and without knowledge by her of their contents, and with the belief that they did not refer to her policy. But two objections are presented to the pleading. To make the first tenable, we are asked to overrule the case of *Insurance Co. v. Woods*, (Ind. App.) 37 N. E. 180, so far as it holds that the contract of assignment there under consideration was an Indiana contract. No authority is cited to support this demand, and we do not feel justified in complying with it. On the contrary, we regard the decision of that case upon this point as eminently just and proper.

It is next insisted that conceding the assignment to have been void, as executed to secure her husband's debt, then the payment by the company did not relieve it from liability to appellee, and she should look to the company, and compel it to pay the money a second time. Granting that appellee might pursue the company, she is not compelled to. The appellant having received the proceeds of the policy, which were really due to her, she may compel him to pay them over to her. By this means the most equitable result is attained.

We are unable to discover in the findings any material departure from the theory of the case as set forth in the complaint, nor do we think they show a gift of the policy from the appellee to her husband. If the finding falls to speak specifically as to the affirmative matters and facts set up by appellant, then they must be regarded as found against him.

Objection was made to appellee's testifying as to how much she understood a policy to be for, upon the ground that the policy was the best evidence of its own contents. If we correctly interpret the evidence, it was not admitted to prove what the policy actually was, but simply what she understood it to be. This was for the purpose, as were several other questions going to her intention, of sustaining her theory that she signed the papers

believing and intending that something else was covered by them, other than her policy now in controversy.

No material error appears in any of the rulings upon the evidence to which objection has been presented. After quite a careful examination of this record, we do not find any just cause for reversal. The case seems, in some respects, a hard one, since it is evident the appellant has been a large loser by appellee's husband. It is, however, but one more of the already numerous reported cases where hardship would result, however the cause might be determined. Judgment affirmed.

(13 Ind. App. 48)

STONE v. MORGAN.

(Appellate Court of Indiana. June 14, 1895.)

ACTION AGAINST DECEDENT'S ESTATE—COMPLAINT.

A complaint in an action against a decedent's estate by a guardian which alleges that the claim is for "services rendered under contract with decedent in performing manual labor in attending to his physical wants, to making rails, cutting wood, looking after his farm and personal property, by which the said decedent agreed to will the said ward the whole of his estate, valued at \$13,500," does not entitle claimant to recover on a quantum meruit, and is demurrable. *Lutz, J.*, dissenting.

Appeal from circuit court, Monroe county; *R. W. Miers, Judge.*

Action by John D. Morgan, guardian of Samuel Briscoe, against James H. Stone, administrator of William Stone, deceased, on a contract between deceased and plaintiff's ward. A demurrer to the complaint was overruled, and defendant appeals. Reversed.

Fulk & Carr, W. W. Moffett, W. H. Martin, and Loudon & Loudon, for appellant. *H. C. Duncan and A. M. Cunning*, for appellee.

DAVIS, J. The claim in this case is in two paragraphs. The first is as follows:

"Estate of William Stone.

"To John D. Morgan, Guardian of Samuel Briscoe, Dr.

"1886 to 1892. To services rendered under contract with decedent in performing manual labor in attending to his physical wants, to making rails, cutting wood, looking after his farm and personal property, by which the said decedent agreed to will to the said ward the whole of his estate valued at \$13,500.00."

The affidavit thereto attached is in substance that said \$13,500, the balance shown in said account, is justly due and owing to him.

A demurrer was overruled to this paragraph, and proper exception reserved. Appellee, on trial by jury, recovered verdict for \$8,112, on which judgment was rendered against the estate.

The only theory on which the first paragraph can be sustained is that it is an action to recover on the quantum meruit the value of the services rendered. In our opinion this

position is not tenable. The first paragraph is a complaint to recover on the alleged special contract therein mentioned. The value of the services is not referred to. The gravamen of the action is to recover the value of the property. It is not an action to recover for the value of the services rendered, but is an action to recover the value of the whole estate. *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, and 34 N. E. 611; *Knight v. Knight*, 6 Ind. App. 269, 33 N. E. 456; *Hershman v. Pascal*, 4 Ind. App. 330, 30 N. E. 932; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Foerster v. Foerster* (Ind. App.) 38 N. E. 426. This paragraph does not show a *prima facie* indebtedness against the estate. *Brown v. Sullivan*, 3 Ind. App. 211, 29 N. E. 453.

The record does not disclose whether the verdict was based on one or both paragraphs of the complaint. The demurrer to the first paragraph of the complaint should have been sustained. For this error the judgment of the trial court should be reversed. So far as any objection has been urged to the second paragraph, it may be sufficient. It occurs to us, however, that under the most favorable construction, in view of the averment that appellee was placed in possession of all the property, the failure to convey or devise it to him would only entitle him to recover nominal damages. If it is true that he has the property, he is certainly not entitled to recover its value. It is not necessary, however, to consider this question. Neither are we required to determine whether the motion for a new trial should have been sustained.

The judgment is reversed, with instructions to sustain the demurrer to the first paragraph of the complaint, with leave to amend each paragraph, if desired.

LOTZ, J. (dissenting). I am unable to agree with my associates in the conclusion reached, that the first paragraph of the complaint is insufficient, and in the reversal of the cause. After a most careful consideration of all the questions involved in this appeal, I am of the firm conviction that the judgment should be affirmed. The holding of the majority that the first paragraph is bad on demurrer, and that it was reversible error to overrule the demurrer to it, I regard as a radical departure from the established practice, as well as in contravention of the letter and the spirit of the statute regulating the settlement of the estates of deceased persons, and if adhered to will, I believe, hinder and delay the settlement of such estates and impose costs and expenses upon claimants as well as on the estates, and be a prolific source of litigation; a thing which courts ought to discourage rather than foster. These results, which I believe will flow from the majority opinion, are my apology for the long opinion following.

This action was instituted in the Monroe

circuit court by the appellee as guardian of Samuel Briscoe, a minor, and against the appellant as the administrator of the estate of William Stone, deceased. The cause was tried by a jury, which returned a general verdict for the appellee in the sum of \$3,000, on which judgment was rendered. Three errors are assigned in this court: First, the overruling of the demurrer to the amended first paragraph of the complaint; second, the overruling of the demurrer to the second paragraph of the complaint; and, third, the overruling of the motion for a new trial. The demurrers were for want of facts.

The first paragraph is informal and somewhat indefinite in its allegations, but it shows that the estate of the deceased became indebted to the appellee on account of services "rendered under contract with the decedent in performing manual labor in attending to his physical wants, to making rails, cutting wood, looking after his farm and personal property, by which the said decedent agreed to will to the said ward the whole of his estate, valued at \$13,500." This paragraph or claim was duly verified by the appellee, and in the oath it is stated that said amount "is now justly due and owing to him." In filing claims against the estates of deceased persons the statute does not contemplate that formal pleadings shall be adopted. No action by complaint and summons can be instituted. The claimant is only required to file "a succinct and definite statement thereof in the office of the clerk where the estate is pending." Section 2465, Rev. St. 1894 (section 2465, Rev. St. 1881). Much the same rules of pleading govern in filing claims against the estates of deceased persons as prevail in actions before justices of the peace and in presenting claims for allowance before boards of county commissioners. In none of these instances are formal pleadings required. *Ginn v. Collins*, 43 Ind. 271; *Board v. Ritter*, 90 Ind. 362. The purpose of our statutes is to facilitate the settlement of decedents' estates, with as little expense as possible to the claimants, as well as to the estate. It is not expected that the claimant shall employ counsel, and cause his complaint to be prepared with professional skill and accuracy. The statement is sufficient when it apprises the defendant of the nature of the claim, the amount demanded, and states such facts as are necessary to show *prima facie* that the estate is lawfully indebted to the claimant, and contains enough to bar another action for the same demand. *Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91; *Davis v. Huston*, 84 Ind. 272; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511. The pleader, however, is not confined to this informal statement. He may, if he choose, file formal pleadings upon such claim, and form issues of law upon the facts contained in such pleading. When he elects to pursue this course, the sufficiency of the pleadings may be determined and ruled upon as in ordinary civil

actions. *Stout v. Board*, 107 Ind. 343, 8 N. E. 222. The paragraph under consideration does not purport to be drawn with professional skill or accuracy. It is just such a statement of claim as the ordinary nonprofessional claimant would prepare upon the facts indicated. It apprises the administrator of the nature of the claim, that it is upon a contract, and that the estate is indebted to the claimant on account of the services rendered in pursuance thereof. It is in our judgment sufficient to bar another action for the same cause.

It is insisted, however, that the theory of the paragraph is to recover upon a special contract; that the contract, not being in writing, is within the statute of frauds and is not enforceable. The rule that a pleading must proceed upon a single definite theory has but little or no application to claims against estates when the statements are informally prepared and filed by the claimants themselves. A rigid enforcement of the rule that a pleading must proceed upon a single definite theory would often defeat the very purpose of the statute, and lead to hardship and injustice. It would compel the claimant in nearly all cases to incur the expenses of employing skilled and professional counsel. In *Milholland v. Pence*, 11 Ind. 203, a complaint before a justice of the peace which charged that the defendant was indebted to the plaintiff in the sum of \$30, "for one gun obtained by fraud," was held to be sufficient. Whether the complaint proceeded upon the theory of contract, or on the theory of a tort, was immaterial. It stated enough to apprise the defendant of the nature of the action, and was sufficient to bar another recovery. If this be true in actions which must be commenced by complaint and summons, there is no occasion to apply a more rigid rule to a statute which only requires "a succinct and definite statement" to be filed. The general rule is that a party cannot declare on a special contract and recover on the proof of an implied one, nor vice versa (*Foerster v. Foerster* [Ind. App.] 38 N. E. 426); but this rule applies more particularly to formal pleadings. In any event, it is a rule of practice and not of pleading. The statute of frauds does not prohibit the making of contracts; it only withholds a remedy for their enforcement. If the parties make a contract and voluntarily carry its terms into effect, it is then binding upon them, although it could not have been enforced in the courts. It is only when it is executory that the law withholds the remedy for its enforcement. In *Wallace v. Long*, 105 Ind. 522, 5 N. E. 996, a complaint against the estate of a deceased person which sought to enforce a special contract within the statute of frauds was held to be bad on demurrer, and that no recovery could be had upon it; that the proper remedy in such cases was to declare on an implied contract and recover upon the quantum meruit. But in that case the pleader chose to adopt formal pleadings.

He was bound by the theory of his complaint. *Stout v. Board*, supra.

In the paragraph under consideration, the pleader has not promulgated any definite theory as the basis of his recovery. If the proof should be that the contract was taken out of the statute of frauds, he would be entitled to recover upon this paragraph. If, on the other hand, it should be shown that the contract was within the statute, he might nevertheless recover for the value of his services. This seems to be the later and better rule adopted by the supreme court, and also by this court. It has been expressly held that when a complaint declares on special contract, which contract is absolutely void for want of power on the part of one of the persons to make it, and it be made to appear that work has been done or goods furnished which inured to the benefit of the person sought to be charged, a recovery may be had on the same complaint for the value of the goods furnished or work done. *Bass Foundry & Machine Works v. Board Com'rs Parke Co.*, 115 Ind. 234, 17 N. E. 593; *Schipper v. City of Aurora*, 121 Ind. 154, 22 N. E. 878; *Smith v. Board*, 6 Ind. App. 153, 33 N. E. 243. This being the practice with reference to contracts which are absolutely void, so much stronger is the reason why the same rule should prevail in cases where the contracts are not void, but the statute only withholds the remedy for their enforcement. It was also the settled practice in this state prior to the adoption of the Code that in a bill in equity for the specific performance of a contract, if for any reason specific performance could not be decreed, the same court, upon the same complaint, might award damages in lieu thereof. *Johnston v. Glancy*, 4 Blackf. 94.

Under the reform procedure adopted by our Code both legal and equitable jurisdiction is conferred on the circuit court, and both legal and equitable remedies may be blended in the same paragraph of complaint or cause of action. The complaint should demand the relief to which the plaintiff may suppose himself entitled, and if the recovery of money be demanded the amount thereof should be stated. Rev. St. 1894, § 341 (Rev. St. 1881, § 338). But a failure to make a demand, or an improper prayer for relief, will not render a complaint bad on demurrer, if the facts pleaded show the plaintiff entitled to any relief whatever. *Baker v. Armstrong*, 57 Ind. 189. In speaking of the union or combination of legal and equitable jurisdiction and remedies in the same court under the reform procedure, Mr. Pomeroy in his work on *Specific Performance of Contracts* (section 478) uses this language: "In some of the states the courts have gone a step further and have allowed damages, even though the plaintiff knew or had reason to know at the time of bringing his suit that a specific performance was impossible; but only when such relief in the equity action is necessary to prevent a fail-

ure of justice. As an illustration, if a suit is brought to specifically enforce a parol contract within the statute of frauds, the relief being sought on the ground of part performance, and it turns out on the trial that there has been no sufficient part performance, or for any other defect or failure the specific relief is improper, damages, according to certain decisions, may be given, on the ground that otherwise the plaintiff would be without remedy, since no action could be sustained on the agreement in a court at law." In *Sternberger v. McGovern*, 50 N. Y. 12, it was decided that if a complaint states facts constituting a cause of action for specific performance of a contract, and also for damages for the breach thereof, a failure of the first will not prevent a recovery on the second, whatever may have been the prayer for relief. See, also, *Pom. Rem. & Rem. Rights*, §§ 76-86, inclusive. It occurs to me that more technical rules of pleading and practice ought not to be applied to claims against estates than are applied to the ordinary civil actions, and that is what the majority opinion does, if I correctly understand it. A large discretion is given to the trial court in the settlement of decedents' estates. It is the ultimate guardian of the interests of the estate, and when it is satisfied that substantial justice has been done, it may disregard technical errors of pleading and practice, if the pleading is sufficient to bar another action for the same subject-matter, and sufficiently apprise the defendant of what he is required to meet. This event ought not to disturb the discretion reposed in the trial court upon a barren technicality. I am of the opinion that there was no error in overruling the demurrer to the first paragraph.

In the second paragraph of his complaint the pleader had adopted formal pleadings, and within the rule announced in *Wallace v. Long*, supra, and *Hersham v. Pascal*, 4 Ind. App. 330, 30 N. E. 932, he is bound by the theory adopted. It is alleged that the decedent, William Stone, was at the time of his death and during all of his life an unmarried man; that on the 1st day of July, 1888, he had neither father nor mother living; that his only heirs at law were his brothers and sisters living and the descendants of brothers and sisters who were dead; that Samuel Briscoe, the appellee's ward, was an illegitimate son of William Stone, the decedent, and was always acknowledged by him as his natural son; that by reason of the relationship existing between them there was a mutual affection shown by each towards the other, which increased as the age of the decedent increased; that the decedent was the owner of an estate consisting of real and personal property of the value of \$13,500; that the decedent well knowing that he had no other children, and that under the laws of the state of Indiana his son could not inherit his estate, and being advanced in years, to wit, 70 years old, he desired some one to look after his affairs, and having con-

fidence in his son, and desiring that he should have his estate on his death, he entered into a contract with the said son by which it was agreed that he [the son] should look after his estate, both real and personal, attend to such business as he desired, conduct himself towards him as a dutiful and faithful son, administer to his wants, and he, the said decedent, in consideration thereof, would give him all his property, of every description, and previous to his death, in order to more perfectly vest in him the title, would make a will, or either make him a deed for all the real estate and vest the title to all personal property in the said son, or he would make him a will devising or bequeathing to him all the said real estate and personal property of which he might be possessed at his death; that in pursuance of the said agreement the said decedent put his said son in possession of all of said real estate and of a part of said personal property; that the said son fully complied with his part of the said agreement; that he conducted himself towards his said father as an obedient and dutiful son during the lifetime of said decedent; but he says that the said decedent wholly failed to make the said deed or to make the said will, to his damage in the sum of \$14,000, and which he asks may be allowed against his estate.

The first objection urged against this paragraph is that the contract declared on is within the statute of frauds, and therefore not enforceable. In *Wallace v. Long*, supra, a contract somewhat similar was held to be within the statute. It was there alleged that the ward faithfully performed the contract on her part, but there was no allegation that possession had been taken under the contract. It was said that "if the statute of frauds presents no obstacle to the enforcement of the contract, then, so far as the record discloses, none exists. It cannot, of course, be denied that if the contract had been in writing, or if, in pursuance of an oral contract, the plaintiff had been put in complete possession, and she had otherwise fully performed on her part, specific performance could have been enforced." This case differs from that in this essential respect: It is here averred "that in pursuance of the said agreement the said decedent put his said son in possession of all said real estate and of a part of said personal property." This averment takes the contract out of the statute. "It is not essential that the contract should expressly stipulate for the delivery of possession. If the possession is taken in pursuance and execution of the agreement, and with the knowledge of the vendor, it is a good part performance, although the contract be silent in respect to it." *Pom. Spec. Perf.* § 117; *Drum v. Stevens*, 94 Ind. 181, 183.

The case made by this paragraph is very similar to that of *Mauck v. Melton*, 64 Ind. 414, except that that was an action for specific

performance and this is an action to recover damages, the damages to be measured by the value of the property agreed to be conveyed or devised. In that case *Mary Gilmore*, the owner of the land, entered into a parol contract with *Lavisa and Daniel Melton*, by which it was agreed that if they would board and care for the said *Mary* during her life, and attend to all her proper wants, she in consideration thereof would convey the said lands to *Lavisa Melton*, or devise the same to her by will. It was also averred that said *Mary* had put them in possession of said land under said contract, and that they had fully complied with the contract on their part. This contract was held not to be within the statute of frauds, but capable of specific enforcement, and was so adjudged. Here the effort is not to enforce the contract specifically, but to recover the damages for its breach, and to have the damages measured by the value of the property agreed to be conveyed or devised. If an action for specific performance will lie upon the facts alleged, surely an action for damages will lie. In such cases the plaintiff may elect to sue in equity for specific performance, or at law for damages. *Snodgrass v. Snodgrass*, 32 Ind. 406. If he is entitled to specific performance, but choose damages in lieu thereof, the market value of the property agreed to be conveyed or devised is the measure of damages. *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 806, and 34 N. E. 611; *Case v. Walcott*, 33 Ind. 5; *Hopkins v. Lee*, 6 Wheat. 109.

As the effort is to recover the value of the property, it is contended that it is equivalent to an action for specific performance, and that the same rules of pleading apply as in cases of specific performance; that it appears from the complaint that the ward at the time he entered into the contract and performed the services, and at the time of instituting this action, was a minor, and, being a minor, the contract could not be enforced against him; it therefore could not be enforced by him,—in other words, that there is no mutuality of remedy. There are some cases which hold that an infant cannot have specific performance of a contract, owing to a want of mutuality of remedy. *Flight v. Bolland*, 4 Russ. 298; *Blanchard v. Railroad Co.*, 31 Mich. 44; *Pom. Spec. Perf.* § 164. The more recent and better-considered cases declare a contrary doctrine. The case of *Wallace v. Long*, *supra*, was an action by an infant. It was there said that if the statute of frauds presents no obstacle to the enforcement of the contract, then none existed. There may be some reason for the rule contended for when the contract is executory as to both parties, but when the infant has performed his part of the contract he may have specific performance. *Yerkes v. Richards*, 153 Pa. St. 646, 26 Atl. 221; *Wat. Spec. Perf.* §§ 186, 197, 206, 265, and notes. It is here averred that the infant fully performed the con-

tract on his part. There is nothing in this paragraph to disclose that the infant has ever been dispossessed of the property, but no objection is made to it in this respect. It is in any event good for nominal damages. There was no error, in my judgment, in overruling the demurrer.

The majority opinion concedes the sufficiency of the second paragraph. The first and second paragraphs both declare on the same transaction, the only difference being that the allegations of the second are more specific than those of the first. Conceding that the first paragraph is bad, and the second good, as determined by the majority opinion, it is clear that all the evidence that could have been given under the first paragraph necessary to support a recovery on the special contract and take it out of the statute of frauds could have been given under the second. This being true, it is apparent that the ruling on the first paragraph, although erroneous, was not a harmful error, or one that should lead to a reversal. No effort was made to recover upon an implied contract on the trial, and not a syllable of evidence was given upon that theory. The majority opinion, in holding this ruling to be reversible error, in my judgment flies in the face of the statutes, overturns the reformed methods of procedure intended to be adopted by our Code, and resorts to a barren technicality which works great injustice. The statutes expressly forbid an appellate court to reverse a case under the circumstances shown by the record before the court. The sections of the statute are as follows: "But no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appear from the whole record that the merits of the cause have been fairly determined." *Rev. St. 1894, § 348 (Rev. St. 1881, § 345)*. "The court must at every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party and no judgment can be reversed or affected by reason of such error or defect." *Rev. St. 1894, § 401 (Rev. St. 1881, § 398)*. "No judgment shall be stayed or reversed in whole or in part by the supreme court, for any defect in form variance or imperfections contained in the record, pleadings, process, entries, returns or other proceedings therein which by law might have been amended by the court below, but such defects shall be deemed to be amended in the supreme court. Nor shall any judgment be stayed in whole or in part where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." *Rev. St. 1894, § 670 (Rev. St. 1881, § 658)*. There may be some occasion for holding it to be reversible error to overrule a demurrer to a bad paragraph of complaint when there are two paragraphs of complaint founded upon separate transactions, or where the proof under one can-

not be made under the other; but where the same proof can be made under a good paragraph, it is inconceivable how a defendant can be harmed. Courts should exist for the purpose of determining controversies and administering justice, not for the sake of disciplining the parties and prolonging litigation by a resort to barren technicalities, and especially should this be true in the settlement of decedents' estates.

The first cause for a new trial is that the court erred in submitting the cause to the jury for trial. The contention is that the action is one for specified performance, an equity case, and triable by the court without the intervention of a jury. The action is not a suit in equity, but is an action at law for damages, and was properly triable by a jury.

The second cause for a new trial is that the verdict is not sustained by sufficient evidence and is contrary to the law. It is insisted with much force and a large array of authorities that the evidence fails to establish such a contract as the courts will specifically enforce, or give damages measured by the value of the thing agreed to be conveyed or willed. There was some evidence, although meager and unsatisfactory, as it appears to us, that tended to prove the contract and possession taken under it. It is well settled that specific performance will not be decreed unless the contract and the fact that it is not within the statute of frauds are established by competent, clear, and satisfactory evidence, free from doubt and suspicion. This is not an action for specific performance, but assuming, without deciding, that the same rules apply to it as apply to actions for specific performance, the argument of counsel is one more properly applicable in the trial court, or in a court having full equity powers, than in this court. The rule in this court is that if there be any evidence tending to support the verdict or finding, or if the evidence is conflicting on any material question, this court will not weigh it or disturb a verdict founded upon it. This court, in an action to remove a trustee, a proceeding peculiarly within the jurisdiction of a court of equity, by Gavin, J., said: "The rule is thoroughly established that this court cannot on appeal weigh the conflicting evidence to ascertain the real facts, but that it must take that view of the evidence most favorable to the appellee, and if there be any evidence which fairly supports the verdict or finding, then the action of the trial court must be sustained." Upon the further contention of counsel that there was a total want of evidence, the court in that case said: "With this view, however, we are unable to agree. No good purpose would be subserved by going into the details of the evidence in this case. It is an unfortunate one in many of its aspects, but keeping in mind the narrow limits allowed to us as an appellate tribunal for the review of the facts, we are constrained to hold that there is some evidence to sustain the action of the trial

court, and its determination of the questions involved must be considered final." So in this case, as there was some evidence tending to support the verdict, the determination of the jury and of the trial court must be considered final.

It is next insisted that the amount of the recovery is too large. No point is made that the complaint does not show that the ward was not dispossessed of the property, and that it is good only for nominal damages. It is insisted that only the value of the services can be recovered. If the complaint is sufficient to withstand a demurrer, and the evidence should show that the plaintiff's ward was deprived of the possession, the complaint will in this court be deemed amended so as to recover for the value of the property. Rev. St. 1894, § 670 (Rev. St. 1881, § 658). A temporary suspension or surrender of the possession taken under the contract will not defeat a specific performance. *Drum v. Stevens*, supra. Nor would a forcible dispossession. And it must be borne in mind that the ward was an infant and that a surrender of the possession would be an act not necessarily binding on him.

Exceptions were taken to certain instructions given to the jury by the court on its own motion. Appellee's counsel insist that the instructions are not properly in the record. The record shows that the instructions were duly filed, "and are as follows, to-wit." Following this statement are copied into the record a series of instructions, numbered from 1 to 10 consecutively, which instructions are signed by the presiding judge. This we think brings them properly into the record, and the presumption is that they were all the instructions given by the court. *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630.

Objection is taken to that portion of instruction numbered 3 which is in these words: "As I said, before you can find for the plaintiff, you must find that he has proven the material averments of his complaint by a preponderance of the evidence. You must find that Stone and Briscoe entered into a contract as set out in the complaint. It is not, however, incumbent on the plaintiff to prove a contract in direct terms, but he must prove such a state of facts and circumstances as from which a contract can be inferred." We discover no valid objection to this instruction. It is equivalent to saying that a contract may be established by indirect or circumstantial evidence. In judicial investigation facts are often as well established by inferences from circumstances as from direct evidence. *Barr v. Railroad Co.* (Ind. App.) 37 N. E. 814.

Objection is also made to instruction numbered 6. It in effect told the jury that if it found that the contract was entered into between the deceased and the ward, and possession of the property taken under the contract, the measure of damages would be the value of the estate both real and personal which was agreed to be conveyed or willed. It is

insisted that the instruction is bad because the measure of the damages is not limited to the property of which possession was actually taken under the contract. The law is that when the contract is not within the statute of frauds the value of the property agreed to be conveyed is the measure of damages. If the contract were in writing the plaintiff would be entitled to recover the value of the property, although no part of it was ever taken into possession. It is not necessary to take a parol contract out of the statute that all the property should be taken into the possession of the plaintiff. Even if it be conceded that this instruction is bad, it was corrected by a subsequent instruction in which the court limited the recovery to the fair cash value of all the real and personal property the possession of which had been turned over to the ward under the contract.

Instruction numbered 5 is as follows: "The law will not compel the enforcement of a parol or verbal contract disposing of his lands, unless possession is taken under the contract and the purchase price paid, or a complete performance of the terms of the contract on the part of the vendee." In two elaborate printed briefs filed by counsel for appellant no objection is made to this instruction. It was only incidentally alluded to by them in the oral argument, and no authority was cited to show that it is incorrect. Under such circumstances, if any objections exist they should be deemed waived. But this aside, we find no infirmity in the first part of the instruction. If it is incorrect in any respect, it must be in the last part or clause. It is not true that a parol contract will be enforced when the vendee has made full performance on his part. The contract must be taken out of the statute of frauds by possession taken under it. It is possible to so construe the instruction that the last clause was intended as explanatory of the first, and that by complete performance on the part of the vendee is meant the payment of the purchase price and taking possession under the contract. Assuming, without deciding, that the instruction is incorrect, it does not follow that it harmed the appellant. It must be considered in connection with all the other instructions given. In a subsequent instruction the court said to the jury that the measure of the damages under the contract would be the value of the property the possession of which was turned over to appellee's ward. To say that a parol contract for the sale of lands may be enforced upon complete performance on the part of the vendee may be incorrect as an abstract proposition, but when the measure of damages is limited to the value of property of which possession was taken it conclusively appears that the jury was given to understand that there could be no recovery unless possession was taken under the contract. This instruction, when considered in connection with all the instructions, was not harmful to the appellant.

There are other causes for a new trial dis-

cussed by counsel, but a careful examination of them convinces me that they are not well founded. I am of the opinion that the judgment should be affirmed.

(13 Ind. App. 446)

THORNBURG v. BUCK.¹

(Appellate Court of Indiana. June 14, 1895.)

ACTION AGAINST DECEDENT'S ESTATE—RECOVERY OF TRUST FUND—LIMITATIONS—PLAINTIFF AS WITNESS—VERDICT.

1. A verdict or finding which contains facts from which the amount of damages may be determined by mathematical calculation is sufficient.

2. The ruling on a motion for a new trial on the ground of newly-discovered evidence cannot be reviewed where, though all the affidavits filed on such motion have been copied into the record, only a portion of them are made a part thereof by order of court or bill of exceptions.

3. A new trial will not be granted for newly-discovered evidence, unless it appears that such evidence will probably produce a different result on the second trial.

4. The discretion of the trial court in requiring plaintiff, in an action against an administrator, to testify will not be reviewed where it appears that a prima facie case had been previously established by the evidence of other witnesses.

5. Where, in an action to recover a trust fund from the estate of a decedent, the complaint avers that the decedent sold real estate held in trust for the plaintiff, for the sum of \$1,000, a finding that the decedent received as a consideration land in the value of \$1,000, instead of money, will not constitute a variance.

6. Where one takes the legal title of land, for which another pays the purchase money, without any fraudulent intent, and subsequently sells the same, agreeing verbally to hold the proceeds in trust, a trust is created in the proceeds of the sale.

Gavin, J., dissenting.

Appeal from circuit court, Marshall county; Charles Kellison, Special Judge.

Action by Calesta A. Buck against Celestian E. Thornburg, administrator, to recover a trust fund. From a judgment for plaintiff defendant appeals. Affirmed.

E. C. Martindale and J. D. McLuren, for appellant. J. W. Parks and C. P. Drummond, for appellee.

LOTZ, J. The appellee, Calesta A. Buck, filed a claim against the estate of Harvey Thornburg, deceased. The claim was disallowed by the administrator, and transferred to the issue docket for trial. Appellant's demurrer for want of facts was overruled to the claim or complaint, and he then answered the six-year statute of limitations. The cause was tried by the court, which, at the request of appellant, made a special finding of the facts and stated conclusions of law thereon. The appellant excepted to the conclusions of law. Appellant's motion for a venire de novo and motion for a new trial were also overruled. Exceptions were taken to all these adverse rulings, and they are each assigned as error in this court.

In her statement of claim or complaint the

¹ Rehearing denied.

appellee avers that on the 24th day of August, 1877, she was the wife of one Edgar Wilson, but was living separate and apart from him; that at said time she had money, notes, and other property in her own right, and that she purchased the west half of lot No. 8 in Blain's addition to the city of Plymouth, Indiana, and paid therefor in cash the sum of \$500; that, on account of the fact that she and her husband were living separate and apart, she believed it to be necessary to convey the said real estate to some other person than herself; that the wife of the decedent and the claimant were sisters, and that on account of such relationship, and upon his consenting to hold the title to said property for her, the real estate was conveyed to said decedent, to be held by him in trust for her; that after the purchase of said property she occupied it for a number of years, when she changed her residence to the city of Ft. Wayne; that it was afterwards agreed that the deceased should sell the property for such sum as it was worth, and keep and retain the money derived therefrom for the use and benefit of the claimant; that said Harvey Thornburg did, on the 6th day of October, 1879, sell and convey said real estate to one Albert Bohmer, at and for the price of \$1,000; that said decedent had the use and benefit of said \$1,000 trust fund since the 6th day of October, 1879; that the principal and interest on said sum from the date of said last conveyance is justly due and owing. It also appears from the averments that the claimant is now the wife of one Buck.

It is urged against the sufficiency of the complaint that the claim at the most is but a naked legal obligation, a debt, and not a trust; that it is stale and barred by the statute of limitations. Is the obligation set forth in the complaint the ordinary legal one, or is it one arising from equitable conditions and considerations? A debt in the technical sense is money due or owing on account of a contract express or implied; while a trust, strictly speaking, is an obligation arising out of a confidence reposed in a person to whom the legal title to property is conveyed upon the condition that he will faithfully apply it according to the direction and risks of the vendor. Under the circumstances averred, the obligation arising is one growing out of a trust, and not a mere legal one. The settled rule is that if the statute of limitations contains exceptions, and it is relied on as a defense, it must be specially pleaded, unless the complaint clearly shows upon its face that the plaintiff is barred notwithstanding such exception. *Potter v. Smith*, 36 Ind. 231. There are exceptions contained in our statute. For aught that appears, the plaintiff may have been under the legal disability, or a nonresident of the state; and there is nothing in the complaint to show that she is or is not within any of the exceptions. But as the same question arises on the exception to the conclusions of law we will dispose of

it in the order in which the appellant has presented it. The rule is well settled that the statute of limitations begins to run against a trust only from the time when the trust is openly disavowed by the trustee who insists upon adverse rights and interests which are fully and unequivocally brought to the knowledge of the cestui que trust. The appellant contends that the facts pleaded do not establish a trust relationship between the plaintiff and the decedent, or, if they do, the trust is one concerning real estate, resting in parol and incapable of enforcement under the statute. Sections 3391, 6631, Rev. St. 1894 (sections 2969, 4906, Rev. St. 1881). Conceding that an express trust in real estate resting in parol, while it is executory, may be voidable, still it may be enforced as a resulting trust under certain conditions; as where one party pays the consideration, and by agreement and without fraudulent intent the conveyance is made to another to hold the land in trust for the party paying the purchase money. Section 3398, Rev. St. 1894 (section 2976, Rev. St. 1881). Here it appears that the purchase money was paid by the plaintiff, and that by agreement the title was taken by the decedent in trust and without any fraudulent intent. But aside from this it further appears that the real estate was sold, and that the decedent agreed to keep and hold the proceeds for her use and benefit. Here was a trust created in the money or personal property, and it is well settled that a trust in personalty may be created by parol. *Talbott v. Barber* (Ind. App.) 38 N. E. 487; *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82. It is further insisted that in order to create a trust in the proceeds of the sale there must be a consideration shown for the agreement to hold the proceeds in trust. This contention is shadowy, to say the least. The decedent had appellee's money or property, and this is a sufficient consideration. There is nothing in the complaint from which it appears that the trust was ever disavowed, or that the statute of limitations ever ran against it. There was no error in overruling the demurrer.

The next contention is that the court erred in its conclusions of law. There are many unnecessary and evidentiary matters contained in the special findings, but, disregarding all such, those still remaining are substantially the same as those averred. The appellant insists that there is a fatal variance between the averments of the complaint and the facts found, in this respect: The complaint avers that the decedent sold the real estate for the sum of \$1,000, while the finding of the court in relation thereto is as follows: "That on the 6th day of October, 1879, said Thornburg sold said property in pursuance of said agreement, and executed a deed therefor to one Albert Bohmer, receiving a consideration therefor in the lands in the value of \$1,000." The

allegation is that the decedent received money or funds, while the proof is that he received lands. It is assumed that a trust obligation arising out of money is not supported by a finding that the obligation arose out of lands; that there is here a fatal variance of failure of proof. In the strict legal sense there is a marked difference between a sale and an exchange or barter; but in common parlance the one is frequently used for the other. If the effort were to pursue a particular fund, or to enforce a trust as against specific property, the contention would have much force; but the effort is to enforce an obligation, and the manner in which it arises is of secondary consideration. The strict rules of pleading and practice do not apply in claims against decedent estates. Neither nicety of averment nor nicety of proof is required. The statute requires that only a succinct statement of the nature and amount of the claim shall be filed. The purpose of the statute is to facilitate the settlement of estates with as little expense as possible to both the estate and the claimant. It is not contemplated that the claimant shall incur the expense of employing professional counsel, and prepare his pleadings with legal accuracy. The rule that a pleading must proceed upon a single, definite theory, the trial had and judgment pronounced upon the theory indicated, has but little or no application to claims against estates. This rule concerning theory should not be carried to that degree of refinement that leads to absurdity and injustice. To compel a claimant to conform to this rule would require him in nearly all instances to employ skilled counsel in the preparation of his claim, and the purpose of the statute would, in a large measure, be defeated. To this end it has often been held that formal pleadings are not required. If the statement shows the nature and amount of the claim with sufficient precision to bar an other action, and a prima facie right to recover, this is all that is required. *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455. The court before which such claims are brought for adjudication is the ultimate guardian of the interests of the estates of deceased persons, and it is given a wide discretion. When it is satisfied that the substantial interests of the estate have been preserved and protected by its judgment under the rules above stated, this is all the law requires. In the case of *Hileman v. Hileman*, 85 Ind. 1, the claim or complaint alleged that the intestate was indebted to the claimant for certain trust funds which he had and held, during his life and at the time of his death, for the use and benefit of the claimant. The proof showed that the deceased did not receive either money or funds, as charged in the complaint, but that he only took credits on certain notes made by himself, and owing to the parties from whom he should have collected the trust funds. In speaking of whether or not the

evidence failed, or, in other words, whether or not there was a variance, the court made use of this language: "If the strict rules of pleading were applicable, this position would perhaps be maintainable; but it has been held that a formal complaint is not necessary in prosecuting a claim against an estate, a succinct statement of the nature and amount of the claim being all that the statute requires. * * * The complaint in this instance, besides the bill of particulars, shows the sources from which the money was received by the intestate, and neither he nor his representative ought to be heard to say it was not money, merely because it consisted of his promises to pay money, taken up instead of the money itself. Having taken his own notes in lieu of the money coming to his wife, and having, presumably, canceled or destroyed the notes instead of holding them for her use or turning them over to her as he ought to have done, he may, without great impropriety of averment, be charged as holding the amount of the notes in trust for her." So in the case at bar, while the averment is that the decedent received money, and the finding is that he received lands, in either event there is a valid obligation existing against his estate, and there is not such a failure of proof or variance as will defeat a recovery.

Under the assignment that the court erred in overruling the motion for a venire de novo, it is assumed in the argument that the special findings fail to assess the damages or amount of recovery. It was found that no part of the sum of \$1,000, or the consideration received by the decedent for the real estate, was paid by him in his lifetime to the plaintiff, or to any other person by her order, and that the same is due and wholly unpaid. A mere finding for the plaintiff without any assessment of damages or amount of recovery is insufficient to support a judgment. *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829. The verdict or finding must determine the amount of the judgment, or find such facts as leave nothing for the court to do except to make a mere mathematical calculation. *Johnson v. Bucklen*, 9 Ind. App. 154, 36 N. E. 176. There are in the special findings enough facts from which the court could make a mathematical calculation and arrive at the amount of the judgment. There was no error in overruling this motion.

Under the last assignment of error it is insisted that the court abused its discretion in requiring the appellee to testify as a witness. Before this was done, however, several witnesses had testified to the material facts in the case sufficient to make a prima facie case. The discretion of the trial court will not be reviewed under such conditions, as was expressly held by this court in *Talbott v. Barber*, supra.

Another cause for a new trial was based upon the newly-discovered evidence. Affidavits setting forth the newly-discovered evidence, and of the diligence used by the ap-

pellant, were filed and presented to the court below, and brought into the record by a bill of exceptions. Counter affidavits, contradicting the newly-discovered evidence, and of the diligence used, were filed by the appellee. It is settled that when a motion for a new trial is based upon newly-discovered evidence, and the motion is supported by affidavits, counter affidavits may be filed, questioning the exercise of diligence on the part of the moving party, and also for the purpose of showing that the alleged ground for a new trial had no existence. *Bank v. Gibbons*, 7 Ind. App. 629, 35 N. E. 31. The counter affidavits are not all brought into the record by a bill of exceptions. The record affirmatively shows that the appellee filed the counter affidavits of Barney Ryder, Catherine Ryder, and Calesta Buck. The appellant moved the court to strike out a part of the affidavit of Barney Ryder, and the whole and certain parts of the affidavits of Catherine Ryder and Calesta Buck. This motion was sustained, to which the appellee excepted, and the motion, affidavits stricken out, and parts of affidavits stricken out, and rulings of the court and exceptions thereto, were ordered made a part of the record without a bill of exceptions. The appellee then filed her affidavit, again differing in many material respects from her former affidavit. The appellant then moved the court to strike out parts of the last affidavit of Calesta Buck, which motion was sustained in part and overruled in part. The parts of the affidavits stricken out, and the rulings of the court and the motion, were ordered made a part of the record without a bill of exceptions. The whole of these affidavits is not made a part of the record, it is only the parts stricken out; that portion of the affidavit not stricken out is not properly a part of the record, because it is neither presented by bill of exceptions nor made so by order of the court. The fact that it is copied into the record does not make it a part thereof. An instrument of writing of any kind which is improperly in the record cannot be considered for any purpose. *Norton v. State*, 106 Ind. 163, 6 N. E. 126; *Barnes v. Jones*, 91 Ind. 162; *Colee v. State*, 75 Ind. 511. The reason for this rule is that material portions may be left out, or new matters inserted. Its correctness is not certified to, nor does it in any manner receive the sanction of the court.

Upon the question of newly-discovered evidence this court cannot pass, for all the affidavits and statements considered by the court below are not properly before us. The evidence given on all the material points on the trial of the cause was sharply conflicting. If the failure to get all the affidavits into the record be waived, and they be considered as they appear in the record, we find the same sharp conflict. "It is a firmly-established rule that a new trial will not be granted unless the newly-discovered evidence is such as will probably produce a different result upon

a second trial." *Sullivan v. O'Conner*, 77 Ind. 149.

Judgment affirmed.

GAVIN, J., dissents.

DAVIS, J., did not participate in the consideration of this case.

MEMORANDUM DECISIONS.

AGATE, Appellant, v. HOUSE, Respondent. (Court of Appeals of New York. April 30, 1895.) Geo. W. Blunt, for appellant. Henry W. Taft, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 30 N. Y. Supp. 1119. All concur.

BARNEY, Appellant, v. MAYOR, ETC., OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. April 23, 1895.) James A. Deering, for appellant. David J. Dean, for respondent. No opinion. Order affirmed, with costs, on opinion below. 29 N. Y. Supp. 175. All concur.

BEST, Respondent, v. ZEH et al., Appellants. (Court of Appeals of New York. April 23, 1895.) A. V. S. Cochrane, for appellants. A. Frank B. Chace, for respondent. No opinion. Judgment affirmed, with leave to appellants to withdraw demurrers and answer over within 20 days on payment of the costs of the appeals and of the demurrer, on opinion below. 31 N. Y. Supp. 230. All concur.

BLANSTEIN, Respondent, v. GUINDON et al., Appellants. (Court of Appeals of New York. April 30, 1895.) Arthur D. Williams, for appellants. G. Washbourne Smith, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 31 N. Y. Supp. 559.

DAVIES, Appellant, v. PELHAM HOD ELEVATING CO., Respondent. (Court of Appeals of New York. April 23, 1895.) I. Newton Williams, for appellant. Geo. S. Coleman, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 30 N. Y. Supp. 1130.

DUEKE, Appellant, v. TENTH & TWENTY-THIRD STREET FERRY CO., Respondent. (Court of Appeals of New York. April 9, 1895.) A. H. Dailey, for appellant. Wm. A. Jenner, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 29 N. Y. Supp. 739.

DUNTZ, Respondent, v. HORTON et al., Appellants. (Court of Appeals of New York. April 30, 1895.) E. C. Aiken, for appellants. Frank C. Cushing, for respondent. No opinion. Judgment affirmed, on opinion below (31 N. Y. Supp. 742), with costs. All concur, except HAIGHT, J., not sitting.

EARLE, Respondent, v. ROBINSON et al., Appellants. (Court of Appeals of New York.

April 9, 1895.) Geo. M. Pinney, Jr., for appellants. A. J. Dittenhoefer, for respondent. No opinion. Appeal dismissed, with costs. All concur. See 32 N. Y. Supp. 730.

In re EDWARDS' ESTATE. (Court of Appeals of New York. May 3, 1895.) John H. Corwin, for appellant. Emmet R. Olcott, for respondent. No opinion. Order affirmed, with costs. All concur. See 32 N. Y. Supp. 901.

FINLEY, Appellant, v. HUDSON ELECTRIC RY. CO., Respondent. (Court of Appeals of New York. April 30, 1895.) J. Rider Oady, for appellant. L. F. Longley, for respondent. No opinion. Judgment affirmed, on opinion below, with costs. All concur. See 19 N. Y. Supp. 621.

GERRY, Respondent, v. LIDDLE, Appellant. (Court of Appeals of New York. April 9, 1895.) Barna Johnson, for appellant. G. W. Youmans, for respondent. No opinion. Appeal dismissed, on the ground the order is not final, with costs. All concur. See 31 N. Y. Supp. 58.

GOMEZ et al., Appellants, v. GOMEZ et al., Respondents. (Court of Appeals of New York. April 16, 1895.) No opinion. Motion to advance granted, without costs, and cause reserved for argument upon the first day of the next session of this court. See 31 N. Y. Supp. 1127.

In re HARBECK et al. (Court of Appeals of New York. April 9, 1895.) J. Treadwell Richards, for appellants. Samuel S. Thomas, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 30 N. Y. Supp. 521.

HARBECK, Appellant, v. PUPIN et al., Respondents. (Court of Appeals of New York. April 23, 1895.) No opinion. Motion for reargument denied, with costs. See 39 N. E. 722.

HARMON, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. April 9, 1895.) J. W. Dunwell, for appellant. W. E. Hughitt, for respondent. No opinion. Judgment affirmed, with costs. All concur, except FINCH and HAIGHT, JJ., not sitting. See 29 N. Y. Supp. 1144.

HARMON, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. April 9, 1895.) J. W. Dunwell, for appellant. W. E. Hughitt, for respondent. No opinion. Judgment affirmed, with costs. All concur, except FINCH and HAIGHT, JJ., not sitting. See 29 N. Y. Supp. 1144.

HAUPTMANN et al., Respondents, v. FIRST NAT. BANK OF BROOKLYN, Appellant. (Court of Appeals of New York. May 3, 1895.) Joseph A. Burr, Jr., for appellant. Geo. H. Pettit, for respondents. No opinion. Judgment affirmed, with costs. All concur. See 31 N. Y. Supp. 364.

HAWKE, Appellant, v. HAWKE et al., Respondents. (Court of Appeals of New York.

April 30, 1895.) John Foley, J. W. Houghton, and J. S. L'Amoreaux, for appellant. John L. Henning and Charles E. Patterson, for respondents. No opinion. Judgment affirmed, with costs. All concur. See 31 N. Y. Supp. 968.

In re HODGMAN'S ESTATE. (Court of Appeals of New York. April 9, 1895.) Edgar Hull, for appellant. Chas. S. Foote, for respondent. No opinion. Appeal dismissed, with costs. All concur. See 31 N. Y. Supp. 263.

JORGENSEN, Appellant, v. SQUIRES et al., Respondents. (Court of Appeals of New York. April 16, 1895.) No opinion. Motion for reargument denied, without costs. See 39 N. E. 373.

KITTEL, Appellant, v. STUEVE, Respondent. (Court of Appeals of New York. May 3, 1895.) John A. Straley, for appellant. Fredk. H. Hinrichs, for respondent. No opinion. Order affirmed, with costs. All concur. See 32 N. Y. Supp. 272.

In re LANDY'S WILL. (Court of Appeals of New York. April 16, 1895.) No opinion. Motion to amend return granted, on payment of \$50 costs within 20 days.

LICK, Respondent, v. TOWN OF MORAVIA, Appellant. (Court of Appeals of New York. May 3, 1895.) J. A. Wright, for appellant. H. Greenfield, for respondent. No opinion. Judgment affirmed, with costs and 10 per cent. damages, under section 3251 of the Code. All concur, except HAIGHT, J., not sitting. See 25 N. Y. Supp. 1132.

LOWRY, Appellant, v. WOOLSEY, Respondent. (Court of Appeals of New York. May 3, 1895.) Alex. Thain, for appellant. W. W. Culver, for respondent. No opinion. Judgment affirmed, on opinion below (31 N. Y. Supp. 1101), with costs. All concur.

LYTHGOE, Respondent, v. LYTHGOE et al., Appellants. (Court of Appeals of New York. April 9, 1895.) Edward S. Peck, for appellants. A. J. Skinner and L. A. Gould, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 26 N. Y. Supp. 1063.

McANDREWS, Respondent, v. LAKE SHORE & M. S. RY. CO., Appellant. (Court of Appeals of New York. May 3, 1895.) Chas. A. Pooley, for appellant. Geo. E. Towne, for respondent. No opinion. Appeal dismissed, with costs, on Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co., 109 N. Y. 342, 16 N. E. 539. All concur, except HAIGHT, J., not sitting. See 27 N. Y. Supp. 1119.

McBRIDE, Respondent, v. CHAMBERLAIN et al., Appellants. (Court of Appeals of New York. April 9, 1895.) John Gillette, for appellants. Henry M. Field, for respondent. No opinion. Judgment affirmed, with costs. All concur, except HAIGHT, J., not sitting. See 25 N. Y. Supp. 1135, and 26 N. Y. Supp. 94.

McCLURE, Respondent, v. LEVY, Appellant. (Court of Appeals of New York. April 16, 1895.) No opinion. Motion to open default. Ordered, that the clerk of the supreme court of

the First judicial department return the remittitur herein, and upon its return this motion is granted, and the cause restored to calendar, on payment within 10 days of \$50 costs.

MARTINEAU, Respondent, v. ROCHES-TER RY. CO., Appellant. (Court of Appeals of New York. May 3, 1895.) Chas. J. Bissell, for appellant. Thos. Raines, for respondent. No opinion. Judgment affirmed, on opinion below (30 N. Y. Supp. 778), with costs. All concur, except HAIGHT, J., not sitting.

MILLER, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. April 30, 1895.) C. D. Prescott, for appellant. Myron G. Bronner, for respondent. No opinion. Judgment affirmed, with costs. All concur, except FINCH, J., not sitting, and GRAY, J., not voting. See 31 N. Y. Supp. 317.

MONTIGNANI v. BLADE et al. (Court of Appeals of New York. April 23, 1895.) No opinion. Motion to amend remittitur denied, with costs. See 39 N. E. 719.

PALMER, Respondent, v. CITY OF BROOK-LYN, Appellant. (Court of Appeals of New York. May 3, 1895.) H. O. Wood, for appellant. John P. Adams, for respondent. No opinion. Order affirmed, with costs. All concur. See 32 N. Y. Supp. 739.

In re PEASLEE. (Court of Appeals of New York. May 3, 1895.) Robert Hunter McGrath, Jr., for appellants. C. N. Bovee, Jr., for respondent. No opinion. Order affirmed, with costs, on opinion below. See 30 N. Y. Supp. 1028. All concur.

PEOPLE, Respondent, v. HODNETT, Appel-lant. (Court of Appeals of New York. May 3, 1895.) W. E. Kisselburgh, Jr., for appellant. Chas. H. Brown, for the People. No opinion. Judgment affirmed, on opinion below. See 30 N. Y. Supp. 735. All concur, except HAIGHT, J., not sitting.

PEOPLE ex rel. BIRD, Appellant, v. BAR-KER et al., Commissioners, Respondents. (Court of Appeals of New York. April 30, 1895.) Ten Eyck & Remington, for the motion. D. J. Dean, opposed. No opinion. Motion for rear-gument denied; \$10 costs. See 39 N. E. 1065.

PEOPLE ex rel. DINSMORE v. GILROY, Mayor, etc. (two cases). (Court of Appeals of New York. April 16, 1895.) No opinion. Motion for reargument denied, with costs. See 40 N. E. 164.

PEOPLE ex rel. NEW YORK & E. TEL. CO., Respondent, v. PLYMPTON et al., Com-missioners, Appellants. (Court of Appeals of New York. April 9, 1895.) Wm. B. Horn-blower, for appellants. E. H. Benn, for re-spondent. No opinion. Order affirmed, with costs. All concur. See 32 N. Y. Supp. 1148.

PEOPLE ex rel. ONONDAGA COUNTY SAV. BANK, Appellant, v. BUTLER, Respond-ent. (Court of Appeals of New York. April 16, 1895.) No opinion. Motion to advance granted.

POWERS, Respondent, v. PRUDENTIAL INS. CO. OF AMERICA, Appellant. (Court of Appeals of New York. April 16, 1895.) Thom-as F. Magner, for appellant. Chas. J. Patter-son, for respondent. No opinion. Judgment affirmed, with costs. All concur, except GRAY, J., not voting. See 31 N. Y. Supp. 628.

PRENTISS, Appellant, v. BOWDEN, Re-spondent. (Court of Appeals of New York. April 23, 1895.) No opinion. Motion to amend remittitur denied, without costs. See 40 N. E. 13.

SCOTT, Appellant, v. CALLADINE, Re-spondent. (Court of Appeals of New York. April 9, 1895.) August Becker, for appellant. Patrick F. King, for respondent. No opinion. Judgment affirmed, on opinion below (29 N. Y. Supp. 630), with costs. All concur, except HAIGHT, J., not sitting.

SISCO, Respondent, v. LEHIGH & H. R. RY. CO., Appellant. (Court of Appeals of New York. April 16, 1895.) John W. Lyon, for appellant. Isaac H. Maynard and John J. Beat-tie, for respondent. No opinion. Motion to amend remittitur granted. See 39 N. E. 958.

SKELTON, Respondent, v. LARKIN, Appel-lant. (Court of Appeals of New York. April 30, 1895.) A. T. Clearwater, for appellant. David M. De Witt, for respondent. No opinion. Judgment affirmed, on opinion below (31 N. Y. Supp. 234), with costs. All concur.

SMITH et al., Plaintiffs, v. MAYOR, ETC., OF CITY OF NEW YORK, Defendants. (Court of Appeals of New York. April 9, 1895.) John F. Kavanagh, for plaintiffs. Geo. L. Sterling, for defendants. No opinion. Judg-ment affirmed, with costs. All concur. See 31 N. Y. Supp. 783.

SOLDIERS' ORPHANS' HOME OF ST. LOUIS, Appellant, v. SAGE et al., Respond-ents. (Court of Appeals of New York. May 3, 1895.) Joseph H. Choate, for appellant. Wins-low S. Pierce, for respondents. No opinion. Order affirmed, with costs, on opinion below. 33 N. Y. Supp. 549. All concur.

STEVEN, Respondent, v. LORD, Appellant. (Court of Appeals of New York. April 23, 1895.) No opinion. Motion to advance grant-ed. See 32 N. Y. Supp. 309.

SYKES et al., Respondents, v. SILVER LAKE ICE CO., Appellant. (Court of Appeals of New York. April 23, 1895.) Forsyth Bros., for ap-pellant. Walter S. Hubbell, for respondents. No opinion. Judgment affirmed, with costs. All concur, except HAIGHT, J., not sitting. See 29 N. Y. Supp. 1150.

THOLEN, Respondent, v. BROOKLYN CITY R. CO., Appellant. (Court of Appeals of New York. April 9, 1895.) Albert C. Ten-nant, for appellant. Thos. E. Pearsall, for re-spondent. No opinion. Judgment affirmed, with costs. All concur, except GRAY, J., not sit-ting. See 30 N. Y. Supp. 1085.

TIMONY, Respondent, v. BROOKLYN CITY & N. R. CO., Appellant. (Court of Appeals of New York. April 9, 1895.) Albert C. Ten-nant, for appellant. Chas. J. Patterson, for

respondent. No opinion. Judgment affirmed, with costs. All concur. See 80 N. Y. Supp. 1071.

TOCH, Appellant, v. TOCH et al., Respondents. (Court of Appeals of New York. April 30, 1895.) M. L. Townsend, for appellant. Edward C. Stone and Treadwell Cleveland, for respondents. Judgment affirmed, without costs to either party. All concur, except GRAY, J., not voting. See 30 N. Y. Supp. 1003.

TOCH, Respondent, v. TOCH et al., Appellants. (Court of Appeals of New York. April 30, 1895.) Edward C. Stone and Treadwell Cleveland, for appellants. Louis Wertheimer and M. L. Townsend, for respondent. No opinion. Judgment affirmed, without costs to either party. All concur, except GRAY, J., not voting. See 30 N. Y. Supp. 1003.

WHEELER, Respondent, v. WATERTOWN ST. RY. CO., Appellant. (Court of Appeals of New York. April 9, 1895.) D. G. Griffin, for appellant. Chas. W. Thompson, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 28 N. Y. Supp. 1124.

WILLDIGG, Respondent, v. CITY OF BROOKLYN, Appellant. (Court of Appeals of New York. April 9, 1895.) E. B. Baraum, for appellant. Arthur H. Smith, for respondent. No opinion. Judgment affirmed, on opinion below (30 N. Y. Supp. 75), with costs. All concur, except PECKHAM, J., not voting.

WILSON, Respondent, v. HAWKE et al., Appellants. (Court of Appeals of New York. April 30, 1895.) John Foley, J. W. Houghton, and J. S. L'Amoreaux, for appellants. John L. Henning and Charles E. Patterson, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 31 N. Y. Supp. 968.

(155 III. 592)

BEAVAN v. WENT et al.¹

(Supreme Court of Illinois. Jan. 15, 1895.)²

DESCENT AND DISTRIBUTION—ALIENS.

The interposition of an alien ancestor between an intestate and a collateral relative claiming to inherit from the intestate through such ancestor bars the collateral relation's claim to inherit, even though he is a citizen. Craig and Baker, JJ., dissenting.

Appeal from superior court, Cook county; W. G. Ewing, Judge.

Bill by James Beavan against Sarah Went and others. Defendants obtained a decree. Complainant appeals. Affirmed.

Prentiss, Montgomery & Hall, for appellant. Cratty Bros., Jarvis & Cleveland, J. Warren Pease, and Flower, Smith & Musgrave, for appellees.

BAILEY, J. This was a bill in chancery, brought by James Beavan against Sarah Went, Susanna Went, Jane Holland, Elizabeth Yarnold, Francis Barnes, Charlotte Elizabeth Baylis, Susan Baylis, and the un-

known heirs of William Went, deceased, for partition. Sarah Went and several of the other defendants appeared, and filed a general demurrer to the bill, which being sustained, and the complainant electing to abide by his bill, a decree was entered dismissing the bill for want of equity, at his costs, and he has now appealed to this court.

The bill alleges: That the complainant is a resident of the state of Ohio, and a naturalized citizen of the United States. That William Went, late of Chicago, departed this life August 10, 1892, being then seised in fee of certain lands in Cook county, which the bill seeks to have partitioned, and leaving a last will and testament, as follows: "Chicago, March 16, 1892. Know all men by these presents: That I, William Went, being sound in mind and weak in body, do this day make this instrument. Born in Prestigne, Radnorshire, England, in the year A. D. 1828, on the 28th day of July, at present a citizen of the United States of America. I will and bequeath all real and personal property to my wife, Sarah Lewis, née Went, in trust for my surviving sisters and their lawful descendants. William Went." That the foregoing will was duly attested by witnesses, and was admitted to probate by the probate court of Cook county August 15, 1892. That the testator left no issue or descendants of issue, but left, him surviving, Sarah Went, his widow, Susanna Went, Jane Holland, Elizabeth Yarnold, and Francis Barnes, his sisters, and Charlotte Elizabeth Baylis and Susan Baylis, the daughters of his deceased sister, Charlotte Baylis; and that they and the complainant are the only next of kin and heirs at law of the testator. That the complainant is the son and only issue of William Beavan and Jane Beavan. That his father was the only issue of William Beavan and Jane Beavan, the last-named Jane Beavan being the only sister of William Went, the father of the testator, said William Went having no brothers. That William Beavan and Jane Beavan, the complainant's father and mother, William Beavan and Jane Beavan, his grandfather and grandmother, and William Went and Charlotte, his wife, the father and mother of the testator, were all deceased prior to the death of the testator. The bill admits that the complainant's father and mother, his grandfather and grandmother, the grandmother being the sister of the testator's father, and through whom he traces his relationship to the testator, are all nonresident aliens. The bill further alleges that the four sisters and the two nieces of the testator above mentioned were at the time of the testator's death, and still are, nonresident aliens; they all being citizens and residents of the kingdom of Great Britain, and were and are, under the laws of this state, incapable of acquiring title or taking or holding lands or real estate in this state, by devise, purchase, or otherwise; also, that Sarah Went, the testator's widow, on the

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

² Rehearing denied June 15, 1895.

18th day of August, 1892, filed her renunciation of her rights under the will, and on the 11th day of January, 1893, filed her election to take her share in the estate of her deceased husband, as provided by law. The bill claims that, by reason of the premises, Sarah Went and the complainant became each seised of an undivided one-half interest in the premises in question, as tenants in common, and seeks to have them partitioned accordingly.

The first, and we think the only question presented by the appeal, is whether any interest in the real estate of William Went, the testator, has descended to and become vested in the complainant. No cross bill having been filed by either the widow or sisters of Went, no question arises as to their rights as between themselves, unless a consideration of their rights becomes necessary to a determination of those of the complainant. Even then, if it be admitted, as the complainant contends, that the beneficiaries under the will, being nonresident aliens, were incapable of taking any interest in real estate by devise, and that the will therefore is void, thus rendering the estate of Went intestate,—questions about which we now desire to express no opinion,—does it follow that any interest in the estate descended to the complainant? It is, to say the least, doubtful whether, under our statute of descents, the complainant, so long as the deceased left a widow, became entitled to inherit any portion of his estate as next of kin. The complainant was a second cousin of the deceased, being a son of his first cousin. The only provision of the statute which in express terms provides for the descent of real estate to the next of kin, other than children and their descendants, brothers and sisters and surviving parents, and their descendants, and the widow and surviving husband, is the fifth clause of section 1 of chapter 39 of the Revised Statutes, and that provides merely that the estate shall descend in equal parts to the next of kin, "if there is no child of the intestate or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister, and no widow or surviving husband." And it is difficult to see how the complainant can inherit under this clause so long as the intestate left a widow surviving him.

Looking at the entire section, it will be seen that the first clause provided that intestate estates shall descend to the children of the intestate and their descendants. By the second clause it is provided that where there is no child of the intestate or descendant of such child, and no widow or surviving husband, it shall descend in equal parts to the parents, brothers, and sisters of the intestate and their descendants. The third clause provided that where there is a widow or surviving husband, and no child or children or descendants of a child or children, one-half of the real estate and all the personal estate, after the payment of debts,

shall descend to the widow or surviving husband; the other half to descend as in other cases where there is no child or children, or descendants of a child or children. The fourth clause relates solely to personal estate, and the fifth clause, as we have already seen, provides that, "if there is no child of the intestate or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree (computing by the rules of the civil law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate." The sixth clause provides that "if any intestate leaves a widow or surviving husband, and no kindred, his or her estate shall descend to such widow or surviving husband"; and the seventh clause provides that, if the intestate leaves no kindred and no widow or husband, his or her estate shall escheat to the county. But it is claimed that the right of the complainant to inherit in this case may be made out from the third clause, which provides that the half of the estate not given by that clause to the widow or surviving husband shall descend as in other cases where there is no child or children, or descendants of a child or children. But the only clause which directs the course of descent where there is no child or children, or descendants of a child or children, is the second; and it is there provided that in such case the estate shall descend to the parents, brothers, and sisters, and their descendants, and no mention whatever is made of collaterals. The only clause which appears to give any right of inheritance to collaterals, as we have already said, is the fifth; and it is there given to them only where there is no survivor of any of the classes there named, a widow and surviving husband being of the number; and, there being here a surviving widow, it is difficult to see how, under that or either of the other clauses of the section, the complainant is entitled to inherit.

But, without expressing any decided opinion upon this question, we prefer to place our decision on another ground, and that is that the complainant must trace his kinship to the deceased through several nonresident aliens, who, if themselves living, could not have succeeded to the estate as next of kin. If the well-known rules of the common law applicable to this question are in force in this state, it is very clear that the complainant did not inherit from the intestate. The common-law rule is, and always has been, that a citizen cannot take by representation from an alien, because the alien has no inheritable blood through which the title can be deduced. 2 Kent, Comm. 54. An alien is not regarded as having sufficient inheritable blood to transmit the inheritance to collateral heirs who are citizens. Tied. Real Prop. §

675. In England this rule was changed by the statute of 11 & 12 Wm. III., which provided, in substance, that a natural-born subject might inherit, notwithstanding the fact that his father and mother or other ancestor through whom he derived his pedigree was born out of the king's allegiance. The case of *Levy's Lessees v. McCartee*, 6 Pet. 102, furnishes a very elaborate and learned discussion of the whole question. In that case both the intestate and the claimants were citizens of the United States, the former being a resident of the state of New York, and the latter of the state of South Carolina. The claimants were grandchildren of the maternal uncle of the intestate, the uncle being an alien. The state of New York had adopted both the common and statute law of Great Britain, but had afterwards passed a statute declaring that none of the statutes of Great Britain should be considered as laws in that state. The supreme court of the United States, after reaching the conclusion that the statute of Wm. III. had thus been repealed, so as to restore the common-law rule prior to the death of the intestate, held that a claimant who must make his pedigree through mediate alien ancestors could not in that state inherit collaterally from a citizen. After discussing the English authorities, and especially the leading case of *Collingwood v. Pace*, reported in 1 Vent. 413, 1 Keb. 671, and in various other reports, the court reached the conclusion that, if the pedigree must be traced through a mediate alien ancestor, the party cannot take by descent, for the inheritable blood is stopped, and there is a flat bar to the assertion of any title derived through the alien. The only exception to this rule, as settled in *Collingwood v. Pace*, is that brothers who are citizens may inherit from each other, although their father is an alien; but this is upon the theory that brothers inherit from each other immediately, and not mediately, and, therefore, that they are not obliged to derive their pedigree through their alien father. To the same effect, see *Jackson v. Green*, 7 Wend. 333; *Jackson v. Fitz Simons*, 10 Wend. 9; *Redpath v. Rich*, 3 Sandf. 79.

The question, then, arises whether the rule of the common law on this subject must be deemed to be in force in this state. There can be no doubt that the statute by which the common law was adopted in this state is comprehensive enough to include it. By that statute, the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of or to supply the defects of the common law prior to the fourth year of James I. (with the exception of certain statutes not material here), and which are of a general nature, and not local to that kingdom, shall be considered as of full force until repealed by legislative authority. Rev. St. c. 28, § 1. It cannot be justly claimed that there is anything in the rule under con-

sideration so repugnant to the nature of our institutions, or so unsuitable to the condition of things existing in this country, that it can be pronounced by the courts not to be in force because inapplicable. It existed in England, not as a part of the feudal system, as counsel seem to suppose, but was based upon general principles of public policy, having in view the protection of the kingdom from foreign influence and foreign domination,—principles not altogether unlike those which have given rise to our recent legislation reimposing upon aliens the common-law disabilities in relation to taking and holding real estate in this state. True, during most of our history as a state those disabilities have been removed, but that has been done by express legislation, changing the common-law rule, and not by any attempt on the part of the courts to hold the rule not in force because inapplicable. The statute in relation to the rights of aliens in force prior to the act of June 16, 1887, was the act of February 17, 1851,—an act which seems to have superseded the chapter of the Revised Statutes of 1845 relating to aliens. The act of 1851 provided that all aliens might take, by deed, will, or otherwise, lands and tenements and any interest therein, and alienate, sell, assign, and transmit the same to their heirs or any other persons, whether such heirs or other persons were citizens of the United States or not, in the same manner as natural-born citizens of the United States or of this state might do; and that, upon the decease of any person having title to or interest in any lands or tenements, such lands and tenements should pass and descend in the same manner as if such alien were a citizen of the United States; and that it should be no objection to any persons having an interest in such estate that they were not citizens of the United States, but that all such persons should have the same rights and remedies, and in all things be placed upon the same footing, as natural-born citizens and actual residents of the United States. *Gross' St.* (Ed. 1869) 7. There can be no doubt that this statute, while it was in force, operated as a complete removal of all the disabilities of alienage, so far as they affect the right of the alien to take, hold, and transmit real property in this state, and that it also superseded the common-law rule that the interposition of an alien ancestor between an intestate and a collateral relative claiming to inherit was a barrier to the devolution of the estate by inheritance. But by the act of 1887 the common-law disabilities of alienage were in the main restored, and the act of 1851, as well as all other acts in conflict with the act of 1887, was expressly repealed. It is a rule of the common law that, where one statute is repealed by another, the repeal of the repealing statute revives the statute repealed; and the same rule is held to extend to the common law, so that, where an act which supersedes in any particular the common-law

rule previously applicable is itself repealed, the rule is held to be revived. *End. Interp. St. § 475; State v. Rollins, 8 N. H. 550; Mathewson v. Phoenix Iron Foundry, 20 Fed. 281; Gray v. Obeare, 54 Ga. 231.* By section 3, c. 131, of the Revised Statutes, it is provided that no act or part of an act repealed by the general assembly shall be deemed to be revived by the repeal of the repealing act; but we have no statute affecting the rule that the repeal of a statute superseding a common-law rule will have the effect of reviving the rule. It must accordingly be held that the repeal of the statute of 1851, by which the common-law rule which made it impossible for a collateral to inherit where he is obliged to trace his pedigree through an alien, was revived.

But it is claimed that the rule, even if in force in this state, can have no application in the present case, because, as the complainant insists, the next of kin, under our statutes, takes immediately from the intestate, and not mediately through his alien ancestors. We find nothing in the language of the statute which necessarily leads to the conclusion contended for. It merely provides that the estate shall descend in equal parts to the next of kin to the intestate, leaving the party who claims the right to inherit the burden of deducing his pedigree through a line of ancestors up to the intestate. And it will not be questioned that in this case, if any one of the ancestors through whom the complainant deduces his pedigree had been alive at the death of the intestate, and capable of inheriting, the estate would have gone to him or her, and not to the complainant; thus showing that such ancestor is the medium hereditatis, and not merely the medium sanguinis. Descents have long been distinguished as mediate and immediate; but as shown by Mr. Justice Story in *Levy's Lessees v. M'Cartee*, supra, these terms are susceptible of different interpretations, whence some confusion has been introduced into their legal discussion, since different judges have used them in different senses. But as said by Lord Hale, as quoted in *Collingwood v. Pace*, supra: "In immediate descent there can be no impediment but what ariseth in the parties themselves, but in mediate descents, it is agreed, the disability of being an alien or attainted, in him that is the medius antecessor, will disable the other, though he have no disability." In *Collingwood v. Pace*, which was argued before all the judges of England, the question was whether the inheritance by a brother from his brother, the father being an alien, was mediate or immediate; and it was decided, after much discussion, by seven judges against three, that the inheritance was immediate, so as not to be affected by the alienage of the father. It was held that, in tracing the line of inheritance between brothers or their descendants, it was not necessary to name the father as their common ancestor, and that alienism in

any ancestor whom it was not necessary to name in tracing such inheritance or descent does not have the effect to impede it. In *McGregor v. Comstock, 3 N. Y. 408*, the same rule was applied to an inheritance between first cousins, their fathers being citizens, but whose grandfather was an alien. Thus, in *Jackson v. Doran, 7 Wend. 333*, the intestate was a naturalized citizen, and the claimants were the heirs at law of a cousin of the intestate, who was also a naturalized citizen. It was claimed that the descent between cousins was immediate, notwithstanding the circuity of the line of sanguinity, and that the alienage of their intervening relatives was no bar to the inheritance; but this claim was disallowed, it being held that, while the descent from brother to brother was considered immediate, that from cousin to cousin was not, and that no one who was obliged to trace his descent through an alien can inherit real estate, the intestate having died at a time when the statute of 11 & 12 Wm. III. was not incorporated into the New York law of descent. The same rule was applied in *Jackson v. Fitz Simmons, 10 Wend. 9*, where the intestate was a naturalized citizen, and the claimant his nephew, but whose father, a brother of the intestate, was an alien. So, in *Redpath v. Rich, 3 Sandf. 79*, it was held that a nephew who was obliged to trace his descent through an alien mother could not inherit from his uncle. In *McCarthy v. Marsh, 5 N. Y. 265*, the intestate and the claimant were second cousins, and were both citizens, all their ancestors, up to their common great-grandfather, being aliens. It was held that, under the New York statute which provided that no person capable of inheriting should be precluded from the inheritance by reason of the alienage of any ancestor of such person, the claimant was entitled to the estate; but it was admitted that at common law, and in the absence of such statute, he could not inherit, because he was obliged to trace the descent of the estate through aliens who had no inheritable blood. In *People v. Irvin, 21 Wend. 128*, where the same statute was in force, it was held that the nephew of a person dying intestate, although naturalized, was not capable of inheriting from his uncle if his father was an alien and still living at the time of the death of the intestate, as the statute did not enable a person to deduce title through an alien ancestor still living. If, in such case, however, the descent from the uncle to the nephew was immediate, as is claimed in the case at bar, it is difficult to see how the fact that an intermediate alien ancestor was living could have the effect of barring the inheritance. *McLean v. Swanton, 13 N. Y. 535*, involved substantially the same question as the case last cited. There the decedent left, him surviving, a sister and a niece, the former being an alien, and the latter a citizen; and it was held that the niece could not take the real estate of the decedent by

inheritance so long as her mother was living at the date of her uncle's death. It was urged on behalf of the niece that the existence of her mother might be disregarded, upon the doctrine laid down by Chancellor Kent, viz.: "If a citizen dies, and the next heir be an alien, who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had existed." 2 Kent, Comm. 58. This contention was disallowed, and the doctrine announced by Chancellor Kent held inapplicable, the court saying: "The difficulty of this position is that, if the name of the mother be stricken from the plaintiff's genealogical chart, it will not appear that she has any connection with Robert Swanton, whose heir she claims to be. The cases to which the doctrine referred to in the commentaries applies are those in which the claimant does not make title through the alien, but where he can deduce her pedigree from the person dying seised, by leaving out or passing by the alien." And, again: "All the cases decided in this country, where an alien would have taken the estate but for his alienage, and in which a more remote heir was preferred, were cases of the same character, the successful claimant making out his descent independent of and not through the alien. Upon the plaintiff's theory, the statute under consideration would have been quite unnecessary; for if she can be allowed to strike out her alien ancestors, intervening between the person dying seised and herself, whether living or dead, and make title to the land of the person so dying seised, as his immediate heir, the defect of heritable blood in such ancestors would be a matter of no moment." The same construction of the language of Chancellor Kent is adopted in *Wunderle v. Wunderle*, 144 Ill. 40, 83 N. E. 195.

We have examined the cases cited by counsel for the complainant where a citizen who has been compelled to trace his relationship to the intestate through an alien has been held entitled to inherit; and we find them, in most if not every instance, to be cases arising under a statute expressly giving the right to inherit in such cases. The decisions of this character in the state of New York all seem to have arisen while the statute of 11 & 12 Wm. III., or the section of the Revised Statutes of the state substantially re-enacting that statute, was in force. The case of *Jacksons v. Sanders*, 2 Leigh, 109, was decided under a statute of the state of Virginia, which provided that, "in making title by descent, it shall be no bar to a party, that any ancestor through whom he derives his descent from the intestate is or hath been an alien." Similar statutes are found in several of the other states. It is scarcely necessary to remark that in this state no such statute exists.

We are of the opinion, then, that, as the complainant is compelled to trace his descent

from the intestate through nonresident aliens, he is barred and incapacitated from taking any interest in the real estate by inheritance. The decree of the superior court dismissing his bill for want of equity must therefore be affirmed. Decree affirmed.

CRAIG, J., dissents.

BAKER, J. I do not feel satisfied with the conclusion reached, and am inclined to the opinion that the law well could be, and should be, held otherwise.

(156 Ill. 194)

TORRENCE v. SHEDD et al.¹

(Supreme Court of Illinois. June 15, 1895.)

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—TAX TITLE—LIMITATIONS.

1. S., the owner of an undivided two-thirds of 143 acres, conveyed the land to H., supposing that it contained only 116 acres. After discovering his mistake, he claimed a reconveyance of 17 acres. Thereupon it was agreed, in writing, that as soon as S. procured title to the remaining one-third interest, and caused the same to be conveyed to H., the latter would convey to S. 17 acres, to be agreed on between them. S. procured title to the one-third interest, and conveyed it to a third person in trust for himself, while H. conveyed all his title to other parties. Held, that the grantee of S. held title to said one-third interest in trust for H.'s grantees, and that the latter held title to 17 acres of the tract in trust for the grantee of S. Craig, J., dissenting.

2. A tax deed, unsupported by affidavit of notice to the owner, will not set in motion Rev. St. 1893, c. 83, § 4, limiting actions to recover land sold for taxes to seven years.

Appeal from superior court, Cook county; Phillip Stein, Judge.

Bill for partition by Joseph T. Torrence against Susan M. Shedd and others. Defendants obtained a decree. Complainant appeals. Reversed.

Osborn & Lynde, for appellant. Ullmann & Hacker, D. P. Doyle, Wm. Richle, and Flower, Smith & Musgrave, for appellees.

MAGRUDER, J. Upon the second hearing of this cause we said: "This was a bill brought by the appellant on the 29th day of August, 1881, for partition of a certain tract of land in Cook county, known as the 'north quarter of section 7, township 37 north, range 15 east of the third principal meridian,' containing about one hundred and forty-three acres. On the first hearing the court entered a decree dismissing the bill, and the complainant appealed to this court, where a judgment was entered reversing the decree and remanding the cause for another hearing. See *Torrence v. Shedd*, 112 Ill. 466. A statement of the leading facts involved in the case will be found in the opinion of the court when the case was before us on the former appeal, and it will not be necessary to repeat them here, except so far as new facts were developed on the last hearing. Upon looking into the record when the case was here before, it will be found that appellee contended: (1)

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

That the deed from Edward Sorin to the complainant, under which he claimed title to the property, was invalid, because the agreement in pursuance of which it was made was (as alleged) champertous. (2) That the deed from Edward Sorin to James H. Bowen of April 25, 1871, under whom the defendants claimed title, was in such form that it passed to Bowen the title and all interest in the land which Sorin might thereafter acquire. (3) That the 'Onahan contract,' so called, of the 29th of January, 1876, was binding on Sorin, and that appellant was concluded by it. As to these positions it was then said: 'We have carefully considered these positions, and, after having availed ourselves of all additional lights thrown upon the subject by the petition for a rehearing, and given it our best thought, we are fully satisfied that said positions, and each of them, are not tenable, and they must, therefore, thenceforth be regarded as conclusively settled against appellees.' The remanding order left all other questions arising in the record, except the three, open for further consideration upon a second hearing after the case should go back to the superior court. After the cause was redocketed in the superior court, the appellees set up and relied upon a contract executed by Haines and Sorin in 1877, which had not been relied upon on the former hearing. The contract was as follows: 'This agreement, made this 8th day of March, A. D. 1877, between John C. Haines, of the city of Chicago, and Edward Sorin, of Notre Dame, Indiana, witnesseth: Whereas, the said Haines has become seised and possessed of a title in and to an undivided two-thirds of all the north quarter of fractional section 7, town 27, range 15 east, south of Indian boundary line, and I have agreed with the said Sorin that if he will procure and convey to me the outstanding one undivided third of the same property, that I will convey to him all my interest, including the said one-third, as well as the two-thirds interest of which I am at present seised, in and to seventeen acres of the said north quarter, to be selected by agreement between them: Now, therefore, it is mutually covenanted and agreed by and between the said parties that, as soon as Edward Sorin procures or causes to be procured a good title to the said outstanding undivided one-third interest, and shall convey or cause to be conveyed by good and sufficient deed or deeds of conveyance to the said Haines the title of the said undivided one-third interest in and to said north quarter, then the said Haines will well and truly convey, or cause to be conveyed, to the said Sorin, all of said interest, including the interest now held by said Haines, as well as the interest of one-third to be so conveyed in and to the seventeen acres, to be selected and agreed upon between them, and conveyed to said Sorin in his own separate right, and to his heirs and assigns forever. The covenants are to extend to, and be mutually binding on, the respective

heirs, administrators, and assigns of said parties. Witness the hands and seals of the said Haines and Sorin. [Signed] John C. Haines, by Charles J. Haines, Attorney in Fact.' The contract was in duplicate,—one executed by Haines and delivered to Sorin, the other executed by Sorin and delivered to Haines. At the time this contract was executed, Edward De Sille, who owned one-third of the quarter of land in question, resided in Belgium, and was then, and had been for many years, insane. On September 18, 1877, Haines sold and conveyed by quitclaim deed to Susan M. Shedd a portion of the north quarter, and in February, 1878, he deeded by quitclaim deed the remainder to Turpin, the receiver of the Fidelity Bank. On the 17th day of November, 1878, Edward De Sille died, and his one-third interest in the section of land passed to his sister, Melanie De Sille, and to the children of his brother, Charles De Sille. On the 6th day of March, 1879, Melanie De Sille conveyed to Sorin the entire section, and in 1881 Sorin acquired by purchase from the children of Charles De Sille their interest in the section of land. By these conveyances Sorin acquired the title to the one-third of the section which was originally owned by Edward De Sille, and on the last hearing of the cause it was claimed by appellees when Sorin obtained Edward De Sille's title he became, under the agreement between himself and Haines, a trustee for Haines and his grantees as to the north quarter of the section, and his conveyance to Torrence, and Torrence's contract with Brown, were in fraud of their rights. Appellees are entitled to the benefit of that title. The contract between Haines and Sorin was not assigned by Haines to the parties to whom he conveyed the land, and much importance is attached to this fact by appellant in his argument. It is no doubt true that the conveyance from Haines to Mrs. Shedd and Turpin would prevent him from conveying the seventeen acres named in the contract to Sorin, nor could he, after having parted with the title to the land, maintain a bill in his own name against Sorin for a specific performance of the contract. But we are inclined to hold that the deeds made by Haines transferred to his grantees all title and interest he had in the land, regardless of the manner in which he acquired that interest. Whatever title he held, either legal or equitable, obtained by deed or contract, was transferred by the deeds to his grantees, and it was not necessary that the deeds should specify the Sorin-Haines contract. In other words, after the conveyance, the grantees of Haines, as respects his title, stood in his shoes, and any relief he was entitled to as against Sorin his grantees should be entitled to the same relief."

We still entertain the views expressed in the foregoing extract, and readopt the same. Before proceeding to a further discussion of the contract of March 8, 1877, it may be

well to refer to the course of proceeding after the first decree entered by the superior court of Cook county on December 15, 1883, dismissing appellant's bill, was reversed by this court on April 6, 1885. After the cause had been docketed in the court below, and on May 5, 1885, Sorin, who had not been before that time a party, was allowed to come in, and be made a defendant. He filed an answer and cross bill, alleging that his conveyance to Torrence, the appellant, though absolute in form, was merely made in trust; that appellant held the title in trust for the purpose of instituting proceedings to establish Sorin's title; that the agreement made on January 19, 1881, with appellant, recited the trust and confidence so reposed in appellant; that appellant violated his trust by making an agreement to convey the land to one Brown; and that Brown had full notice and knowledge that appellant was Sorin's trustee. Appellant and Brown demurred to the cross bill, which prayed that whatever title appellant should be found to have might be decreed to belong to Sorin; and it seems that this demurrer has never been disposed of. It appears, however, that appellant, Sorin, and Brown have made a settlement of their differences. We may here remark that we regard this controversy as really and in fact a controversy between the present appellees and Sorin. The proof shows that appellant was, at the time he obtained his deed and contract from Sorin, the latter's agent, and had been his agent for some years, and had notice of the contract between Haines and Sorin, and of all the transactions between Sorin and Bowen in reference to the title of the property, as the same are herein-after referred to, and that he was thus fully informed in regard to all these matters when Sorin made the deed to him of January 12, 1881, and the contract with him of January 19, 1881. Hence we think that the bill for partition herein filed must be treated, in the consideration of the case, as though it was filed by Sorin. In May or July, 1885, the cause was removed, upon the petition of appellant, from the superior court to the circuit court of the United States for the Northern district of Illinois. The latter court, after a long and careful hearing, and after the granting of a rehearing and a reconsideration of the cause upon such rehearing, made a final decree on April 13, 1888, dismissing the bill for want of equity, as the superior court of Cook county had done in 1883. An appeal was taken by the present appellant from the said circuit court to the supreme court of the United States. The latter tribunal held that the cause was improperly removed into the federal court, and reversed the decree of the circuit court, with directions to that court to remand the cause to the superior court. 12 Sup. Ct. 726. The cause was again docketed in the superior court, and after a second hearing was again, and a third time, dismissed for want of equity.

v.41N.E.no.2-7

From the last decree of dismissal, which was entered on April 27, 1893, the present appeal is prosecuted.

Coming back to the subject of the proper construction of the contract of March 8, 1877, we think that that contract was binding upon Sorin and his assigns, as well as upon Haines and his assigns, and that, when Sorin obtained the title to the one-third interest which had been outstanding in Edward De Selle, and at his death became vested in his heirs, it was his duty to tender a conveyance of that interest to Haines or his assigns, and demand that the 17 acres be selected and conveyed to him. If there had been refusal, upon such tender and demand, to select and convey the 17 acres, then it was his right to file a bill for the specific performance of the contract; and, in case of a failure to agree upon a selection of the 17 acres with the grantees of Haines, to obtain a partition of his undivided 17 acres from the balance of the north quarter of the section. *Jackson v. Horton*, 126 Ill. 568, 21 N. E. 490. But when Sorin put the title which he had obtained in appellant as his trustee, and the latter commenced a partition proceeding, in which he claimed to own the whole of the one-third interest so obtained, and ignored the rights of the appellees as grantees from Haines under said contract, neither he nor appellant came into equity with clean hands. They refused to do equity, and were not entitled to the relief which they asked.

In order to determine the intention of the parties in making the contract of March 8, 1877, it may be well to consider the circumstances leading up to and surrounding the execution of the contract, before examining its terms and language. It is well settled that a court will construe a contract in the light of the circumstances surrounding the parties and of the objects which they evidently had in view. *A. B. Dick Co. v. Sherwood Letter-File Co.* (opinion filed at Ottawa, June, 1895) 42 N. E. —; *Chicago, M. & N. R. Co. v. National Elevator & Dock Co.*, 153 Ill. 70, 38 N. E. 915. In 1868, James H. Bowen purchased possessory title to said section 7, and went into possession of it; and in 1869 he purchased a tax title from one John Forsythe, who had obtained a tax deed thereto. In 1870, Sorin had obtained the government title to nearly two-thirds of the section, which was a fractional one. In 1871, Bowen and Sorin had a settlement of their respective claims as between themselves, and it was agreed between them that Bowen should have the north quarter of the section and Sorin the south three-quarters thereof. Accordingly, by deed dated April 25, 1871, and recorded July 29, 1871, Sorin quitclaimed to Bowen "the following * * * parcel of land * * *, to wit, in such manner as he may and to the extent that he has heretofore acquired title thereto, the north quarter of fractional section 7, * * * and all the title of the party of the first part,"

etc.; and by deed dated July 1, 1871, and recorded July 26, 1871, Bowen quitclaimed to Sorin "the south three-fourths of fractional section number seven," etc. When the case was here before, it was claimed by appellees that the words, "in such manner as he may," meant "in such manner as he may acquire," and that, by that language, Sorin had agreed to convey to Bowen such title as he might thereafter acquire to the north quarter of the section. The former decision of this court was adverse to such claim, and the language was construed to have another meaning, as will be seen by reference to *Torrence v. Shedd*, 112 Ill. 466. There can be no doubt, however, that the words, "to the extent that he has heretofore acquired title thereto," imply the existence of an outstanding title. As it is conceded that the grantees of Bowen subsequently acquired title to all of the north quarter except one-third thereof, we shall treat the outstanding title as exactly one-third, and as being in Edward De Sells or his heirs. The land was originally owned by an Indian named Ashkum, to whom the government issued a patent, and who conveyed the land by warranty deed, in 1836, to Louis De Sells, a missionary Catholic priest, in recognition, it is said, of his conversion to Christianity. Louis De Sells died in 1837, and his brother, Edward, inherited one-third of the land as one of his heirs. These heirs regarded the land as belonging to the church, and hence were willing to convey it without price to Edwin Sorin, who was also a Catholic priest. Sorin was interested in getting in the outstanding title to one-third of his own south three-quarters, and in doing so could easily obtain title to one-third of Bowen's north quarter. In fact the deeds afterwards made to him by the heirs of Edward De Sells were deeds of the whole section. On July 10, 1871, Sorin rented his south three-quarters of the section to Bowen for 20 years at an annual rental of \$5,000 for the first 10 years and \$10,000 for the second 10 years, with the privilege of renewal for another 20 years at an amount of rent to be fixed by appraisers, with provisions contemplating the construction of wharfs, docks, buildings, depots, and the laying of railroad tracks, etc. On September 1, 1873, Bowen executed a trust deed upon the north quarter of the section to a trustee to secure an indebtedness of \$75,000 to the Fidelity Savings Bank, and on December 1, 1875, another trust deed to the same trustee to secure an additional indebtedness to the same bank of \$50,000. On November 6, 1875, Sorin executed a power of attorney to William J. Onahan, authorizing the latter to make a settlement with Bowen as to the rents and taxes then due and unpaid on his lease, to make such new lease as he might think proper, to direct such legal proceedings as might be necessary to secure Sorin's rights in section 7, and to sign, seal, execute, and deliver such legal papers as might be necessary, etc. On January

29, 1876, Onahan, under the power which he supposed that he had by virtue of said power of attorney, executed and delivered to Bowen the following instrument: "I, Edward Sorin, of Notre Dame, South Bend, state of Indiana, in consideration of the conveyance heretofore made by me to James H. Bowen, of Chicago, state of Illinois, in July, 1871, for the north one-fourth part of fractional section seven (7), township 37 north, range 15, do hereby agree and promise with the said Bowen that, in case of my obtaining at any time hereafter, by deed or release, a greater or better title, or a conveyance or release of any further interest, in said north one-fourth of the said section from any other person or persons, abroad or at home, and particularly from any heir at law or other person claiming any interest in north fourth part as heir or heirs of the late deceased Father Louis De Sells, that I will, by further assurances or deed or deeds, convey said interest to said Bowen; and further that I will use every reasonable and diligent effort to secure a conveyance from the present or future claimants of any outstanding interest remaining in any heir of Louis De Sells, deceased, in Belgium or elsewhere, so as to perfect said title of said Bowen, so far as I may be able to do so, without pecuniary loss or the payment of any pecuniary consideration to said heirs of Louis De Sells for said interest. Witness my hand and seal, this 29th day of January, A. D. 1876. Edward Sorin, by W. J. Onahan, His Attorney in Fact." On the same day on which this instrument was executed, Bowen, under his hand and seal, made and annexed thereto a written assignment thereof to John C. Haines, who was the president of said bank. Haines had no personal interest in the matter, but acted for the bank. At the same time Bowen executed and delivered to Onahan a written instrument, releasing and surrendering to Sorin his possession of the south three-quarters of said section, and all his interest therein under said lease. By reason of the agreement of January 29, 1876, made in his name by Onahan, Sorin obtained a cancellation of the lease, possession of the south three-quarters of the section, an acknowledgment by Bowen of an indebtedness of \$28,164.26, and avoided a tedious litigation. The evidence shows conclusively that Sorin would never have secured these advantages but for the reliance which Bowen placed in the Onahan agreement, that there should be procured for him the title to the north quarter of the section, which was outstanding in the De Sells heirs, whereby he would be enabled to dispose of the property for enough to discharge his large indebtedness to the bank. Shortly thereafter, to wit, on March 4, 1876, he made, acknowledged, and recorded a plat of a subdivision of said north quarter, entitled "James H. Bowen's Addition to South Chicago." It also appears that Onahan, as Sorin's agent, in September, 1876, platted and subdivided the south three-

quarters of the section, calling it the "Notre Dame Addition to South Chicago," and that Sorin recognized the subdivision by making deeds of lots by that description. The bank, however, after Bowen's subdivision was made of the north quarter, foreclosed its trust deeds by sales under the powers therein contained, and the trustee therein made two deeds to Haines on September 4, 1876, which were recorded on September 6, 1876. On September 5, 1876, Bowen conveyed the north quarter to Haines by a warranty deed, which was recorded on September 7, 1876. When Onahan signed the agreement of January 29, 1876, Sorin was in Europe. Onahan, however, on that very day wrote to Sorin, telling him that he had made the agreement with Bowen, and giving a full account of all he had done in that behalf. Sorin replied by letter dated March 5, 1876. In this letter, which has been put in evidence since the former hearing of the case in this court, Sorin says to Onahan: "You will assure F. Flanagan of my good will. But now, first of all, he must aid you in obtaining from B. [Bowen] simple justice. I deeded him 116 acres. I cannot subscribe to any more. I am ready to deed him again the same against his own cession of all claims on section seven." What deed is here referred to? Evidently the deed of April 25, 1871, because Sorin had made no other deed than that to Bowen. His own construction of that deed is that he intended thereby to convey 116 acres. The evidence clearly explains the meaning of his letter. The patent to Ashkum recited that the fractional section 7 contained 465.08 acres, one-fourth of which is 116.27 acres. When Sorin deeded the north quarter to Bowen, on April 25, 1871, he supposed he was conveying 116.27 acres. But a subsequent survey, as appears from a certificate of the commissioner of the general land office at Washington, dated July 29, 1871, showed that the fractional section contained 572.61 acres, one-fourth of which is 143.15 acres. It is conceded that one Doyle acquired title to 10 acres in the north quarter of the section by an adverse possession of 20 years, beginning in 1850. Accordingly, Bowen had made a deed to him of this 10 acres, leaving 133.15 acres in the north quarter. Sorin claimed that it was not just for Bowen to claim the 133.15 acres, as it was originally understood that he was only to have 116.27 acres. Sorin's contention was that the difference between 133.15 acres and 116.27 acres, to wit, 16.88 or 17 acres, belonged to him. The difference between Bowen and Sorin which demanded "simple justice" related to this 17 acres. The letter, however, of March 5, 1876, contains a plain admission by Sorin that he intended Bowen to have title to 116 acres when the deed of April, 1871, was made. If the object of that deed was to convey to Bowen only such part of the north quarter as Sorin then had title to, then the intention was that Bowen should have

only 77½ acres, because Sorin then had title to only two-thirds of the north quarter, supposed to be 116.27 acres, and two-thirds thereof was only 77.50 acres. Such a construction is wholly inconsistent with the statement in his letter that he had deeded Bowen 116 acres, and was ready to deed it to him again.

We do not wish to be understood as receding from the findings made upon the former hearing, that the deed of 1871 did not have the effect of passing after-acquired title, and that the power of attorney from Sorin to Onahan was technically insufficient to authorize Onahan to legally bind Sorin by the agreement of January 29, 1876, and that the circumstances referred to in our former opinion did not establish a ratification of that agreement by Sorin. But the deed and lease of 1871, and the trust deeds of 1873 and 1875, and the agreement of January, 1876, and its assignment, and the cancellation of the lease in January, 1876, and the subdivisions of 1876, and the letter of March 5, 1876, taken in connection with all the circumstances surrounding them, and looked at in the light of all the testimony in the record, establish clearly and beyond peradventure that for nearly six years before March 8, 1877, there was an understanding between Bowen first and the bank afterwards on one side and Sorin on the other, that when the latter, through his influence as a churchman, should obtain the outstanding title to one-third of his own south three-quarters of the section, he should at the same time obtain for Bowen or the bank the same outstanding title to the north quarter thereof. This understanding was based upon a good consideration, because all the various transactions and arrangements hereinbefore detailed were based upon it, and were conducted and entered into because of it, and in reliance upon it. That this was so is apparent from the conduct of the parties subsequent as well as prior to March 8, 1877. In September, 1877, V. A. Turpin was appointed receiver of said bank in a proceeding begun against it in the superior court of Cook county, and thereafter, in February, 1878, Haines conveyed to said receiver all the property acquired by him through the sales under said trust deeds and by the deed from Bowen, except one block, which he had previously conveyed to the appellee Shedd. He also assigned to the receiver said contract of January, 1876, then supposed to be as valid as that of 1877. The purchasers from Haines and from the receiver made their purchases in reliance upon the agreement of Sorin to perfect their titles as soon as it could be done.

Now, what was the attitude of Sorin and Haines towards each other when they met on March 8, 1877, and entered into the contract of that date? Each of them was fully aware of the understanding that had existed for years in regard to getting in the outstanding title. Haines, as president of the

bank, held by assignment from Onahan the agreement of January, 1876, and Sorin knew this. Haines was aware of Sorin's claim in regard to the 17 acres, and was willing to recognize it, and Sorin was satisfied with this recognition of his claim. Accordingly they executed in duplicate the contract of March, 1877, as the same is above set forth. In view of the circumstances thus detailed, it was clearly the intention of the contract that Sorin should obtain the outstanding title for the bank in consideration of receiving 17 acres out of the north quarter of the section. In commenting upon the terms of the contract, we will advert to some of the objections made to it by counsel for appellee.

First. It is said that the contract was entered into for a mere temporary purpose, and that it was abandoned. The temporary purpose is alleged to have been the procurement of the title by means of the appointment of a conservator for Edward De Saille, the holder of the legal title to one-third, who was said to be insane. There is some testimony that one of the methods proposed for obtaining Edward De Saille's interest was to procure a conservator to be appointed, but there is nothing in the contract itself which limits Sorin to any one mode of getting the title, or to any particular time within which he should procure it. The language is, "As soon as said Sorin procures or causes to be procured a good title," etc. These words are broad enough to refer to deeds obtained from the heirs of Edward De Saille after his death. The extension of the covenants to the heirs, administrators, and assigns of the parties negatives the idea of an immediate accomplishment of the object sought through a conservatorship. The alleged fact of an abandonment is inferred from the circumstances that Haines conveyed block 1 to Mrs. Shedd and the balance of the north quarter to the receiver. So far as the conveyance to the receiver was concerned, it was no evidence of a sale of the property. Haines was a mere trustee for the bank, and so was the receiver. But the transfer of the title by Haines did not operate as an abandonment, for the reasons already stated in the above quotation from our opinion filed on the second hearing, and because, by the express terms of the contract, its covenants are binding upon "the respective heirs, administrators, and assigns of both of said parties." The word "assigns" cannot be limited in its signification to assignees of the contract, but includes grantees of the land. As it was contemplated that the bank, through its president or receiver, would sell different parts of the land to different parties, the contract, which was one, could not be assigned to every grantee. It could have been assigned to the receiver for the benefit of his grantees, but this was not done, either because the contract of January 29, 1876, which was considered valid, was assigned to Turpin, or because the duplicate copy of the contract of

March, 1877, held by the bank, was, in some unknown manner, taken from its vaults, and lost. The land in the hands of the assigns of Haines was charged with a trust in favor of Sorin for the 17 acres, and, whatever title might be acquired by Sorin or his grantees with notice was charged with a trust in favor of the grantees of Haines. We do not think that the first objection to the contract is a valid one.

Second. It is claimed on behalf of appellant that the contract is unilateral, and that it imposed no obligation upon Sorin, but that it was a voluntary matter with him whether he should convey the title obtained by him, and receive the 17 acres, or not. We cannot concur in this view. We think that by the terms of the contract, when fairly construed, Sorin undertook to act as the agent or trustee for Haines to convey the title to him or his grantees when it should be obtained. The contract states that it is "mutually covenanted and agreed by and between said parties"; that is, that both parties covenanted, and not that one only was bound. Again, it states that "the covenants herein are to extend to and be made binding upon the respective heirs, administrators, and assigns of both of said parties." The word is not "covenant," but "covenants." What covenants are meant? No other covenants can be referred to than the covenant of Sorin to convey the outstanding interest when procured, and the covenant of Haines to convey the 17 acres. The covenants could not be binding upon the heirs, administrators, and assigns "of both of said parties," unless they were binding also upon "both of said parties" themselves. A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negated by the language used. *Bish. Cont. § 417; Furnace Co. v. Magill*, 108 Ill. 656. Courts will seek to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words which they may have used to express it. *Walker v. Douglas*, 70 Ill. 448; *Wilson v. Marlow*, 66 Ill. 385. We are inclined to agree with the learned chancellor below that, "just as soon as Sorin acquired that one-third outstanding undivided interest, he held it as trustee for Haines, and those claiming under him."

Several other points are discussed in the briefs of counsel, but, as these were all decided in favor of appellant, they need not be here considered.

The land in question was sold for taxes, and under and by virtue of the sale the sheriff of Cook county executed and delivered to the assignee of the purchaser at the tax sale a deed for the premises. On the hearing the defendants offered in evidence the delinquent

list, judgment, precept, and the sheriff's deed. The evidence was offered for the purpose of establishing title under the act of 1835, which provides that "actions brought for the recovery of lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such lands for the non payment of taxes, * * * shall be brought within seven years next after possession being taken as aforesaid."

The appellees here assign as cross error that the court below refused to allow this deed to be introduced as evidence of the *prima facie* title which entitles the holder to protection under the law of 1835, because it did not appear that the sheriff had power, under the law, to make any deed until after an affidavit had been made, showing that the purchaser had complied with the constitutional provision concerning notice to the owner of the land of such sale, and of the time when the right to redeem from it would expire. We think that this ruling was correct. It conforms to our recent decision in *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60, which, after a careful reconsideration, we are inclined to adhere to. We there held that, in order to show a *prima facie* title under said act of 1835, notice by personal service or by publication to the owner must be shown before a tax deed of his land can be lawfully executed by a public officer. This litigation has been pending in the courts nearly 14 years, and, as it is evidently a speculative suit, it is time that it should end. We are not altogether certain that Edward Sorin, who has not testified in this case, intended by the agreement which he made on January 29, 1881, with appellant, as the same is set forth in *Torrence v. Shedd*, 112 Ill. 468, to authorize appellant to do anything more than seek to recover the 17 acres named in the contract of March, 1877. The appellant has, however, prosecuted this suit for the recovery of the whole of the one-third interest acquired from the heirs of Edward De Sille, in disregard of that contract, and Sorin must be held responsible for the conduct of appellant, his agent and trustee. But the defendants below, appellees here, are not without fault. They have contented themselves with simply opposing appellant's right to such a partition as will give him said one-third of the premises, and have filed no cross bill, nor offered, in their answers or otherwise, to convey the 17 acres to appellant or Sorin. Since the case has come here the last time, both parties have petitioned for a rehearing, and a rehearing has been granted upon the application of both. No further petition for rehearing can be allowed. After a full and careful consideration of the case we make the following disposition of it:

The decree of the superior court dismissing

the bill for want of equity is reversed, and the cause is remanded to that court, with directions to permit the appellant to file an amended bill within some time to be fixed by the court, therein asking for a specific performance of the contract of March 8, 1877, and therein offering to convey to appellees the title to the one-third interest acquired from the heirs of Edward De Sille in exchange for a conveyance of 17 acres by appellees, to be selected by them and appellant or Sorin; or therein praying for a partition of the undivided 17 acres out of the north quarter of said section, in accordance with the usual practice in partition cases; and with further directions that, in case such amended bill shall not be filed within the time so limited, the decree of dismissal hereby reversed shall be entered, and stand as the final decree in the cause. Reversed and remanded.

CRAIG, J., dissents.

(184 Mass. 18)

COREY et al. v. INHABITANTS OF WRENTHAM.

(Supreme Judicial Court of Massachusetts.
Norfolk. June 19, 1895.)

TOWN WAYS — ACCEPTANCE BY TOWN MEETING —
RECOVERY OF LAND DAMAGES.

1. Plaintiffs laid out certain streets at their own expense, which were afterwards laid out as town ways by the road commissioners, and reported to the town for acceptance in a report which included an award as compensation for the land taken. When the streets were first constructed, they were opened to the public by plaintiffs, and were thereafter used by the public without restriction. At a town meeting it was first voted that the town "accept the layout of the commissioners," but a second vote on the amount awarded was in the negative. At the same meeting a further appropriation for street improvements was made, and an additional sum was granted, to be expended on the streets in controversy. The town afterwards voted to discontinue the streets as town ways. *Held*, that the streets were legally established as town ways, as the effect of the second vote was merely to defer payment of the award.

2. Pub. St. c. 49, § 69, provides that land damages awarded in laying out town ways shall not be paid until the land is entered upon and possession taken for the purpose of constructing the way, and, if possession is not taken, the party, instead of damages, shall be entitled to indemnity. *Held*, that plaintiffs could not recover land damages where they laid out at their own expense streets which were afterwards accepted by the town and used by the public, but which were discontinued before the town entered and took possession thereof.

Appeal from superior court, Norfolk county.

Action by D. C. Corey and others against the inhabitants of Wrentham to recover damages awarded by the road commissioners in laying out town ways. From a judgment for defendants, plaintiffs appeal. Affirmed.

T. E. Grover, for plaintiffs. Henry E. Fales and Stephen H. Tyng, for defendants.

BARKER, J. The action is for damages awarded by road commissioners in laying out town ways. The award is the same which the town unsuccessfully sought to have revised by a jury in *Inhabitants of Wrentham v. Corey*, 159 Mass. 93, 34 N. E. 179, in which case the court declined to say whether the ways were legally laid out. The town now contends that they were not legally established, and that, if they were, this action must fail, for the reason that no entry and possession has been taken for the purpose of constructing the ways. It is agreed that the plaintiffs, owners of a tract of land in Wrentham, about the year 1886, laid out and constructed at their own expense three streets, which are the same laid out as town ways by the road commissioners on March 8, 1892, and reported to the town for acceptance in a report which included an award of the sum now sued for as compensation to the plaintiffs for land taken and damages sustained because of the taking of their land; that when the streets were first constructed they were opened to the public by the plaintiffs, and some houses were built upon them, and that the streets have been used by the public from that time to this without restriction. The report of the road commissioners was acted upon in town meeting on March 21, 1892, and since that time neither the town nor its officers have entered upon or taken possession of the streets for the purpose of constructing or altering them, or of making repairs, but the streets have been used by the public as before, and there is nothing to indicate that they are not public ways. No question is made as to the authority of the road commissioners, or the validity of their proceedings, nor as to the power of the town to establish the streets as town ways at the meeting of March 21, 1892; but it is contended that the votes passed at that meeting were not in law an acceptance and allowance of the report of the road commissioners, within the meaning of the provisions of Pub. St. c. 49, § 71. The record of the meeting shows that, the report of the road commissioners having been read to the meeting, a motion was made and discussed that the report be accepted; that the meeting voted that the question be divided, and that thereupon "the town voted to accept the layout of the commissioners"; that "then the question on allowance for land damages came up. Mr. Sherman moves that the award of the commissioners, \$740, be granted, which was voted in the negative." At the same meeting, under an article in the warrant "to see how much money the town will appropriate for highways and bridges the ensuing year, and determine how the same shall be expended," the town first voted to appropriate the sum of \$3,000, and later the article was again taken up, and "an additional sum of six hundred dollars (\$600) was granted, to be expended on Broad, Cottage, and Spring streets," which were the

streets dealt with in the report on which the town had voted. On November 16, 1892, the town filed its petition for a jury to revise the assessment of damages made by the road commissioners. The rescript sustaining the demurrer of the present plaintiffs to that petition for the reason that a town is not entitled to have an award of damages by road commissioners revised by a jury, was sent down on May 17, 1893, and at a town meeting held on October 31, 1893, the town voted to discontinue the streets as town ways. The present action was commenced on July 17, 1893.

The streets were legally established as town ways if they were "accepted and allowed" as town ways at the meeting. In the agreed statement all questions as to the competency of the agreed facts as evidence are saved, but neither party has contended that any fact stated is not competent. We will, however, first consider only the record of the action of the meeting of March 21, 1892, under the article which warned it to hear and act upon the report of the road commissioners. The first motion was that the report be accepted, and the first vote was that the question be divided, and next "the town voted to accept the layout of the commissioners," and it next negated a motion "that the award of the commissioners, \$740, be granted." What was the "layout of the commissioners" which the meeting accepted? The defendant contends, upon the authority of *Russell v. New Bedford*, 5 Gray, 31, and *Cambridge v. Commissioners*, 117 Mass. 79, that "the assessment of damages in these cases is * * * part of the laying out." If so, when the "layout of the commissioners" was accepted, the assessment of damages which was part of it was accepted by the same vote. The remaining action under the article, by which a motion "that the award of the commissioners, \$740, be granted" was negated, is not inconsistent with the acceptance of the portion of the report which assessed damages. The natural meaning of the motion was the present appropriation of \$740 to the payment of the damages awarded; and, even upon the theory that the meeting knew that the award, if accepted, could be revised only upon the application of the landowners, it was not necessary then to appropriate the money. The award might be revised upon such an application, and the town might, for that or other reasons, deem it unwise then to grant the money. The defendant contends that the votes, taken together, were a rejection of the award; and so that the whole action under the article was not a confirmatory vote of the town upon the report. But the failure to pass in the affirmative a motion that an award of money "be granted" is not a rejection of the award, but a mere omission then to appropriate money for its payment. We all think that, upon a fair construction of the whole action of the meeting upon the ar-

title which brought before it the question of establishing the streets as town ways, they were accepted and allowed as such ways. This conclusion would be strengthened by considering the other votes of the town at the same meeting, for under another article the town "granted" the sum of \$600, to be expended on the same streets; and the appropriation was illegal if they had not been established as town ways. In the same direction were the acts of the town in bringing its petition to revise the award, and in discontinuing the streets after the failure of that petition.

The remaining question is whether the fact that neither the town nor its officers have entered upon or taken possession of the ways for the purpose of constructing or altering them or of making repairs, although the ways have been used by the public since March 21, 1892, prevents the plaintiffs from recovering. This depends upon the meaning of the provisions of Pub. St. c. 49, § 69, providing that "damages so awarded shall not be paid until the land is entered upon and possession taken for the purpose of constructing the way, * * * and if possession is not taken * * * the party, instead of the damages awarded to him, shall be entitled to indemnity to be assessed by the selectmen or road commissioners in the same manner that indemnity is awarded by county commissioners in like cases." The plaintiffs contend that this statute does not apply to the case here presented; and that, if it applies, the fact that the town, after establishing as town ways these streets already constructed and in public use, permitted the public to continue to use them until October 31, 1893, without doing anything to indicate that the streets were not public ways, constitutes an entry and possession within the meaning of the statute. After the establishment of the streets as town ways, and in the absence of any action by the town forbidding the public to use them as such ways, we have no doubt that the use by the public was a use of the streets as town ways, under the public easement so taken and acquired, notwithstanding the fact that there was no entry and possession for the purpose of construction or repair. Nor do we doubt that, if this use of the streets as town ways damages the plaintiffs, they were entitled to recover a reasonable compensation therefor. But the real question is whether this action for damages awarded on the basis of a permanent taking is their proper remedy. Upon this question the history of the legislation is instructive. Up to the year 1842, when a public way was once established and the damages ascertained in the prescribed modes, both the right of the public to a permanent easement and the right of the landowner to his damages became vested, and the landowner could recover the damages awarded to him, although his land was

never entered upon nor used by the public, and although the way had been discontinued, so that the public could never use it. See *Harrington v. Commissioners*, 22 Pick. 263, 267; *Hallock v. Franklin Co.*, 2 Metc. (Mass.) 558. In consequence of these decisions it was enacted that no person claiming damage by the laying out or altering of a highway should have a right to demand the same until the land had been entered upon and possession taken for the purpose of constructing the highway or alteration, and that, if he was put to trouble or expense by the proceedings, the county commissioners should allow him full indemnity therefor. St. 1842, c. 86, § 1. *Harding v. Medway*, 10 Metc. (Mass.) 465, 470. In the case last cited this statute was held to apply to all public traveled ways, whether town ways or county ways, when laid out by the county commissioners; and in *Bishop v. Medway*, 12 Metc. (Mass.) 125, it was held not to apply to town and private ways, when the laying out and the assessment of damages were not made by county commissioners, but by selectmen. This decision was in 1846, and by St. 1847, c. 259, § 4, the provisions of St. 1842, c. 86, § 1, were extended, and applied to town ways and private ways thereafter to be laid out by selectmen; and it was provided that when a person claiming damages had been put to any expense for injuries sustained by the proceedings the selectmen should allow him full indemnity therefor, and that he might also have a jury to revise their estimate. The substance of these provisions was incorporated into Gen. St. c. 43, §§ 14, 15, 63; and it seems that they were extended to cities by force of Gen. St. c. 43, § 81. See *Pickford v. Lynn*, 98 Mass. 491, 498. In the year 1862 further protection was given to owners of land in such cases by an enactment that the laying out or alteration of the way should be void as against them, unless within a reasonable time, not exceeding two years, possession should be taken for the purpose of constructing the way, or the damages awarded him should be paid or tendered. St. 1862, c. 203. The application of this act to ways located before its passage was limited by St. 1863, c. 108. St. 1866, c. 303, repealed these acts, and provided that any laying out or alteration should be void as against the owner of land taken, unless possession should be taken for the purpose of constructing the way within two years from the time when the right to take possession for that purpose first accrued by law, and that an entry for the purpose of constructing any part of the way should be deemed a taking possession of all the lands included in the laying out. The provisions of Gen. St. c. 43, §§ 14, 15, 63, and 81, upon this subject, and of St. 1869, c. 303, were continued in Pub. St. c. 49, §§ 14, 15, 69, 91, and 88, respectively, and are now in force. The system is that, when a public way is established, the claim of the landowner to a reasonable compensation is

recognized and his damages as for a permanent taking are awarded by the tribunal which lays out the way, with a right on his part to have the estimate revised by a jury. This compensation does not, however, become payable until there is an actual entry and possession, for the purpose of construction, upon some land included in the laying out. But, if such entry and possession are delayed more than two years, he may have the laying out declared void; and, if possession is not taken, he is entitled to an indemnity, the amount of which he may have revised by a jury. This system allows the landowner a reasonable compensation in every supposable case, even if his damages as first assessed never become recoverable because no land is entered upon for the purpose of constructing the way, even if the way is finally discontinued without such entry and possession, and after a period of use by the public. To protect the rights of the landowner it is not necessary to give other than their literal, natural construction to the words of the statutes in which this system is found, and in the opinion of a majority of the court it was intended by the legislature to embrace cases like the present. The phraseology of the statutes has been quite uniform. The words used in St. 1842, c. 86, § 1, are: "Until the land over which the highway or alteration is located shall have been entered upon and possession taken for the purpose of constructing said highway or alteration." This language is significant, because in *Harrington v. Commissioners*, in view of which decision the statute was enacted, nothing like the phrase, "possession taken for the purpose of construction," was used, the land not having been entered upon at all, either for constructing the way or in using it as a public highway. The legislature might well say that entry and possession for the specific purpose of construction should be the prerequisite to the right of the landowner to recover damages assessed upon the theory of a permanent taking, and that without such an entry and possession, if his damages were not tendered to him, he should be entitled only to indemnity for such injury and expense as he might actually sustain by the proceedings. Every legislature since that of 1842 which has dealt with the subject has used substantially the same formula, and a majority of the justices think that Pub. St. c. 49, § 69, is meant to cover all cases of town and private ways, including those already in public use when laid out; and that the damages are not to be paid, except at the option of the municipality, until entry is made and possession is taken for the purpose therein stated. The case of *Parker v. Norfolk Co.*, 150 Mass. 491, 23 N. E. 231, where, an agent of the county having set bounds at the angles of a county way, it was held that the placing of the bounds could not be said, as matter of law, to be a taking possession of the land within the meaning of St. 1860,

c. 303, supports the view now expressed. Such bounds could not have been set without an entry upon the land taken, and the taking was in the widening of an existing way, already in use by the public.

All the justices are of opinion that the ways were legally established, and a majority think that the right of the plaintiffs to recover the damages awarded has never accrued, because there has been no entry and possession taken for the purpose of constructing the ways. Judgment for defendants affirmed.

(164 Mass. 124)

MALONEY v. CASEY et al.

(Supreme Judicial Court of Massachusetts.

Essex. June 21, 1895.)

TRUSTEE PROCESS—DEPOSIT IN SAVINGS BANK—RULES OF BANK.

The right of a creditor to attach funds in a savings bank belonging to the debtor is not affected by plaintiff's failure to observe rules of the bank requiring that when money is demanded the bank book shall be presented, and that, before funds can be drawn, a certain notice shall be given the bank.

Report from superior court, Essex county; Edgar J. Sherman, Judge.

Action by Frank J. Maloney against William J. Casey. The Haverhill Savings Bank was summoned as trustee of defendant, and the court found that plaintiff was entitled to enter judgment against it without giving an indemnity bond. At the request of the bank, the case was reported to the supreme judicial court. Judgment for plaintiff.

S. W. Clifford, for plaintiff. Ira A. Abbott and Francis H. Pearl, for defendant trustee.

FIELD, C. J. We deem it unnecessary to determine whether it was within the power of the superior court in this case to order the plaintiff to give a bond of indemnity to the trustee before entering judgment charging the trustee. In ordinary actions at law it has been deemed within the power of a court of common law, although there is no statutory authority to order such a bond to be given by the plaintiff to the defendant in certain cases where, on equitable considerations, a bond seems to be necessary or desirable to indemnify the defendant against the claims of other persons than the plaintiff on account of the same cause of action. This practice was adopted from the practice in suits in equity. *Potter v. Cain*, 117 Mass. 238; *Schmidt v. Bank*, 153 Mass. 550, 27 N. E. 595. Pub. St. c. 183, § 33, is as follows: "When a savings bank or an institution for savings is charged as trustee, and in the opinion of the court there arises upon the answer a doubt as to the identity of the defendant, the court may in its discretion require the plaintiff to give bond, with surety or sureties to be approved by the court and conditioned to save such bank or institution harmless from any loss or damage arising

out of a payment by it pursuant to the order of the court." This is the only statutory provision on the subject in trustee process, and the finding of the court in the present case that the principal defendant is the person who made the deposit makes this section inapplicable. The trustee in this case is protected by the judgment of the court against assignments of which it had not received notice at the time it was charged. It is only when a trustee, having notice of an assignment, neglects to bring it to the notice of the court, or neglects to notify the assignee of the suit that the judgment charging the trustee is no bar to an action for the benefit of an assignee. *Wardle v. Briggs*, 131 Mass. 518. If we assume that the superior court had the power to order a bond in the present case, it was largely within its discretion whether it would exercise the power; and the facts found by the court show that there was no error in law in refusing to order a bond in the present case, even if, under any circumstances, the exercise of such a discretion is subject to revision by this court.

The last contention is that by the rules of the savings bank it was provided that "no payments will be made without the presentation of the deposit book," etc., and that, as it has been found that the deposit book in this case had been lost and could not be presented, the bank is not liable to be charged in trustee process. Whether a depositor under such a rule can maintain an action against the bank, without having presented or caused to be presented to the bank the deposit book when the demand for payment is made, or whether the rule would be held not to apply to, or would not be enforced in, cases where the bank book is lost or had been destroyed, need not be considered. The statutes on trustee process plainly intend that credits in savings banks shall be subject to attachments by that process. These statutes have made no provision for compelling the principal defendant to surrender his deposit book, and without such compulsion the plaintiff usually could not obtain the book. The credits are attached and applied to the payment of the defendant's debt to the plaintiff, against the will of the defendant, and it has not been made a condition of the attachment that the plaintiff shall conform, in bringing his action, to all the rules which the defendant is required to observe before he can bring an action against the bank. The plaintiff in trustee process, where the depositor is the principal defendant, is not required to give the notice which the depositor is often required to give before he can demand payment of the bank. It is for the legislature to say on what terms trustee process shall be maintained to reach the creditors of the principal defendant, and the rules of the bank are not regarded as essential conditions, on a compliance with which the indebtedness of the bank to the depositor necessarily depends. We are of opinion that

the statutes do not make the liability of the bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which were intended to regulate the conduct of a depositor in his relations with the bank. Judgment charging the trustee affirmed.

(164 Mass. 26)

NICKERSON v. SPINDELL et al.

(Supreme Judicial Court of Massachusetts.

Barnstable. June 20, 1895.)

SUBSCRIPTION—SERVICES OF SUBSCRIBER—RIGHT TO RECOVER—NONJOINDER OF DEFENDANTS—EVIDENCE—LOST TELEGRAM.

1. Where one of several subscribers to the purchase of a boat, to be owned by all in proportion to their subscriptions, at the request of the agents of the subscribers, superintends its construction and expends money therein, and afterwards it is agreed between him and the other subscribers that his interest in the boat shall cease, he can recover from the other subscribers at law for the value of his services and disbursements.

2. Where two of several joint owners of a boat, sued for services rendered thereon, fail to plead in abatement the nonjoinder of the others, they are liable as if they were sole owners.

3. Where, in an action for services rendered, defendant sets up that the services were gratuitous, plaintiff may show that when he entered on the work he was engaged in a business in which he was earning from \$3 to \$10 a day, and that he expected to be paid.

4. Where the sender of a telegram takes the initiative, the message as delivered will, as between him and the recipient, be treated as the original, and proof of its loss will entitle the recipient to prove its contents, there being no evidence of a mistake in the transmission of the message.

Exceptions from superior court, Barnstable county.

Action by one Nickerson against Isalah Spindell and another for services rendered and disbursements paid. A verdict was rendered for plaintiff, and the case was reported to the supreme judicial court. Exceptions overruled.

This was an action of contract by plaintiff against Isalah Spindell and Augustus S. Messer, as owners of the steamer Kearsarge, to recover the sum of \$122.80 for expenses and services of the plaintiff in the superintendence of the building of the steamer. At the trial in the superior court, before Dewey, J., in addition to facts which appear in the opinion, it appeared that Agreement A, which was signed by plaintiff, was as follows: "We, the undersigned, agree to take the amount set opposite our names in a steamboat to be purchased or built, the same to be under the management of Isalah Spindell and Company, until such time as the majority of the parties hereto signed shall determine otherwise. We agree to pay to said Isalah Spindell and Company the sums set opposite our names at such times as he may ask for it." Opposite the name of plaintiff was \$500. Agreement B: "We, the undersigned, stockholders in steamer Kearsarge, agree to pay to Isalah Spindell, managing owner, the

sums set opposite our names for the purpose of paying outstanding bills against said boat to date, the surplus amount to be used as working capital for the said boat. The money to be paid at such time as said Isalah Spindell may ask for it." The name of the plaintiff was not signed to this agreement. Both defendants signed each agreement. The plaintiff's wife, called as a witness for the plaintiff, testified that her husband had received numerous telegrams from Spindell, but they had been destroyed. Plaintiff then offered secondary evidence of the contents of the telegrams, to which defendants objected. The court ruled that, where the sender of a telegram takes the initiative, as between him and the sendee of the message, the original is the message as delivered to the sendee, and that, on proper foundation being laid, secondary evidence of the contents of said telegrams was admissible, and having found that the absence of the telegrams as delivered to the plaintiff was accounted for, allowed the witness to testify as to the contents of the telegrams, and the witness then testified that the telegrams requested the plaintiff to meet Spindell at a station in the town of Bourne. The jury found for the plaintiff, and the case was reported to the supreme judicial court.

C. F. Chamberlayne, for plaintiff. H. P. Harriman and F. J. Dagett, for defendants.

KNOWLTON, J. There was evidence to show that the plaintiff performed the services and incurred the expenses set out in his declaration in superintending the building of a steamer for the defendants and others who were the owners of her, and that he did this at the request of the defendant Spindell, who was the managing agent of the owners. It is contended that there can be no recovery, inasmuch as the plaintiff was one of the signers of the agreement under which the steamer was built. But this was merely an agreement on the part of each of the subscribers to it to take a share in the enterprise, and to pay the managing agents a stated sum whenever they should ask for it. It was entered into as a preliminary to the purchase or the construction of a steamboat, and when the plaintiff signed it with the others it was contemplated that he should be the commander of the boat when she was put to use, and should own a share in her. But at some time the plan was changed, and the plaintiff did not become the captain of the boat, nor does it appear whether he ever became the owner of any share in her. He never paid, and apparently was never asked to pay, anything under Paper A, and he was not among the signers of Paper B, who are described as the "stockholders in steamer Kearsarge." There was also evidence that the defendant Spindell said that he did not consider the plaintiff an owner in the steamer. Assuming that he was originally expected to become a part

owner, the jury might have been warranted in finding either that he never actually became one, or that, if his ownership was complete, a new arrangement was made which left him as if it had never existed. Upon a finding that he rendered services and expended money in the construction of the boat at the request of the managing agent, the law would imply a contract to pay for them, in the absence of anything to rebut the ordinary presumption. Even if he had done this as one of the owners, he would have been entitled to contribution from the others, although so long as their relations remained unchanged, he could not have maintained an action against them at common law. *Duff v. Maguire*, 99 Mass. 300; *Terry v. Brightman*, 132 Mass. 319. If he was one of the proprietors of the business at the time of rendering his services, and if it was afterwards understood and agreed between him and the other owners that his ownership should cease, and that his rights should be determined in the same way as if he had never signed the first agreement, he could have recovered notwithstanding his former interest. *Sikes v. Work*, 6 Gray, 433.

The defendants might have pleaded in abatement the nonjoinder of the other owners, but in the absence of such a plea they are liable as if they were the sole owners. The signing of Paper B, as well as Paper A, by both of the defendants, and the testimony that Messer visited the steamer and suggested the name Kearsarge for her, warranted a finding that they were both part owners in her.

One of the defenses relied upon was that the plaintiff rendered his services and paid his money gratuitously. As bearing upon that defense, it was competent for the plaintiff to show that he was then engaged in other business at which he was earning from three to ten dollars per day. As affecting the probabilities, this fact would furnish a legitimate argument against the defendants' contention. *Parker v. Coburn*, 10 Allen, 82; *Upton v. Winchester*, 106 Mass. 330; *Norris v. Spofford*, 127 Mass. 85. Upon the same proposition he might testify that, when he rendered the services, he expected to be paid for them; not that his expectation would furnish a ground for recovery if there were not facts to create a liability otherwise, but if he was acting voluntarily, and making a gift of his money and services without their disclosing it, he could not afterwards change his mind and recover pay for what he did gratuitously, even if the other circumstances were such that, looking to them alone, the law would imply a contract to pay. It was, therefore, competent for him to negative this part of the defendants' contention by his testimony that he was not acting gratuitously. It was also competent for him to testify to the price per day that his services were fairly worth. *Kendall v. May*, 10 Allen, 59.

When the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it. Whether we should go further, and hold that the telegraph company is so far the agent of the sender as to bind him by their errors in sending it, it is unnecessary in this case to decide. There is much authority in support of this last proposition, although the contrary has been held in England. There was no error in the admission of the testimony. See *Durkee v. Railroad Co.*, 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Wilson v. Railroad Co.*, 81 Minn. 481, 18 N. W. 291; *Association v. Hutmacher*, 127 Ill. 652, 658, 21 N. E. 628; *Telegraph Co. v. Shotter*, 71 Ga. 760; *Howley v. Whipple*, 48 N. H. 487; *State v. Hopkins*, 50 Vt. 316; *Smith v. Easton*, 54 Md. 138; *Henkel v. Pape*, L. R. 6 Exch. 7.

The instruction "that, if the plaintiff rendered the services and incurred the expenses in question at the request of Isaiah Spindell, acting in his own behalf and representing the defendant Augustus S. Messer, and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred by him," was not given as the whole law of the case, but is to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendants at the time of bringing the suit. So considered it contains no error. Exceptions overruled.

(164 Mass. 29)

BROWNELL et al. v. OLD COLONY R. CO.
et al.

(Supreme Judicial Court of Massachusetts.
Bristol. June 19, 1895.)

**RAILROAD COMPANY — COMPELLING EXERCISE OF
FRANCHISE—FERRIES—SPECIFIC PERFORMANCE OF DUTIES.**

1. Under St. 1854, c. 124, the proprietors of a ferry transferred their charter and property to a railroad company, with a provision that the latter should be held to perform all the duties prescribed in the ferry charter, and that the two companies should become one line. The ferry was discontinued in 1873. By St. 1894, c. 392, defendant railroad company, which in 1883, by virtue of St. 1882, c. 80, succeeded to all the franchises of the above railway company, was required to provide and operate a suitable ferry in accordance with the original charter and St. 1854, c. 124. *Held*, that such act was within the power of the legislature.

2. Where the statute requires that a suitable ferry be operated, and there is no proof before the court from which it can determine what kind of a ferry is suitable, an order will be made in the first instance to provide a suitable ferry, and further application can be made if the ferryboat provided is not suitable.

3. When, by legislative authority, a ferry was adopted by a railroad company as a part of its line, the subsequent maintenance of the ferry becomes as much a part of the business of

the railroad company as the maintenance of any other part of its line.

4. Where a ferry franchise has been blended in that of a railroad company, a contention that the only penalty for failure to operate the ferry is forfeiture of the ferry charter cannot be maintained.

5. Where, by legislative authority, the franchise and property of a ferry company were transferred to a railroad company, and blended in it, with a proviso that the grantee was to perform the duties imposed on the grantor by its charter, but no clause of re-entry for breach of the condition was inserted, the contention of defendant, a remote grantee of the railroad company, that it never acquired the franchise to maintain a ferry, on the ground that the deed from the ferry company became void by the failure of defendant's grantors to maintain a ferry, and that in recent transfers no express mention of the ferry franchise has been made, cannot be maintained.

6. No waiver of the obligation to operate a ferry can be presumed from the fact that the commonwealth acquiesced in its abandonment for over 20 years, or from legislation subsequent to its abandonment, by which railroads were permitted to lease and consolidate upon the basis of such abandonment, in the absence of some statute expressing or clearly implying a waiver.

7. The legislature may provide, as in St. 1894, c. 392, for the specific enforcement of the obligation to maintain a ferry by a suit in court.

8. The better construction of St. 1894, c. 392, making it the imperative duty of defendant to operate a ferry, and prescribing a penalty to the commonwealth of \$100 a day for each day's delay in operating a ferry, but containing no provision making the commonwealth, or any of its officers, a party to the suit which 10 or more citizens may bring to enforce the provisions of the act, is that the commonwealth may enforce the penalty which inures to its benefit, and that the 10 or more citizens authorized may maintain a petition in equity to enforce so much of the statute as requires defendant to operate the ferry.

Case reserved from supreme judicial court, Bristol county; Lathrop, Judge.

Petition by Stephen A. Brownell and others under Act 1894, c. 392, to compel the Old Colony Railroad Company to operate a ferry between Fairhaven and New Bedford, and to enforce a penalty provided in the statutes. The case was heard in the supreme judicial court, and reserved for the full court. Decree ordered requiring defendant to operate the ferry, and denied as to the penalty. Case reserved.

T. M. Stetson and L. Le B. Holmes, for plaintiffs. J. H. Benton, Jr., for defendant Old Colony R. Co. H. M. Knowlton, Atty. Gen., for the Commonwealth.

ALLEN, J. By St. 1854, c. 124, the proprietors of the New Bedford & Fairhaven Ferry were authorized to transfer their charter to the Fairhaven Branch Railroad Company by deed, which should vest in the latter company all the rights and powers conferred by said charter, with a provision that the latter company should be held to perform all the duties prescribed thereby, and that from and after the execution and delivery of the deed the name of the ferry company should be changed, and that the said corporation should afterwards exist and be known by the name

of the Fairhaven Branch Railroad Company, and should not be required to hold separate meetings as a ferry company, but that all acts needful and proper to be done should be done at regular or special meetings of the railroad corporation, or by the directors thereof. The deed which was executed under the above statute was expressed to be upon the condition that the railroad company and their successors should at all times discharge the duties, and become and remain subject to the liabilities, prescribed and set forth in the charter of the ferry company, and also in St. 1854, c. 124. Various intermediate transfers were made, until, in 1883, by virtue of St. 1882, c. 80, the Old Colony Railroad Company succeeded to all the franchises and property which had belonged to the Fairhaven Branch Railroad Company. The evidence in the case leaves no doubt, and it is conceded, that after the deed to the Fairhaven Branch Railroad Company the railroad of that company and the ferry became one line, and were operated as such for a number of years. It was the same in effect as if the railroad company, by its original charter, had been authorized to establish and operate the ferry as a part of its line. The ferry became practically an extension of the railroad, just as if the railroad had been extended over a bridge. The railroad line having been thus extended and operated until 1873, the ferry was in that year discontinued as unprofitable; and by St. 1894, c. 392, the Old Colony Railroad Company was expressly required to provide and operate a suitable ferry in accordance with the provisions of the original ferry charter and of St. 1854, c. 124.

The first question which we have to determine is whether this statute is within the legislative power; that is to say, whether a railroad company, which runs a ferry as a part of its line, and which is operating the rest of its line, can discontinue the ferry, and refuse to obey a legislative requirement to operate it. A railroad company has by no means an absolute power to determine what parts of its line it will operate. Its franchises are granted for the public good, and in exercising them it is largely subject to the control and direction of the legislature. Either by virtue of the police power or of the reserved power to alter charters, many acts may be required which involve expense, and which a railroad corporation, or other corporation to which like rules would apply, would not, if left to itself, undertake. Numerous illustrations of this are found in the decisions of this court, as well as in those elsewhere. *Roxbury v. Railroad Co.*, 6 Cush. 424; *Com. v. Hancock Free Bridge Co.*, 2 Gray, 58, 64; *Fitchburg R. Co. v. Grand Junction R. R. & Depot Co.*, 4 Allen, 198; *Com. v. Eastern R. Co.*, 103 Mass. 254; *Commissioners on Inland Fisheries v. Holyoke Water-Power Co.*, 104 Mass. 446; *Mayor, etc., of Worcester v. Norwich & W. R. Co.*, 109

Mass. 103; *In re City of Northampton*, 158 Mass. 299, 301, 33 N. E. 568; *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 277; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *People v. Albany & V. R. Co.*, 24 N. Y. 261; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Inhabitants of Montclair v. New York & G. L. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242; *People v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. 657; *State v. Iowa Cent. R. Co.*, 83 Iowa, 720, 50 N. W. 280. The present case is merely an instance of compelling a railroad company to operate its entire line. The legislature has seen fit to pass an imperative statute to this effect. In view of this statute, it is not open to the railroad company to determine that the ferry should be discontinued while all the rest of its various lines are operated. The defendant appears to rely on *Com. v. Fitchburg R. Co.*, 12 Gray, 180, as sanctioning a contrary doctrine; but in that case there was no statute requiring that the railroad company should run the unprofitable trains. There is nothing in the decision which declares or implies that the legislature might not have imposed this as an absolute duty. The same thing may be said of *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369, and *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856.

The defendant contends that St. 1894, c. 392, did not impose a new obligation on the defendant, but only required the defendant to perform such obligation as the ferry company would have been under to maintain and operate the ferry, if it had not transferred its charter in 1854; and an elaborate argument is made to show that the original ferry company was not bound to maintain the ferry for all time. But, whatever may have been the obligation of the original ferry company, the Fairhaven Branch Railroad Company, when it made the ferry a part of its line, no longer had the power to discontinue the ferry, provided the legislature expressly required that it should be operated. And we are unable to give to the statute of 1894 the construction suggested by the defendant. This statute makes it the imperative duty of the defendant to operate the ferry, whether it is profitable or not. The defendant contends that the statute requires it to provide and operate a "suitable" ferry, and that there is no proof before the court upon which it can be definitely decided what kind of a ferry is suitable. We think, however, that an order to provide a suitable ferry is sufficient in the first instance, and that, if complaint is made that a ferryboat which may be provided is not suitable, a further application may be made to the court.

The defendant further contends that the requirement to operate a ferry forces it into a new business, and that, if the legislature can require it to operate a ferry for a mile, it could also require it to maintain a

line of steamboats to Nantucket. The only answer which needs to be given to this argument is that the ferry, by legislative authority, was adopted by the railroad company as a part of the line of the railroad, and that its subsequent maintenance is no more outside of the business of the railroad company than the maintenance of any other part of the railroad line.

The defendant further contends that the only liability of the defendant for failure to operate the ferry is a liability to forfeit the ferry charter. This argument cannot prevail, since the blending of the ferry franchise with that of the railroad company.

The defendant also contends that it has never acquired the franchise to maintain the ferry. The ground of this argument is that the deed of the ferry franchise to the Fairhaven Branch Railroad Company was upon condition, and that the deed became void by the failure to perform the duties required by the condition; and, moreover, that in the recent transfers no express mention has been made of the ferry franchise. But the deed of the proprietors of the ferry to the Fairhaven Branch Railroad Company cannot be considered as technically a deed upon condition subsequent. No clause of re-entry for breach of condition was inserted, and the purpose of the proviso was rather to show that the grantee was to assume and perform the duties prescribed and set forth in the charter. *Rawson v. School Dist.*, 7 Allen, 125; *Sohler v. Trinity Church*, 109 Mass. 1, 10; *Episcopal City Mission v. Appleton*, 117 Mass. 326. No conveyance upon condition subsequent was contemplated by St. 1854, c. 124, or by the vote of the stockholders of the Fairhaven Branch Railroad Company to make the purchase. The effect of the transaction was to transfer the duties from one corporation to another, after which the original corporation had no further interest in the matter; but the railroad company was bound by law to perform all and singular the duties of the ferry company. The ferry company was not authorized to make a conditional transfer. By section 3 of the statute, its only existence after the transfer was as the Fairhaven Branch Railroad Company. Moreover, an estate on condition subsequent is not defeated except by re-entry for breach of condition. No such re-entry has been made in this case, nor is it easy to see how it could be, since the ferry company, as a separate corporation, has ceased to exist. In reference to the suggestion that no special mention of the ferry franchise has been made in the recent conveyances, it may be said that none need be, since the provisions of St. 1854, c. 124, and the delivery of the deed thereunder. Since that time the ferry corporation has existed and been known by the name of the Fairhaven Branch Railroad Company, and has been included in all transfers of that company.

The defendant further contends that it

cannot be required to maintain the ferry during the term of the lease of its railroads and property to the New York, New Haven & Hartford Railroad Company. This lease was not pleaded in defense, and we have no reason to suppose that the omission was through inadvertence. Its admission in evidence was objected to as incompetent, and not open, and no motion was made to amend the answer by pleading it. We therefore have no occasion to consider whether the existence of the lease would exonerate the defendant as lessor from its obligations to the commonwealth, respecting which, however, see *Braslin v. Railroad Co.*, 145 Mass. 64, 13 N. E. 65; *Davis v. Railroad Co.*, 121 Mass. 184.

The defendant also suggests that any obligation to the commonwealth to operate the ferry was waived by the acquiescence of the commonwealth in its abandonment for a period of 20 years after 1873, and also by legislation subsequent to the abandonment in 1873, by which the railroads were permitted to lease and consolidate upon the basis of such abandonment. But no such waiver on the part of the commonwealth is to be presumed without the use of language in some statute clearly expressing or implying it. The omission by officers of the commonwealth or by others to take steps earlier for enforcing the duty signifies nothing. No statute has been pointed out showing an intention on the part of the legislature to waive the performance of it.

The defendant contends that the legislature could not provide for the specific enforcement of the obligation to maintain the ferry by a suit in court, such as is provided for in St. 1894, c. 392. The numerous cases already cited in which resort has been had to the courts for the enforcement of similar obligations and duties show to the contrary, and that the forfeiture of the charter is not the only remedy.

Finally, it is contended that the penalty of \$100 a day for each day's delay in operating such ferry cannot be enforced in this suit. Upon this point the statute is not clear, but we have come to the conclusion that the better construction of the statute is as the defendant contends. The principal reasons supporting this view are as follows: The forfeiture of the sum prescribed is to the commonwealth, but the statute contains no provision making the commonwealth or any one of its officers a party to the suit which 10 or more citizens may bring to enforce the provisions of the act. The maintenance of the ferry is for the peculiar benefit of New Bedford and Fairhaven, but the citizens of those places have no special interest in the enforcement of the penalty. The legislature can hardly have intended that the penalty should be paid to the 10 or more citizens who are authorized to file a petition in equity to enforce the provisions of the statute, yet nobody else is required to be a

party plaintiff. The plaintiffs have made the attorney general a party to represent the commonwealth; but he is not a financial officer of the state, and we are at a loss to see how he can properly be made a party, or be entitled to appear in his own name to represent the pecuniary interest of the commonwealth under this statute. The ordinary way of enforcing a penalty which is to go to the commonwealth is by proceeding in the name of the commonwealth, unless some other mode is enacted by statute or established by custom. We have a difficulty in inferring that the legislature intended that a heavy pecuniary penalty inuring to the commonwealth should be enforceable by a suit or petition in equity in this court, which suit is instituted, managed, controlled, and subject to be discontinued solely by private citizens, who have no interest in such penalty. The provision of the statute that this court should have jurisdiction in equity upon the petition of 10 or more citizens of New Bedford or Fairhaven to enforce the provisions of this act is satisfied by holding that it means the provisions requiring the Old Colony Railroad Company to provide and operate a suitable ferry. These citizens may maintain a petition in equity to enforce so much of the statute as concerns the citizens of New Bedford and Fairhaven. The commonwealth may enforce the penalty which inures to its benefit. This view derives some confirmation from Pub. St. c. 217, § 2, providing that "all fines and forfeitures * * * expressly appropriated to the use of the commonwealth * * * may, unless otherwise expressly provided by law, be prosecuted for and recovered by indictment in the superior court * * * or the same may be recovered in an action of tort." The result is that the plaintiffs are not entitled to a decree for enforcing the forfeiture of \$100 a day to the commonwealth, but, in the opinion of a majority of the court, they are entitled to a decree requiring the defendant to provide and operate a suitable ferry. Ordered accordingly.

(163 Mass. 569)

SMITH v. NEW YORK & N. E. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 3, 1895.)

**R. ILROAD LOCATION—PART ABANDONMENT—DOCU-
MENTARY EVIDENCE.**

1. On an issue whether defendant railroad company had abandoned a strip of land one-half a rod wide on the east side of its location, which was five rods wide, and the center of which was two rods west of the strip in question, it appeared that before the filing of the location the land on both sides of the location belonged to T., who conveyed to C. a part of it lying outside of the strip, the west boundary of the land thus conveyed coinciding with the east boundary of the strip, and that C. at the time of the location was also the owner of the next two adjoining

lots north of the lot purchased from T., through which two lots the location ran, *held*, that a petition to the county commissioners by the administrator of C. from the assessment of damages for C.'s land taken by the location, the decision of the commissioners thereon by consent of the parties, and a deed executed in escrow by the widow and heirs of C. as part of the same transaction, none of which purported to deal with the land in question, were inadmissible.

2. In such a case a subsequent conveyance of land 800 feet away from the land in question, by a third party, to defendant, tending to show that defendant only claimed a location 4 rods wide at that place, is inadmissible to prove that defendant did not claim a location 5 rods wide at the place in question, thus embracing the strip in dispute.

3. The fact that defendant railroad company accepted a deed to other land, with reference to a plan not purporting to be drawn to scale, but which attributed to defendant's location a certain width, does not make such plan admissible to show the width of defendant's location at the place in controversy.

Exceptions from superior court, Suffolk county.

Action by H. Smith against the New York & New England Railroad Company. To the admission of certain evidence defendant excepts. Exceptions sustained.

Defendant's bill of exceptions was as follows: This was an action of tort for a trespass alleged to have been committed by the defendant in the erection of a fence in 1888 upon land claimed to belong to the plaintiff. The locus was about 800 feet south of the defendant's Harvard street station, in the city of Boston, and on the opposite side of the tracks therefrom, and the fence extended a distance of about 100 feet parallel with the center line of location of said railroad company, and distant therefrom $2\frac{1}{4}$ rods. The plaintiff claimed to own a piece of the land whereon the fence was built, and extending from the said fence towards said center line of location a distance of one-half a rod. The railroad company claimed to own, for railroad purposes, under its charter and location, the strip of land between these two lines, the land in question thus being a strip one-half rod wide, parallel with the center line of location, and lying between two lines, one two rods distant from the center line (and during the trial, and herein, spoken of as the 4-rod line), and the other $2\frac{1}{4}$ rods distant from said center line (spoken of as the 5-rod line). These designations are given, because, if at the time of the alleged trespass defendant's location was 4 rods wide only, its line extended only to the line claimed by the plaintiff; but, if the location was 5 rods, then the defendant's line extended to said 5-rod line, so called, and the fence in that case was lawfully built. Plans of the premises were used at the trial, and may be used at the argument of these exceptions.

The court ruled, upon all the evidence, that the Boston & New York Central Railroad Company, a predecessor in title of the present defendant, filed a valid location in 1854, which said location was five rods wide at the point in question, and its center line is

the same as the present center line at the place in question. In other words, the court rules, on all the evidence, that the present location is one which was legally filed, and which the present defendant holds by mesne conveyances, under the charter and filing of said Boston & New York Central Railroad Company. By said location, the land in question in this suit, which may be spoken of as the half-rod strip, became the property of said railroad company for railroad purposes, and remained its property, or that of its successors, up to the time of the alleged trespass, unless the present defendant, or some one of its predecessors in title, has abandoned said half-rod strip, this question of abandonment being the main, and practically the only, issue in the case under the ruling of the court.

Originally, and before the filing of the location in 1854, the land on all sides of the locus was the property of one Tolman, said property being a farm of about 20 acres. The width of the farm where the railroad crossed it was about 500 feet, and it extended a long distance on each side of the location. Previously to the filing of the location, however, on April 3, 1854, one end of the farm, containing about 4 acres, was sold to one Carleton, and the division between the portion sold to him and the remainder was claimed by the plaintiff to have coincided with a line 2 rods east of the center line of the railroad as subsequently located, or, in other words, with the present 4-rod line. This portion bought by Carleton was known as the Tolman lot. There was no natural boundary or fence on the division line, but there was testimony that a fence was built there two or three years later, and maintained until 1888. Said Carleton, at the time of the location, was also the owner of the next two adjoining lots of land north of the lot purchased by him from Tolman, through which two lots the location ran. These lots were known respectively as the Carleton and Pierce lots. The land taken by the railroad company was not paid for up to 1857. During this year Carleton died, and, subsequently, in the same year, proceedings were had before the Norfolk county commissioners, a copy of the record of which is hereto annexed, marked "A," and an agreement was made between the said Boston & New York Central Railroad Company, on the one hand, and the heirs of said Carleton, on the other hand, relating to the payment for the land taken by said railroad company from said Carleton in his lifetime. Said agreement did not include the half-rod strip which was in question in this case. The land belonging to the Carleton heirs at that point was bounded by the 4-rod line. A copy of said agreement is hereto annexed, marked "B," and made a part of this bill of exceptions. The sum provided for in said agreement was not paid within the time limited therein, and the escrows mentioned therein were never

delivered to the Boston & New York Central Railroad Company by the holder in escrow. A copy of said escrow covering the Tolman lot is hereto annexed, marked "C," and made part of these exceptions. The railroad company paid the Carleton heirs in 1864 said sum and interest.

The defendant objected to the admission of said proceedings before the Norfolk county commissioners, and of said agreement and the deed in escrow, and to them severally, but the court admitted the same, and the defendant duly excepted.

It appeared that the Carleton lot, the Pierce lot, and the Tolman lot, as owned by Carleton, each contained more land than was covered by the said location of the railroad as filed, and the escrow put in and relating to the Tolman lot covers in its description the whole of the Tolman lot, while the escrows relating to the Carleton and Pierce lots cover only a strip four rods in width.

The plaintiff put in, as evidence of abandonment in this case, a deed from George F. Pinkham and others to William T. Hart and Charles P. Clark, trustees, dated August 4, 1873, and referring to a recorded plan which may be used at the argument. It was admitted that, when said deed was given, said Hart and Clark were in possession of the property of the Boston, Hartford & Erie Railroad Company, including the line of road at the point in question. A copy of said deed is hereto annexed, marked "D." It was not claimed by the plaintiff that said deed covered any part of the locus or of the land originally a part of the Tolman farm, but it was claimed that it did cover the half-rod strip outside the four-rod line, where defendant's Harvard street station stands, said strip being part of the so-called Carleton lot, and of the land belonging originally to S. B. Pierce, and afterwards to Bicknell, Pinkham, and others, and bordering on the so-called Pierce lot. The nearest point of the land which was claimed to be covered by said deed to Hart and Clark was, as appears above, about 800 feet from the nearest point of the locus in this case, and on the opposite side of the tracks therefrom. It appeared that said grantors in said deed had erected a railroad station on the premises conveyed by it, for the use of the railroad company, and intended by said deed to make a gift of the same to the trustees for the railroad. The premises were, however, foreclosed by a prior mortgage, and the trustees and company finally got no title under said conveyance.

The defendant objected to the admission of this deed, and it was admitted against his objection and exception.

The court found in favor of the plaintiff, and the defendant, being aggrieved thereby, alleges its exceptions and prays that the same may be allowed.

E. O. Achorn, for plaintiff. F. A. Farnham, for defendant.

HOLMES, J. This is an action of tort, in which the question is whether a strip of land half a rod wide on the east side of the defendant's roadbed belongs to the plaintiff or to the defendant. The land is to the south of the lands in controversy in *Bicknell v. Railroad Co.*, 161 Mass. 428, 37 N. E. 378, and in *Westcott v. Railroad Co.*, 152 Mass. 465, 25 N. E. 840, and is on the east side of the roadbed. In this, as in those cases, it is to be taken that the original location was five rods wide and included the strip in question, and the only issue is whether it had been narrowed by abandonment of this strip. The principal exception is to the admission of the documents mentioned in the cases named. These documents are a petition to the county commissioners by the administrator of one William L. Carleton, from the assessment of damages for land taken by the location, the decision of the county commissioners thereon by consent of the parties, and a deed executed in escrow by the widow and heirs of Carleton, as part of the same transaction, together with the agreement as to the terms and conditions for its delivery.

The documents were held to be admissible in the former cases, but the present case is materially different. The land now in controversy did not belong to Carleton, but lay just outside his line, which only extended to what has been called the four-rod line, on the east side of the location. Of course, therefore, the proceedings on behalf of his estate could not affect or deal with this strip. They did not purport to do so in any way, or contain any language about it. If the escrow had been delivered, which it was not, it would have afforded no argument from probabilities that the location extended only two rods to the east of the center line, on the ground that it was only two rods on the west. On the contrary the escrow would have conveyed at this place the whole of the Tolman lot, so called, belonging to Carleton, which was much more than two rods and a half on the west of the center line. No argument in favor of abandonment can be drawn from the fact that the road was only four rods wide further to the north; for the location was five rods, and the greater part of the road unquestionably is five rods wide. This escrow contained no language like that in the *Bicknell Case*, importing that a tract only four rods wide was the whole roadbed of the defendant at that point. The only expression which could be laid hold of as possibly affecting the defendant's right is a general allegation in the petition to the county commissioners that the railroad had taken from the parcels belonging to Carleton "a strip of land four rods in width or thereabouts." If this allegation were more specific than it is, it still would leave untouched the question what land the railroad had taken not belonging to Carleton. We are of opinion that in this case the documents should have been excluded.

The other exception relates to the admission of a deed of land 800 feet distant from the strip in question, and a plan referred to in the deed. In the *Westcott Case*, the deed was admitted, as it conveyed a part of the land then in controversy. But, for the reason already given, the fact, if it be one, that the railroad did not claim other land outside the four-rod line, does not tend to prove that it did not claim this. The deed was not admissible as a conveyance. It was argued that the plan referred to was admissible on independent grounds. It is an extended lithographic plan of land belonging to the Mt. Bowdoin Land Associates, and on the outskirts of the land is laid down the track of the defendant's predecessor, the Boston, Hartford & Erie Railroad, for a very considerable distance. A witness who testified that the original was made in his office testified also that the scale of the plan referred to was a reduced lithographic scale, and that the scale would appear different by measurement, but stated that he was very familiar with the plan, and that the width of the road as shown was about four rods at different places, including the place in question. The width to the eye is the same throughout. The plan does not purport to be drawn to scale. It seems to us quite impossible to say that the railroad, by accepting a deed referring to a different part of the plan, admits, or may be argued to have admitted, that the width attributed to its road is correct throughout its whole length, without having any intimation on the face of the paper what that width is supposed to be, and the purpose of the reference to it having no bearing on the matter, except in one small and distant spot.

Exceptions sustained.

(164 Mass. 1).

LINCOLN v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 12, 1895.)

HIGHWAY BY PRESCRIPTION—RELOCATION—CONSTRUCTION OF SEWER—ADDITIONAL SERVITUDE.

1. On an issue as to whether a certain way running over petitioner's land was a highway, it appeared that S. street, of which the land in controversy was claimed to be a part, was an ancient highway, and that a part thereof was located in 1868 according to a certain plan, which did not show that the highway ran over petitioner's land; but there was testimony that that part of S. street was not then in dispute, and that it was part of the ancient highway. There was a relocation in 1875, which also referred to said plan; but the way crossing petitioner's land was expressly included, as part of S. street, in the written description. *Held*, that the county commissioners had jurisdiction to include the land in controversy in the relocation of 1875, and, having done so, their action was binding on petitioner.

2. Under Pub. St. c. 49, § 13, providing for the relocation of highways, whether the same were laid out by the authority of the town or otherwise, highways by prescription may be relocated.

3. Land taken for a highway may be made subject to the easement of a metropolitan sewer without imposing an additional servitude.

4. The fact that the right to construct a sewer in the highways is withdrawn from a town, and exercised by the commonwealth, lays no additional burden on the one who owned the land when it was taken for the highway by the town.

5. On an issue as to whether a way is public or private, testimony that it was or was not included in an assessment for taxation is irrelevant.

Exceptions from superior court, Suffolk county.

Petition by Orray A. Taft against the commonwealth for assessment of damages under the metropolitan sewerage act (St. 1889, c. 439). After a previous trial, Taft died, and Charles S. Lincoln, as executor, prosecuted the petition. There was a judgment for the commonwealth, and exceptions by petitioner. Exceptions overruled.

C. S. Lincoln and Elder, Wait & Whitman, for petitioner. J. D. Long and W. D. Turner, for the Commonwealth.

HOLMES, J. In *Taft v. Com.*, 158 Mass. 526, 33 N. E. 1046, there was conflicting evidence as to whether Shirley street extended across the petitioner Taft's land before 1875, and the record of a relocation in that year establishing a part of it on Taft's land was held conclusive against him. At the second trial all the witnesses who testified agreed that the way over Taft's land was not known as "Shirley Street," and that they never knew of any controversy about it. The records of the town of Winthrop were produced, and showed the acceptance in 1868 of "a street laid out from City Farm to Point Shirley, according to a plan drawn by John Lowe." The plan was put in, and did not show any way over Taft's land, and finally one of the petitioners for the relocation of 1875 testified that at the time he signed the petition there was no controversy as to where the southern terminus of Shirley street was. On the other hand, the location by the town in 1868 did not cover the whole of Shirley street. Shirley street was an ancient highway. There was no question that there was a visible way over the place in dispute, and there was some evidence, from Taft himself, and from other witnesses, that there was a way there by prescription. The petitioners contended that on this evidence it must be assumed that the county commissioners had no jurisdiction, but the judge ruled that the way was a public way.

The petitioner makes some slight attempt to fortify his argument by the reference to John Lowe's plan in the relocation, and by suggesting that the petition for relocating was not intended to open this question. These suggestions may be dismissed with a few words. The relocation, although referring to Lowe's plan, overrides it, or supplies by express words what the plan does not show. The petition is broad enough to open any question

which could be raised on relocation, and what the petitioners intended does not matter.

Coming to the main point, we are of opinion that the ruling of the court was right. As was pointed out by the counsel for the commonwealth, the conclusiveness of a relocation made in good faith, and not manifestly absurd, is laid down in stronger terms in *Hadley v. Commissioners*, 11 Cush. 394, than it was in our former decision (158 Mass. 534, 33 N. E. 1046). See *Tufts v. Somerville*, 122 Mass. 273, 275; *Dean v. City of Lowell*, 135 Mass. 55. It is true, on this evidence, as it was at the first trial, that the road in question was a mere spur of Shirley street proper, even if not part of it, and that the decision that it was part of Shirley street was not absurd, even on the evidence produced as to the state of things before 1875; for, stated in a somewhat different way, the evidence showed that Shirley street was an ancient highway, in existence before the location of 1868, and some, if not all, of the evidence was that this continuous portion of the way was also an ancient highway. It was part of the same way in everything but name. *Com. v. McDonald*, 160 Mass. 528, 36 N. E. 483. If it had not the same name, it had no public name, so far as appears. Under these circumstances, it is impossible to say that the county commissioners were not warranted in finding that the place in question was a part of Shirley street, and their adjudication is not to be made dependent for its effect upon whether a jury agrees with them on the evidence which can be found many years after they decided what it was their duty to decide. It was not argued that highways by prescription may not be relocated, as well as ways laid out by a town. The language of the statute is, "whether the same was laid out by authority of the town or otherwise." Pub. St. c. 49, § 13. "It is immaterial how it was originally established. If by prescription, the effect of a new location would be the same." *Stockwell v. Fitchburg*, 110 Mass. 305, 309, 310; *Richards v. Commissioners*, 120 Mass. 401, 402.

The record was complete and clear without the plans, and the failure to produce them did not make it inadmissible.

The other exceptions do not require much discussion. An exception was taken to a ruling that the right of the commonwealth to lay this sewer was not an additional servitude. It is not disputed that, when a highway is laid out, the right to lay common drains is among the elements for which compensation is given. *Pierce v. Drew*, 136 Mass. 75, 81, 88, and cases cited. But it is said that the metropolitan sewer is an uncommon drain, and cannot be supposed, by any fiction, to have been contemplated and paid for in the laying out of a suburban road. The answer is that our law recognizes no such distinctions, although they seem to prevail in some other states. *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. 973; 2 Dill. Mun.

Corp. (4th Ed.) § 688. When land is taken for a highway, all uses of the land directly or incidentally conducive to the enjoyment of the public easement which the necessity and convenience of the public may require, either then or in the future, are paid for, wherever the highway may be. *Boston v. Richardson*, 13 Allen, 146, 159, 160. It sometimes is said that the whole beneficial use of the land is taken. *Com. v. Gaslight Co.*, 12 Allen, 75, 77. As, practically, the landowners get the full value of their land in such cases, if there is any injustice it is not they who suffer it. *Brainerd v. Clapp*, 10 Cush. 6; *Cassidy v. Railroad*, 141 Mass. 174, 177, 5 N. E. 142; *Newton v. Perry*, 163 Mass. 322, 39 N. E. 1032. It being settled that one of the uses covered by the taking for a highway is an underground sewer, it extends to any sewer which is natural to the configuration of the ground. See *Titus v. Boston*, 161 Mass. 209, 212, 36 N. E. 793. The fact that the public, in this case, is represented directly by the commonwealth, instead of by the town, is of no importance. The beneficial interest is the same, either way. Also, it is held that the public right extends to authorizing companies to make use of the streets. *Pierce v. Drew*, 136 Mass. 75, 81; *Com. v. Gaslight Co.*, 12 Allen, 75. And, if the commonwealth has withdrawn from the town a part of the right formerly vested in it, that is no more a wrong to the plaintiff than a conveyance in fee by a private person having a similar right in gross would be, on the ground that it changed the chances of extinction of the owner's blood.

Temporary interruptions of business, caused by the construction of the sewer along the highway where the commonwealth had a right to construct it, without a new taking from the plaintiff, cannot be recovered for. This was all that the ruling of the court meant. *Brooks v. Boston*, 19 Pick. 174, 178; *Treadwell v. Boston*, 123 Mass. 23, 25.

The question to the assessor, whether in assessing Taft's land he ever deducted a roadway, or assessed it in two parts, was irrelevant to any issue which was open, apart from other objections. See *Kenerson v. Henry*, 101 Mass. 152, 155.

Exceptions overruled.

(164 Mass. 144)

BOYLE v. GOULD et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 21, 1895.)

VENUE IN MECHANICS' LIEN CASES—INFERIOR COURTS.

Under Pub. St. c. 191, § 11, providing that a mechanic's lien may be enforced in a district court, the petition must be to the court within whose jurisdiction the land lies, irrespective of the residence of the parties; and the only effect thereon of St. 1893, c. 396, revising and consolidating the laws relating to district and police courts, was to increase the amount within which the latter courts have jurisdiction.

Appeal from district court, Middlesex county.
Action by one Boyle against Gould and

others to enforce a mechanic's lien. The petition was dismissed, and petitioner appeals. Affirmed.

C. F. French, for plaintiff. Weed & Weed, for defendants.

LATHROP, J. This is a petition to enforce a lien, under Pub. St. c. 191, for labor performed on a house situated in Newton, in the county of Middlesex. The petition is to the Second district court of Eastern Middlesex, whose judicial district comprises Waltham, Watertown, and Weston. Id. c. 154, § 2. The city of Newton is "a judicial district under the jurisdiction of the police court thereof." Id. § 1. The petitioner is described in the petition as of Waltham. In the superior court the petition was dismissed on the ground that the land was without the jurisdiction of the Second district court of Eastern Middlesex, and this is the only question which is before us on the petitioner's appeal.

A petition under Pub. St. c. 191, is essentially a proceeding in rem; and the only decree which the court can make, if the lien is established, is a sale of the property, and the distribution of the proceeds. Section 24 et seq. By section 10, if the petition is brought in the superior court it must be "in the county where the building or structure is situated," thus treating it as in the nature of a local action. Section 11 is as follows: "When the amount of the claim does not exceed three hundred dollars, the lien may be enforced by petition to a police, district, or municipal court, or trial justice; and such courts and justices shall have like power and authority within their jurisdiction as are conferred by this chapter upon the superior court, and the parties shall have like rights of appeal as exist in other civil cases." It seems to us very clear that the words "within their jurisdiction" are not to be interpreted solely with reference to the amount claimed, but that they mean that each court, be it police, district, or municipal, shall, if the land is within its judicial district, enforce a lien to the amount stated.

The question remains as to the effect of St. 1893, c. 396, entitled "An act revising and consolidating the laws relating to district and police courts." This act does not, in terms, repeal any part of Pub. St. c. 191. Section 68 provides: "The provisions of this act so far as they are the same as those of existing laws shall be construed as a continuation of such laws and not as new enactments, and references in laws to provisions of law which are re-enacted herein shall be construed as applying to such provisions so incorporated in this act." The only direct reference to Pub. St. c. 191, is in section 12, which gives to district and police courts original and concurrent jurisdiction with the superior court of actions to enforce liens under Pub. St. c. 191, where the amount of the claim does not exceed \$1,

000. The only effect of this is to change the jurisdiction given by Pub. St. c. 191, § 11, to police and district courts from \$300 to \$1,000. Section 13, c. 396, St. 1893, begins as follows: "Civil actions brought in said courts shall be brought in the court in whose district some one of the parties lives or has his usual place of business." It is hence argued that the petition in this case was rightly brought. But we are of opinion that the words "civil actions" refer to transitory and personal actions, and not to local or statutory actions, such as the one before us. The principal object of the act was to revise and amend Pub. St. cc. 154, 155,—the first relating to police, district, and municipal courts, and the second to trial justices,—so far as they applied to district or police courts. None of the provisions of the chapters last cited have any reference to proceedings to enforce liens. This jurisdiction was, as we have seen, specially conferred by Pub. St. c. 191, § 11, upon inferior courts, when the amount in issue was \$300. The statute of 1893 in no way affects section 11, except by increasing the amount to \$1,000. There is, of course, no reason why a proceeding to enforce a mechanic's lien, which must be brought in the county where the land lies, if the proceeding is in the superior court, may be brought out of the county, if the proceeding is in an inferior court. Yet, if the petitioner's view is correct, the proceeding in the later case may be brought in Berkshire county, if the petitioner lives there, while the land is in Essex county. We do not think that the legislature intended this, or that apt words to express such an intent have been used. Taking the statutes together, we are of opinion that a proceeding to enforce a mechanic's lien in an inferior court must be brought in that court within whose judicial district the land lies. The petition was therefore rightly dismissed for want of jurisdiction. *Petition dismissed.*

otherwise, judgment on the verdict. Judgment for plaintiff.

The following is a copy of the note sued on: "Boston, May 1, 1891. \$500. On demand, after date, I promise to pay to the order of Hollis Bowman Page five hundred dollars, payable when payor and payee mutually agree. Value received. No. ——. Due, ——. Grace V. Cook."

Hesseltine & Hesseltine, for plaintiff. E. J. Jones and C. W. Cushung, for defendant.

MORTON, J. According to the literal construction of this note, although the defendant promises to pay the plaintiff the sum named when he demands it, he may escape the performance of his promise by refusing to agree with the plaintiff when it shall be paid. We think that it hardly could have been the intention of the parties to put it into the power of the defendant thus to avoid payment, and that it is more reasonable to construe it as meaning that it is payable when and after the payor ought reasonably to have agreed. *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312; *Sloan v. Hayden*, 110 Mass. 141; *Black v. Bachelor*, 120 Mass. 171; *White v. Snell*, 5 Pick. 426; *Crooker v. Holmes*, 65 Me. 195; *Works v. Hershey*, 35 Iowa, 340; *Lewis v. Tipton*, 10 Ohio St. 88. The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently, it is expected, from the tenor of the note, that the parties will agree, and that a time will be fixed, and that the note will be paid. But no time is fixed within which that agreement is to be made. The law will therefore imply a reasonable time. Besides, it is the payment, not the nonpayment of the note, for which the parties are providing. If the payor does not, within a reasonable time, agree when the note shall be paid, there is nothing unjust, nor at variance with the real meaning of the contract, in holding that the payee may thereupon demand payment, and, if the note is not paid proceed to collect it. The case of *Barnard v. Cushing*, 4 Metc. (Mass.) 230, is distinguishable. The question chiefly discussed in that case was whether the indorsement on the note constituted a part of it, and the court held that it did. The indorsement expressly provided, not only that the payees would receive the amount of the note when convenient for the promisors to pay, but that they would not compel its payment. In bringing suit, the payees proceeded, therefore, in direct violation of their agreement. Possibly, if the question arose now, a different result might be reached from that arrived at in that case. According to the terms of the report, the entry must be: Verdict set aside, and judgment for the plaintiff for amount of the note, with interest from the date of the writ.

(164 Mass. 116)

PAGE v. COOK.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

CONSTRUCTION OF NOTE—TIME OF PAYMENT.

Where a demand note is made payable when the payor and payee mutually agree, the payee may, if the payor refuses within a reasonable time to agree when the note shall be paid, demand payment, and, upon refusal, proceed to collect it.

Report from superior court, Suffolk county; Henry M. Sheldon, Judge.

Action by Hollis Bowman Page against Grace V. Cook on a promissory note. Verdict ordered for defendant, and case reported for consideration of the supreme court,—judgment to be entered for the plaintiff for amount of note, if the ruling was wrong;

(164 Mass. 122)

MCGILVRAY v. WEST END ST. RY. CO.(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)**ASSAULT—LIABILITY OF ASSAILANT'S EMPLOYER.**

Where a person who has paid his fare on a street car to his destination gets off when the car is switched into the car house before reaching his destination, and, while standing in the street, with one foot resting on the step to the car house, engages in an altercation with the conductor over the fact that the car did not run through, and that he was not informed that it would be switched, and on that account is assaulted by the conductor, he cannot recover of the company, the conductor's act not having been within the scope of his employment.

Appeal from superior court, Suffolk county; John Hopkins, Judge.

Action by Daniel McGilvray against the West End Street-Railway Company for an assault committed by one of defendant's employes. The court ruled that plaintiff had no evidence on which to go to the jury, and he excepts. Exceptions overruled.

Plaintiff testified that while he was standing in the street with one foot on the sidewalk and the other on the step to defendant's car house, waiting for a car, he complained to the conductor of the car which had just been switched into the car house, because the conductor had not told him that the car was not going through, and that the conductor, after saying that plaintiff had not asked him if it was going further, and after certain other conversation, assaulted him.

L. M. Child, for plaintiff. Wm. B. Sprout, for defendant.

BARKER, J. If we assume in favor of the plaintiff that, upon the evidence, the jury might find that he had paid his fare through to Prospect street, and that, in addition to his right to remain unmolested upon the public street, he had the right, upon leaving the car which had been switched into the stable, to inquire of the conductor why the contract to carry him to Prospect street was not carried out, and to enter the stable to ascertain when and how he could be carried to his destination, yet the verdict for the defendant was rightly ordered. The only reasonable inference to be drawn from the whole evidence is that while waiting in the public street to take one of the defendant's cars, he saw fit to engage in an altercation with a person who was in fact one of the defendant's servants, and received from him an assault which was not made for any purpose which the jury could find to be part of the defendant's business. The defendant had no control over the place where the plaintiff was, and no duty to protect the plaintiff there from any assaults, although it would be responsible to him for assaults committed upon him there, as elsewhere, by its servants in the scope of their employment. The suggestion that it could be found within the scope of that employment for a servant to punish him for asserting his

rights against the defendant is of course untenable; nor is there sufficient ground in the suggestion that the assault was for the purpose of putting him out of the defendant's premises to warrant submitting the case to a jury. Exceptions overruled.

(164 Mass. 48)

SISE v. WILLARD et al.(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)**CONSTRUCTION OF WILL—NATURE OF ESTATE.**

A testator directed that after his youngest child should attain a certain age certain shares of his estate should be held in trust for his daughters, and that the income thereof be paid over to them "so long as they shall live." Provision was made for the issue of any child who should die intestate before the youngest child attained said age, but no provision was made for said issue if any child died after that time, and no disposition was made of the share of any child who should die intestate without issue. *Held*, that the daughters took an equitable life estate only, and were not entitled to their respective shares absolutely.

Appeal from supreme judicial court, Suffolk county; James M. Barker, Judge.

Bill in equity by Edith Sise against Z. A. Willard and others to compel a transfer of certain funds held in trust. The bill was dismissed, and complainant appeals. Affirmed.

J. L. Thorndike, for appellant. L. S. Dabney, for appellee Lucy A. Willard. W. G. Russell, for appellee Z. A. Willard.

FIELD, C. J. This is a bill in equity, brought by Edith Sise, one of the daughters of John Ware, late of Boston, deceased, testate, against the two trustees under his will, one of whom is her husband, and by amendment the surviving wife and other children of said John Ware and the children of the plaintiff have been made parties defendant. The first wife of the testator was living at the time the will was made, but died in the lifetime of the testator, and he married again, and made provision by a codicil for his second wife, who survived him. At his death he left, besides his widow, five children, all of whom are still living. The object of the bill is to compel an absolute transfer to the plaintiff of the fund held for her benefit by the trustees under the fourth and fifth articles of the will. The youngest of the children of John Ware has already attained the age of 35 years, and the property given in trust has been divided into six equal shares, and the trustees have set apart for the plaintiff one of these shares, which they hold in trust for her benefit, and the income of which they have paid to her from time to time. The children of the testator are one son and four daughters, and the share of the son was conveyed to him, in accordance with the provisions of the will, when the youngest child of the testator reached the age of 35 years. The contention of the plaintiff is

that the entire beneficial interest in the share set apart for her benefit belongs to her, and that she is entitled to have the trust terminated, and this share of the property absolutely transferred to her. The contentions of the respondents are that the plaintiff has an equitable interest in this share for her life only, with the power of testamentary disposition, and that the remainder after her death goes either to her issue, if she leave issue, or to the heirs or distributees of the testator, unless she makes some disposition of it by will, or by an instrument in the nature of a will. They also contend that, if this is not so, and she has the entire beneficial interest, the will of the testator should be carried out during her life, and that the intention of the testator concerning the shares allotted to his daughters is clearly expressed in the will in the following sentence of the fifth article: "But as to the shares of the said property which shall be set apart for my daughters, it is my will that the said trustee shall continue to hold them in trust for their benefit, and shall continue to pay over to them the income from their respective portions for their sole use, and upon their own receipt in writing, so long as they shall live," etc. By the sixth article of the will the testator made provision for the issue of any child in case any of his children should die leaving issue before his youngest child reached the age of 35 years, and without having disposed of his or her share of the property by will; but he made no provision in terms for the disposition of the share of the property allotted to his daughters, if any of them, after his youngest child attained the age of 35 years, should die leaving issue, and without having made a testamentary disposition of her share. There is no provision in terms in the will for the disposition to be made of the share of the property allotted to each child in case any child should die without having disposed of his or her share by will, and without leaving issue, whether the child die before or after the testator's youngest child reached the age of 35 years, although the son's share, after that time, became his absolute property, and would descend in the same manner as his other property. Considering all the provisions of the will, we are of opinion that the plaintiff took only an equitable life estate. Up to the time when the division was to be made of the property into shares, the trust property was to constitute one trust, the income of which was to be paid in equal shares to all the children; and, if any child died leaving issue, and without having disposed of his or her share by will, his or her issue were to take their parent's share of the income, and when the time came for division such issue were to take their parent's share of the principal. Up to that time, undoubtedly, the children of the testator had only a life interest, coupled with a power of testamentary disposition. When the time came for

a division of the property into shares, the son's share was to become his absolute property, but each daughter's share was to remain in trust on a separate trust for her life, with the power of testamentary disposition; but that is all the change which the will in terms provides for. If it be implied that on the death of each daughter after the division her share shall go to her issue, if she leave issue, and make no testamentary disposition of the property, still such issue would take as legatees under the will, and not as heirs or distributees of their mother. There is absolutely no provision that, on the death of any of the children without issue before the division, or on the death of any of the daughters without issue after the division, if no testamentary disposition has been made, the share of each child shall go to his or her heirs or distributees. The gift is to the trustees, and the children take only equitable interests, and up to the time of the division this interest is clearly for life. After the division, the son's share is absolute, and each daughter's share is to be held on a separate trust, but we can find no language in the will by which the interest of the daughters in the property is enlarged. It still remains, we think, an interest for life. *Collins v. Wickwire*, 162 Mass. 143, 33 N. E. 365. This is the principal distinction between the present case and *Forbes v. Lothrop*, 137 Mass. 523. The court in that case, from the language of the will, and particularly from the clause that at the death of the wife the whole property was "to be equally divided among all my children and their heirs by right of representation," decided that the intention of the testator was to give to his daughter Mary the whole equitable interest in her share, which would pass to her heirs or distributees if she at her decease made no disposition of it "by will or otherwise." We can find no equivalent words in the present will. In the view we have taken of the extent of the plaintiff's interest in the share set apart for her, it is unnecessary to consider whether, if the whole beneficial interest in the share absolutely belonged to her, she would be entitled to a decree for a conveyance against the clear intention of the testator that the share should be held in trust for her during her life. It is premature now to consider whether, on the death of the plaintiff leaving issue, but having made no testamentary disposition of her share, that share goes to such issue. The bill must be dismissed. So ordered.

(164 Mass. 84)

DEGNAN v. JORDAN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

INJURY TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE.

Plaintiff was an elevator tender, and, on starting to work in the morning, was informed that the elevator was out of order. Plaintiff,

without reporting that fact to his superintendent, went underneath the elevator, and pulled the rope, whereupon it came down on him. *Held*, that plaintiff was wanting in due care.

Report from superior court, Suffolk county.

Action by Patrick F. Degnan against Eben D. Jordan and others for personal injuries. There was a verdict ordered for defendant, and the case was reported to the supreme court. Judgment on the verdict.

A. Hemenway, T. H. Pearse, and W. Schofield, for plaintiff. J. Lowell, Jr., and S. H. Smith, for defendants.

MORTON, J. The plaintiff was at the time of the accident an elevator tender in the employ of the defendants, and was 43 years of age. He had been at work running the elevator about a fortnight, and, as he testified, understood the business fairly well. On the morning of the accident he found the elevator below the level of the street floor, and tried, without succeeding, to open the door. Then he went down into the basement, as he had been told by the engineer to do in such a case. There he met a man by the name of Feehley, who told him that he could not move the elevator. Thereupon the plaintiff stooped into the elevator well under the elevator, which was four or five feet from the floor, so that the whole upper part of his body was under the elevator, for the purpose of reaching the elevator rope, which was in one corner; and as he pulled the rope the elevator came down on him, causing the injuries complained of. Neither the plaintiff nor Feehley made any effort to report to the superintendent of elevators, or to the engineer, that there was anything wrong with the elevator. And we think that in view of the notice that he had, from the situation of the elevator, that something about it was probably out of order, his conduct in exposing himself, in the manner in which he did, to injury from its sudden descent, was wanting in due care. *Murphy v. Webster*, 151 Mass. 121, 23 N. E. 842; *Id.*, 156 Mass. 48, 30 N. E. 88. The plaintiff excepted to certain rulings in regard to the admission of testimony. But the manner in which the case is reported renders their consideration unnecessary. According to the report, even if there are material errors, prejudicial to the plaintiff, in the ruling in regard to the admission of testimony, the verdict is to be set aside only in case there is evidence to warrant a finding of due care on the part of the plaintiff. Judgment on the verdict.

(164 Mass. 118)

BLANCHARD et al. v. LOW.

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1895.)

EXECUTORY SALE — SALE BY AGENT — OVERPAYMENT TO PRINCIPAL — MISTAKE OF FACT — RIGHT OF AGENT TO RECOVER.

The captain of a fishing boat, being authorized by the owner to sell the cargo, agreed to

sell to a fish dealer at one-half cent a pound. Afterwards the captain arranged with a commission merchant to sell the whole cargo on commission, the merchant guarantying the price. The captain then directed the mate to deliver to the merchant such fish as he might call for, and the merchant, being at the boat when the dealer sent for the fish, delivered them to him, and charged him on his books one cent a pound, that being the market price of the fish on the day of delivery. Neither the dealer nor the merchant knew of the captain's agreement with the other. For the fish delivered to the dealer the merchant settled with the owner of the boat at one cent a pound, but the dealer refused to pay the merchant for the same. *Held*, that the merchant was entitled to recover from the boat owner the amount remitted on the sale to the dealer.

Exceptions from superior court, Suffolk county: Albert Mason, Judge.

Action by Leonard A. Blanchard and others against Mary J. Low, administratrix of Benjamin Low, to recover money received by defendant for plaintiffs' use. The court found for plaintiffs, and defendant excepts. Exceptions overruled.

It appeared from the evidence that defendant's intestate, Benjamin Low, was the owner of a fishing boat, and that the captain thereof had full authority to proceed to Boston and sell the cargo. On the arrival of the vessel he went to the office of a fish dealer, and agreed to sell him such fish as he might take at one-half cent a pound, and the dealer said that he would send his trucks to the boat, and get the fish. Thereafter the captain met Blanchard, one of plaintiffs' firm, on the walk, near the vessel, and employed him to sell the fish on commission, the captain agreeing to pay plaintiffs 10 per cent. on the proceeds of sale, and the merchant agreeing to do the best he could to handle the fish, and to guaranty payment therefor, and, after paying dockage, towage, and commission, to remit the balance to the owner of the boat. A member of plaintiffs' firm then stationed himself at the boat to deliver fish as called for, the captain having directed the mate, who was left in charge of the boat, to deliver to him such fish as he might require. The dealer sent his trucks to the boat, and received the fish, not knowing that they were being delivered to him by the merchant. Nothing was then said about the price, the merchant merely charging the dealer on his books one cent a pound, which was the market price of the fish on the day of delivery. Plaintiffs paid to the owners of the boat the proceeds of the sale to the dealer, but the dealer refused to pay the merchant's bill.

Robert T. Babson, for plaintiffs. John J. Flaherty, for defendant.

MORTON, J. There was evidence tending to show that the captain had authority from the defendant's intestate to sell the fish, and that he sold to Potter & Wrightington what fish they might want at one-half cent a pound. The fish were in bulk, and the quantity which Potter & Wrightington would take was uncer-

tain, and it was necessary to weigh and separate them from the rest of the cargo. No title to any specific quantity passed, therefore, at the time of the bargain. *Young v. Austin*, 6 Pick. 280; *Merrill v. Hunnewell*, 18 Pick. 213; *Scudder v. Worster*, 11 Cush. 573; *Foster v. Ropes*, 111 Mass. 10. The sale was an executory one. But the subsequent arrangement, also made on behalf of the defendant's intestate by the captain with the plaintiffs, without the knowledge or consent of Potter & Wrightington, to sell the cargo on commission, could not affect or avoid the previous contract with Potter & Wrightington; and when they sent their teams to the vessel for fish pursuant to directions, there was evidence that the captain knew or understood the delivery must be referred to the contract between the principals, rather than to the mistaken belief on the part of the agents of defendant's intestate that it was a sale effected through their own instrumentality. It was competent for the court to find upon the evidence before it that in sending the money, as they did, to the defendant's intestate, the plaintiffs were acting under a mistake of fact, to which their own negligence had in no way contributed. The question as to the admissibility of the evidence relating to usage has not been argued, and we treat it as waived. Exceptions overruled.

(164 Mass. 79)

INHABITANTS OF TOWN OF ESSEX v. BROOKS.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

COLLATERAL INHERITANCE TAX—ISSUE AS TO LIABILITY — JURISDICTION OF COMMON-LAW COURT — CHARITABLE AND EDUCATIONAL INSTITUTION.

1. St. 1891, c. 425, imposing a tax on collateral legacies and successions, and conferring on the probate court jurisdiction to determine any question relating to any legacy under that act, does not take away the right of a legatee, under Pub. St. c. 136, § 19, to recover his legacy in an action at common law, and have the question determined there whether the legacy is subject to a tax under St. 1891, c. 425.

2. Legacies given a town to establish and maintain a free public library are exempt from the tax on collateral legacies imposed by St. 1891, c. 425, as being given for the use of a "charitable or educational" institution.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Action by the inhabitants of the town of Essex against Francis A. Brooks, executor, for a balance due on two legacies under the will of defendant's testate. The treasurer of the commonwealth was made a party on petition of defendant. There was a judgment against defendant, and he excepts. Exceptions overruled.

Frank C. Richardson, for plaintiff. A. S. Hall, for defendant.

MORTON, J. The defendant raises a preliminary question of jurisdiction. He con-

tends that the probate court has sole jurisdiction, subject to appeal to this court, of the question whether the legacies are subject to a tax under St. 1891, c. 425. He bases this contention on the provisions of section 14 of that act. We do not so construe the statute. By Pub. St. c. 136, § 19, it is provided that "every legatee may recover his legacy in an action at common law." There is nothing in St. 1891, c. 425, which expressly or by implication repeals that provision. The only effect of section 14 is to confer upon the probate court in which the estate of a decedent is in process of settlement jurisdiction to hear and determine any question that may arise relating to any devise, legacy, or inheritance under the act, but does not take away the right of the legatee to sue at common law in the superior court, and have the question heard and determined there whether the legacy is subject to a tax. The executor had an opportunity to try the question in the probate court, and, not having availed himself of that opportunity, he cannot now object that the superior court had no jurisdiction, or insist that its judgment will not avail him in the settlement of his accounts in the probate court. Upon the petition of the executor, a citation was issued by the superior court summoning in the treasurer of the commonwealth after a hearing upon and overruling of the defendant's demurrer. The treasurer at first objected to being made a party, but afterwards withdrew his objection, and a hearing was had on the petition, and it was dismissed. No appeal or exception was taken to the overruling of the demurrer or dismissing of the petition, and the question is not, therefore, before us whether the ruling changing the petition was correct. It is said, and it appears, inferentially perhaps, from the papers, that the time has gone by within which the treasurer could bring suit to recover the tax, and we proceed to consider the main question, which is whether the legacies are exempt from taxation. By St. 1891, c. 425, § 1, all property within the commonwealth which shall pass by will or by intestate succession, or by deed, grant, sale, or gift, to take effect after the death of the grantor, "other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter of a decedent, or to or for charitable, educational or religious societies or institutions the property of which is by law exempt from taxation shall be subject to a tax of five per centum of its value for the use of the commonwealth." By the will in question the testator gave to the town of Essex first "twenty thousand dollars for the erection of a town hall and library for the use of its inhabitants"; then, by a subsequent provision, he gave "the further sum of twenty thousand dollars, in trust to invest and keep invested in some safe security, the

income whereof shall annually be expended by the officers of said town for the purchase of books for said library for the free use of its inhabitants." The two provisions, taken together, contemplate the establishment and maintenance by the town, with the sums thus bequeathed, of a free public library for the use of the inhabitants of the town, and the erection of a library building and town hall. We think that the library thus established may fairly be called an educational or charitable institution, and that the legacies, being given to the town for it, come within the exemption of the statute, and are not subject to the tax. *Williston Seminary v. County Com'rs*, 147 Mass. 427, 18 N. E. 210; *Drury v. Natick*, 10 Allen, 169. Exceptions overruled.

(164 Mass. 85)

**SANFORD v. SOULE PIANO & ORGAN
INV. CO. et al.**

(Supreme Judicial Court of Massachusetts.
Plymouth. June 21, 1895.)

**CREDITORS' BILL—STATUTORY REMEDY—PENDING
ACTION AT LAW.**

1. To entitle one to maintain a bill under the statutes giving a remedy in equity against property of a debtor which cannot be attached or taken on execution at law, the claim need not be reduced to judgment.

2. Where, during the pendency of a suit at law to recover a debt, the creditor commences a suit in equity against property of the debtor which cannot be attached or taken on execution at law, the bill in equity should be dismissed, unless the creditor elects to discontinue the action at law.

3. A bill under the statute giving a creditor a remedy in equity against the property of the debtor which cannot be attached or taken on execution at law must set out the cause of action as fully as is required in an action at law.

Bill in equity by Cynthia E. Sanford against the Soule Piano & Organ Investment Company and Belle Wright to have a debt due defendant Wright from the defendant company applied in payment of a debt due plaintiff by defendant Wright. A demurrer by defendant Wright to the bill was sustained by the trial court, and plaintiff appeals. Demurrer to be sustained, unless plaintiff discontinues her pending suit at law to recover the debt, and to be overruled if such suit is discontinued.

The bill alleged that suit to recover the debt had been entered in the police court of Brockton, and the defendant corporation summoned as trustee; that it appeared by the answer of the alleged trustee that certain sums would be due defendant Wright upon the payment by certain persons of money due on musical instruments sold by defendant Wright on commission. The grounds of demurrer were: (1) That the plaintiff had not shown that she had recovered judgment on her alleged debt, or that she had taken all the steps requisite to obtaining an execution at law; (2) It did not appear from the bill that she had not an ade-

quate remedy at law; (3) that there was an action at law pending; and (4) that the bill did not show that the amount involved is sufficient to warrant the court taking cognizance of the case.

Charles F. Chamberlayne, for appellant. F. E. Sweet, for appellee Belle Wright. Louis C. Southard, for appellee Soule Piano & Organ Investment Co.

FIELD, C. J. There is nothing in the first or second grounds of demurrer. The debt need not be reduced to a judgment in order to maintain a bill in equity, like the present, under the statutes which give a remedy in equity to reach and apply in payment of a debt, property of the debtor which cannot be attached or taken on execution at law.

The third ground of demurrer is that it appears by the bill that there is an action at law pending in this commonwealth between the same parties for the same cause of action, and that it is not "just or equitable that the said defendant shall be held to answer both suits concurrently." The bill of complaint alleges that the principal defendant is indebted to the plaintiff in certain sums of money for board and lodging furnished her, etc., and that a suit at law to recover said sums of money has been brought by the plaintiff against the defendant by trustee process in the police court of the city of Brockton, and that the trustee has made answer that there was due from the trustee to the defendant a sum of money less than the plaintiff's claim; whereupon this bill is brought to reach certain other sums which may become payable to the defendant from the trustee upon certain contingencies which may happen in the future. A bill of this nature on a legal cause of action should set out the cause of action as specifically as is required in an action at law. This bill contains no specification whatever of the sums due for board and lodgings, or of how much board or what lodgings were furnished, or when they were furnished. If the demurrer had been put upon this ground, it must have been sustained; but this defect is a matter capable of amendment, and the superior court probably would have permitted the plaintiff to amend, upon terms or without terms, if this objection had been taken. If the two suits were actions at law, and if the pendency of the former action had been pleaded in abatement in the second suit, that suit necessarily would abate, as the suits are both pending in the same jurisdiction. A court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction, by the prosecution of two suits for the same cause of action by the same plaintiff. A court of equity will not permit this to be done, but, instead of dismissing the second suit, it usually permits the plaintiff to elect which suit he will proceed with; and, when the plaintiff has brought an ac-

tion at law, and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity. *Sears v. Carrier*, 4 Allen, 339; *Connihan v. Thompson*, 111 Mass. 270; *Colt v. Partridge*, 7 Metc. (Mass.) 570; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588. In the present case we think that the demurrer should be sustained on the third ground taken, unless the plaintiff elects to discontinue the action at law. Upon proof that he has done this to the satisfaction of the superior court, however, the demurrer may be overruled, provided the plaintiff will amend his bill so as specifically to state his cause of action.

The fourth ground of the demurrer is that it does not appear that the amount involved is sufficient to warrant the superior court in taking cognizance of the case. When this court had exclusive jurisdiction in equity, it declined to take cognizance of such a bill as the present when the debt claimed did not amount to \$100. St. 1884, c. 235, provided that a bill in equity of this kind may be maintained, although the plaintiff's debt does not amount to \$100. It does not, however, follow from this statute that this court or the superior court is required to entertain a bill in equity when brought upon a claim of a very trifling sum, such as one cent or one dollar. By the neglect of the plaintiff to specifically state her cause of action, we do not know what the amount of her claim is. If this suit is prosecuted, and it should appear that the claim is for less than \$20, it may be necessary to consider whether a bill for so small an amount ought to be entertained by the superior court; but this question is not now before us. The entry must be, "demurrer to be sustained, and bill to be dismissed," unless the plaintiff discontinues her suit at law, and obtains leave of the superior court to amend her bill by specifically setting out her cause of action, when the entry may be made by that court of "demurrer overruled." So ordered.

(164 Mass. 129)

O'LAUGHLIN v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

CARRIERS—EJECTMENT OF PASSENGER—EVIDENCE
—RULE OF COMPANY—CHARGE—HARM—
LESS ERROR.

In an action against a railroad company for the forcible ejectment of a passenger from one of its trains by a conductor, where the defense was that plaintiff was intoxicated and used indecent language, defendant was not prejudiced by the erroneous exclusion of a rule of the company requiring conductors to see that order is preserved in its cars, where the court charged that it was the duty of the company to see that no person on its train conducted himself improperly, and that it is the duty of the company to maintain order on its train, and to eject a passenger by force, if necessary, for that purpose.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Action by James O'Laughlin against the Boston & Maine Railroad for the forcible ejectment of plaintiff from one of defendant's trains. The defense was that plaintiff was intoxicated, and was using indecent language. A verdict was rendered for plaintiff, and defendant excepts. Exceptions overruled.

The rule of the company and the charge referred to in the opinion are as follows:

"Railroad corporations are public corporations, to some extent. They are what is known as 'quasi public corporations.' They are bound to take every person who presents himself in a proper manner, and carry him upon their trains. And, being obliged to do that, of course it is right and reasonable for them to have reasonable rules, reasonable orders, and have reasonable and proper conduct upon their trains; and I might say, so far as the passengers are concerned,—so far as this passenger is concerned,—he has a right, when he engages his passage upon the train, that the railroad officials shall see to it that he is not annoyed by unseemly talk, by improper talk, by improper actions, upon the train; that is, it is the duty (and I am speaking now of the rights of the passengers), or it becomes the duty, of the railroad corporation, on behalf of all the passengers, to see to it that no person upon that train (either a railroad official or a passenger upon that train) shall conduct himself improperly, either by conversation which is improper conversation, swearing, or improper or indecent language, or by intoxication, or by violence of any kind. It is not only the right of the railroad, but it is the duty of the railroad, to see that all things of that kind are suppressed, and are not countenanced or allowed, upon the train, so as to be an annoyance to the passengers upon the road, because, when a passenger contracts for transportation from one point to another, he has a right to have it in a way that he can enjoy it, reasonably and properly. * * * Each passenger must conduct himself towards the other passengers so as not to annoy; and, if any passenger does not do that, it is the duty of the railroad corporation to see that he does it; and, if it is necessary, in order to maintain that degree of order on the train, the railroad corporation will have the right, even between stations, to eject a passenger, and use force, if it is necessary."

Rule 72 of the railroad, which was excluded, was as follows: "Rule 72. In this interview with passengers he [the conductor] must be civil and obliging. He must see that order and decorum are preserved in the cars, and prevent the annoyance of passengers by the rude and improper conduct of others."

O. W. Bartlett and E. R. Anderson, for plaintiff. W. I. Badger and T. Hunt, for defendant.

FIELD, C. J. The rule of the company should have been admitted in evidence, but a majority of the court are unable to see that the defendant was harmed by the exclusion of it. *Com. v. Power*, 7 Metc. (Mass.) 596; *O'Brien v. Railroad Co.*, 15 Gray, 20; *Wills v. Railroad Co.*, 129 Mass. 351; *O'Neill v. Railroad Co.*, 155 Mass. 371, 29 N. E. 630. The rule was very general in its terms, and the rule of law given by the court to the jury for their guidance was more specific, but was the same, in substance, as the rule of the company. Exceptions overruled.

(164 Mass. 166)

KENERSON v. COLGAN.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1895.)

BREACH OF CONTRACT—DAMAGES.

Where plaintiff, on the promise of defendant to make papers giving her property to plaintiff's wife, after defendant's death, if plaintiff would move "from his residence" to defendant's home, and take care of her, moved his buildings onto defendant's property, he cannot recover therefor, on defendant's repudiation of the agreement and refusal to allow plaintiff to remove them; moving the buildings having been either a gratuitous act, or at most a means by which plaintiff enabled himself to do his stipulated part.

Appeal from superior court, Suffolk county.

Action by Gustene Kenerson against Margaret Colgan to recover the value of materials and labor employed in moving to and erecting on the property of defendant certain buildings, which, after her repudiation of a certain agreement, she refused to allow plaintiff to remove. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Browne, for plaintiff. F. Burke, for defendant.

HOLMES, J. According to the agreed statement of facts, the consideration of the defendant's promise to "make papers giving the property to Mary, the wife of the plaintiff, after her death," was that the plaintiff "would move from his residence in East Cambridge to her [defendant's] home in Allston, and take care of her." Moving his buildings was no part of the consideration, and therefore, conversely, the defendant's promise was not the consideration or conventional inducement for moving the buildings, and a repudiation of the express promise does not let in a recovery for the buildings on a quantum valebat, as in *Parker v. Tainter*, 123 Mass. 185. Moving the buildings was either a gratuitous act, or at most a means by which the plaintiff enabled himself to do his stipulated part. It was not within the defendant's request. *Bacon v. Parker*, 137 Mass. 309, 311.

As the facts stand, judgment must be for the defendant; but, as it seems very possible that the agreed statement does not present the plaintiff's case adequately upon this

point, we think it best to mention that our judgment is without prejudice to a motion to discharge the facts in the superior court if the counsel for the plaintiff thinks he can show just cause. *Platt v. Justices of Superior Court*, 124 Mass. 353.

Judgment for the defendant.

(164 Mass. 38)

RICE v. ALBEE.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

ACTION FOR SLANDER—SUFFICIENCY OF DECLARATION.

A declaration alleging that defendant, by speaking words affecting plaintiff in his character and credit as a merchant, and disparaging his business and property, persuaded a third person not to enter into a certain contract with him, and that defendant did this unlawfully, maliciously, and unjustifiably, is insufficient if it does not set out the words spoken, either in tenor or substance, and it does not state how they affect plaintiff's character or credit, or disparage his business and property, and does not allege that the words spoken were false.

Appeal from superior court, Suffolk county.

Action by Walter S. Rice against Lyman C. Albee for slander. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

M. F. Dickinson, Jr., for appellant. Frank P. Goulding and Frank L. Dean, for appellee.

FIELD, C. J. The only acts alleged against the defendant in the third count are that he took Wilson aside, and, by speaking words to him affecting the plaintiff in his character and credit as a merchant, and by disparaging the business and property of the plaintiff, persuaded and induced Wilson not to enter into the contract of partnership and the contract of sale, the terms of which had been orally agreed upon, and which were to be reduced to writing, and the writing signed. It is alleged that the defendant did this unlawfully, willfully, maliciously, and unjustifiably. The words spoken are not set out, either according to their tenor or their substance, and it is not alleged in what way they affected the plaintiff in his character or credit, or in what way, by the words spoken, the defendant disparaged the plaintiff's business and property. It is not alleged that the words spoken were false. It is alleged that by the words spoken Wilson was persuaded and induced not to enter into the contracts, but it is not alleged that he was deterred from entering into the contracts by any acts or threats or in any manner except by persuasion. No interference is alleged with an existing business or with existing contracts. We do not deem it necessary to consider the cases which relate to a malicious interference with an existing business, or with existing contracts, or those which relate to the enticing away of servants actually employed or under contracts of

employment, or the enticing away of a wife or husband. This is a case of words privately spoken in order to persuade the person to whom they were spoken to do what he had a legal right to do, namely, to refuse to enter into certain contracts. We think that the law of slander should apply to this case. The case, we think, in principle, is like the common case of words spoken of a servant or other person on an occasion not privileged, for the purpose and with the effect of preventing him from obtaining employment which otherwise he might have obtained. In slander, the truth of the words spoken is a complete defense, whether the words on their face appear to be actionable or are made actionable by reason of special damages, and whether the words affect the person spoken of in his reputation or in his profession, employment, or property. In the present case we do not know that the words spoken were defamatory, but, if they were, they must have been falsely spoken to be actionable, and, a fortiori, this should be true if the words spoken were not defamatory. As the third count does not set out the words spoken in any form, and does not allege that they were falsely spoken, we are of opinion that the demurrer was rightly sustained. Judgment affirmed.

(164 Mass. 157)

COMMONWEALTH v. HUGO et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. June 21, 1895.)

INTOXICATING LIQUORS—PLACE OF MAKING SALES
—DELIVERY TO EXPRESSMAN.

Defendant was a licensed dealer in liquors at Boston, and was proprietor of parcel express wagons. Persons living in a district wherein the sale of liquors was prohibited sent written orders to defendant, through his employes, or by depositing the orders at one of the express offices, instructing him, as their agent, to purchase and accept the delivery of liquors from himself, at Boston, and ship them by express. The orders were accompanied by money for the purchase of the liquors, and upon receipt thereof the liquors were set apart, and shipped to the respective customers by the express wagons. *Held*, on a prosecution for illegally selling liquors in said district that, notwithstanding the form of the orders, there was evidence from which the jury might infer that the delivery of the liquors was made by defendant in the prohibited district.

Exceptions from superior court, Norfolk county.

George B. Hugo, Albert P. Hauck, and Mark J. Cody were convicted of illegally selling intoxicating liquors, and bring exceptions. Exceptions overruled.

This was an indictment charging George B. Hugo, Albert P. Hauck, and Mark J. Cody with exposing and keeping for sale intoxicating liquor in the town of Hyde Park. Before the impaneling of the jury the defendants moved to quash the indictment. There was evidence tending to prove that the defendant Hugo was a licensed dealer in intoxicating liquors in Boston; that he was also

a common carrier of goods, wares, and merchandise between Boston and Hyde Park, being the proprietor of an express route called Hugo's Boston, Hyde Park & Readville Parcel Express. The defendants Hauck and Cody were in his employ as such common carrier, in the capacities of messenger and driver, respectively. On the 11th day of July, A. D. 1894, one Andrew D. Rooney, a police officer of Hyde Park, arrested the defendants Hauck and Cody, and searched the wagon, which was marked with the title of the express, which they were then driving in the streets of Hyde Park. Upon it, among other articles, were found 11 cases of lager beer, each marked with the name of the person to whom they were to be delivered, and two packages containing intoxicating liquor, also so marked. There was also upon the wagon numerous orders in blank, a copy of one of which hereinafter appears, and an expressman's book, containing a list of the articles found upon the wagon, and against them the names of the persons to whom they were to be delivered, corresponding exactly to the marks and names upon the boxes and packages containing intoxicating liquor. One Concannon testified that previous to the 11th day of July, and within the time mentioned in the indictment, he stopped the defendants Hauck and Cody, who were driving along the street in said Hyde Park, and told them that he wanted them to purchase for him 12 bottles of lager beer of George B. Hugo & Co., in Boston; that thereupon he was told by one or both of the defendants Hauck and Cody that he must sign an order similar to the one referred to; that he instructed the defendant Hauck to sign it for him, as he (Concannon) was unable to write his name; that the beer so ordered by him (Concannon) was a part of the intoxicating liquor seized by Rooney on the 11th day of July; that he paid Hauck the price of the 12 bottles of beer at the time of giving the order; that it was to be at his risk after being set apart for him in the store of George B. Hugo & Co., in Boston; that it was to be delivered to him in Hyde Park that night by said Hugo's Express; and that the beer had never been received by him, having been confiscated to the use of the commonwealth. One Davis testified that on the 3d day of July he gave to the agent of Hugo's Express an order for one-half barrel of ale; that on the evening of that day it was delivered to him by the defendant Hauck, who refused to take the money therefor; that a month afterwards the defendant Cody called upon him, in Boston, with a bill from George B. Hugo & Co.; and that he paid a part of the price of the ale which was delivered to him on the 3d day of July. This was controverted by the defendants, and the fact of payment was left for the jury to decide. Said Andrew D. Rooney testified that he had seen the defendants Hauck and Cody delivering beer from the express wagon, on pay days at the mill, to op-

eratives whom he knew were too poor to advance the money for it. There was other evidence, uncontradicted and uncontradicted, that Hugo's Express had places of business for the receipt of orders in four places in Hyde Park, and in two general express offices in Boston; no business of the express was done in the licensed place of business of the defendant Hugo in Boston; that the course of business pursued by the defendant in conducting the express business was to furnish blank orders similar to the one referred to, to be filled out by persons who desired the service of the express for any purpose, left at one of the various places of business of the express in Hyde Park, and, if it was desired that a purchase should be made of anything, accompanied by the money; that in so far as the business of the express related to the carrying of intoxicating liquor, and as that liquor came from the defendant Hugo's licensed place in Boston, the *modus operandi* was to forward the order containing the money to George B. Hugo & Co., in Boston, and that, thereupon, the defendant Hugo, if the order met his approval, caused the liquors required by the order to be separated from his general stock, set apart, and marked with the name of the person sending the order, and, in case of liquors other than beer, the quality and price of the article sold. Said Hugo testified that, in no case where money accompanied the order, had he refused to fill it. He also testified that he was the controlling member of the firm of Hugo & Co., licensed liquor dealers in Boston; the company being his wife, who was a partner in the license for the purpose of keeping it alive in case of his death. He also testified that no charge was made for the delivery of intoxicating liquors, whether by said Hugo's Express, or any other common carrier, but that the cost of delivery was included in the price charged for liquor, and received by said George B. Hugo & Co. before the goods were delivered to the carrier. One Owen Auboushon testified: That he worked in a store in Hyde Park where Hugo's Express had an order box; that he gave the orders to the defendant Cody from the drawer in which they were placed; that he wrote an order for goods for himself upon one of the blanks, a copy whereof is as follows: "To George Hugo & Co.: Purchase for me, as my agent, from Geo. Hugo & Co., Boston, Mass. [naming articles], delivery of which you will accept for me, as my agent, from said George Hugo & Co., in said Boston, to be shipped by Hugo's Express at my expense. [Signed.]" That this order was given to Cody, with others. That he ordered beer or whisky nine or ten times, and always received the liquor, which was delivered at his place. That he always inclosed the money with the order. That the express called three times a week. That his orders were always given to one of the defendants Hauck or Cody. "They would call three times a week. Occasionally I would write an order address-

ed to Mr. Hugo, saying, 'Please send me' so and so, and put in my money. The orders for liquors were always given to either of the defendants Hauck or Cody."

Robert O. Harris, Dist. Atty., for the Commonwealth. Harvey H. Pratt, for defendants.

MORTON, J. The motions to quash and in arrest of judgment have been waived, and need not, therefore, be considered. Notwithstanding the forms of the orders, there was evidence on which the jury properly could find that the liquors were not delivered until they reached, in Hyde Park, the houses of those ordering them, and that until then they were at the risk of the defendant Hugo. The express was owned by the defendant Hugo, and used and run by him, the jury might have found, as a means of delivering the liquors that were ordered of him. The defendants Hauck and Cody were his servants, and were paid by him to deliver the liquors. The jury might have found that a delivery to the express was no more a delivery to a common carrier in the ordinary course than a delivery to the parcel wagon run by a merchant in Boston to accommodate his customers in Boston and its suburbs would be to them. The case is settled by former decisions. *Com. v. Burgett*, 136 Mass. 450; *Com. v. Greenfield*, 121 Mass. 40; *Suit v. Woodhall*, 113 Mass. 391. Exceptions overruled.

(164 Mass. 146)

WHALEN v. COLLINS.

HARDIGAN et al. v. SAME.

(Supreme Judicial Court of Massachusetts. Middlesex. June 21, 1895.)

MECHANIC'S LIEN—ENFORCEMENT.

Under Pub. St. c. 191, § 1, giving workmen a mechanic's lien upon the building which they had helped to erect, "and upon the interest of the owner thereof in the lot of land upon which the same is situated," a lien cannot, at the option of the holder thereof, be established on a part only of the whole lot.

Report from superior court, Middlesex county; Lilley, Judge.

Actions by Whalen against Collins and against Hardigan and another to enforce mechanics' liens. Judgment was ordered for defendant, and the case reported to the supreme judicial court. Judgment for defendant.

These were two petitions to enforce mechanics' liens. The work was done on a building situated on a tract of land owned by defendant, on which was another building. At the trial in the superior court before Lilley, J., it appeared that the premises described in the petitions did not include the whole, but only a portion, of the tract, whereupon the presiding justice ruled that the liens could not be maintained on a part of the tract, and ordered judgment for the de-

fendant, reporting the case to the supreme judicial court.

Smith & Ludden, for petitioners. Allin & Mayberry, for respondent.

BARKER, J. The statute gave the petitioners a lien upon the building which they had helped to erect, "and upon the interest of the owner thereof in the lot of land upon which the same is situated." Pub. St. c. 191, § 1. The words quoted have been held to mean the whole lot on which is the building, although the lot is capable of division, and although there are upon it other buildings which are part of the same realty, if nothing has been done by the owner to indicate a purpose to divide the lot. *Quimby v. Durgin*, 148 Mass. 104, 107, 19 N. E. 14, and cases cited. The present question is whether a lien so given can, at the option of the holder of the lien, be established upon a part only of the whole lot. The holder of the lien must first file in the registry of deeds a statement, which must contain "a description of the property intended to be covered by the lien." Pub. St. c. 191, § 6. His next step is a suit to enforce the lien by a petition which must contain "a description of the premises subject to the lien." Pub. St. c. 191, § 13. Notice of this petition is to be given to the owner of the land and to the debtor, who often is not the owner, "and to all other creditors who have a lien of the same kind upon the same estate." All these persons are interested in the result of the suit, and may become active parties to it. Pub. St. c. 191, §§ 16-23. If the lien is established, the court orders a sale of the property, and, if part of it can be separated from the residue, and sold without damage to the whole, and if the value of such part is sufficient to satisfy all debts proved in the case, the court may order a sale of such part, if such sale appears to be for the interest of all parties concerned. Pub. St. c. 191, §§ 24, 25. If all the claims against the property covered by the lien are ascertained at the time of ordering the sale, the court may order the officer who makes the sale to distribute the proceeds; but, if all the claims are not then ascertained, the proceeds may be brought into court, and distributed. But, although all creditors who have a lien of the same kind upon the same estate are to have notice of the suit, and may appear and have their respective liens established and enforced in it, they do not lose their liens by omitting so to do, and each may bring his separate suit to enforce his own lien. *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367. From this outline of the statute it appears that, while other persons than the owner of the land and the petitioner who asks for its sale may be interested in the result of the sale; and, while the law recognizes that the sale of a part only of the land may be all that is necessary, the decision

of the question whether the lien shall be enforced by a sale of the whole land or of a part is given to the court, which may order the sale of a part only when such a sale appears to be for the interest of all concerned. To allow a petitioner to claim and enforce his lien by a petition under which the court can order the sale of but a part of the land covered by the lien, is to enable the petitioner to take from the court important powers, explicitly conferred, and the exercise of which may be essential not only to the rights of the landowner, but of other creditors having similar liens on the same estate. Under such a petition the court cannot order a sale of the whole property covered by the lien, for the petition does not embrace it all; nor can it divide the property, and sell separately such a part of the whole as it may deem best, for an arbitrary division has already been made by the petitioner. By such a course, a division of the owner's property, not contemplated by the statute, is forced upon him at the option of the holder of the lien; and a forced division, not authorized by law, is a wrongful interference with the rights of a landowner, although the two parcels may be worth as much as the whole. Such a course is also prejudicial to the rights of others having similar liens upon the same estate. If they appear in the suit, and establish their liens under the petition which prays that a part only of the land covered may be sold, they are restricted to a fund which is less than that to which the statute has given them a right; and, if they do not appear, but bring subsequent petitions of their own, the sale of the whole land subject to their liens will be interfered with by the sale of a part of it under the former petition. While there may be instances in which no pecuniary harm would result to the owner or to any other person from allowing a petitioner to enforce a lien upon a part only of the land, the legal damage of an enforced division at the option of one to whom the law has given no such option must, in every such case, be done to the owner. Besides this, such statutes should be so construed as to give the fullest relief and protection to all when the remedy given is pursued in the plain and obvious way pointed out by the statute; and one who attempts to pursue the remedy in some other manner cannot justly complain if he fails. We think, therefore, that the ruling requested by the petitioners, "that it was not necessary that the liens should be claimed upon the entire tract of land upon which the buildings stood, provided that all the land under the building upon which the labor was performed and furnished was included in the description of the lot upon which the liens were claimed," was rightly refused, and that the ruling "that the liens could not be claimed upon a part of the entire tract" was right. Judgments for the respondent.

(164 Mass. 136)

RIE v. DOANE et al.(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)**PARTNERSHIP—NOTE FOR PRIVATE DEBT.**

A note executed by one partner without the assent of the other, the consideration of which is in part the payment of a private debt of the partner executing the note, and in part money loaned at the time to the partnership, can only be enforced to the extent of the money loaned, against the assignee, for the benefit of the creditors of the partnership.

Appeal from superior court, Suffolk county; Albert Mason, Judge.

Action by Wilbur P. Rice against Francis Doane and others, assignees. From an order allowing only a portion of plaintiff's claim, he appeals. Affirmed.

The plaintiff seeks to prove against the estate in insolvency of Winkley, Dresser & Co. the full amount of a note for \$1,000, as a firm indebtedness. The plaintiff's dealings were solely with Dresser, one of the partners, by whom the note was executed, and related to a house which this partner was building for his own use. The firm's business was stationery, and in no way concerned in Dresser's housebuilding. At the time the note was given, Dresser owed to the plaintiff a balance of \$500 on indebtedness incurred in building the house. This indebtedness was paid by Dresser's giving the plaintiff said note for \$1,000, signing the firm name thereto, and the plaintiff at the same time receipting his account against Dresser, and giving his (the plaintiff's) check to the order of the firm for \$500. Winkley, the other partner, had no knowledge of said transactions, and never assented to them in any way. The defendants do not object to the plaintiff's proving a claim for \$500 on this note against the firm assets, as allowed by the court; but they do object to the plaintiff's proving a claim for the additional \$500 against the firm assets, because Dresser, without authority, used his firm's name for a private purpose of his own, and the plaintiff had knowledge of the circumstances which made it invalid.

Sherman L. Whipple and Robert W. Frost, for appellant. Proctor, Tappan & Warren, for appellees.

MORTON, J. When Rice called on Dresser for payment of the balance of \$500, the latter told him that the firm was short, and that if he would lend the firm \$1,000 for 60 days he would pay the bill. Thereupon Rice gave his check for \$500 to the firm, and gave Dresser a receipt for \$500, and Dresser gave him the firm's note for \$1,000, payable in 60 days. This transaction was, in substance, paying the private debt of Dresser, to the extent of \$500, with the firm's note. Its real character is not affected by the fact that neither Rice nor Dresser intended any fraud, or went through the form of lending and bor-

rowing \$1,000 for the firm. They adopted the form which they did only as a convenient mode of adjusting the balance. Although each partner had authority to draw checks on the firm deposit in payment of private debts, and Dresser had done that once with Mr. Rice, and although Dresser had authority to borrow money for the firm, and give its notes therefor, there was nothing in their dealings with each other, or in Dresser's with Rice or other parties, which expressly or impliedly authorized him to give the firm's note in payment of his own private indebtedness. The note was taken by Rice with knowledge of the fact that it was given in part for the private indebtedness of Dresser, and it would have been good in his hands, as against the firm, only to the extent of the money actually furnished to the firm, unless assented to by the other partners. *Daniels v. Hammond*, 154 Mass. 165, 28 N. E. 12. But the court expressly found that: "The partner, Winkley, had no knowledge of the transaction, and never assented to it in any way. Neither had he knowledge that the firm note had in any case been given to pay a private debt of either partner, nor had he ever asserted that it should be given for such purpose." We think that the ruling of the learned chief justice of the superior court was right. Order allowing the claim of Wilbur P. Rice only for \$500, with interest, affirmed.

(164 Mass. 52)

LEONARD v. SOUTHWORTH.(Supreme Judicial Court of Massachusetts.
Norfolk. June 21, 1895.)**CONSTRUCTION OF DEED — CREATION OF TENANCY IN COMMON—PROVISION FOR SURVIVORSHIP.**

A father conveyed certain land to his children and their heirs, reserving to their mother a homestead therein, and providing that, if either of the grantees should die before their mother, the survivor should take the whole estate. One of the grantees died before his mother. *Held* that, though Pub. St. c. 126, § 5, provides that such a conveyance shall be construed to create a tenancy in common, the proviso as to survivorship took effect by way of a shifting use.

Appeal from superior court, Norfolk county.

Action by Edgar F. Leonard against Louise Southworth to recover an undivided half interest of certain land. There was a judgment for the tenant, and the demandant appeals. Affirmed.

E. L. Leonard, for appellant. William N. Osgood and John L. Bates, for appellee.

MORTON, J. The demandant contends that the effect of the deed from Albert Southworth to the tenant and Jedediah A. Southworth was to convey in fee to the grantees, as tenants in common, the premises described in it, and that, as he claims under Jedediah, he is entitled to an undivided half. The question is whether this construction is

correct. The deed sets forth that the grantor, "in consideration of one dollar and other valuable considerations paid by Jedediah A. Southworth and Louise J. Southworth," gives, grants, bargains, sells, and conveys unto them the premises in question, "reserving to Harriet Southworth, mother of the grantees, all the rights which she may have in the granted premises, and provided that, should either of the grantees decease before their mother, Harriet Southworth, then the other grantee, his heirs and assigns, shall have the whole of said real estate, reserving to the said Harriet Southworth all the right which she may have in the granted premises, being the same premises set off to me as a homestead by commissioners appointed by court." The habendum is to them, their heirs and assigns, forever, and the covenants are with them and their heirs and assigns forever. It appears from the agreed facts that the grantor owned the premises in fee, and that they were held by him as a homestead, under Pub. St. c. 123; that his wife obtained a divorce from him in March, 1867, and the premises were set off to her free from any interference by him; and that she died in April, 1890, and Jedediah died the April before, leaving a son, who conveyed to the demandant, in February, 1892, the half which he now seeks to recover. We understand that what was set off to the wife was the homestead estate for her life, and, taking the circumstances into account, we think that the object which the grantor had in view is plain. He intended to convey the property to the grantees, to hold subject to such rights as his wife had; and, if either of the grantees died before she died, then the survivor was to take the whole, subject to her estate. The question is whether this purpose can be carried into effect consistently with the rules of law. The tenant contends that the deed may be treated as a conveyance in joint tenancy. The difficulty with this is that the grant, habendum, and covenants are all to and with the grantees as tenants in common. The conveyance is to them as tenants in common. Pub. St. c. 123, § 5. It is only in case one of the grantees dies before the mother that there is a provision for an estate by survivorship. An estate in fee simple is thus created to arise in futuro on the happening of a certain contingency upon another estate in fee simple, which can only be done by way of a use. As a conveyance to use, the deed is inartificial. But, as already observed, the intent is plain; and it has been held that no precise form of words is required to create a conveyance to use, and that "a conveyance of land may always be construed to be that kind and species of conveyance which may be necessary to vest the title according to the intention of the parties if such interpretation is not repugnant to the terms of the grant." *Chenery v. Stevens*, 97 Mass. 77, 85. The demandant admits, in substance, that, if a right of home-

stead had been given to Mrs. Southworth by the deed, a case similar to *Chenery v. Stevens*, supra, would have arisen. He contends that in the present case there is no conveyance to a use, that the grantees are not seised to a use, and that there is no cestui que use in whom a use could be executed. But we think that the deed may be construed so that the proviso shall take effect by way of a shifting use. There is a conveyance in fee to the use of the grantees as tenants in common, and upon the death of one of them before Mrs. Southworth the survivor is to take the whole. In other words, upon the happening of that event the use shifts, and is extended to the survivor, so as to give him the whole estate, subject only to the wife's rights. It is no objection that the previous use is declared in favor of the grantees. In such a case the shifting use takes effect in substitution of it. *Leake, Land*, 121. And it is well settled that several persons may be seised to the use of one of their number. 2 Washb. Real Prop. 117; *Leake, Land*, 119, 120; *Sammes' Case*, 13 Coke, 54. We think, therefore, that the ruling of the superior court was right. Judgment affirmed.

(164 Mass. 99)

LYMAN v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)EMINENT DOMAIN—VALUE OF LAND—EVIDENCE—
PRICE PAID FOR NEIGHBORING LAND—
EXPERT TESTIMONY.

1. In a proceeding to assess damages for land taken for a park, where a witness for the city testified to the price paid by him for land near that taken, petitioner was not prejudiced by the exclusion, on cross-examination, of a question as to whether there were not restrictions on the witness' land which affected its value, evidence being afterwards introduced as to the nature of such restrictions, and the lawyer who examined the title for the witness testifying that he did not regard the witness' title as absolutely clear.

2. Petitioner cannot complain because his question to the witness as to whether there was any topographical resemblance between his land and that taken was excluded, where the witness was allowed to describe the two properties.

3. In a proceeding to assess damages for land taken for a park, the mere fact that other land in the immediate neighborhood is different in shape, size, and situation, and is subject to different restrictions from that taken, does not render the price paid for the other land irrelevant.

4. On an issue as to the value of land taken by a city for a park, a real-estate broker doing business in the city, who testified that he had kept acquainted with values of land in the city and the suburb in which the land taken was located, and had examined the land, and was acquainted with the streets and buildings in the suburb, was competent as an expert, though he had never lived in the suburb, or bought, sold, or owned any land there.

5. A person who testified that on several occasions he had made investigation to appraise land in the suburb, and was familiar with sales of land and values there, and was engaged in the management, care, and development of land in the city and its suburbs, was competent as an

expert, though he had never lived in the suburb, or bought, sold, or owned land there.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Proceeding by Edward H. R. Lyman, trustee, against the city of Boston, for the assessment of damages for land taken for park purposes. Petitioner excepts to rulings on the admission of evidence. Exceptions overruled.

Robert M. Morse, for petitioner. Thomas M. Babson, for respondent.

MORTON, J. The questions put by the petitioner to the witness Rice on cross-examination, whether there were not restrictions upon his estate, and whether they did not enter into the price, were excluded on the ground that the restrictions could only be shown by the production of the deed. Subsequently Mr. Balch testified at length, without objection, to the state of the title, describing the restrictions, and saying, in substance, that he never was fully satisfied as to the nature of them; that he did not regard the title as absolutely clear; and that he was content for Mr. Rice to take it, and passed it. Mr. Rice gave the price which he paid for the property, and testified to the circumstances surrounding the sale, and to his conversations with Mr. Billings regarding it. The facts explanatory of the title and the sale were all before the jury, and they could judge whether the restrictions were accounted material, and affected the price. It does not seem to us that the petitioners were prejudiced by the exclusion of the questions. It was much better to have the witness describe the two estates than to permit him to express his opinion on their topographical similarity, etc. The petitioner has no valid exception to the exclusion of the question to Mr. Rice whether there was any topographical resemblance between his estate and the Lyman estate.

2. The next exception is that the Rice estate was so dissimilar to the Lyman estate that the price paid for the former furnished no just guide to the value of the latter. The dissimilarity is alleged to consist of the restrictions upon the Rice estate, etc., in the size, shape, topographical features, and situation of the two estates. It is also said that the sum paid for the Rice estate did not tend to show its market value, but involved other matters besides the value of the land and buildings, and included buildings of whose value the jury had no means of judging. It is well settled that sales of land similarly situated, and not too remote in point of time, are admissible to determine the value of land taken for public purposes. From the nature of the case, no two estates can be exactly alike. The question in each case is whether the similarity is sufficient to afford material assistance to the jury in determining the value of the estate in controversy, or wheth-

er the dissimilarity is such that the jury will be liable to be misled and prejudiced by the evidence. It is evident that there may be considerable difference in the size, shape, situation, use, and immediate surroundings of two estates, and perhaps in other respects, and yet the price which one brought may be of substantial assistance in determining the value of the other. There may be general considerations, applicable to both alike, which largely affect their value, and render it proper that the price paid for one should be considered in arriving at the value of the other, notwithstanding the differences between them. *Benham v. Dunbar*, 103 Mass. 365. Much must of necessity be left to the discretion of the presiding judge on the question whether the similarity is such as to render the testimony competent. But his discretion is not an unlimited one. *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305. If, in the present case, he had excluded the evidence because the two estates were not sufficiently alike, we should have hesitated to disturb the ruling. On the other hand, we cannot say that the restrictions were of such a character, or the dissimilarity of the two estates so great, that the evidence would tend to mislead or prejudice the jury, and would be of no material assistance to them in arriving at the value of the land in controversy; and that its admission was clearly wrong. As to the price, the facts in regard to the sale and explanatory of it were, as already observed, all before the jury, and they could consider what effect, if any, they naturally would have had on the price, and how far that represented the actual market value. The fact that it included buildings could also be taken into account by them. *Patch v. Boston*, 146 Mass. 52, 14 N. E. 770; *Id.*, 146 Mass. 57, 14 N. E. 772.

3. The remaining exception relates to the competency of the four experts called by the city,—Mr. Meredith, Mr. Viaux, Mr. Whittier, and Mr. Cobb. The petitioner objected that they were not qualified, and excepted to rulings permitting them to testify. All of them, except Mr. Cobb, testified that they were real-estate brokers doing business in Boston, and all of them, except Mr. Whittier, that they were members of the Real-Estate Exchange in Boston. Perhaps Mr. Whittier was a member also, though it did not appear. Mr. Meredith, Mr. Viaux, and Mr. Whittier stated that they had followed the prices, and kept acquainted with the values of real estate in the city and suburbs, including Jamaica Plain. Mr. Cobb stated that on several occasions he had appraised lands at Jamaica Plain, and had made investigations for that purpose, and that he was familiar with sales of land and values there, and that he was engaged in the management, care, and development of real estate in Boston, South Boston, and in the suburbs. All of them testified that they had examined the premises in question before the trial, though after the

buildings had been removed. Mr. Meredith also stated that he had advised people as to sales of land in Jamaica Plain. Mr. Viaux said that he was acquainted generally with the streets and buildings in Jamaica Plain and property round the pond. Mr. Whittier stated that he had testified as an expert to values of real estate there, that he had known of sales there, and had known the real estate in controversy for many years. Mr. Cobb also stated that he was familiar with it. We think that the rulings admitting them to testify as experts were correct. It is true that it appears that neither of them had ever lived in Jamaica Plain, and that, with the exception of Mr. Meredith,—and in his case it was several years before the taking in question,—they had not bought or sold or owned land there. But it is not necessary, in order to qualify a witness as an expert in the value of real estate, that he should have lived in the locality about which he is testifying, or bought or sold or owned land there. If he had done that, it may give additional value to his opinion, but the fact that he has not done it does not destroy his competency as an expert. That depends on other considerations, such as his knowledge of values in the particular locality, the extent of his experience regarding real estate in the city or town where the property is situated, and the attention which he has given to the subject generally. *Bank v. Keavy*, 128 Mass. 298. It is possible that districts might be so widely separated in a metropolitan area that the general knowledge which a real-estate broker might have of values would not be regarded as a sufficient qualification in regard to a particular neighborhood. We do not, however, think that that is true of Boston and Jamaica Plain. See *Amory v. Inhabitants of Town of Melrose* (Mass.) 39 N. E. 276. On the whole, we discover no error in the rulings. Exceptions overruled.

(164 Mass. 168)

CASSADAY v. BOSTON & A. R. R.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 25, 1895.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

1. An experienced freight handler, who has been in the employ of a railroad for several years, a part of whose duty has been to hook up the doors of grain cars preparatory to loading them, assumes the risk of injury by falling of a door through an obvious defect therein which would cause it to fall when a heavy load was emptied into the car.

2. The ruling as to the assumption of the risk by an employé is the same whether the action is brought at common law or under the statute of 1887 (chapter 270), regulating the liability of employers to employés.

Exceptions from superior court, Suffolk county.

Action by one Cassaday against the Boston & Albany Railroad for personal injuries. There was a verdict for defendant, from which plaintiff brings exceptions. Exceptions overruled.

v.41N.E.no.3—9

S. L. Whipple, W. R. Sears, and G. A. Saltmarsh, for plaintiff. W. Hudson, for defendant.

LATHROP, J. The plaintiff was injured, while at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car, and there fastened by a hook, a short time before, the work of swinging up and fastening being done by the plaintiff and a fellow servant. If there was any evidence in the case which would warrant a finding that there was any defect in the door or its fastening, notwithstanding the testimony of the plaintiff and his witnesses that the hook was all right, it is to be found in the testimony of Agnew "that the end of the hook was a little more or less blunt from wear; that the top of the grain door, which would come directly under the jaw over the hook, was a little worn too,—he couldn't say positively how much, it may have been an eighth or a quarter of an inch; that there was no iron over this part of the car door, to prevent the wood from wearing against the jaw above." It is to be noticed, however, that none of the witnesses testified that this condition of things caused the door to fall. Nor is there any evidence that the hook used in this case was not a proper and usual hook to use, although another kind of hook was put in evidence. The condition of things was known to the plaintiff. He had been in the employ of the defendant for three years, and was an experienced freight handler. It was a part of his duty to put up and hook the grain door. He did it in this instance, and looked to see whether it was all right, just as he had previously looked to see whether other grain doors which he had put up were all right. If, then, any defect existed in the door which would cause it to fall when the car vibrated, as all cars must vibrate when a heavy load is dumped into them, this defect was an obvious one, of which the plaintiff took the risk. *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 589; *Carey v. Railroad Co.*, 158 Mass. 228, 33 N. E. 512; *Conroy v. Inhabitants of Clinton*, 158 Mass. 318, 33 N. E. 525; *Murphy v. Rubber Co.*, 159 Mass. 206, 34 N. E. 268; *Goldthwait v. Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Allen v. Iron Co.*, 160 Mass. 557, 36 N. E. 581; *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. On the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law or under St. 1887, c. 270. *O'Maley v. Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119; *Fisk v. Railroad Co.*, 158 Mass. 238, 33 N. E. 510; *Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79; *Daigle v. Manufacturing Co.*, 159 Mass. 378, 34 N. E. 458; *Kleinest v. Kunhardt*, 160 Mass. 230, 35 N. E. 458. Exceptions overruled.

(164 Mass. 61)

BASCOM v. SMITH.(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)**CONSTRUCTION OF CONTRACT—PROVINCE OF COURT
—GUARANTY OF PAYMENT FOR WORK
—MISTAKE OF GUARANTOR.**

1. An instruction wherein the court undertook to construe the contract with reference to all the circumstances which the evidence tended to establish, and left it to the jury to determine whether the circumstances assumed had been established, is not objectionable, as leaving the whole construction of a written contract to the jury.

2. No special notice of the acceptance of defendant's guaranty is necessary when defendant knew that plaintiff was performing work relying on it.

3. One who agreed to be responsible for patterns to be made for another is not relieved of liability because he understood that the contract was to make a complete set of patterns, wood and iron, while in fact only wooden patterns were ordered and made, if he had an opportunity to know what work was ordered, and there was nothing in the guaranty indicating whether the pattern was to be of wood or iron or both.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action of contract by H. Clay Bascom against J. Heber Smith. From a judgment for plaintiff, defendant excepts. Exceptions overruled.

H. E. Warner, for plaintiff. Warren Ozero Kyle, for defendant.

FIELD, C. J. The court undertook to construe the contract declared on with reference to all the circumstances existing when it was made which the evidence tended to establish, and merely left it to the jury to determine whether the circumstances assumed had been established by the evidence. This is not leaving the whole construction of a written contract to the jury; and the jury, by their verdict, have found that the circumstances were as they were assumed to be, and have construed the contract in the same manner as the court. The principle of construing a writing most strongly against the party who wrote and proffered it, when it is reasonably capable of two constructions, and has been honestly understood and acted upon by the other party according to the construction which is most against the interest of the party proffering it, was announced in the charge of the presiding justice not as an instruction to the jury, but as the rule adopted by the court. It is a rule which had been adopted in certain cases of real ambiguity, although we have some doubt whether, on the circumstances shown, there was any need of invoking it in the present case. *Barney v. Newcomb*, 9 Cush. 47. Assuming that the defendant knew that Mr. Webb, in behalf of the *Economic Duplex Stove Company*, had requested the plaintiff to make a new set of range patterns, of which there is no doubt, the letters of October 7, 1890, and October 8, 1890, become intelligible enough. The plaintiff, in his letter to the defendant of October

7, 1890, indicates that he wants a note in writing from the defendant confirming what Mr. Webb had said, namely, that the defendant will become responsible to the plaintiff for work on the new set of patterns ordered of the plaintiff to the amount of \$500, although the plaintiff politely says that he has such confidence in Mr. Webb's integrity that he regards his letter as superfluous; and the defendant, in his letter in reply, signifies in writing his present willingness and intention to become responsible to the plaintiff for work on such new set of patterns to the amount of \$500. The whole letter of the defendant shows that he expected that the plaintiff would go on and make a new set of patterns, as ordered by Mr. Webb; and the evidence shows that he knew that the plaintiff did go on, and make the patterns. There was evidence that the defendant understood that the plaintiff in doing so was relying upon his agreement to become responsible to the amount of \$500, and the jury must have so found. Upon such a finding no special notice of the acceptance of the guaranty or of the offer of guaranty was necessary. Knowledge was equivalent to notice. *Bishop v. Eaton*, 161 Mass. 496, 87 N. E. 665. In view of the facts which the court assumed in its hypothetical construction of the contract, which facts the jury must have found, the construction which the court gave to the clause, "in the event of any such action on my part becoming necessary for any cause," seems to be the only reasonable one. It meant that if, for any cause, the company shall be unable to pay for the new patterns, and it becomes necessary for me to pay, I will pay for them up to the amount of \$500. The defendant contends that he is not bound, because it is said that he understood that the contract between the plaintiff and the company was, or was to be, for a set of patterns of wood and another set of iron, whereas the order actually given by Webb was for a set of wooden patterns, and the plaintiff made only a set of wooden patterns, in conformity to the order. Upon this point the instructions of the court were as follows: "There is another matter to which I ought to refer, and that is the claim of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both; and that, inasmuch as he understood it that way, that that was the contract, and not the contract to make a set of wooden patterns alone; and he agreed to guaranty a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guarantying; that, therefore, he was not bound. The claim is not correct. If a man undertakes to guaranty a contract which he may know the terms of upon inquiry, and he makes no effort to find

out what the terms are, but guaranties it,—says, 'I will guaranty that contract,'—and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guaranties it without knowing, he is bound. Now, whether that applies in this case you will determine upon the evidence." We think that this instruction was correct. The meaning of the letters, construed with reference to the circumstances which the jury must have found, is that the defendant is to become responsible to the amount of \$500 for the work done by the plaintiff upon the new set of patterns, size No. 7, of the Economo Duplex Stove Company, which Mr. Webb, acting in behalf of the company, had ordered the plaintiff to make. There is nothing in the letters indicating whether the new patterns were to be of wood or of iron, or whether there were to be two sets of patterns,—one of wood and the other of iron; and the defendant guaranties payment to the amount of \$500 for the work to be done by the plaintiff on the patterns size No. 7 of the Economo Duplex Stove Company, which Mr. Webb had ordered. As Mr. Webb ordered only wooden patterns, the defendant guarantied payment for them to the amount of \$500. Exceptions overruled.

(164 Mass. 112)

FARNSWORTH v. MULLEN.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

NEGOTIABLE NOTE—LIABILITY OF INDORSER—DEMAND OF PAYMENT—DILIGENCE—REVIEW ON EXCEPTIONS.

1. An issue which is not shown by the bill of exceptions to have been raised in the trial court will not be considered on review.

2. A holder of a note who upon transfer of the same before maturity places the address of the maker below his name on the face of the note, without the maker's knowledge, will be bound by a demand of payment by a subsequent holder at the address so given.

3. Evidence that a notary duly demanded payment of a note at the place designated on the face of the note as the residence of the maker, and that the replies received when demand was made justified him in believing that such place was the residence of the maker, warrants a finding of due diligence in demanding payment.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action by C. M. Farnsworth against James F. Mullen on a promissory note. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled.

W. F. Kimball, for plaintiff. Warren O. Kyle, for defendant.

BARKER, J. This case turns upon the effect to be given to the act of the defendant, Mullen, the payee and first indorser of the note, who, upon transferring it to Pinkham, the second indorser, and being inquired of by him as to the address of McDermott, the maker, replied, "I will write his address out," and thereupon wrote upon the face of the

note below the maker's signature the words "76 Chauncey Street," and delivered the note with his own blank indorsement to Pinkham. The note was afterwards indorsed in blank by Pinkham and transferred to the plaintiff, who in turn indorsed it in blank and transferred it to the Shoe & Leather Bank, its holder at maturity. The maker of the note had no knowledge of the memorandum. He lived in Boston, was a bookkeeper, and at the maturity of the note his place of business was at 88 Essex street, and his residence 16 Scotia street. The note was dated February 2, 1893, and matured on June 5, 1893. The maker had been employed as a bookkeeper in an office on the fourth floor of 76 Chauncey street until October, 1892, when he left that office. When he began to work at 88 Essex street, or to live at 16 Scotia street, does not appear. The only demand of payment was made at the office at 76 Chauncey street on June 5th, the last day of grace, shortly after 2 o'clock in the afternoon, and the notices of dishonor were sent before 3 o'clock on the same afternoon. The maker was not at 76 Chauncey street when the demand was made, and then had no place of business there.

The contention that the notices were sent too soon is not open, because it is not shown by the bill of exceptions to have been made in the superior court, and the defendant is now restricted to the questions which his bill of exceptions shows were there raised and ruled upon. We therefore have no occasion to consider whether the memorandum placed by Mullen upon the note estops him from contending that the note was not dishonored when the notices were sent.

The effect of a memorandum upon the face of a promissory note has been often considered. See *Heywood v. Perrin*, 10 Pick. 228; *Perkins v. Bank*, 21 Pick. 483; *Demond v. Burnham*, 133 Mass. 339; *Saunderson v. Judge*, 2 H. Bl. 509; *Exon v. Russell*, 4 Maule & S. 505; *Price v. Mitchell*, 4 Camp. 200; *Williams v. Waring*, 10 Barn. & C. 2; *Trecothick v. Edwin*, 1 Starkle, 468; *Woodworth v. Bank*, 19 Johns. 391. Following the decision in *Demond v. Burnham*, the effect to be given to the words "76 Chauncey Street" in the present case is to treat them as a part of the date of the note. Thus treated they raise a presumption, not conclusive, that the maker resided or had a place of business at 76 Chauncey street (*Smith v. Philbrick*, 10 Gray, 252; 3 Kent, Comm. 98; *Demond v. Burnham*, *ubi supra*); and a demand made either at the residence or the place of business of the maker is of course good when no place of payment is stated in the note. But if at the maturity of the note the maker no longer resides or has a place of business at the place designated in the note, and that be known to the holder, diligence must be used to find him. 3 Kent, Comm. 98, 97; *Smith v. Philbrick*, *ubi supra*. In the present instance the memorandum was added to

the note by the defendant Mullen before its maturity, and before it came into the possession of the plaintiff, or of the bank which held it when it became due, and which was charged with the duty of demanding payment. Having thus added the memorandum, Mullen cannot be allowed to say that the holder cannot rely upon its statements, nor insist that the holder shall act as if there were no such memorandum for his guidance in making demand.

Looking at the circumstances stated in the bill of exceptions, we think the presiding justice was right in ruling that due diligence had been used to find the maker of the note. The memorandum gave the holder a right to suppose that the maker's place of business was at 76 Chauncey street. Having this information, it was not incumbent upon the holder to make inquiries before the day of maturity. The notary used due diligence in going with the note shortly after 2 o'clock in the afternoon of the last day of grace to the place indicated in the memorandum as the maker's place of business, for the purpose of demanding payment. If upon his arrival there he had found any circumstances to indicate that the maker of the note did not have a place of business there, it would have been his duty to prosecute further inquiries. But we find nothing in the circumstances which should have informed him that the office at 76 Chauncey street was not the place of business of the maker of the note. The replies which the notary received there justified him in believing that the information given by the defendant in the memorandum was correct. The ruling that due diligence was used was right. Exceptions overruled.

(164 Mass. 107)

BOWDITCH et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

EMINENT DOMAIN — LAND TAKEN FOR PARK — MEASURE OF DAMAGES—EVIDENCE OF VALUE.

1. On an issue as to the value of land taken for a park, the admission of evidence of what other land, 500 feet away, sold for 2½ years before, since which time electric cars had been introduced, is not necessarily an abuse of discretion.

2. In 1891 a city acquired for park purposes an estate adjoining both petitioner's land and another estate, and in April, 1892, it took all the estates surrounding J. pond, except petitioner's and two adjoining it on the north, and in December took petitioner's land. *Held*, that there was evidence to support a finding that the plan, as it existed in April, 1892, contemplated the taking of petitioner's land, so as to deprive him of damages growing out of an increase of value in his land resulting from such public improvement.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Action by Francis Parkman against the city of Boston for the assessment of damages by a jury for land taken for a public park. Said Parkman having died, Charles P. Bowditch and another, his executors, were sub-

stituted as parties, and they except to the rulings, and refusals to rule, of the superior court. Exceptions overruled.

Robert M. Morse, for petitioners. Thomas M. Babson, for respondent.

MORTON, J. We cannot say that the Duff estate was so unlike the petitioners' estate that the price paid for it would furnish no criterion as to the value of the latter, and that the ruling admitting it was clearly wrong, as it must appear to have been, in order to justify us in holding that the discretion of the presiding judge was improperly exercised. *Paine v. Boston*, 4 Allen, 168; *Shattuck v. Railroad Co.*, 6 Allen, 115; *Patch v. Boston*, 146 Mass. 52, 14 N. E. 770.

It does not appear that the introduction of electric cars had affected prices so much, or that the general rise in values had been so great, as to render it misleading as a standard of comparison. The fact that it was 2½ years before the taking in question did not, of itself, render it incompetent. *Benham v. Dunbar*, 103 Mass. 365.

The remaining question relates to the instruction given by the court, that if the scheme of public improvement existing in April, 1892, did not contemplate the taking of the petitioners' land, they would be entitled to recover damages for the enhanced value resulting from such scheme, but that if it did they would not, and to the refusal of the court to rule that there was no evidence that the scheme adopted in April, 1892, included or contemplated the taking of the petitioners' land. The petitioners do not controvert the correctness of the general rule of law as stated by the court, and it must be regarded as established in this state. *May v. City of Boston*, 158 Mass. 21, 32 N. E. 902; *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 23 N. E. 846; *Dorgan v. City of Boston*, 12 Allen, 223. They contend that there was no evidence to warrant its application to the case before the court, and that its only effect was to mislead the jury. *Brightman v. Eddy*, 97 Mass. 478. It appeared in evidence that in 1891 the defendant had acquired, for park purposes, the estate adjoining the petitioners' on the north, and also an estate known as the "Frothingham Estate," and that in April, 1892, it took for park purposes all of the estates surrounding Jamaica pond, except the land of the petitioners and the two estates immediately adjoining it on the north. On one of the estates not taken was an ice house. One of the defendant's experts, in giving reasons for his opinion that there had been no increase in value by reason of the taking in April, 1892, said that every one knew that the park plans contemplated taking the estate of the petitioners and all remaining lands on Jamaica pond, and that no purchaser would pay an increased price, as he would know that his land would be taken before any work was done to improve the park lands taken in

April, 1892. It also appeared that the petitioners' land (and, we infer, the remaining estates) was taken in December, 1892, only some seven or eight months after the taking in April of the same year. We think that, upon this evidence, it was competent for the jury to find that the scheme or plan, as it existed in April, 1892, contemplated, as a part of it, the taking of the petitioners' land and of the remaining estates around the pond, and that the instructions that were given were therefore pertinent. It was open to argument, in the absence of evidence to the contrary, that the park commissioners could hardly have entered upon a scheme for the purpose of improving and beautifying the lands around Jamacia pond, as part of a system of public parks, and at the same time have contemplated leaving in the foreground, from different points of view around the pond, an unsightly block of ice houses, and that it was more reasonable to infer from the fact that they had acquired so much land around the pond in April, and that this was taken within so few months after, that the taking of it formed a part of the scheme, as it then existed. We think that the exceptions should be overruled, and it is so ordered. Exceptions overruled.

(164 Mass. 153)

COMMONWEALTH v. HALL.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

FORGERY—EXPERT EVIDENCE—HARMLESS ERROR.

A conviction of forgery will not be reversed because a witness was allowed to testify that, in his opinion, the forged instrument was in defendant's handwriting, before defendant was permitted to cross-examine him as to his qualifications, where defendant had an opportunity later to cross-examine the witness, but did not avail himself of it.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Phlander B. Hall was convicted of forgery, and excepts. Exceptions overruled.

D. E. Graves, a witness for the prosecution, testified that he had frequently seen defendant write, and was then asked if he knew in whose handwriting the forged instruments were. Defendant's counsel objected to the question, and asked permission to examine the witness as to the extent of his knowledge of defendant's handwriting. The court overruled the objection, and stated that defendant's counsel could cross-examine the witness on the point stated after the close of the direct examination. The witness answered that he believed the forged instruments to be in defendant's handwriting.

M. J. Sughrue, First Asst. Dist. Atty., for the Commonwealth. Lesser, Fall & Fall, for defendant.

MORTON, J. The witness Graves was clearly competent to testify as an expert to

the handwriting of the defendant. He testified that he had seen him write frequently, and there was nothing to control this testimony. It is well settled that one acquainted with the handwriting of another may testify concerning it. *Keith v. Lothrop*, 10 Cush. 453; *Com. v. Nefus*, 135 Mass. 533; *Hopkins v. Megguire*, 35 Me. 78; *Hammond v. Varian*, 54 N. Y. 398; *Lewis v. Sapio*, 1 Moody & M. 39; *Garrells v. Alexander*, 4 Esp. 37; *Tharpe v. Gisburne*, 2 Car. & P. 21; *Best, Ev. (Am. Ed.)* § 232, note 1.

The defendant objects that he had a right to cross-examine the witness as to his qualifications before he was admitted to testify to the merits. Without undertaking to say that in no case would a refusal to permit it to be done operate to the prejudice of the party claiming the right, the defendant fails to show that it resulted in any harm to him in the present instance. He had an opportunity to cross-examine later, and did not see fit to avail himself of it. As the testimony was left, there was nothing to impeach the competency of the witness. The determination of the question whether a witness is qualified as an expert is for the trial court. *Nunes v. Perry*, 113 Mass. 234; *Com. v. Sturtivant*, 117 Mass. 122. The presiding judge may conduct the examination himself, or may permit it to be made by counsel. Ordinarily no harm can result if the adverse party is given an opportunity at some stage of the case to test in such manner as he chooses the qualifications of the witness, though perhaps the more general and better practice is to permit it to be done as a part of the preliminary examination. Without meaning to say that the court would have the right to refuse any cross-examination on the question of qualifications, we think that in the present case the course pursued was within the discretion of the court as to the order of the trial. See *Sarle v. Arnold*, 7 R. I. 582; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; 1 *Greenl. Ev. (15th Ed.)* § 440, note c. Exceptions overruled.

(164 Mass. 162)

COMMONWEALTH v. McCANCE.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1895.)

OBSCENE PUBLICATION—PROSECUTION FOR SELLING.

On a prosecution for selling a book, only parts of which contain obscene language, if the language complained of is too obscene to place in the records, the indictment must identify by description or reference the parts containing the language upon which it is founded.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Alexander McCance was indicted for selling a book containing obscene language. There was a verdict of guilty, and defendant excepts. Exceptions sustained.

Frederick E. Hurd, First Asst. Dist. Atty., for the Commonwealth. P. Henry Hutchinson, for defendant.

FIELD, C. J. This is an indictment under St. 1890, c. 70. The defendant is charged with "knowingly, unlawfully, feloniously, wickedly, and scandalously" selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say: 'The Decameron; or Ten Days' Entertainment of Boccaccio. A Revised Translation by W. K. Kelly, with Portrait and Ten Illustrations, Drawn and Engraved by Leopold Flameng. Published for the Trade,'—and which said book, then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth, in no legal and sufficient terms, wherein said book is amenable to the penalties denounced by the statute; no specification of any offending passage is exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: Novel 1, third day; novel 2, fourth day; novel 4, fifth day; novel 7, sixth day; novel 8, eighth day; novel 9, ninth day. No evidence of the character of the book was adduced by the commonwealth other than the book itself." The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains 10 novels or stories, for each of 10 days' entertainment. Of these 100 novels 6 only were introduced in evidence by the commonwealth. We cannot know what parts of the book the grand jury found to be obscene, indecent, and impure, and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the commonwealth. The first precedent, so far as we know, for an indictment in this form is the second count in the indictment in *Com. v. Holmes*, 17 Mass. 335. In

that case the court say: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it." This decision has been followed by many of the courts in this country. See *People v. Girardin*, 1 Mich. 90; *State v. Pennington*, 5 Lea, 506; *McNair v. People*, 89 Ill. 441; *Fuller v. People*, 92 Ill. 182; *State v. Brown*, 27 Vt. 619; *State v. Griffin*, 43 Tex. 538; *State v. Smith*, 17 R. I. 371, 22 Atl. 282; *U. S. v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571. No authorities are cited in *Com. v. Holmes*, and the opinion in *Com. v. Wright*, 1 Cush. 46, shows that the decision in *Com. v. Holmes* must be regarded as an exception to the general rule of pleading relating to libelous publications. *Com. v. Tarbox*, 1 Cush. 66, decides that in an indictment for publishing an obscene paper, if the indictment purports to set out the alleged publication, it must do it in the very words of the paper, and the court say that "the excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment by proper averments." See *Com. v. Dejardin*, 126 Mass. 46. *Com. v. Wright*, 139 Mass. 382, 1 N. E. 411, where the indictment was quashed, decides that the indictment "must at least by some general description identify the paper" which is alleged to contain obscene matter, and which the defendant is charged with publishing. This question of the mode of pleading in cases of this kind was considered in England by the court of appeals, in *Bradlaugh v. The Queen*, 3 Q. B. Div. 607, and it was unanimously decided that the words alleged to be obscene must be set out according to their tenor. The two principal Massachusetts cases were considered, and the decision in *Com. v. Holmes* was not approved. *Id.* 620, 638, 641. But the weight of authority in this country is in favor of the decision in *Com. v. Holmes*, and the principle of that decision has been several times recognized by this court as correct, and we think that it must be regarded as an established rule of law in this commonwealth. It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameron of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many culti-

vated people of the world in Italy at the time. It was read for the entertainment of men and women. Parts of it are coarse, and according to the standards of modern times, are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, "among other things, certain obscene, indecent, and impure language." If books of this character are to be regarded as within the provisions of St. 1890, c. 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to certain other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be known that the indictment was founded upon the language which is put in evidence and relied upon at the trial. If the obscene language complained of is found only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages. The records of the court of common pleas or of the supreme judicial court for the county of Worcester contained no copy of the book entitled "Memoirs of a Woman of Pleasure," referred to in the indictment in *Com. v. Holmes*, but apparently the whole book was presented, and the indictment was at common law. The statutes on the subject were first enacted here in Rev. St. c. 130, § 10. It may be suggested that on a motion to quash the indictment the court cannot take judicial notice of the contents of the book referred to in the indictment. But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the part of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence so that the defendant could have known to what he was called up-

on to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed. The exceptions taken at the trial need not be considered. Exceptions sustained.

(52 Ohio St. 539)

ROOT v. BOARD OF EDUCATION.

(Supreme Court of Ohio. April 23, 1895.)

COMPETENCY OF LEGISLATURE AS TO SPECIAL TAXING DISTRICTS—UNIFORMITY OF LEVY—CONSTITUTIONAL LAW.

1. It is competent for the legislature to provide for the creation of a special taxing district, but in such case the tax must be levied by a uniform rule on all property in the district.

2. The act of the general assembly to provide higher education in counties containing cities of the first grade of the first class, passed May 21, 1894 (91 Ohio Laws, 842), is unconstitutional and void, by reason of the want of uniformity in the mode provided for levying the requisite tax, contained in the second section of the act.

(Syllabus by the Court.)

Error to court of common pleas, Hamilton county.

Action by George A. Root against the board of education of the school district of Cincinnati for an injunction. There was a decree for defendant, and plaintiff brings error. Affirmed.

R. A. Harrison, John A. Wolfe, and L. M. Pummill, for plaintiff in error. Frederick Hertenstein, for defendant in error.

MINSHALL, C. J. On May 26, 1894, the plaintiff, George A. Root, brought suit in the court of common pleas of Hamilton county to restrain the defendant, the board of education of the school district of Cincinnati, from excluding his son from Woodward High School, the school being under the supervision and control of the defendant. The plaintiff did not reside in the Cincinnati district, but in a special school district of Columbia township, Hamilton county. Under a resolution that had previously been adopted, the defendant exacted the payment of \$17.50 as tuition in advance for the quarter ending July 1, 1894. This the defendant refused to pay, claiming the right to have his son admitted without such payment, under the provisions of the act of the legislature passed May 21, 1894. There was no objection to the admission of the plaintiff's son other than the nonpayment of the tuition. The cause was heard on a demurrer to the petition. The court held the law to be invalid, sustained the demurrer, and dismissed the petition. The only question involved in the case is the validity of the statute. The material sections are as follows:

"Section 1. That hereafter all bona fide residents of that portion of any county containing a city of the first grade of the first class not within the corporate limits of such city, and not within any school district which maintains a high school with a four years'

course of study of similar character to the high schools of such city shall be admitted into and receive instruction in any such high school of such city or school district on the same terms and conditions as to tuition fees and otherwise, as are now or may hereafter be prescribed for pupils of such schools residing within such city, or school district.

"Sec. 2. The board of education or other proper board of such city or school district shall, after this act shall have been in force one year, and annually thereafter, make an estimate of the additional funds required for the maintenance of such high school under the provisions of this act, and certify such estimate to the commissioners of the respective county, who, in addition to their other powers of taxation, are hereby authorized and directed to assess and levy upon all the taxable property of such portion of said county not within the corporate limits of such city, and not within the limits of any such school district maintaining such a high school, a sufficient tax annually to provide such additional funds; provided, that nothing in this act shall be so construed as to render nugatory the stipulations under which any bequest, devise, donation or endowment has heretofore been made or given for the support and maintenance of any such high school. * * *

"Sec. 3. This act shall take effect and be in force from and after its passage."

A number of objections are made to the validity of the law. The principal one is to the mode of levying the tax authorized by the second section. The claim is that the provision for levying it is not uniform, as required by section 2, art. 12, of the constitution. It is a tax on property, and must, therefore, conform to this provision. The section referred to requires the board of education of the city, after the act has been in force for one year, and annually thereafter, to make an estimate of the additional funds that will be required for the support of the high school under the provisions of the act, and certify the amount to the commissioners of the proper county, who are then directed to assess and levy a sufficient tax to provide such additional funds upon all the taxable property, not of the entire county, but upon such portions of it, not within the corporate limits of such city, and not within the limits of any school district that maintains a high school with a course of study similar in character to the high school of the city. Now, unless a tax district can be said to be created by this statute, within which all the property subject to taxation is to be assessed for the purpose of raising the additional funds, it is manifestly invalid for want of uniformity. *Field v. Commissioners*, 36 Ohio St. 476. It is claimed by the plaintiff that the tax district is not the county, but the portion that remains after excluding the territory of the city and such school districts as maintain a high school similar in character to that of the city; and that it is competent to the legislature, as held in

Bowles v. State, 37 Ohio St. 35, to create a special taxing district without regard to the municipal or political subdivisions of the state. In that case special tax districts were created by the law. Each embraced all the taxable property within one mile on each side of the road improvement, with certain exemptions at the crossings where lands had been assessed for similar improvements. The court noted the similarity between the want of uniformity between the statute then under consideration and the statute considered and held invalid in the *Field Case*, which provided for the levying of a tax in certain counties for the construction of turnpikes, making, however, an exception of such lands as had been assessed for a similar improvement. But, as the record in the case did not disclose that there were any such crossings on the Biddinger road (the road in question) as would require an exemption of any lands to be made under the law, and the statute might therefore have a constitutional operation in the particular instance, the court held a bond that had been issued for the making of the improvement to be a subject of forgery. It was not held that exemptions could be made in the district in which the tax is to be levied. In the statute now under consideration there is no attempt by definite lines to make a tax district within which the tax is to be uniformly levied. It may extend to and include the whole county outside of the corporate limits of the city, or it may include but part. This will depend upon whether there are or are not school districts within the county having a high school similar in character to that of the particular city; in other words, whether there are lands within the county outside the city entitled under the law to exemption from the tax. The county is the tax district, and the amount estimated by the board of education of the city as necessary to carry out the provisions of the law is to be levied by the county commissioners upon all lands in the county except the city, because it maintains the particular high school, and school districts having a high school similar to the city, because taxed for a similar purpose. There is, then, no difference in principle between this statute and the one held invalid in *Field v. Commissioners*. There lands in the county were to be exempt that had been assessed for similar road improvements; here property in the county is to be exempt that has been taxed for the maintenance of a high school similar to that of the city. It violates the principle of uniformity in the taxation of property required by the provision of the constitution above referred to.

There is no question but that it would be competent for the legislature to create or provide for the creation of a special district in any county for the maintenance of a high school. It might embrace the whole county, or a part of it, provided that all property in it is taxed alike for the maintenance of the school. Such is not this case. The city, through its board, determines the amount of

the levy to be made, but pays no part of it. Those who have the tax to pay have no voice whatever in determining the amount of it. It signifies nothing to say that the tax is levied by the commissioners. When the amount has been ascertained by the board and certified to the commissioners, the law is mandatory as to them. They must make the levy. They are mere agents in carrying out the determinations of the board of education.

A special district for taxation should, during the operation of the law creating it, be permanent and definite. Here both these characters are wanting. Until the commissioners have made a levy under the law, no one can tell with certainty what property in the county will be assessed and what not; and their determination may be changed by the judgment of some court on the question, whether some district does or does not maintain a high school similar in character to that of the particular city. Again, there is nothing to prevent any district from raising the standard of its high school to that of the particular city, or even above it, in which case the district would be diminished, or, possibly, left without any property in it subject to taxation. These considerations show that any attempt to liken the provisions of this statute to the creation of a special taxing district is illusory, and wholly falls of its object.

This is not a case in which the invalid portion of the law may be rejected without affecting the entire statute. The provisions of the first and second sections are dependent. We cannot assume that the legislature would have authorized the children of nonresidents to attend the high school of the particular city, as is done by the first section, without the provision as to taxation, contained in the second. The invalidity of this section emasculates the law, and renders the entire act invalid. The conclusion here reached makes it unnecessary to consider the other objections to the statute. Judgment affirmed.

(63 Ohio St. 110)

JENKINS v. MAPES.

(Supreme Court of Ohio. June 11, 1886.)

BARTER—COMPLETE PAYMENT—DELIVERY—TENDER AND ACCEPTANCE.

1. A barter is a transaction where goods are exchanged for goods; and it is immaterial whether the goods exchanged are of the same kind and quality or of an entirely different species, or whether mutual delivery is had contemporaneously with the making of the contract, or delivery by one is made then and delivery by the other is to occur afterwards.

2. In such a transaction, where the party bound to future payment tenders goods in discharge of his obligation, payment is not completed, and the obligation discharged, until the title to the goods tendered passes to the creditor or obligee; nor will the title pass to the latter until he has expressly or impliedly accepted the goods.

3. In such case the party bound to pay by a future delivery of goods must, when he tenders them, notify the creditor, and afford him an opportunity to inspect the goods tendered, before

the latter will be held to an implied acceptance of them.

(Syllabus by the Court.)

Error to circuit court, Knox county.

Action by one Jenkins against one Mapes on a contract of sale. There was a judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error brought an action before a justice of the peace of Knox county to recover the value of 20 bushels of oats that had been delivered by her to the defendant in error, to be by him consumed, and shortly thereafter returned in kind to her. The defendant prevailed before the justice, whereupon the plaintiff appealed the cause to the court of common pleas, where the defendant again was successful. The plaintiff then took the case to the circuit court on error, where the judgment of the court of common pleas was affirmed, whereupon she instituted proceeding in this court to reverse the judgment of the circuit court and that of the court of common pleas. The facts will be found in the opinion of the court.

D. F. & J. D. Ewing, for plaintiff in error.
F. V. Owen and William M. Koons, for defendant in error.

BRADBURY, J. The defendant in error admits that on August 30, 1881, he received from the plaintiff in error 20 bushels of oats, to be consumed by him, which shortly thereafter he was to return in kind; and he contends that soon after he had received the oats he performed his obligation by delivering to her an equal number of bushels of oats, of the same quality as those he had received and consumed. The plaintiff in error denied their delivery, and upon this issue the parties went to trial. The transaction was not a bailment of the oats, but a sale, where payment was to be made in kind, which in law constitutes a barter. True, a barter usually consists of an exchange of commodities differing from each other in kind; and doubtless, most frequently, mutual delivery of the respective articles occurs contemporaneously. These conditions, however, though the usual, are not necessary, incidents of a barter; a transaction being equally a barter if goods of the same kind are exchanged, and delivery by one party is to be made in the future, as though they were of different kinds, and delivery made simultaneously by both parties when the bargain was made. The distinguishing feature of a barter is that goods are exchanged for goods instead of money; and, to constitute a transaction a barter, it is no more essential that the delivery should be made by both parties at the time the bargain is made than it is necessary, in order to constitute a sale, that the price should be paid contemporaneously with the delivery of the goods which are the subject of the transaction. Bouvler says of barter that "it differs from a sale, in that a barter is always of

goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not." 1 Law Dict. p. 223; 2 Am. & Eng. Enc. Law, 128; Massey v. State, 74 Ind. 368; Com. v. Davis, 12 Bush, 241. As the transaction constituted a barter, the defendant's obligation was discharged if he delivered to the plaintiff 20 bushels of oats of the quality of those he had received; and this was the question over which the parties contended.

Upon the trial in the court of common pleas of the issue respecting the return of the oats, evidence was given tending to prove that about four weeks after the defendant had received the oats he threshed, and, measuring out an equal quantity of oats similar in quality to those he had received, sent them by his stepson, a youth of about 16 years of age, to the plaintiff, in payment of those he had received from her. That the boy took the oats to the premises of the plaintiff and placed them in a bin which he found in her granary, but gave no notice to her, or any one else about the premises, of what he had done, and that she had no knowledge of the return of the oats, if they were returned, until long after they had been sold or consumed. The evidence tended to prove that the granary in question contained at least two bins, one of which was used to store grain owned by the plaintiff alone, and the other used to store that owned by her and her tenant,—a brother-in-law,—or owned by him alone. After the testimony was all in, her counsel requested the following propositions, among others, to be given to the jury: "(1) That in order for the defendant to establish by proof his allegations that he delivered to the plaintiff 20 bushels of oats in full payment of the plaintiff's claim, set forth in the amended petition, he must satisfy your minds, by a preponderance of evidence, that he actually presented the 20 bushels of oats to her for her inspection, and to give her an opportunity to accept or refuse to accept the 20 bushels of oats presented and offered in payment of her claim, and if such opportunity was not offered plaintiff, and she did not accept said 20 bushels of oats in full payment of her claim against defendant, the emptying of said 20 bushels of oats in a bin of oats in her grain house, in which bin there were a lot of other oats, and without plaintiff's knowledge or consent, and all of said oats were taken from said bin and disposed of before plaintiff had any knowledge or information that the defendant claimed to have emptied said oats in said bin in payment of the oats delivered by plaintiff to defendant on or about August 30, 1881, would not in law constitute a delivery of the 20 bushels of oats to her, and would not in law be full payment of the claim of the plaintiff as set forth in her amended petition, and your verdict should be for the plaintiff. (2) That if they find from the evidence in this case that defendant in attempting to deliver to plaintiff 20 bushels of oats in payment of the 20 bushels of

oats that the defendant received of the plaintiff on or about the 30th day of August, 1881, did, without the knowledge or consent of plaintiff, or any one else acting for her, place 20 bushels of oats in an oats bin, in plaintiff's grain house, and in which bin at the time were a lot of other oats which belonged to A. J. Berry, and that before said plaintiff had any notice or information that defendant claimed to have placed said 20 bushels of oats in said bin in payment of said oats delivered by plaintiff to defendant, said Berry took all of said oats out of said bin and converted the same to his own use, that that would not be a delivery to plaintiff, and their verdict should be for the plaintiff." The court refused to give either of these propositions to the jury, to which refusal plaintiff excepted; nor did it supply the omission in the general charge. By declining to give the last proposition, the court left the jury at liberty to find for the defendant, if they found that he, in fact, returned the oats in controversy to her granary; although, without the knowledge or consent of plaintiff, he caused them to be placed in a bin therein which contained oats belonging to another person, whereby the grain thus returned was mingled with that of such other person, and afterwards consumed by him before she was informed of the return. To state such a proposition, is to refute it. Such a return constituted no delivery to the plaintiff. She had no knowledge of what had been done, neither was the grain deposited in a receptacle subject to her control, nor did she receive the slightest benefit from the attempted delivery. The natural result of such a delivery would be the consumption of the grain by the person into whose bin it had been placed. Upon what principle of law can this be held to exonerate the defendant? We know of none.

2. In refusing to give the first of the two propositions, the jury were authorized to find for the defendant if he caused the oats to be deposited in plaintiff's granary in a bin containing other oats belonging to her, although it was done without her knowledge or consent. By the terms of the contract between the parties, the defendant was bound to pay in kind. There can be no payment unless the thing tendered, be it money or goods, is accepted by the party to whom payment is due. Tender alone is not payment. It ordinarily stops the running of interest, and, often by statutory regulations, saves costs, but it does not discharge the obligation of the promisor or debtor. Payment is consummated by an acceptance of the thing tendered, and is incomplete until then. Property cannot be thrust upon a person without his consent, and the effect of payment is to transfer from the payor to the payee the title to the thing delivered and received. "Payment is a mode of extinguishing obligations. It is an act calling for the exercise of will,—of consent. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing

the debt, and the creditor must receive it for the same purpose." 18 Am. & Eng. Enc. Law, 150; Bank v. Gay, 19 Barb. 459. "Payment, in its largest sense, is the actual accomplishment of the thing that the party obliges himself to give or to do, whatsoever it may be, although, in our acceptance, it is ordinarily confined to money engagements, and it is therefore the natural manner in which obligations are extinguished. When the obligation is to give something, the payment is accomplished when the property in the thing to be given is actually transferred to the creditor, and, of course, in order to constitute the transaction a payment, there must be both delivery by the debtor and acceptance by the creditor, with the purpose on the part of the former to part from, and the other to accept of, the immediate ownership of the thing passed from the one to the other. In a payment, we ordinarily look to the act of the party making it; but yet its legal import is an act in which the debtor tenders and the creditor accepts that which is offered." *Thompson v. Kellogg*, 23 Mo. 285; *Vancleave v. Beach*, 110 Ind. 289, 11 N. E. 228. Acceptance of the thing tendered doubtless may be inferred from circumstances; but, in order to hold a person to an implied acceptance, knowledge that the tender was made or the delivery attempted should be shown, unless under some peculiar and special circumstances, or by some established custom, the obligee is bound to possess such knowledge. No such conditions or custom appear in the case under consideration. Before the plaintiff could rightfully be held bound to the consequences which follow even from a tender, she was entitled to an opportunity to inspect the thing tendered. How else could she ascertain whether it was of the quality and quantity which, by the terms of the contract, she was entitled to receive? If the quality of the thing tendered was inferior to that which the obligor was bound to render to her, or if the weight or measure was less than was her due, she was at liberty to reject it, and the transaction would not constitute even a tender. In the very nature of things, there can be no tender of a thing unless the person to whom the tender is made has, by himself or agent, knowledge of it. A tender is necessarily included in every payment; payment occurs whenever the tender is accepted. Tender is the act of the obligor; payment the joint act of the obligor and the obligee. If a transaction does not embrace every act essential to constitute a tender, it necessarily falls short of payment. If, in the case before us, the defendant in error returned oats in the quality and quantity he had received, and without notice to the plaintiff in error deposited them in her granary, still the transaction did not fill the measure of the obligation he had incurred to her. This obligation, as we have already seen, was to pay in other oats of similar quality. He was not authorized to determine whether a sufficient quantity of oats of the proper quality had been returned. The rights of the

plaintiff in error in this respect were equal to his rights. His duty was to offer; hers to accept or reject what he offered. He was bound to afford her an opportunity to accept or reject what he tendered in satisfaction of his obligation. That she might exercise her rights in this respect understandingly, she was entitled to inspect the oats, both as regarded their quality and quantity. Not only this, but if the grain became her property, which it would do if the transaction was a payment, it was thereafter at her risk and entitled to her care. In this view alone it is only reasonable that she should be advised of it, that the care necessary for its preservation could be given by her. If the defendant neglected to cause the plaintiff to be notified that the oats had been placed in her granary, he failed to do that which was necessary to constitute the transaction a payment, and must abide the consequences.

Judgment reversed, and cause remanded for a new trial.

(53 Ohio St. 174)

EVERSMANN v. SCHMITT.

(Supreme Court of Ohio. June 11, 1895.)

BUILDING ASSOCIATION — MUTUAL INTEREST OF MEMBERS — CANCELLATION OF MORTGAGE.

1. The members of a building association, whether borrowers or nonborrowers, have a mutual interest in its affairs, and, sharing alike in its earnings, must assist alike in bearing its losses.

2. A borrowing member is one who receives in advance the par value of his shares, and agrees, in consideration of such advance, to pay the weekly dues on the shares and the interest on the loan, until the dues paid and the dividends declared and not paid are equal to the par value of his shares. He then ceases to be a member, and is entitled to a cancellation of the mortgage given to secure the obligations arising from the loan.

3. The mortgage executed by a borrowing member of a building association contained, among other conditions, a stipulation for the payment of such "assessments" as might be levied on him as a member. Losses occurred, and the association became insolvent, whereupon a receiver was appointed to wind up its affairs, who ascertained the "shortage" in the assets, and made a pro rata assessment on the members to meet the same. *Held*, that an assessment for such purpose is within the above stipulation of the mortgage, and that the member is not entitled to its cancellation until paid. *Held*, further, that in such case the receiver is the proper person to ascertain the amount of the losses, and make an assessment on the members to meet the same.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by George H. Eversmann, receiver of the New Ohio Building Association, against Maria T. Schmitt, to foreclose a mortgage. There was a decree for defendant, and plaintiff brings error. Reversed.

George H. Eversmann, receiver of the New Ohio Building Association, an insolvent corporation, on March 10, 1890, brought suit in the Hamilton common pleas to foreclose a mortgage that had been given it by the defendant below, Maria T. Schmitt. The de-

fendant, being a member of the association, and the owner of 12 shares of the aggregate value of \$3,000, when paid up, on May 1, 1880, had received an advanced loan of that amount, bidding therefor \$240. To secure the obligation to the association arising from the loan, she executed and delivered a mortgage to it on definitely described property. The defeasance clause of the mortgage is contained in the finding of facts, hereinafter inserted. Among other conditions, it stipulates for the payment of the dues on the stock and interest on the loan "until such time as the weekly dues paid and dividends declared and unpaid shall amount to the said sum of three thousand dollars," and the payment of such assessments as may be levied upon her as a member of the association. The petition avers that, by reason of the payment of dividends that had not been earned and the misappropriation of funds by its treasurer, the capital of the association had become impaired to the extent of 31 and a fraction per cent.; that the defendant had participated in the receipt of these unearned dividends; that the plaintiff had been appointed as a receiver to wind up the affairs of the association, and as such receiver, had made an assessment on the stock of the members to meet the losses, that against the defendant amounting to the sum of \$934.17, which she refused to pay. The defendant claimed to have paid in dues the full amount of her loan (\$3,000), and all the interest thereon, and had performed all the requirements of the mortgage according to the constitution and by-laws, and was entitled to its cancellation, and prayed accordingly. Issues having been made up, the case was tried in the common pleas, and both parties appealed from the judgment to the circuit court.

The circuit court made a finding of facts which is as follows: "The New Ohio Building Association is an insolvent corporation. Its insolvency is due partly to the overpayment of dividends by its secretary, George R. Topp, and partly to a misapplication of its moneys by its treasurer, William Peters. The amount of the shortage, as determined by the receiver, is about thirty-one per cent. George H. Eversmann is the receiver of the company, and is engaged in winding up its affairs. The receiver was appointed December 5, 1889. Maria Theresa Schmitt became a member of the corporation May 5, 1880, and subscribed for twelve shares of its stock (\$250 each), and bid for a loan of money for the amount of her shares, three thousand (\$3,000) dollars. This sum was advanced to her, and she gave to the company her mortgage on certain real estate in Cincinnati, described in the petition in this case. This mortgage was duly recorded May 6, 1880. The clause of defeasance provided that 'if said Maria Theresa Schmitt, who has become a member of said building association, and subscribed to twelve shares therein, and received in advance from said association said sum of

three thousand (\$3,000) dollars, the par value of said shares, shall pay or cause to be paid to the said building association, without demand therefor, according to its constitution and by-laws, until such time as the weekly dues paid and dividends declared and unpaid shall amount to said sum of three thousand (\$3,000) dollars, or, in case of the dissolution of said association, until, within the meaning of the constitution and by-laws of said association, she shall be released therefrom: (1) The sum of six dollars per week from the date hereof, the same being the dues on said twelve shares; (2) the sum of six per cent. interest upon said three thousand (\$3,000) dollars, payable pro rata in weekly payments, subject to rebate every corporate year; (3) the sum of six (\$6) per week from the date hereof for a period of forty (40) weeks, the same being in payment of the premium of two hundred and forty dollars bid on said twelve shares; (4) all fines, assessments, and penalties which the said Maria Theresa Schmitt shall incur, and which may be levied upon her as a member of said association, and in accordance with its constitution and by-laws; (5) all rents, taxes, assessments, and premiums of insurance upon the said mortgaged premises, in accordance with the constitution and by-laws of said association,—then this instrument to be null and void.' The constitution of said association contains the following sections: Article 11, § 1: 'All members shall pay for every share fifty (50) cents initiation fee, and an installment of fifty (50) cents per week.' Article 12, § 1: 'Every shareholder shall be entitled to a sum equal to the amount of \$250 for each share.' Section 3: 'Every share for which the money has been drawn shall be considered as a paid out share, and shall bear six per cent. interest (6 per cent.) annually, and the premium must be paid in weekly rates. The interest and premiums shall be payable pro rata, as soon as any part of the money is ready to be paid out. Interest will only be charged on the amount remaining due at the beginning of each year.' Section 4: 'Every member who wishes to draw the amount of his or her shares shall secure the payment by the executing of an acceptable mortgage on real estate, and this mortgage shall remain in force until the weekly dues and undrawn dividends make up the sum of \$250 on each share. The mortgage shall then be canceled, and such a member shall then cease, on the ground of such shares, to be a member. Those members who have not yet drawn money can have their dividend paid to them. They may also draw their money before six months without the dividends.' Maria Theresa Schmitt was a stockholder, and shared equally with the others in the profits of the company, and withdrew the same from time to time. She withdrew dividends from time to time as they were declared, amounting to nine hundred and ninety-five and 92-100

(\$995.92) dollars, with the consent of the association. Maria Theresa Schmitt made the last payments in her book on November 27, 1889, which was the last regular meeting night but one before the receiver was appointed, and demanded cancellation of her mortgage, which was refused. The last payment of dues with the other payments of dues made the entire amount paid in by her, as dues, the sum of \$3,000. In addition to the dues, defendant paid interest and premium in full. The losses occurred during her membership. The assets of the company are mortgages. The liabilities are to members only. The entire premium of \$240 due under said mortgage was paid by Maria Theresa Schmitt at the time she became a member of the association, to wit, May 5, 1880. The dues and interest called for by the mortgage were paid regularly, and according to the terms of the mortgage. The court finds that the proceedings in the superior court of Cincinnati, in which plaintiff was appointed receiver, were for the dissolution of the association, and that the assessment set up in the petition herein was made by the said receiver; that there are a great number of members of said association, both borrowing and non-borrowing, and that none of said members, including the defendant, were parties to said case in which the receiver was appointed, nor were they or this defendant given an opportunity to be heard in reference to said assessment; that there were a large number of members of said association, both borrowing and nonborrowing, who were members thereof during the time said losses set up in the petition occurred, and who withdrew from said association prior to the time said association went into the hands of the receiver; and that none of said parties have been brought into said suit in the superior court of Cincinnati, nor have the liabilities of said parties been considered in making said assessment." The court found and adjudged that the defendant was liable as a member for her proportion of the losses, but held that the condition of the mortgage had been performed, and that she was entitled to have it canceled, and decreed accordingly. The plaintiff in error claims that the judgment ordering a cancellation of the mortgage is not sustained by the findings, and asks to have it reversed.

Huntington & Holmes, for plaintiff in error. Tugman & Baker, for defendant in error.

MINSHALL, C. J. (after stating the facts). Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned among themselves or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums, in the way of dues, interest on loans, and premiums for loans. Each shareholder, whether a borrow-

er or nonborrower, participates alike in the earnings of the association, and alike assists in bearing the burden of losses sustained. It has what is called a capital stock. But this is only true in a modified sense. Unlike other corporations for profit, a share in a building association has, at its inception, only a nominal value. Its value is expected to increase by the lapse of time and the success of the association. It is contrary to the purpose and genius of a building association that a share in it should be paid up at the time of the subscription. This is done by the payment of small dues, and the crediting, at stated times, of the earnings in the way of dividends. When the aggregate dues with the credited earnings equal in amount the par value of a share of stock, it is paid up, and the owner, for that share, ceases to be a stockholder. He is entitled to the par value of his stock, but can no longer participate in the earnings of the association. His relation, then, becomes simply that of a creditor, until he is paid. Of course, what is here said is subject to the qualification that no losses have been sustained. Losses are incident to the most careful management of men. They cannot be wholly avoided, though it is worthy of note that the smallness of the losses in the management of building associations, compared with that of other moneyed institutions, is remarkable. Still, agents may prove unfaithful, and bad loans be made. When this happens, the mutual character of the association prescribes that the burden must be sustained by the stockholders according to the amount of their stock, for he who participates in the benefit of a business must assist in bearing the burden. As before observed, borrowers and nonborrowers participate alike in the earnings of a building association. The difference between them is simply in the time at which each class is paid the par value of his shares. A borrower, before his stock is paid up, receives from the association the par value of his shares, in the nature of an advance loan. For this, he agrees to pay the premium, if any, for the privilege, the interest on the money advanced, subject to abatements to be made at stated times, and the dues on his stock until it matures. In other words, he agrees to keep up and pay out his stock, as if he were a nonborrower, in consideration of the amount being advanced to him before that time. Hence the borrower remains a stockholder, and participates in all the privileges and benefits of a stockholder, has a voice in the management of the association, and participates in its earnings. The latter go towards discharging his obligations arising on the loan, and to shorten the time in which he will be fully discharged therefrom; for, taking all losses into account, whenever the shares of a borrower have reached their par value by the payment of dues and the apportionment of earnings, the loan is liquidated, and he ceases to be a member, as he would

if he had not borrowed at all. In other words, with his shares paid up, he discharges his obligations as a borrower. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made had he not become a borrower.

In this case, Mrs. Schmitt subscribed for 12 shares, and received from the association their par value, \$3,000, as an advanced loan, at a premium of \$240. She paid the premium, and agreed to pay the dues thereon, \$6 per week, and interest at the rate of 6 per cent., subject to an annual abatement, "until such time as the weekly dues paid and dividends declared and unpaid shall amount to the sum of three thousand dollars," and all "assessments" that might be levied upon her as a member of the association. She paid the premium, the dues, \$3,000, and the interest on the loan to the appointment of the receiver. These facts standing alone would satisfy the mortgage. But it is further found that the association is insolvent; that its capital is impaired to the extent of about 31 per cent., for which the receiver has made an assessment on the members, including the defendant; that the losses occurred during her membership, were caused by the payment of dividends that had not been earned, and the misapplication of moneys by the treasurer; and that she had withdrawn \$995.92 of these unearned dividends, although the right to draw earned dividends was limited by the constitution to those members who had not "drawn money." Can, then, a borrower, under these circumstances, claim the cancellation of his mortgage? We think not. To do so would, as we have shown, undermine the principles upon which these associations are organized. By the terms of the constitution of the association, on the cancellation of the mortgage, the borrower ceases to be a member, and all liability to it is at an end. We see no reason why the remaining members should be left to bear all the burden resulting from losses for which they are no more to blame than he is. It is wholly unlike a savings society where the borrower is not a member or otherwise interested in its business. Having no voice in the management nor interest in the earnings of the society, the borrower and it sustain the simple relation of debtor and creditor. Here, as shown, the borrower is also interested as a creditor. The loan is for no definite period of time. It depends upon the management of the association, in which he continues as a member and has a voice. It is, in view of the relation of the borrower to the association and the possibility of losses that the mortgage

stipulates that, in addition to the specific conditions mentioned, the borrower shall pay all "assessments" that may be levied on him. The fourth section of the twelfth article of the constitution, on which much stress is laid, simply expresses what would be true in a safely conducted association. It does not include nor apply to the case where there are no earnings, and losses have to be met and borne. This was wisely provided for in the mortgage. It was a matter about which the parties could and have contracted. There is no suggestion of fraud or mistake in its execution, and their rights must be determined by its stipulations, conforming, as they do, to the equity and justice of the case. She has received from the association, in the way of unearned dividends, a sum greater than the assessment that has been made on her.

But it is insisted that Mrs. Schmitt and the other members were not parties to the suit in which the receiver was appointed, and that he had no power to make the assessment, and it is not binding upon them. This objection is without weight. It is not necessary that the members should, as individuals, have been made parties to that suit. They were parties in their corporate name and capacity, and, for the appointment of a receiver, that was sufficient. We will presume that the receiver was duly appointed, as there is nothing to the contrary. As receiver, it was his duty to collect the assets, and wind up the affairs of the association. This could only be done by ascertaining the loss, and making an assessment on the members to meet it. It was simply a matter of calculation, involved no matters of personal confidence, and could therefore be made by the receiver as well as by the members themselves or their chosen agents. Moreover, these had been displaced by the appointment of the receiver, and could not act in the premises. It is, however, found that a large number of members, borrowing and nonborrowing, who were such during the time the losses occurred, had withdrawn prior to the time the association went into the hands of a receiver. This does not affect the question here. In the absence of bad faith, such persons as had, according to the constitution and by-laws of the association, withdrawn and ceased to be members, cannot again be brought into the association for the settlement of losses. *Wangerlein v. Aspell*, 47 Ohio St. 250, 261, 24 N. E. 405. The withdrawal, being an executed transaction, can only be recalled by the association, and a remedy had in conformity to the rules of equity jurisdiction.

It follows, as we think, that the judgment of the circuit court dismissing the petition of the receiver should be reversed, and judgment entered upon the findings as prayed for in the petition. Judgment accordingly.

(141 Ind. 677)

DENISTON, County Auditor, v. TERRY.

(Supreme Court of Indiana. June 22, 1895.)

BUILDING AND LOAN ASSOCIATIONS—TAXATION OF STOCK—ASSESSMENT OF OMITTED PROPERTY—NOTICE.

1. Under Rev. St. 1894, § 8531, making it the duty of the county assessor to list and assess upon the books of the auditor any omitted property that he may discover at any time during the year, the assessor need not bring the matter before the county board of review before the property is placed on the tax duplicate.

2. One who voluntarily appears to resist the proposed action of the county assessor in placing his property on the duplicate list for taxation cannot resist such action on the ground that he was not served with the statutory notice.

3. Paid-up building and loan association stock is not exempt from taxation under Rev. St. 1894, § 8507, providing that assessment for taxation shall be made upon outstanding shares of stock in such associations, less the amount shown to have been loaned to shareholders upon mortgage security listed for taxation, and the shareholders therein shall not be liable to other taxation upon said shares of stock.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by Frank H. Terry against William H. Deniston, auditor of Fulton county, to enjoin defendant from placing certain stock upon the tax duplicate. A demurrer to the complaint was overruled, and defendant appeals. Reversed.

M. A. Baker, W. A. Ketcham, and Isaiah Comner, for appellant. Holman & Stephenson, for appellee.

HOWARD, C. J. On August 14, 1893, the county assessor placed in the hands of appellant the following statement: "Rochester, Ind., Aug. 14, 1893. Auditor of Fulton County: Place on the tax duplicate as 'omitted property' the sum of \$1,500.00, to Frank H. Terry, town R., and charge up the taxes on the same for the year 1893. Paid-up B. & L. stock. J. N. Orr, County Assessor." On August 21, 1893, the appellee filed with the appellant his written protest against the placing upon the duplicate of said \$1,500 of building and loan stock, for the reasons: (1) That section 89 of the general tax law (Acts 1891, p. 233, section 8507, Rev. St. 1894) "expressly exempts building and loan association stock from taxation"; (2) that the assessor should have brought the matter before the county board of review; (3) that appellee should have received five days' notice of the proposed assessment. On September 27, 1893, the appellee filed his complaint, alleging the foregoing facts, and asking that the appellant be enjoined from placing said building and loan stock upon the tax duplicate. To this complaint a demurrer was overruled, and this ruling is the only error assigned.

If we should consider only the reasons given in the protest and in the complaint for injunction, we should have to hold them insufficient. We do not think, in the first place,

that the statute cited attempts to, or does in fact, "expressly exempt building and loan association stock from taxation"; nor do we think that, if such attempt were made, it would be in compliance with the terms of the constitution. Article 10, § 1, of the constitution requires that "the general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, or charitable purposes, as may be specially exempted by law." Certainly it will not be contended that "building and loan association stock" is within any of the classes of property which it is here provided may be exempted from taxation. This stock is not "municipal, educational, literary, scientific, religious, or charitable" property, and so is not of any of the kinds of property that "may be specially exempted by law" from taxation.

As to the claim that the matter of this taxation should have been brought to the attention of the county board of review, it is enough to say that the complaint shows that this stock was "omitted property," and that section 113 of the general tax law (section 8531, Rev. St. 1894), provides, among other things, that "it shall be the duty of the county assessor, at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; and the same shall be placed upon the duplicate by the auditor, and the taxes thereon extended and collected as in other cases." Notice to the property owner of the proposed assessment of such omitted property is also provided for in the same section. *Saint v. Welsh* (decided at this term) 40 N. E. 903.

As to the third reason given for the injunction,—that "no such notice" to appellee as required by statute was given,—we may observe that it is not denied that some notice was given. It is further shown that appellee did appear and protest against the proposed assessment; and also that, some time afterwards, at the date of filing the complaint, the assessment had not yet been made, the allegation being "that, notwithstanding the protest, the defendant is threatening" to place upon the tax duplicate for the year 1893 said \$1,500 of building and loan stock. Where a party has actual notice, and voluntarily enters his appearance to resist a proposed action against him, that is sufficient to confer jurisdiction.

The reasons given in the complaint being insufficient, it remains to inquire whether the facts alleged were such as to authorize the granting of the injunction. From the complaint it appears that the stock here in question is "paid-up building and loan stock." The statute under which building and loan

associations are assessed, being section 89 of the general tax law, *supra*, and which is substantially a re-enactment of the act in force March 7, 1887 (Acts 1887, p. 40; sections 858, 859, Elliott's Sup.; sections 4462, 4463, Rev. St. 1894), is as follows: "Building, loan fund and saving associations shall be listed and assessed in the following manner: Before the first day of June of each year, the secretary of every building, loan and savings association shall file with the auditor of the county in which such association was organized, a duplicate statement verified by said secretary, showing the amount paid into said association by shareholders upon shares of stock issued by it up to the first day of April preceding and then outstanding, and also the amount loaned up to said date, to shareholders and secured by mortgage upon real estate listed for taxation. And the auditor shall deliver said statement to the proper assessor, who shall proceed to assess said association for taxation with the amount shown to have been paid into said association up to said first day of April upon outstanding shares of stock, less the amount shown by the statement to have been loaned to shareholders upon said mortgage security so listed for taxation; and neither said association nor the shareholders therein shall be liable to other taxation upon said shares of stock." Whether, as contended by appellant, this statute is unconstitutional as to all shares of stock, including those upon which shareholders have made loans from the association, secured by mortgage upon real estate listed for taxation, as well as those shares held by creditors of the association, we need not inquire, since the question before us relates altogether to the latter class of stock. We may say, however, that the stock held by borrowers would seem to be the kind of stock contemplated in the statute. When a shareholder in a building and loan association has borrowed from it the value of his stock, and is engaged, under the rules of the association, in repaying his loan by weekly or monthly installments, or at such times and in such amounts as may be agreed upon, subject to the provisions of the statutes regulating such associations, it would seem that the stock so held in his name is not of any real value, except to show the terms of his contract of payment to the association. As to such stock, moreover, it would appear that the money on hand, being the difference between that received by the association and that so loaned out by it, is the true value of the assets of the association, and the amount, therefore, for which it should be taxed, aside from the mortgaged real estate, the latter being also duly assessed for taxation. If this were true, there would, in effect, be no exemption of shares from taxation, such shares being of no money value. It may be observed, further, that there is here no question of the assessment of notes taken by the association on its loans. It is not clear, therefore, that the Illinois

case cited by appellant is in point, which holds a similar law unconstitutional. *Homestead Ass'n v. Keith* (Ill. Sup.) 39 N. E. 1072. Nor, indeed, are we able to see, as at present advised, why such a method of taxation, so far as borrower's stock is concerned, should be held obnoxious to the requirement of the constitution that "the general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal." As said by counsel for appellee, this provision of the constitution does not require a uniform method of taxation, but only that there shall be a uniform and equal rate of taxation, and that there shall be a just valuation of all the property for taxation. Different methods may be, and, indeed, often must be, pursued, as to different kinds and classes of property, in order to attain to this "uniform and equal rate" and to this "just valuation" of "all property." *Whitney v. Ragsdale*, 33 Ind. 107; *Railway Co. v. Backus*, 133 Ind. 513, 33 N. E. 421. But the question as to assessment of borrower's building and loan stock, and also as to assessment of notes or other evidences of credits held by building and loan associations, are not before us in this case, although ably and earnestly argued by counsel on both sides; and we must therefore decline to pass upon any propositions relating to such matters. The question in the record is whether paid-up building and loan stock—in other words, stock held by investors as debentures, or as evidence of money paid or loaned by them to the association—is taxable, notwithstanding the statute for the assessment of building and loan associations. We think such stock is taxable. If we thought otherwise, we should have to consider the statute itself unconstitutional. In this connection, counsel for appellee, in their additional brief, have laid down three propositions which we think in point, and to which we fully agree: "First. This court will not decide a constitutional question when the cause can be decided upon its merits without such decision. *Hoover v. Wood*, 9 Ind. 286; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, and 33 N. E. 119. Second. A statute may be constitutional in part and unconstitutional in other parts. *State v. Blend*, 121 Ind. 514, 23 N. E. 511; *State v. Gorby*, 122 Ind. 17, 23 N. E. 678. Third. When a statute is susceptible of two constructions, one of which will bring it into conflict with the constitution of the state and the other will not, the latter construction will be adopted. *Warren v. Britton*, 84 Ind. 14; *Hays v. Tippy*, 91 Ind. 102; *Campbell v. Dwiggin*, 83 Ind. 473." The legislature, in the enactment of the statute for the assessment and taxation of building and loan associations, had in mind, as we think, building and loan stock, properly so called; that is, stock held by those who make stated payments to the association in return for money

borrowed by them from the association, and by such borrowers invested in the building or buying of homes. Whether the method provided in the statute for the assessment of building and loan associations is, as to such borrower's stock, constitutional, we need not, as we have already said, inquire, as the question is not here. We are of opinion, however, that the statute did not contemplate that the money loaned to such associations, and evidenced by debentures, called also "shares of stock," should not be taxed as credits held by such stockholders. Such shares of stock are of the apparent value of the money paid upon them to the association, and should be taxed accordingly, as any other credits. Counsel here intimate that if paid-up stock is taxable, so also should stock be which is partially paid up. "It would be absurd," say counsel, "to say that stock half paid up should not be assessed for taxation, and that fully paid up should. Surely, if \$1,000 is invested, certificate issues showing full payment, and is taxed, \$500 invested in a \$1,000 certificate should not escape." In this we quite agree with counsel. Whether the stockholder who has loaned his money to the association, and has received certificates of stock in evidence of such loan, has in fact paid in full for the stock, or has made only part payment thereon, he should, in either case, be taxed for the true cash value of his stock; and that value will, in general, be the amount paid by him on the stock. If, however, the stockholder were a borrower, and not a lender, his stock would represent, not money due to him as a creditor of the association, but rather money due from him as a debtor to the association. Or, at most, if the borrower's stock represented a credit due him, the money borrowed on the stock would be a debit which, as held in *Florer v. Sheridan*, 137 Ind. 23, 36 N. E. 364, he might deduct from the credit. But the stockholder who is simply a lender to, or a creditor of, the association, as appellee, holds his stock in evidence of such credit, just as he might hold the promissory note or other obligation of the association. Whether, in fact, he holds a certificate of stock or not, or whatever other evidence there may be of such credit, can make no difference. He is an actual creditor. The law looks through names, and sees the things which the names stand for. Such a credit, therefore, by whatever name it may be called, or however it may be evidenced, is taxable under the constitution, as any other credit. Any law which should provide otherwise would be invalid. All building and loan stock, therefore, unless it be that held by borrowers, is taxable. Under the law, the stock or shares of stock in question are to be assessed and charged to the holder of the stock or shares of stock, and the tax thereon paid by him, and not by the association. The judgment is reversed, with instructions to sustain the demurrer to the complaint.

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(141 Ind. 702)

STATE ex rel. STEVENS, Prosecuting Attorney, v. BRACKETT.

(Supreme Court of Indiana. June 22, 1895.)

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by the state, on the relation of Smith N. Stevens, prosecuting attorney, against Lyman M. Brackett, to recover a penalty for giving to the assessor a fraudulent list of taxable property. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Smith N. Stevens, M. A. Baker, Isaiah Comer, and W. A. Ketcham, for appellant. Holman & Stephenson, for appellee.

HOWARD, C. J. This was an action brought by the appellant under the provisions of section 55 of the general tax law (section 8485, Rev. St. 1894), against the appellee, for giving to the assessor "a false, or fraudulent" list of taxes, in that he omitted to list a certificate of building and loan stock, evidencing a loan made by him to the loan association named for \$1,500, and worth that sum. To the complaint setting up the facts in the case the court sustained a demurrer. The questions for decision are substantially the same as in the case of *Deniston v. Terry* (decided at this term) 41 N. E. 143. On the authority of that case the judgment is therefore reversed, with instructions to overrule the demurrer to the complaint.

(142 Ind. 163)

STATE ex rel. DUENSING v. ROBY et al.
(Supreme Court of Indiana. June 22, 1895.)

CONSTITUTIONAL LAW—REGULATION OF HORSE RACING—TITLE OF ACT—POLICE POWER—DUE PROCESS OF LAW.

1. Act March 5, 1895, regulating horse racing, is not unconstitutional, as embracing two different subjects of legislation, in that it makes horse racing a misdemeanor, prescribes the punishment therefor, and also authorizes a civil action, prescribing the rules of procedure therein, against any person violating the provision of the act.

2. The term "race meeting," used in Act March 5, 1895, means meetings for horse races; so that section 2, regulating the holding of "race meetings," and prescribing the penalty for violation of its provision, is not unconstitutional, as embracing a subject not expressed in the title of the act, which declares the act to be for the purpose of regulating "horse racing."

3. Act March 5, 1895, making horse racing, except as allowed by the act, a misdemeanor, does not, by authorizing a civil suit against any person violating its provisions, and also providing for the issuance of an injunction against the defendant to enjoin him from such violation, violate Const. art. 1, § 14, providing that no person shall be put in jeopardy twice for the same offense.

4. Act March 5, 1895, which makes horse racing, except as allowed by the act, a misdemeanor, and authorizes a civil suit against any person violating its provision, does not, by authorizing the issuance of an injunction without bond against the defendant in such suit, deprive him, if the owner of the property used in connection with the race, of his property without due process of law.

5. Act March 5, 1895, which makes horse racing, except as allowed in the act, a misdemeanor, and authorizes a civil suit against any person violating its provisions, and provides for an injunction against the defendant, enjoining him from such violation, is a legitimate exercise of the police power of the state.

6. Under Act March 5, 1895, § 2, the holding in the same place of a race meeting, by the same or different persons or corporations, oftener than twice in any period of 60 days, is prohibited, and a period of 30 days must elapse between any two of such meetings.

7. Act March 5, 1895, making horse racing, except as allowed in the act, a misdemeanor, in authorizing a civil suit, and prescribing the rules of procedure therein, against any person violating its provisions, does not violate Const. art. 4, § 22, forbidding the passage of local or special laws "regulating the practice in courts of justice."

Appeal from circuit court, Lake county; John H. Gillett, Judge.

Action by the state, on the relation of Julius Duensing, against Edward Roby and others, to recover the penalty for violation of the statute prohibiting horse racing. From a judgment for defendants, relator appeals. Reversed.

W. A. Ketcham, Atty. Gen., W. H. H. Miller, and Johannes Kopelke, for appellant. J. W. Youche, J. B. Peterson, and Edward Roby, for appellees.

MCCABE, J. The governor of this state, in his biennial message to the legislature of the state in January, 1895, called attention to certain facts, and made certain recommendations for the consideration of that body, as follows: "Near the city of Hammond there has been located what is known as the 'Roby Fair Association.' It is not incorporated under the laws of this state, nor, so far as I can ascertain, of any state, and what is the legal nature of the association is sedulously concealed. What is its actual nature, its purposes and character, is without any concealment. It is simply an immense gambling concern, with a racing attachment to give it the appearance of respectability, and draws within our borders the lawless and disreputable elements of Chicago, for a purpose that is not permitted, nor could be tolerated, within that city's limits. Its every influence is demoralizing, encouraging vice, propagating crime, and thus brings our state into disrepute. Its transactions have been open and notorious, but the authorities of Lake county seem to be either indisposed or powerless to prevent them. I have been earnestly seeking some means, warranted by law, by which this disgrace to our state could be prevented, and although having the able advice, earnest assistance, and active co-operation of the attorney general, Ketcham, have failed to find the way. * * * To contend that the racing of horses can be humanely or interestingly conducted in this climate during the winter months is a rank delusion and fraud. It is but a cloak to deceive, and afford opportunity to conduct gambling on a gigantic scale, and the assembling of disreputable crowds. * * * I therefore, in the name of the people, insist that you shall take action upon this subject, and recommend that you make it unlawful for any association within the state to hold such meetings between the 1st day of November and

the 1st day of April; that no race meetings shall be held within the state except by associations duly incorporated under the laws of this state."

Pursuant to this information and recommendation that legislature passed the following act:

"An act regulating horse racing, defining the meaning of certain terms, prohibiting horse racing at certain seasons, prescribing a penalty for a violation of the provisions of this act, prescribing rules of procedure, giving civil remedies, authorizing the institution of civil suits, and declaring an emergency.

"Section 1. Be it enacted by the general assembly of the state of Indiana that it shall be unlawful for any person, corporation, company, or association to cause, permit, or allow any horse, mare, filly, gelding, colt or mule to race on any track or course wholly or partly within this state at any time between the fifteenth day of November and the fifteenth day of April in any year for a purse or prize, in the presence of fifty persons or more, or in cases where advertisements or notices of such race or races are published or given, notifying the public that such a race will take place. Any person, corporation, company, or association aiding or abetting in such race by taking part in advertising therefor, or by furnishing any animal to participate in such race, or by acting as driver therein, or by allowing or suffering the use of a track, course, or other place owned, managed or controlled by him or it, or by aiding in any way in conducting such race, shall be deemed guilty of a misdemeanor and fined not less than one hundred dollars nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding six months.

"Sec. 2. It shall be unlawful for any person, corporation, company or association to hold or advertise for a race meeting oftener than three times in any year, and no race meeting shall be held longer than fifteen days. It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held. Any person violating the provisions of this section, or aiding or abetting in the violation thereof, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding sixty days.

"Sec. 3. The term 'race' as herein used shall be taken to mean any and all trials of speed of animals of the horse kind, and any and all matches where such animals are suffered to run, gallop, pace or trot for money or prizes, or upon public exhibition, on any track or course. The term 'race meeting' as used in this act shall be taken to mean and include all assemblies of persons or all meetings of

persons who come together, or are notified to come together for the purpose of witnessing any trial of speed, whether running, galloping, pacing or trotting. The terms 'track' or 'course' shall be deemed to mean and include all places prepared, used, kept or maintained for the purpose of conducting races, or of giving public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money or reward is contested for by running, galloping, trotting or pacing.

"Sec. 4. In case of a violation of any of the provisions hereof by any person, whether he was at the time acting with the sanction of the owner, lessee or manager of such track or not, it shall be competent for any citizen of the state to file an information, in the name of the state, on his relation, in the circuit court of the county where such track is situate, alleging that any of the provisions hereof, has been violated, and that the person or persons against whom such information is filed threaten, propose or give out that he or they will do any act hereby prohibited, whereupon it shall be the duty of such court, or the judge thereof in vacation, to issue a temporary restraining order restraining all persons from in any way violating or assisting in the violation of this act. As soon thereafter as possible the court or judge shall direct notice to be given to all defendants, so far as they can be reached by notice, that at a certain time, to be fixed by the court or judge, they may appear and show cause, if any they have, why such order shall not continue until the final hearing. Such notice may be served upon any agent, employé or servant of the defendant or defendants, and shall be as effective as if served upon the defendant or defendants personally, or if the defendants are not residents of this state or are unknown or cannot be found, notice may be given by publication as hereinafter provided.

"Sec. 5. All persons who appear to have any interest in such race track property upon the records of the county may be defendants to such suit, and such persons, as well as all others concerned (the latter of whom need not be mentioned by name) may be notified of the pendency of such proceedings for at least two weeks by publication in some weekly newspaper of the county, of general circulation therein. At the expiration of such time any person having a legal interest in the result of such suit may, upon petition, be admitted as an additional party defendant. Any person having an interest in such property, whether made a party or not, shall be bound by the judgment.

"Sec. 6. Changes of venue may be granted from the county to either party as in other cases, and the relator shall not be liable for any costs. The suit shall be prosecuted either by the prosecuting attorney, at the request of the governor, by the attorney general or an attorney designated by the governor.

"Sec. 7. An emergency is declared to exist for the immediate taking effect of the act,

and it is therefore declared to be in effect from and after its passage."

On May 8, 1895, this suit was begun by the appellant, under the provisions of the above statute, by filing a complaint or information against the appellees in the Lake circuit court, in the name of the state on the relation of Julius Duensing, a citizen of the state of Indiana, which was duly verified in a single paragraph. A temporary injunction was granted until the final hearing. On May 15, 1895, on the motion of appellee Roby, the temporary injunction was dissolved. On May 24, 1895, being the twenty-ninth judicial day of the April term of said circuit court, the appellant filed a verified amended information, in two paragraphs, and afterwards, at the same term, filed a supplemental information, on leave of court, which was also duly verified. Afterwards the defendants Edward Roby, Edward A. Shedd, Charles B. Shedd, the Roby Fair Association, the Roby Breeders' Association, John Condon, Rodman Wells, and John Kelsey appeared and separately demurred to the information, and to each paragraph thereof, and to the supplemental information, for want of sufficient facts, which demurrer the court sustained; and, the plaintiff refusing to further plead, the appellees took judgment upon the demurrer, that the plaintiff take nothing by this suit.

The substance of the first paragraph of the amended information is that the relator informs the court: That he is a citizen of the state of Indiana, prosecuting this action, at the request of the governor of the state, by the attorney general, and that the defendants Roby and the Shedd's are the owners, as appears of record in the recorder's office of said county, of certain real estate (describing it) situate in said county. "That the other defendants, to wit, James A. Webb, the Indiana Racing Association, the Roby Breeders' Association, the Roby Fair Association, and the Hammond Fair Association, John Condon, Rodman Wells, John Kelsey, — Dwyer, whose Christian name is to the plaintiff unknown, with others, whose names are unknown to the relator, have, either jointly or separately, some interest in, or contracts in relation to, said real estate, as to its use and occupancy, but which interest does not appear of record in the recorder's office of the county, or elsewhere, and hence plaintiff is unable to set it forth, but makes them defendants to answer as to their interest. That the Indiana Racing Association, the Roby Breeder's Association, the Roby Fair Association, and the Hammond Fair Association are not, nor is either of them, incorporated under the laws of the state of Indiana. That said association defendants, and each of them, are partnerships, or some other form of association, of the particulars or character of which the relator is not advised. That said defendants other than Roby and Shedd's are each and all interested, as partners or

otherwise, in said several associations or partnerships, for the purpose of carrying on racing upon the premises herein described, and are organized and doing business under said several and different names for the purpose of evading the statutes of the state of Indiana in that behalf enacted, as herein-after more fully averred and set forth. That there is situate upon the real estate a race track or course prepared, used, kept, and maintained by the defendants for the purpose of conducting races and holding race meetings to give public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money, and rewards are contested for by running, galloping, trotting, or pacing of such animals, and for the purpose of assemblies and meetings who come together for the purpose of witnessing such trials of speed, which place, track, and course are commonly known and designated as the 'Roby Race Track.' That on April 15, 1895, previous notice thereof having been given by publication in newspapers, a certain race meeting was held, to continue, according to such notice, for a period of fifteen days from, after, and including said April 15th, upon said grounds. And continuously from said 15th day of April, for a period of fifteen days, excluding Sundays, said race meeting was held, whereat were given races upon each and every day except Sundays, up to and including the 2d day of May, 1895, such race meeting being held by the defendants other than the defendants Roby and Shedd, under the name and designation of 'The Roby Fair Association'; each of said defendants other than Roby and Shedd participating, together with other persons to the plaintiff unknown, in the holding of race meetings, and the defendants Roby and Shedd having full knowledge at the time such race meeting was being held and such races were being run upon the real estate hereinbefore described, of which they were the owners as aforesaid. That thereupon, at and prior to the 3d day of May, 1895, the defendants other than Roby and Shedd did, with their knowledge, consent, connivance, assistance, and co-operation, and with that of others, cause notices to be published that commencing with May 3, 1895, and thenceforward continuously for a period of fifteen days, the Roby Breeders' Association would hold a race meeting, and would upon each day for a period of fifteen days from, after, and including said 3d day of May, but excluding Sundays, give races, trials, and exhibitions of speed, and matches, wherein animals of the horse kind would be permitted to run, gallop, pace, and trot for money and other prizes, upon public exhibition; and upon said May 3, 1895, and at and prior to to the filing of the original information, said defendants other than Roby and Shedd did, as advertised, begin a race meeting, before the period of thirty days had elapsed from and after the first race meeting as hereinbe-

fore set forth. And said last-named race meeting, when taken in connection with the first, constitutes a holding of a race meeting oftener than twice in a period of sixty days, contrary to and in violation of the statute in such cases made and provided, which last-named race meeting was begun and continued from day to day until the same was enjoined and restrained by the temporary injunction already mentioned, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendants Shedd, by the same parties, to wit, the defendants herein, and others, unknown to the plaintiff, under the name of the Roby Breeders' Association, who, under the name of the Roby Fair Association, held said first-named race meeting as hereinbefore averred. That the above-named defendants other than Roby and Shedd, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendants Shedd, with other persons concerned, connected, and interested with them, whose names are unknown to the relator and to the plaintiff, threaten, propose, and give out that they will hold such race meetings oftener than three times in any one year; that they will hold such race meetings longer than fifteen days at a time; that they will hold and cause such race meetings to be held, but under different names, oftener than twice in any period of sixty days; that they will not allow thirty days to elapse after any such race meeting has been held by them until they will hold another on said premises; that, as soon as one race meeting of fifteen days duration has been held by them, they will hold other meetings, and continue such meetings, but for the purpose of evading the law, while seeming to comply therewith, that they will hold such race meetings, while in their interest, and by them, or by some of them, under different names. And that the owners of said race-track property concur and unite with the other defendants in their said threats and propositions to continue such race meetings continuously. That each of the race meetings heretofore held, and that are proposed to be held, by said defendants, are all in the interest of the owners of said real estate and race-track property, and of the other defendants hereto, engaged in the business of racing and holding race meetings. That the defendants herein, and the parties whose names are unknown to the plaintiff, are members of the said several associations herein named, and that said associations are in truth and in fact one and the same association, maintained and controlled by the same parties and for the same purposes. That since the filing the original complaint herein the defendant the Hammond Fair Association has been organized for the purpose of advertising and holding race meetings upon said real estate, and therefore it is a proper party defendant herein, and plaintiff asks that it be made a party defendant, and to amend the complaint in

that respect. That the defendant Edward A. Shedd was not originally made a party defendant hereto, by inadvertence and oversight, but that he has an interest in the subject-matter of this action, by reason of his interest in said real estate, and plaintiff therefore asks leave to make him a party defendant." Prayer for a temporary restraining order, and, on the final hearing, for a perpetual injunction. The second paragraph only differs from the first, in substance, in that it alleges that said defendants Roby and Shedd had leased said premises (said track and course) to the other defendants, and such incidental changes as that change would require. The supplemental information only differs in substance from the first paragraph in that it states dates of race meetings differently, and makes a new party defendant, not before brought in,—Louis E. Hohman. The demurrers to these several pleadings present substantially the same question, and have been so treated, in the main, by the counsel.

The action of the trial court in sustaining the demurrer is defended by appellees' learned counsel on the ground, mainly, that the statute is unconstitutional. Their first contention, however, is that the first section is void because they say it is insensible. It is assumed by the appellant's counsel that it was intended to prohibit winter racing (that is, horse racing) between the 15th day of November and the 15th day of April. But appellees' counsel contend that it does not mean that at all, because the inhibition is "at any time between the fifteenth day of November and the fifteenth day of April in any year." They contend that the period of time there designated must be that intervening between April 15th and November 15th in the same year, thus making the statute prohibit summer racing, instead of winter racing. This, they say, contradicts that part of the clause which makes the forbidden period begin the next day after the 15th day of November, and end with the day before the 15th day of April, which plainly requires the time prohibited to run forward, and not backward. But it is not the first section with a violation of which the appellees were charged in the information, nor against a threatened violation of which the injunction was sought by the appellant. It will be time enough to construe that section when the question arises. It is for an alleged violation of section 2 of the act that this action was brought, such action being authorized by sections 4 and 5. But it is contended that the second section is unconstitutional, because not covered by the title of the act, and that the whole act is in violation of the constitution of the state, in that it embraces two distinct subjects of legislation, namely, the creation of misdemeanors, prescribing punishment therefor, and creating certain civil remedies, authorizing the institution of civil suits, and prescribing rules of procedure therein. In *Robinson v. Schenck*, 102 Ind., at page 319, 1 N.

E., at page 698, it was said: "The power to declare a statute void on the ground that it is in conflict with the constitution is peculiar to the American courts, and the doctrine established by our cases is not found in other systems of jurisprudence. The early cases show that the courts at first asserted this doctrine with much hesitation, and there are still some writers who deny the existence of the power, but it is now firmly fixed in our law [citing authority] * * *. The power is one of the highest possessed by any judicial tribunal in the world, and is, as all the authorities agree, to be exercised with the utmost care, and only in the clearest cases. If there is a doubt in the mind of the court as to the validity of the statute, it must be resolved in favor of the legislature." There are many good reasons in support of the principles thus announced. Under our form of government, there never ought to have been any doubt of the right and the duty of courts, in a proper case, to declare a statute void because of its conflict with the constitution. This right and duty do not grow out of the condition that statutes and acts of the legislative department, within its domain, are not absolutely binding upon the judiciary. But they grow out of the fact that the constitution is the supreme law of the land. Hence, when it is found that a statute contravenes its mandates, the duty to support the constitution, emphasized by the solemn sanctions of an oath, can only be discharged by overthrowing the statute. On the other hand, acts of the legislature come to us as the expression of the will of the sovereign people, clothed with the majesty of law, imposing upon the judiciary the solemn duty of upholding the same, unless found to clearly conflict with the constitution, state or federal. There is the best of reasons why doubts should be solved in favor of the validity of the act of the legislature. In the case of doubt there might be a mistake in declaring the act unconstitutional by the court. To declare an act void for unconstitutionality, in a doubtful case, through a mistake of a court of last resort, would have the effect, not only of paralyzing one of the co-ordinate departments of the state government, but it would be an usurpation of power by the court,—a power withheld from it by the people in the constitution. The dangerous consequences liable to result from a possible mistake in declaring an act of the legislature void for unconstitutionality are sufficient, alone, to inspire the judiciary with the greatest caution in that respect, and furnish ample justification for the rule that no statute will be declared unconstitutional unless its conflict with the constitution is beyond reasonable doubt. Guided by these salutary rules, we proceed to examine the constitutional question.

It is contended that the second section is void because not within the title of the act. As we have seen, the title of the act is limited to regulating horse racing, and prohibiting the same at certain seasons of the year. The

contention is that the second section only prohibits race meetings oftener than three times in any year, and the holding of race meetings longer than 15 days, or oftener than twice in any period of 60 days, and the period between such meetings is required to be not less than 30 days, without any requirement that the race meetings thus limited and restricted were meetings for horse racing. It is contended that as the term "horse" is not once mentioned in the section, and as that part of section 3 which undertakes to define the terms "race" and "race meeting," as used in the act, also fails to mention the term "horse," both sections may include other kinds of races or trials of speed, such as races between cattle, men, reindeer, dogs, or other beings or animals that can run, gallop, pace, or trot, and therefore it embraces a subject not expressed in the title. It is true, the title is so framed as to limit the act to racing of horses, and it is true, also, that section 2 does not use the term "horse," or "horse racing," and it is also true that the defining part of section 3, as to the meaning of the terms "race" and "race meeting," does not use the term "horse" or "horse racing"; but the concluding clause of section 3 does use the language, "giving public exhibitions of trials of speed or matches between animals of the horse kind by * * * running, galloping, trotting, or pacing." This gives an indication of the particular kind of racing the legislature had in mind in both sections. In construing an act the court ought to examine the history of the times, so as to relieve from the mischief and accomplish the purpose of the act. *Maxw. Int. St.* pp. 133, 318, 333, 345; *Potter's Dwar. St.* 240, 247, 262; *Suth. St. Const.* §§ 234, 235, 241, 246, 349, 354, 356. In *Stout v. Board*, 107 Ind., at page 347, 8 N. E., at page 222, it was said: "The legislative intention, as collected from an examination of the whole as well as the separate parts of a statute, will prevail over the literal import of particular terms, and will control the strict letter, where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions." *Investment Co. v. Harris* (at this term) 40 N. E. 1072, and authorities there cited. In view of the current historical facts to which the legislative attention was called by the governor's message, and in view of the whole act, including its title, it would be difficult to say that the terms "race" and "race meeting," used in the second section, did not refer to and mean only horse races, and meetings for having and carrying on horse races. Especially is this true in view of the fact that the public morals and good order of society were never threatened by cow races or cattle races, dog races, or any other kind of races than horse races. An eminent author states the rule thus: "The practical inquiry is usually what a particular provision, clause, or word means. To answer it, one must proceed as he would with any other composition,—construe it with reference to the

leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view, in determining the scope and meaning of any part. This survey and comparison are necessary to ascertain the purpose of the act, and to make all the parts harmonious. They are to be brought into accord, if practicable, and thus, if possible, give a sensible and intelligible effect to each, in furtherance of the general design." *Suth. St. Const.* § 239. The same author says: "If the meaning is doubtful the title, if expressive, may have the effect to resolve the doubts by extension of the purview, or by restraining it." *Id.* § 210. "But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent in cases of doubt, its help cannot be rejected for being extrinsic and extralegislativ. The language of an act should be construed in view of its title and its lawful purposes. Broad language should be confined to lawful objects." *Id.* § 211. To the same effect is *Garrigus v. Board*, 39 Ind. 66. Guided by these rules, we would be justified in holding that no other racing than horse racing, and no other race meetings, were intended to be embraced in the act than those at which horses were to run. At least, there must be a reasonable doubt whether those terms, as used in section 2, did not have reference solely to horse races, and meetings for the purpose of carrying on horse races and horse racing. That doubt should be resolved in favor of that construction that would bring the section within the title, and thus uphold its constitutionality. Where the constitutionality of a statute, or any of its provisions, is under consideration, it has been the uniform rule of this court to so construe and interpret it, if possible, as to sustain, and not defeat, the law; and it is not enough that the constitutionality of the legislation may seem to be doubtful, for in such case the benefit of the doubt must be given in favor of the constitutionality of the legislation. *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggins*, 83 Ind. 478; *Hays v. Tippy*, 91 Ind. 102. But the learned counsel, for the purpose of showing that the section is not covered by the title, invoke the aid of the rule of strict construction. They contend that the section is highly penal, and must be strictly construed, and in support thereof quote the following rule: "Penal statutes receive a strict interpretation. The general words of the penal statutes shall be restrained for the benefit of him against whom the penalty is inflicted. * * * *Potter's Dwar. St.* 736. * * * The law of England does not allow of constructive offenses. No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty. *Id.* 737. * * * By another restrictive rule of construction, penal statutes, if general words fol-

low an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned. *Id.* 737." Without deciding that these rules of strict construction are entirely and fully applicable at this day in this state, it is sufficient to say that they work against appellees' contention as to the construction of section 2 of the act. The appellees are not asking to restrain the general words of the section, but to expand and extend them. It is the appellant that asks to restrict the words of the section to their narrowest possible scope, by confining them to horse racing alone, while the appellees want, under the guise of strict construction, to extend their meaning so as to include all kinds of racing, between all kinds of animals and all kinds of things, in order to reach a conclusion that the section is not covered by the title, that this court may declare it unconstitutional. The doctrine of strict construction of a penal statute does not serve appellees' purpose, or aid them in their contention.

We come now to the objection that the act embraces more than one subject of legislation, in creating and defining misdemeanors, and prescribing punishment therefor, and authorizing the civil remedies and the institution of civil suits, and prescribing rules of procedure therein. In *Warren v. Britton*, 84 Ind., at page 23, it was said: "In the case at bar we are of opinion that the fees and salaries of county treasurers, the officers charged by the law with the collection of taxes, are matters properly connected with the subject of 'An act concerning taxation'; and the closing sentence of section 251 of the act (1881, p. 691) fixing the fees of such officers for collection of delinquent taxes, is a constitutional and valid enactment." The fee and salary law of 1879 contained a provision in relation to the publication of the delinquent list, and the price thereof, and it was contended that the latter provision made the act embrace two subjects, and therefore void. It was said by this court, of that statute, that: "The act does not embrace two subjects. It makes provision for the performance of certain duties by public officers, and prescribes the compensation which shall be paid to officers or others rendering service to the public in connection with public matters and official duties. Whatever is connected with official duty, and is the subject of compensation from the public treasury, is within the act, and forms part of one general subject. * * * No provision of the constitution is invaded by gathering such provisions together in one general act." *Bitters v. Board*, 81 Ind., at page 127. To the same effect are *Benson v. Christian*, 129 Ind. 535, 29 N. E. 26; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Bank of Indiana v. City of New Albany*, 11 Ind. 130; *State v. Sullivan*, 74 Ind. 121; *City of Indianapolis v. Huegele*, 115 Ind. 581, 18 N. E. 172; *Hunter v. Turnpike Co.*, 56 Ind. 213;

Walker v. Dunham, 17 Ind. 483; *McCaslin v. State*, 44 Ind. 151. The title of an act was "An act providing for the election or appointment of supervisors of highways and prescribing certain of their duties," under which there was a provision authorizing the supervisor to bring a civil suit for the obstruction of a highway, to recover damages; and it was held not to embrace two subjects, and that such provision was properly placed under the title. *Railway Co. v. Potts*, 7 Ind. 681. To the exact same effect is *Hines v. Aydelotte*, 29 Ind. 518. *Hingle v. State*, 24 Ind. 28, is a case upon the question here involved, and is perhaps more frequently referred to in the subsequent decisions of this court, as furnishing a correct standard, than any other. It was there said by Mr. Justice Frazer, whose name adds weight to the decision (speaking for the court), that: "The words 'subject' and 'matter' are often used as synonymous. Indeed, in the sense in which they are employed in the constitution, they are as nearly so as it is possible for two English words to be, and both are used simply to avoid repetition. The only difference between them is created by the offices which they are, respectively, made to perform in the clause in question: 'Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.' Now, it is quite evident that the word 'subject' is here used to indicate the chief thing about which legislation is had; and 'matters', the things which are secondary, subordinate, or incidental. * * * Is the insertion in an act to regulate the liquor traffic of a section conferring upon particular courts jurisdiction of cases prosecuted for its violation within any of the mischiefs intended? This question can only be answered in the negative, and such an answer conclusively disposes of this constitutional objection. We happen to have laws in force, by the operation of which, when a new offense is created, some one of our courts can take jurisdiction of it. * * * In the absence of such statutes, the creation of a new offense would beget a necessity for conferring jurisdiction of it upon some court. Can there be a doubt, then, that the two things are properly connected as the constitution requires? It really seems that to state the question ought to be sufficient." That case, and its reasoning, are closely analogous to the case before us. If the civil remedy provided in the statute under consideration extended to the suppression of all violations of law and public morals, or any part of them, outside of the things made unlawful in the main part of the act, then the case referred to would have no bearing, and the act would embrace two independent and separate subjects of legislation. But the civil remedy provided has no connection with any other subject of legislation, either direct or remote. It has no connection with any other crime or misdemeanor than those defined in

the act. Nor can it be used to suppress any other violation of law than those that fall within the provisions of the act. It is necessarily and inherently connected with the main part of the act, making horse racing and its incidents unlawful at certain times and under certain circumstances. Indeed, the connection between the two things is so inherent and necessary that the civil remedy part of the act would be nugatory, and fall to the ground, without the main part of the act. It was designed as an additional and more efficient means of preventing a violation of the main part of the act. It was therefore a matter properly connected with the subject of the act, within the meaning of the provision of the constitution quoted.

It is further contended that the act violates section 22 of article 4 of the constitution, which forbids the passage of local or special laws upon the subject of "regulating the practice in courts of justice," among other things. That question is decided directly against such contention in *Hingle v. State*, supra, and cases there cited, and *Board v. Silvers*, 22 Ind. 491; *Railroad Co. v. Nordyke*, 27 Ind. 95. It is further contended that the act violates section 14 of article 1 of the state constitution, which provides that "no person shall be put in jeopardy twice for the same offense." It is insisted that the defendant may be punished by a fine on a criminal prosecution, and again made subject to an injunction, and deprived of the use of his property, thus punishing him twice for the same offense or act. But the civil suit authorized by the act is not a criminal prosecution, and the injunction is not a punishment, within the meaning of the section of the constitution cited. *State v. Vankirk*, 27 Ind. 121. But it is further contended that, in case of the violation of an injunction under the civil remedy part of the act, the court might fine the defendant for contempt, for disobeying the order of injunction, and that would make him liable to double punishment. The statement of the proposition furnishes a sufficient answer thereto. In that case he would not be punished for crime, but for contempt of court. *State v. Schoonever*, 135 Ind. 526, 35 N. E. 119; *State v. Stevens*, 103 Ind. 55, 2 N. E. 214.

It is also objected that the act, as to the civil remedy part thereof, violates the state and federal constitutions, in that it deprives the owner of his property without due process of law. This objection is founded on the fact that the act provides that the injunction may issue without any provisions for a bond. The contention is that so long as the injunction remains in force the defendant is deprived of the use of his property without recourse or remedy, though the injunction is afterwards dissolved because improvidently or wrongfully issued. The same objection might be urged against that large class of injunctions where no temporary restraining order is asked, no bond given, and no in-

junction awarded until the final hearing, when a perpetual injunction is granted without bond, but which judgment is afterwards reversed on appeal. In that case the successful appellant has no remedy. But it is a serious mistake to suppose that the injunction provided for, in any just or legal sense, deprives the defendant of the use of his property. The fourth section authorizes the judge, in vacation, "to issue a temporary restraining order restraining all persons from in any way violating or assisting in the violation of this act." And the section further provides for the notice to all concerned to appear and show cause if any they have why such order shall not continue until the final hearing. And the clear intent of the act is that on the final hearing, if the facts set forth in the information are established by the evidence, the temporary injunction shall be made perpetual. Of what use of the property does the injunction deprive the owner? None on earth, except a criminal use; none except that which is made criminal by the other part of the statute. The provision of the constitutions, state and federal, securing to every person, for injury done him in person or property, due process of law, were never designed to protect him in the commission of crimes or misdemeanors. After the issue of the injunction, either temporary or final, the defendant or the owner may use his property for any and every purpose, except in violation of the criminal part of this statute. He may use it even for the purpose of horse racing and holding race meetings "for the purpose of conducting races, or giving public exhibitions of trials of speed or matches between animals of the horse kind wherein prizes, money or reward is contested for by running, galloping, trotting or pacing," provided such meetings are not held oftener than three times in any year, "and that any such meeting is not held longer than fifteen days, or oftener than twice in any period of sixty days," and that any such meeting is not held until after the full period of thirty days has elapsed after such meeting has been held, and provided such races are not conducted at such seasons of the year as fall within the prohibition of section 1 of the act. That section only prohibits such races during certain months of the year. But it is insisted that the charge against the defendant owner may be false, and that while he is waiting trial he is suffering unjustly. If he is falsely charged in the information with a violation of the statute, while he in fact is not violating it, the injunction will not interrupt him in pursuing the even tenor of his way. Therefore the injunction provided for does not deprive the owner of the free use of his property for any lawful purpose, and the statute does not deprive him of due process of law.

It is further contended that the civil remedy provided violates the constitution, in depriving the defendant of a jury trial. That ques-

tion, however, is not presented by the record, no jury having been demanded or refused.

It is further claimed that the act is void because it provides for an unwarrantable interference with the management of private property by its owner. "The legislative authority of this state is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it." *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, and authorities there cited; *State v. McLellan* (Ind. Sup.) 37 N. E. 799, and authorities there cited. The right of the state to interfere with the use of private property by its owner belongs to the police power of the state. It was said by this court in *Champer v. City of Greencastle* (Ind. Sup.) 35 N. E. 14, that: "The 'police power of the state,' so far, has not received a full and complete definition. It may be said, however, to be the right of the state or state functionary to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in congress by the federal constitution, or which do not violate any of the provisions of the organic law. Of this power, it may be said that it is known where and when it begins, but not when and where it terminates. But this power, whatever may be its limits, resides in the state, in its sovereign capacity." We think the act was a legitimate exercise of the police power of the state. *Fry v. State*, 63 Ind. 552; *Shuman v. City of Ft. Wayne*, 127 Ind. 109, 26 N. E. 590; *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76; *Baumgartner v. Hasty*, 100 Ind. 575; *Powell v. Pennsylvania*, 127 U. S. 685, 8 Sup. Ct. 992, 1257; *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192; *Tied. Lim. Pol. Power*, 203; *New Orleans v. Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6; *Ellenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424.

It is also urged that the act is unconstitutional because it provides in the fifth section that "any person having an interest in such property, whether made a party or not, shall be bound by the judgment." It is sufficient to say that no such party is now before this court raising such question, the only question presented being raised by the appellees, who were made parties to the information to which they successfully demurred. It will be time enough to decide that question when it is presented.

Another objection urged to the validity of the act is that it prohibits race meetings oftener than three times in any year, or

oftener than twice in any period of 60 days, and with less than a period of 30 days between meetings throughout the entire state; that is, that if such a meeting should be held at the Roby race track at a stated period, and another should be held at Evansville in less than 30 days therefrom, those holding the latter would violate the statute. No such question is presented by the record before us, but all the races and race meetings complained of were held, proposed, and threatened to be held, at the Roby race track, in Lake county, Ind. We will not go outside of the record to decide that question.

It is further contended that the information is not good because a proper construction of section 2, as appellees' counsel say, shows that it applies to persons and corporations, and prohibits any one of them from holding a meeting for a longer period than 15 days, or oftener than prohibited, but another individual or corporation may hold a meeting succeeding a previous meeting held by some other person or corporation, on the same track, without the intervention of 30 days, and not be amenable to the statute. The first clause of the section, ending with the period, is so framed as to make this construction very plausible, though it would tend to defeat the whole scope and object of the act, as gathered from the current history of the times, the evils that gave rise to the enactment, the evident purpose and intent of the legislature, as evinced in the language employed throughout the whole act, and in its several parts. But the language of the second clause, following the period, makes it plain enough that the construction contended for is not the correct one. It reads: "It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days and it shall be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held." This language was broad enough to embrace all persons, corporations, companies, and associations, and prohibits holding the meetings within the inhibited time, whether held by the same persons, corporations, associations, companies, or different ones. Moreover, this construction makes the act an harmonious whole and consistent with itself, while the other one makes the act inconsistent with itself, and incongruous. The former is the construction which the law requires us to place upon the section. *Suth. St. Const.* §§ 339-341.

It follows from what we have said that the circuit court erred in sustaining the demurrers to the information, and to each paragraph thereof. The judgment is reversed, the cause remanded, with instructions to overrule said demurrers, and for further proceedings not inconsistent with this opinion.

(156 Ill. 504)

COMMISSIONERS OF HIGHWAYS OF
TOWN OF ASHMORE v. GREEN.¹

(Supreme Court of Illinois. June 13, 1895.)

INJUNCTION—TRESPASS—REMEDY AT LAW.

Injunction will not lie to prevent a trespass on land, where the trespasser is not insolvent, since the remedy at law is adequate.

Error to circuit court, Coles county; Francis M. Wright, Circuit Judge.

Bill for injunction by Nelson R. Green against the commissioners of highways of the town of Ashmore. Complainant obtained a decree. Defendants bring error. Reversed.

This was a bill in equity, brought by Nelson R. Green against the commissioners of highways of the town of Ashmore to enjoin them from tearing down a certain fence belonging to complainant, and from entering upon his lands. It is alleged in the bill: That Nelson R. Green is the owner of the following described real estate, situated in Coles county, Ill.: "The southeast quarter of the southwest quarter of section 2, town 12 N., R. 10 E. 3d P. M." That B. F. Cutler is the owner of the tract immediately north of said tract. That the commissioners of highways purchased from Cutler the right of way for a highway across the south end of his land, but had not obtained right to enter on the land of complainant. That in opening up said highway at that time they invaded the premises of complainant, and opened up the highway in part on his land. That complainant's land was leased for farming purposes, and to protect the crops thereon he caused to be erected on his line on the west half of his 40-acre tract a post and wire fence. That afterwards the commissioners tore the fence up, and destroyed the same. That recently complainant attempted to rebuild said fence on the same line, and the defendants tore up the same. Complainant avers upon information and belief that said defendants will tear up and destroy all fences he may erect on the said line, which is properly the south line of said highway. It is also alleged that in opening the highway defendants destroyed 30 of complainant's trees, of the value of \$30; that complainant has never been offered, nor has he received, any compensation for the lands attempted to be taken; that a multiplicity of suits will arise unless defendants are restrained. The bill prays for an injunction, and that defendants may be restrained from tearing down and removing his fences, and for damages, etc.

Answer admits that B. F. Cutler and complainant are owners of adjoining land in the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 2; Cutler's land lying north of the land of complainant. Defendants admit that said Cutler released to them the right of way across his land, immediately north of complainant's

land, and that they caused said highway to be opened and worked and ready for the use of the traveling public. Defendants deny that they invaded complainant's premises, or opened said highway on any part of his land; they deny that they caused the south line of said highway at any place to be located on his land, and they deny that they caused to be destroyed any of his trees. Defendants aver that they caused a survey to be made; that the center line of said survey was the center line of said highway, said highway being laid out 20 feet in width on each side of said center line; that the center line of said highway was 20 feet north of an old fence between the lands of complainant and said Cutler, which was then standing, and had for many years previous, being all that time used and acknowledged by complainant and said Cutler as a division fence and a partition line between them. It is also set up that after the highway was opened and used by the public, the complainant, pretending that the old fence did not stand on the line, erected his fences in the highway; that defendants, in the performance of their official duties, caused the fence to be removed, and, when the complainant began to rebuild, they again caused it to be removed. Defendants aver that the complainant has a complete and adequate remedy at law.

F. K. Dunn and J. H. Marshall, for plaintiffs in error. Wiley & Neal, for defendant in error.

CRAIG, J. There is no substantial controversy in this case in regard to the facts. Complainant owned the S. $\frac{1}{2}$ of E. $\frac{1}{2}$, S. W. $\frac{1}{4}$, section 2, town 12 N., range 10 E. third P. M., and B. F. Cutler owned the N. $\frac{1}{2}$ of the 80-acre tract. The commissioners of highways purchased of Cutler 40 feet off the south side of his 40-acre tract for a highway, and a highway was laid out on the land purchased. The surveyor employed to survey the road made a report in writing to the commissioners, showing that he commenced the survey for the line of the road 20 feet north of the N. W. corner of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 3, thence running east, etc.; and the order of the commissioners laying out the road conform to the survey, and in express terms declare the line of the survey to be the center of the road. But, while the road was located in the 40-acre tract of land purchased of Cutler, it appears from the evidence, when the commissioners opened the road they passed over the line, and opened it on the land of complainant. After the road was opened, Dickinson, a county surveyor, was employed to establish the line between the two 40-acre tracts surveyed, and establish the line; and from this survey, which is not disputed by any one, it appears that the highway was opened and worked south of the line. It also appears from the evidence of the surveyor that the fence erected by complainant, which

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

was torn down by the commissioners, was on complainant's land, south of the line between the two 40-acre tracts. It also appears from the evidence that several years before the highway was laid out an old fence had been built between the two 40-acre tracts. This fence was not, however, on the line, but it stood over on complainant's land.

Where adjoining landowners agree upon a boundary line, and enter into possession and improve their lands according to the line thus agreed upon, they will be concluded from afterwards claiming that the line agreed upon is not the true one. *McNamara v. Seaton*, 82 Ill. 500. But that rule has no application here, as the evidence fails to show that the two landowners ever agreed upon the old fence as the true line between the two tracts of land.

But it is contended in the argument of the attorneys for plaintiffs in error that a court of equity will not interfere by injunction to prevent a mere trespass, and upon this ground the decree enjoining the threatened trespass was erroneous. We think it plain from the evidence that the fence erected by the complainant was on his own land, and that the commissioners of highways were trespassers in tearing down and removing the fence. But, as a general rule, courts of equity will not interfere to restrain trespassers, but leave the injured party to his remedy at law. There are, however, two exceptions to this general rule: First, where it is necessary to prevent irreparable injury; second, to prevent a multiplicity of suits. The jurisdiction of a court of equity to restrain a trespass arose in *Owens v. Crossett*, 105 Ill. 357, and in disposing of the question it is said: "It is first urged in affirmance of the decree dismissing the bill that it will not lie to enjoin a trespass. Such is undoubtedly the rule where it is a simple trespass to property, and it is but a single act, and the person committing or threatening the trespass is liable to respond in damages; but where he is insolvent, and repeated trespasses of a grave character are threatened to be repeated, equity will interfere to prevent the wrong by restraining the threatened trespass." In *Thornton v. Roll*, 118 Ill. 350, 8 N. E. 145, it was held: "Where one party threatens to go upon the land of another and remove earth therefrom to make an embankment for a public road, in the absence of any allegation in the bill showing the insolvency of such party, or that irreparable injury will follow, no injunction will follow to prevent the threatened trespass." In *Poyer v. Village of Desplaines*, 123 Ill. 111, 13 N. E. 819, it was held: "Before a court of equity will interfere to prevent a trespass or an alleged persecution under an ordinance upon the ground of irreparable injury, facts and circumstances must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and the law can afford the party no adequate remedy. A general al-

legation to that effect will not suffice. To entitle a party to maintain a bill of peace, or bill to prevent a multiplicity of suits at law, there must be a right demand affecting many persons. If the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will not lie, unless the complainant's right has been established at law." In *Chicago Public Stock Exchange v. McClaughry* (Ill. Sup.) 36 N. E. 88, it was again held: "A court of equity will not enjoin the commission of a threatened trespass where the injury is susceptible of computation, and the trespasser is not shown to be unable to respond in damages."

If those decisions lay down the correct rule on the subject (and upon examination it will be found that they are well sustained by text writers and the decisions of the best courts of last resort), it is manifest the bill in this case cannot be sustained. The bill contains no allegation that the defendants are insolvent, nor is there any proof of insolvency found in the record. Under such circumstances, complainant has a complete remedy at law to recover any and all damages sustained by the tortious acts of the defendants. But it is alleged in the bill that a multiplicity of suits will arise, unless defendants are restrained. No suits will arise except between the complainant on the one hand and the commissioners of highways on the other hand, and the rule as stated in 2 Story, Eq. Jur. § 857, and approved in *Poyer v. Village of Desplaines*, supra, is, if the right be disputed by two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed. In *Chicago Public Stock Exchange Case*, supra, in discussing this subject, it is said: "To warrant interference upon the ground of multiplicity of suits, there must be different persons assailing the same right, and not a mere repetition of the same trespass by the same person, 'the case being susceptible of compensation in damages.' 1 High. Inj. 700." Under the law as declared in this case, as well as the *Poyer Case*, supra, a sufficient case was not made by the bill or the evidence to authorize a court of equity to interfere. The decree of the circuit court will be reversed, and the cause will be remanded, with directions to dismiss the bill. Reversed and remanded.

(156 Ill. 618)

HILDRETH et al. v. HANCOCK.¹

(Supreme Court of Illinois. June 13, 1895.)

ASSAULT AND BATTERY — ACTION FOR DAMAGES — INSTRUCTIONS.

1. In an action against several defendants for assault and battery, it is proper to charge that if one defendant committed the assault charged in the declaration, and the other defend-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ants aided, advised, abetted, or encouraged such assault, the jury should not only find the one making the assault guilty, but also those so aiding and abetting.

2. Instructions to the effect that if one of the defendants, a minor, assaulted plaintiff as charged in the declaration, then the mere fact of minority will not excuse him from liability for damages, and that if two of the defendants struck and beat the plaintiff as alleged in the declaration, without any sufficient provocation therefor, and the plaintiff was injured thereby, the jury should find the issue for the plaintiff as to such defendants, are not misleading, and do not attempt to sum up the facts.

Appeal from appellate court, Third district.

Action of trespass by David Hancock against William H. Hildreth, John Hildreth, and A. K. Hildreth. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal. Affirmed.

Palmer, Shutt, Drennan & Lester, and Lawrence & Lawrence, for appellants. Salmons & Draper, for appellee.

WILKIN, J. Appellee obtained a judgment against appellants, jointly, for \$1,300, in the circuit court of Vermillion county, in an action of trespass, for an assault and battery. On appeal, the appellate court affirmed the judgment. 55 Ill. App. 572.

It seems that the only grounds of reversal considered by the appellate court were that the verdict was not supported by the evidence, and the damages were excessive. The same arguments filed there are submitted here, and also an original reply brief on behalf of appellants. In the appellate court argument it is suggested, rather than insisted upon, that the trial court erred in admitting and excluding evidence. We do not deem it necessary to say more on this point than that we find no prejudicial error in that regard.

It is also contended that the fourth, fifth, seventh, and eighth instructions given on behalf of the plaintiff do not correctly state the law of the case. The seventh and eighth are to the effect that if one of the defendants committed the assault upon plaintiff as charged in the declaration, and the others, or either of them, aided, advised, abetted, or encouraged such assault, the jury should not only find the one making the assault guilty, but also those so aiding, abetting, etc. It is not denied that they correctly announce the law, but it is insisted there is no evidence in the record against William Hildreth upon which to base them. With this position we do not agree. Whether the evidence justified the verdict of guilty against all the defendants jointly is not an open question in this court, and has not been considered, but we do not think it can be seriously contended that there is no evidence tending to connect all the parties with the assault which one of them admittedly committed, the only contention as to him being that he did so in self-defense. The criticism made upon the fourth and fifth is that they unfairly sum up facts favorably to plaintiff, and ignore those relied

upon as justifying the assault. The fourth simply tells the jury that a minor is liable in damages for torts committed by him, and that if A. K. Hildreth, a minor, committed an assault upon the plaintiff "as charged in the declaration, then the mere fact that he is a minor will not excuse him from liability for damages for such assault," etc.; the fifth, that if two of the defendants struck and beat the plaintiff as alleged in the declaration, without any sufficient provocation therefor, and the plaintiff was injured thereby, they should find the issue for the plaintiff as to such defendants. We are unable to see wherein either attempt to sum up the facts is misleading. The instructions given in the case considered as a whole were fair to the defendants, and even more favorable to them than the law would justify.

There are no errors of law in the record, and the judgment of the appellate court must be affirmed. Affirmed.

(156 Ill. 530)

NEWMAN et al. v. COMMERCIAL NAT. BANK OF PEORIA et al.¹

(Supreme Court of Illinois. June 13, 1895.)

EQUITY JURISDICTION—GARNISHMENT—INTERPLEADER.

A creditor sued in attachment and garnished a fund in the hands of a trustee. While this suit was pending, a third person filed a bill in another court to compel the trustee to turn such fund over to him, and the trustee thereupon filed a cross bill of interpleader. *Held*, that the court had no jurisdiction, either of the bill or the cross bill, the remedy at law in the garnishment proceedings being adequate, and the court of law having first acquired jurisdiction. 55 Ill. App. 534, affirmed.

Appeal from appellate court, Third district.

Bill by Benjamin S. Newman and others against the Commercial National Bank and others. Complainants obtained a decree, which was reversed by the appellate court. 55 Ill. App. 534. Complainants appeal. Affirmed.

The facts of this case are sufficiently stated in the opinion filed in the appellate court of the Third district by Wall, P. J., which opinion is as follows:

"This was a bill in chancery, brought in the circuit court of Pike county by Benjamin Newman, S. O. Hoyt, the First National Bank of Pittsfield, and the Griggsville National Bank against the Commercial National Bank of Peoria, the Bank of Commerce of Peoria, Allen C. Rush, Francis E. Rush, Jefferson Orr, Ella M. Orr, and Isaac C. Edwards. It is alleged that said Allen C. Rush was, on December 28, 1892, indebted to the complainants severally in different sums, and that on December 29, 1892, he sold and conveyed certain described lands to the said Jefferson Orr and Ella M. Orr for the price of \$20,280; that said Jefferson, acting for himself and said Ella M. Orr, promised said Rush, as a part of the con-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

sideration for said lands, to pay to said Newman \$3,500, to said Hoyt \$500, to said First National Bank \$4,000, and to said Griggsville National Bank \$1,700; that said Rush was a member of the firm of Kirkwood, Miller & Co., engaged in business in Peoria, which said firm, on December 30, 1892, made a voluntary assignment to said Edwards for the benefit of their creditors; that the deed of assignment contained descriptive terms, under which the assignee claimed the individual property of said Rush, as well as that of the other members of the firm, in addition to the partnership property, and that he claimed the legal title to said lands, because the deed of assignment was made before the conveyances to the said Jefferson Orr and Ella M. Orr were recorded, and that the consideration for said conveyance should be turned over to him; that said Commercial National Bank of Peoria and the Bank of Commerce of Peoria, also named as defendants, instituted suits in attachment in the circuit court of Peoria county on or about the 3d day of January, 1893, against said firm of Kirkwood, Miller & Co., and caused writs of attachment to be levied on said lands of Allen C. Rush, and caused him to be served with summons returnable on the first Monday of February, 1893; that certificates of levy on said lands in said cases had been filed in the circuit clerk's office of Pike county, and that said Jefferson Orr and Ella M. Orr had been summoned in garnishment in both of said cases; that the claim sued on in said cases were the partnership indebtedness of Kirkwood, Miller & Co., and not the individual indebtedness of Allen C. Rush; and that complainants had a prior lien in equity on the individual property of said Allen C. Rush for the payment of his individual indebtedness to them as above set forth. The bill prayed that upon a hearing of this cause the court might order and decree that the said several amounts to be paid to complainants by said Ella M. Orr and Jefferson Orr, as above set forth, were held by them in trust for the said complainants, and that said amounts might be ordered and decreed to be paid to them without delay; but, if the court should find that the said lands had been fraudulently conveyed by the said Allan C. Rush, to hinder and delay his creditors, that the court should order that the same might be set aside, and complainants should have a prior lien, as individual creditors of the said Allan C. Rush, for the amounts above set forth; or, in case the court should order the consideration for said lands to be paid over to the assignee, that complainants might have a prior lien against said proceeds in the hands of said assignee, as individual creditors of the said Allan C. Rush, for the respective amounts above set forth.

"The Peoria banks, by their answer, asserted that by virtue of their attachment proceedings and the service of the writs upon said Rush and upon said Jefferson and Ella M. Orr the circuit court of Peoria county had

first acquired jurisdiction of the parties and of the subject of controversy, and that the circuit court of Pike county could not interfere; asserted their prior lien to the funds in dispute; denied that a case for equitable jurisdiction appeared by bill; and prayed for the same benefit upon the hearing as if they had specifically demurred to the bill. Jefferson and Ella M. Orr answered, and afterwards filed in said cause their bill of interpleader, setting out a statement of the matters involved at great length, praying for an adjustment as to the conflicting claims of the various creditors complainant and defendant, claiming that of the purchase money \$4,525 should be paid to Lucy Rush and to the estate of John Rush by reason of certain provisions of the will of said John Rush, operative upon the lands, and offering, as to the balance of \$15,755, to bring the same into court for such disposition as might be decreed, and praying that the defendants the Bank of Commerce and the Commercial National Bank of Peoria might be restrained by injunction from proceeding further against said above-described premises, and also against the said Jefferson and Ella M. Orr in said garnishee suits, and that the levies upon said premises by virtue of said attachment writs might be canceled, and the cloud removed. This bill of interpleader was answered by all the creditors and by said Rush. The cause progressed to a hearing, and the court, by its original, supplemental, and final decrees, found that it had jurisdiction of the parties and of the subject-matter, and that by virtue of the transaction therein stated and set forth between said Rush and the said Jefferson Orr there was an equitable assignment of the purchase money to said complainants of the sums alleged in their bill, and of other specified sums to other parties, who were named, and that the funds (which had been placed in the hands of a receiver) should be distributed accordingly; and that, though the said Commercial National Bank had obtained a judgment for \$15,000 in said attachment suit against said Kirkwood, Miller & Co., yet said bank and the Bank of Commerce were enjoined from prosecuting any further the said attachment suits pending in Peoria county as against the said Jefferson and Ella M. Orr, and that said receiver should pay to the said Commercial National Bank whatever sum might remain in his hands after paying the specified sums to said Newman and others. Said bank prosecutes the present appeal.

"The first question for consideration is as to the jurisdiction of the circuit court of Pike county. The circuit court of Peoria county, by virtue of the proceedings in attachment, obtained complete jurisdiction, and had full power to ascertain and determine the rights of all parties interested in the funds in the hands of the garnishees. The entire fund was thereby appropriated. *Reeve v. Smith*, 113 Ill. 47; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401.

Any person claiming it, or any part of it, by assignment or otherwise, might appear, and maintain his right, and, if he did not voluntarily appear, he might upon notice be required to do so, and the court had ample power to adjust all questions arising, to appoint a receiver, and to make all orders which might be necessary or equitable between the parties. Rev. St. c. 62, §§ 11, 12-24; *Stevens v. Dillman*, 86 Ill. 233. Having such jurisdiction, it could not be deprived of it by a subsequent proceeding in another court of concurrent jurisdiction. It is elementary that in all cases of concurrent jurisdiction the court which first obtains jurisdiction will retain it to the end of the controversy, to the exclusion of all others. An opposite rule would lead to endless confusion and uncertainty. The scope of the original bill, as well as of the bill of interpleader, was to determine the very questions which would necessarily arise upon the garnishment. Its object was to obtain from the circuit court of Pike county a decision upon the points arising in the suit previously commenced in Peoria county. Accordingly the court in Pike proceeded to hear the controversy, and rendered a decree, whereby it enjoined the further prosecution of the suit in Peoria. This injunction violates section 4, c. 69, Rev. St., which provides that an injunction to stay a suit or proceeding at law shall be in the county where the suit is pending.

"It is urged, however, that the bill of interpleader gave the court in Pike county all needed jurisdiction. It is laid down by Pomeroy in his work on Equity Jurisprudence (section 1322) that the equitable remedy by interpleader depends upon and requires the existence of four essential elements or conditions: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom relief is demanded; (2) all their adverse titles or claims must be dependent on or derived from a common source; (3) the person asking relief must not have any claim or interest in the subject-matter; (4) he must have incurred no independent liability to either of the claimants. Passing the other conditions, the fourth is important here. The same author says, in section 1326: 'The party asking the interpleader in his dealings with one of the claimants may have expressly bound himself by contract so as to render himself liable upon such independent undertaking without reference to his possible liability to the rival claimant upon the general nature of the transaction. Under these circumstances he cannot require the claimants to interplead.' In Story on Equity Jurisprudence (volume 2, § 823) it is said that this remedy, while it has cured many defects in proceedings at law, has left many cases of hardship unprovided for, and, in the following section, that there are cases where a bill in the nature of interpleader will lie by a party in interest to ascertain and establish his own rights when

there are conflicting rights between third persons. Possibly this bill might be in analogy to some of the cases cited under this section, and might be entertained if it were an original bill, and if the statute had not provided a distinct and adequate remedy, and if no question of prior jurisdiction were involved; but it is difficult to see why this bill was necessary, in view of the scope and purpose of the original bill, which sought to accomplish a full adjustment of these conflicting claims. Moreover, the statute had provided a remedy wholly adequate, and a court of concurrent authority had obtained jurisdiction of the fund, and had power to hear and determine the entire controversy. The attachment proceedings in Peoria county had subjected the fund in the hands of the garnishees to the control and judgment of that court. The garnishees were bound to answer to that court, and could not be relieved from that duty by another court of concurrent jurisdiction upon a proceeding subsequently commenced. In their answer they would necessarily disclose the claim of Newman and others, who asserted the rights which were allowed them by this decree; and upon such disclosure those claimants would be brought in to litigate the matter with the attaching creditors, and thus, in a court of law, an adequate remedy is provided. No resort to chancery, even in the court having already obtained jurisdiction, would be necessary. Conceding that the statute would not oust equity of its power to adjudicate in such a case, yet it is clear that equity would not interfere when a court of law having competent power had obtained jurisdiction, and was about to administer the remedy provided by the statute. It follows that the circuit court of Pike county should not have assumed jurisdiction, and that its decree must be reversed, with direction to dismiss the original and the interpleading bill."

Matthews, Higbee & Grigsby, A. C. Crawford, and Jefferson Orr, for appellants. David McCulloch and Irwin & Slemmons, for appellees.

PHILLIPS, J. (after stating the facts). In the brief filed in this court it is urged that the circuit court of Pike county had jurisdiction in the case for the purpose of considering the effect of the deed of assignment made by Kirkwood, Miller & Co. The assignee had qualified under that deed of assignment, and it had been filed in the county court of Peoria county before the institution of this suit in Pike county, and the assignee had entered upon the discharge of his duties as assignee. The county court had jurisdiction to determine what property passed to the assignee by virtue of the assignment, and determine the rights of conflicting claimants, and for that purpose is, in effect, an insolvency court, clothed with legal and equitable powers to determine those questions

Hanchett v. Waterbury, 115 Ill. 220, 32 N. E. 194; *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 908; *Wilson v. Aaron*, 132 Ill. 238, 23 N. E. 1037; *Field v. Ridgely*, 116 Ill. 424, 6 N. E. 156. The county court of Peoria county having such powers under the law with reference to the determination of the property assigned and conflicting claims, a court of equity of one county should not interfere where a court of law of another county has acquired jurisdiction of the subject-matter, and has power to determine the rights of the parties. It is urged by appellants that, as they were strangers to the record of the attachment case pending in the circuit court of Peoria county, they could not be bound by any judgment therein rendered. Their claim to the fund was of an equitable character, and the rule is well established in this state that courts of law will notice and protect the interests of equitable owners of choses in action in garnishee proceedings which are of an equitable character. *Hodson v. McConnel*, 12 Ill. 170; *Carr v. Waugh*, 23 Ill. 418. By section 11 of chapter 62, Rev. St., entitled "An act in regard to garnishment," "if it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person by force of an assignment from the defendant or otherwise the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such manner as the court or justice shall direct." With this provision of the statute, and the circuit court of Peoria county having first obtained jurisdiction, it, in the proceeding before it, had jurisdiction and power to give appellants the relief that was sought under the original bill and the bill of interpleader, and determine their right to the fund. We concur with the appellate court in what is said in the opinion above cited, and its judgment will be affirmed. Affirmed.

(156 Ill. 499)

ORTON et al. v. CITY OF LINCOLN.¹

(Supreme Court of Illinois. June 13, 1895.)

OFFICIAL BONDS—MUNICIPAL ORDINANCE—LIQUOR LICENSES.

The sureties on a city clerk's bond, conditioned that he will pay over all money that may come to his hands by virtue of his office, are not liable for his misappropriation of money paid to him for liquor licenses under an ordinance requiring such money to be paid into the city treasury, since such an ordinance requires the payment to be made to the city treasurer, and not to the clerk.

Appeal from appellate court, Third district.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Action of debt by the city of Lincoln against John H. Starkey, Franklin C. Orton, and William N. Bock. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal. Reversed.

Beach & Hodnett and A. D. Cadwallader, for appellants. E. C. Moos, for appellee.

PHILLIPS, J. John H. Starkey was elected city clerk of the city of Lincoln, and made his bond on April 16, 1890, conditioned that he would faithfully discharge the duties of his office, and pay over all moneys that may come to his hands by virtue thereof, and render a just and true account when required by the city council, and would perform the duties required by virtue of his office, and according to the laws of the state and the ordinances of the city, etc. Appellants were sureties on said bond, which was given to cover a term of two years. On March 8, 1886, the city of Lincoln was incorporated under the general act for the incorporation of cities, approved 1872. Prior thereto it was incorporated, and the clerk was by ordinance authorized to collect certain licenses, fees, etc., not including money paid for dramshop license. By an ordinance approved April 5, 1885, it was provided: "The city council may in its discretion grant license for any period not exceeding one year and not less than three months to such person or persons as may apply therefor, upon such persons paying into the city treasury in advance a sum at the rate of five hundred dollars per year," etc. All ordinances or parts of ordinances in conflict therewith were repealed, and there is no provision authorizing the clerk to collect and receive money paid for dramshop license. The last-mentioned ordinance was in force when the bond was executed. Starkey succeeded himself as clerk for two years from April, 1891, and after the expiration of the latter term suit was brought on his bonds for each term. On the suit on the first bond a judgment was recovered in debt for the amount of the penalty of the bond, to be satisfied by damages assessed at \$1,122.46.

The question of law arising on this record is whether the appellants, as sureties on his bond, are liable for his failure to account for money collected and received by him for dramshop licenses. The ordinance with reference to license of dramshops at the time of the execution of the bond did not authorize the clerk to collect and receive money paid for such licenses. That ordinance was in substance similar to section 3, c. 43, Rev. St. which provides: "It shall not be lawful for the corporate authorities of any city, town or village in this state to grant a license for the keeping of a dramshop except upon the payment in advance into the treasury of the city * * * such sum * * * not less than at the rate of five hundred dollars per annum." A surety is only to be held by the precise terms of his undertaking. His liability is

strictissimi juris, and cannot be extended by construction, or enlarged by the act of others. *People v. Toomey*, 122 Ill. 308, 13 N. E. 521. The undertaking of the clerk was that he should discharge the duties of the office, and account and pay over all moneys which came to his hands by virtue thereof. For the discharge of that duty the appellants became sureties. When they undertook that the principal should account and pay over all moneys that should come to his hands by virtue of his office the intendment was that such money as should be received by the clerk in pursuance of law, and under the ordinances of the city, in his official capacity by virtue of his office, was referred to, and not such money as he might elect to accept without right, and of which some other official was the legal recipient and disbursing agent. Appellants were not sureties for moneys which, by virtue of the statute and under the ordinances of the city, should have been paid the city treasurer. The mere officiousness of the clerk in the assumption of duties not belonging to his office, or the negligence of other officers in the discharge of their duties, cannot extend the sureties' liability beyond the terms of their undertaking. *People v. Pennock*, 60 N. Y. 421; *Supervisors v. Bates*, 17 N. Y. 243. No comptroller was provided for by the ordinances of the city, and by virtue of section 104, c. 24, Rev. St., the clerk acted as comptroller; but the provisions of that section did not authorize the clerk to receive and disburse money which the ordinances and statute provided should be received by the treasurer.

It is finally argued that the requirement that the money should be paid into the city treasury is not a requirement that it should be paid to the city treasurer. A requirement that the money should be paid to the city treasurer is a designation of the city treasurer as a recipient of the money, and when it is paid to him or his agents he is liable therefor, and the undertaking of his sureties is that he shall account for money coming to his hands by virtue of his office. A payment to the clerk or comptroller is not a compliance with the requirement that the money should be paid into the city treasury. This record shows a remarkable method of conducting the business of the city. The bond of the clerk is for \$10,000, covering a period of two years, and he assumed, in violation of statutes and ordinances, to receive all moneys from whatsoever source, including moneys collected for taxes that he assumed to collect during the two years for which this bond was executed,—the sum of over \$95,000. The clerk had no right to collect or receive the money paid for dramshop licenses under the ordinance and statute of this state. The sureties were not liable therefor, and the judgments of the circuit court of Logan county and of the appellate court of the Third district are reversed, and the cause remanded. Reversed and remanded.

(156 Ill. 602)

ORTON et al. v. CITY OF LINCOLN.¹
(Supreme Court of Illinois. June 13, 1895.)

Appeal from appellate court, Third district. Action of debt by the city of Lincoln against Franklin C. Orton and others. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal. Reversed.

Beach & Hodnett, for appellants. E. C. Moos, for appellee.

PHILLIPS, J. The questions in this record grow out of the execution of a bond as city clerk of the city of Lincoln by John H. Stark, on which appellants were sureties. This bond was to cover a period of two years from May 1, 1891. Appellee, claiming that the clerk had, on the expiration of his term, failed to pay over or account for all moneys which came to his hand, brought suit in the circuit court of Logan county, where a judgment in debt for \$10,000, to be satisfied by payment of the damage, assessed at \$795.47, was recovered. That judgment was affirmed on appeal to the appellate court of the Third district, and on certificate of importance, etc., this appeal is prosecuted. While the ordinances existing at the time of the execution of the bond in this case are different from those existing when the bond of Orton v. City of Lincoln (Ill. Sup.) 41 N. E. 159, was filed, yet there are no ordinances authorizing the clerk to receive and receipt for dramshop licenses, and the questions of law on this record are the same as in the above-mentioned case. A further discussion is unnecessary. The judgments of the circuit court of Logan county and of the appellate court of the Third district are reversed, and the cause remanded. Reversed and remanded.

(156 Ill. 534)

BLISS et al. v. CITY OF CHICAGO.¹
(Supreme Court of Illinois. June 15, 1895.)
LOCAL IMPROVEMENTS—ORDINANCE—SPECIAL ASSESSMENT.

1. A city ordinance providing for a local improvement need not state that the proposed improvement is within the city limits. *Stanton v. City of Chicago* (Ill. Sup.) 39 N. E. 987, followed.

2. Where separate objections to a special assessment are filed by owners of different lots, the court may hear them on different days, and enter several judgments of confirmation on different days, in the same proceeding. *Browning v. City of Chicago* (Ill. Sup.) 40 N. E. 565, followed.

Error to Cook county court; Frank Scales, Judge.

Petition by the city of Chicago for confirmation of a special assessment. There was judgment of confirmation. N. W. Bliss and other property owners bring error. Affirmed.

H. T. & L. Helm and Hamline, Scott & Lord, for plaintiffs in error. J. F. Holland, for defendant in error.

BAKER, J. This is a writ of error to reverse a judgment confirming a special assessment, rendered by the county court of Cook county on the 16th day of May, 1892, in a proceeding to assess the cost of constructing

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

a main sewer in accordance with the provisions of an ordinance of the city of Chicago, adopted by the city council on the 14th day of March, 1892. The assessment roll was filed in the court April 28, 1892, and all the preliminary steps required by law in order to give the court jurisdiction of the property and its owners seem to have been taken. Plaintiffs in error filed no objections to the assessment roll, and on said 16th day of May, 1892, a default and judgment of confirmation were entered as against them and their property, as well as against the property of all other persons not objecting and being in default. But some of the property owners filed objections; and on seven different days subsequent to said May 16, 1892, seven other judgments of confirmation were entered as to property of different objectors.

It is urged upon this writ of error that the ordinance of the city of Chicago, upon which the assessment was based, is invalid, by reason of its falling to affirmatively and specifically state that the proposed local improvement is within the territorial limits of the city of Chicago. This contention must be decided adversely to plaintiffs in error, on the authority of *Stanton v. City of Chicago* (Ill. Sup.) 39 N. E. 987, and numerous subsequent cases.

It is also claimed that it was error to enter several different judgments of confirmation, on different days, in one and the same special assessment proceeding. This claim is not well grounded. The case, upon this question, is governed by the decisions of this court in *Delamater v. City of Chicago*; ¹ *Browning v. City of Chicago* (Ill. Sup.) 40 N. E. 565; *Wells v. City of Chicago* (Ill. Sup.) 40 N. E. 567; and other cases. We find no manifest error in the record. The judgment is affirmed. Affirmed.

(156 Ill. 616)

WELLS v. PEOPLE ex rel. KERN.²

(Supreme Court of Illinois. June 15, 1895.)

JUDGES OF COUNTY COURT — HOLDING COURT IN ANOTHER COUNTY.

Under Rev. St. 1893, c. 37, § 215a, which provides that the county judges of the several counties, "with like privileges as the judges of the circuit courts," may "interchange with each other, hold court for each other and perform each other's duties," when necessary or convenient, a county judge of one county may hold court in another county at the same time that the county judge of the latter county is holding another branch of the court there. *Pike v. City of Chicago* (Ill. Sup.) 40 N. E. 567, followed.

Appeal from Cook county court; Frank Scales, Judge.

Application for judgment for delinquent taxes. F. C. Wells filed objections, which were overruled, and he appeals. Affirmed.

¹ Rehearing pending.

² Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

A. B. Wells, for appellant. Harry Rubens, Corp. Counsel, and William J. Donlin, for the People.

BAKER, J. This was an application by the collector to the county court of Cook county for judgment against delinquent lands for unpaid special assessments. Wells, the appellant, filed objections, which were overruled, and judgment was entered ordering his lands to be sold. The objections that are relied on by appellant in the prosecution of this appeal are these: "Because no judgment has ever been entered confirming the assessment roll against the property described in the advertisement of this application for judgment;" and because "the judgment of the county court confirming the assessment roll against said property is void, because not rendered by the judge of said county court, but rendered by George Brown, a judge of the county court of Du Page county." The application for judgment against the lands was based on a judgment confirming the assessment roll against said lands, rendered on the 3d day of November, 1893, in the county court of Cook county, the Hon. George Brown, judge of the county court of Du Page county, presiding. The record shows that on the 3d day of November, 1893, the Hon. Frank Scales, the duly-elected and sole judge of the county court of Cook county, was present in and held court in said county, and tried causes, and entered a number of orders and judgments. It also shows that, on the same day, the Hon. George Brown, judge of the county court of Du Page county, also presided in the county court of Cook county, and likewise tried causes, and entered a number of orders, and rendered a number of judgments, among which was the judgment confirming the assessment roll involved in this case. The contention of appellant is that Judge Brown had no power or jurisdiction to preside in said court on that day, and render the judgment confirming the assessment roll, at the same time that the county judge of Cook county was holding another branch of the county court of Cook county; and that therefore said judgment of confirmation was and is void, and cannot be the basis of a judgment for the sale of appellant's lands. The case of *Pike v. City of Chicago* (Ill. Sup.) 40 N. E. 567, decides this contention against appellant. This case is governed by the *Pike* Case. The judgment of the county court is affirmed. Affirmed.

(156 Ill. 574)

RASMUSSEN v. PEOPLE ex rel. KERN.¹

(Supreme Court of Illinois. June 15, 1895.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS — PRACTICE.

Where separate objections to a special assessment are filed by owners of different lots,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

the court may hear them on different days, and enter several separate judgments of confirmation in the same proceeding. *Browning v. City of Chicago* (Ill. Sup.) 40 N. E. 565, followed.

Appeal from Cook county court; Frank Scales, Judge.

Application for judgment for delinquent taxes. R. R. Rasmussen filed objections, which were overruled, and he appeals. Affirmed.

Matz & Fisher (McMurdy & Job, Mason Bros., Wm. Garnett, Jr., Chas. T. Mason, R. E. Pendarvis, and D. H. Horne, of counsel), for appellant. J. F. Holland (George W. Smith, of counsel), for appellee.

BAKER, J. The appeal in this case is taken from a judgment of the county court of Cook county rendered July 30, 1894, upon the application for the collection by judgment of sale for a delinquent special assessment of the city of Chicago for a street improvement. The only ground urged for error is that the county court entered several judgments against the property of different objectors in a proceeding based upon a single assessment roll. The contention of appellant must be decided adversely to him, on the authority of *Delameter v. City of Chicago*;¹ *Browning v. City of Chicago* (Ill. Sup.) 40 N. E. 565; and *Wells v. City of Chicago*, Id. 567. The judgment of the county court is affirmed. Affirmed.

(156 Ill. 601)

CITY OF CHICAGO v. SILVERMAN,*

(Supreme Court of Illinois. June 15, 1895.)

MUNICIPAL CORPORATIONS—ORDINANCE—LOCAL IMPROVEMENT.

A city ordinance providing for a local improvement need not state that the proposed improvement is within the city limits. *Stanton v. City of Chicago* (Ill.) 39 N. E. 987, followed.

Appeal from Cook county court; Frank Scales, Judge.

Petition of the city of Chicago for confirmation of a special assessment. Lazarus Silverman filed objections, which were sustained. The city appeals. Reversed.

W. J. Donlin, for appellant.

PHILLIPS, J. Petition prays for the cost of an improvement to be paid for special assessment. Objections filed by appellee present the question whether the ordinance is invalid, because it fails to show affirmatively that the improvement was within the city. Objections were sustained. This question was determined in *Stanton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987, and this ruling of the county court in sustaining the exceptions was error. The judgment is reversed, and the cause remanded. Reversed and remanded.

¹ Rehearing pending.

* Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

(156 Ill. 437)

QUINCY, O. & K. C. RY. CO. v. PEOPLE
ex rel. CORRIGAN, Tax Collector.¹

(Supreme Court of Illinois. June 13, 1895.)

RAILROAD COMPANIES—TAXATION—RAILROAD TRACK.

1. Trustees in charge of a railroad whose main track is all outside the state, but whose trains are brought into the state over the tracks of another company, are "operating a railroad in this state," within the meaning of *Starr & C. Ann. St. c. 120, par. 40*, requiring those "owning, operating or constructing a railroad in this state" to return schedules of its taxable property.

2. Land belonging to the railroad, on which are situated its passenger and freight depots, roundhouse, side tracks and terminal facilities, is properly assessable as "railroad track," under *Starr & C. Ann. St. c. 120, par. 42*, which declares that "such right of way including the superstructures of main, side or second tracks and turnouts and the station and improvements of the railroad company on such right of way shall be held to be real estate for the purpose of taxation and denominated 'railroad track' and shall be so listed and valued."

Appeal from Adams county court; Benjamin F. Berrian, Judge.

Application of the people of the state of Illinois on the relation of James B. Corrigan, collector, for judgment for delinquent taxes. The Quincy, Omaha & Kansas City Railway Company filed objections, which were overruled, and it appeals. Reversed.

The appeal in this case questions the acts of the county court of Adams county in rendering judgment for taxes against certain lots in the city of Quincy, owned by appellant, and which were sought to be taxed on an assessment made by the local assessor of the town. The Quincy, Omaha & Kansas City Railway Company owns a line of railroad from Trenton, Mo., to a point on the Mississippi river known as "West Quincy." The road is at present operated by John Patton and Edwin Parsons, trustees in charge for bondholders, and who are in possession of all the property of the road. The lots in question, which it is sought to tax, are occupied by appellant as a passenger depot, freight depot, shops, roundhouse, water tanks, side tracks, and other purposes of like character, in connection with the business of the road, and are not used for any other purpose. In order to reach this property on which their depots are located, appellants use the Chicago, Burlington & Quincy tracks in the city of Quincy. Trains arriving on the road of appellant in West Quincy proceed across the bridge controlled by the Chicago, Burlington & Quincy road, and thence, on the tracks of the latter road about three-fourths of a mile, south to appellant's passenger depot. The freight depot and switch yards of appellant are still further south. The bridge, and that portion of the Chicago, Burlington & Quincy tracks connecting appellant's depots and switch yards with the main

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

track in West Quincy, is used by appellant under a lease or agreement with the Chicago, Burlington & Quincy. Trains with passengers, freight, baggage, mail, and express, destined for Quincy or points east, are run over the bridge and the leased lines, and passengers and freight carried discharged at Quincy depot, and likewise trains west bound are there loaded. In other words, while appellant's road ends at West Quincy, its terminus, by virtue of its use of leased lines, is east of the river in the city of Quincy. The lots owned by appellant, described as lots 6, 7, 8, block 44, lots 5, 6, 7, 8, in block 43, all in Woods' addition to Quincy, and lot 4, block 52, in Holmes & Woods' addition, and block 3, in Van Phuls' addition, to Quincy, contain about 5,204 feet of side track, in addition to the buildings above mentioned, all necessary in the management and operation of the road. All the property of appellant in this state is in the town of Quincy. In pursuance of a demand made by the state board of equalization of this state, the auditor of appellant, in 1892, made his return to this board of all the property owned by his company in this state, which was assessed by the board as "railroad track," and appellant paid on this assessment the sum of \$677.27. The local assessor of the town of Quincy also assessed these lots, with tracks and buildings thereon, for the year 1892, and the tax as extended amounted to \$669.38. The lots were advertised for delinquent taxes, and a judgment sought to be taken against them. Numerous objections were filed by appellant urging, as reasons, in substance, that the trustees Patton and Parsons were engaged in operating the road in this state; that the lots and block are part of the road, and were at the time of the assessment, whereby they are, under the statute, "railroad track"; that the local assessor had no power to assess this property, and that consequently the assessment was void; that said trustees had caused a schedule of all this property, under the head of "railroad track," to be filed in the county clerk's office, and also with the state board of equalization, and that all the property had been assessed by said board, and the tax so assessed by them had been paid. The county court overruled all objections and rendered judgment against these lots and block for delinquent taxes, from which judgment this appeal is prosecuted.

Berry, O'Harra & Scofield, for appellants.
Almeron Wheat and Carl E. Epler, for appellee.

PHILLIPS, J. (after stating the facts). The question to be determined by this court is whether the lots and property owned by appellant are to be taxed on an assessment by the local assessor of the town of Quincy, or by the state board of equalization. All the property of this company in this state is situated in the town of Quincy, and whether

the tax is extended by virtue of the assessment made by the assessor of that town, or by the state board of equalization, so far as the revenue is concerned, is immaterial, as the town in either case receives the benefit. Paragraph 40, c. 120, Starr & C. Ann. St., provides that "every person, company or corporation owning, operating or constructing a railroad in this state shall return sworn lists or schedules of the taxable property of such railroad as hereinafter provided," etc. It is insisted that the trustees, Patton and Parsons, are not operating a railroad in this state. Indirectly, the eastern terminus of their road is on the west side of the Mississippi river, but practically on this side, in the city of Quincy. The passenger and freight depots are located in this state; also their round-houses, switch yards, side tracks, and terminal facilities. The fact that these are reached by running over a portion of a leased line of road does not change the fact. The trains of appellant, in arriving from Trenton, Mo., do not remain on the west side of the river, but are operated through to this state, where the passengers, freight, and mail are discharged. Its freight and passenger trains are made up in the switch yards in Illinois, and, in fact, all trains arrive at and depart from its station in this state. Under the section of the statute above referred to, it is not necessary that appellant should own all the lines used by it. A railroad company running its trains on a leased line of road, and transacting, in connection therewith, the business usually done by such corporations, is operating a road in this state, under this statute. Every train run by appellant, carrying passengers and freight over the line of the Chicago, Burlington & Quincy Railroad to the terminal of appellant's road in Quincy, was an act of operating a railroad in this state. The record in this case, showing the manner and method of the arrival and departure of trains from the Quincy station, the use made by appellant of its property for all the purposes generally made by railroads of terminal facilities of this character, all show that the trustees were operating a railroad in this state.

Irrespective, however, of the fact as to whether or not this road was being operated in this state, it is an assured fact that the property sought to be taxed is located in Illinois, and the important question to be determined is whether it should be assessed by the assessor of the township or by the state board of equalization. It is insisted by appellee that the property is subject to assessment by the local assessor, for the reason that appellant has no main track located in this state. Paragraph 41, c. 120, Starr & C. Ann. St., provides for the filing of a sworn schedule by persons owning or operating a railroad in this state, showing the property held for right of way, and the length of the main and all side and second tracks and turn-outs in such county, etc. Paragraph 42 of the

same statute provides as follows: "Such right of way including the superstructures of main, side or second tracks and turnouts and the station and improvements of the railroad company on such right of way shall be held to be real estate for the purpose of taxation and denominated 'railroad track' and shall be so listed and valued," etc. The trustees of appellant's company are engaged in operating a railroad in this state, and it is not necessary for a railroad company to own "main track" in order to be engaged in the operation of a railroad. It is sufficient that they are operating a leased line, or, as in the case at bar, are running all their trains through or into this state by virtue of a contract or lease from another railroad. The property in question, it appears, is used altogether for railroad purposes, and is all necessary in the operation and management of appellant's road. This is not disputed, nor is it shown that any part of the property is used for any other purpose except for strictly railroad purposes. In the case of *Chicago & A. R. Co. v. People*, 98 Ill. 350, there was an assessment of a tract of ground occupied by railroad tracks, switches, turnouts, depots, shops, and other buildings used in the business of the road, like this. It was assessed by the board of equalization as railroad track, and, like this, it was assessed as land by the local assessor. The contest was as to which was the legal and valid assessment, and it was held that the law required the land to be assessed as "railroad track," and the assessment by the local assessor was unauthorized, and the collection of the tax extended on that assessment could not be enforced. Such is also the rule announced in the case of *Chicago & A. R. Co. v. People*, 99 Ill. 464. In the case of *Railway Co. v. Goar*, 118 Ill. 134, 8 N. E. 682, the facts were somewhat similar to the case at bar, the lots and blocks being occupied by the railway company with its shops, depots, and other buildings, with a large number of railroad tracks, and used exclusively for railroad purposes. The proper schedule was returned to the state board of equalization, and the property was by it assessed according to law. The local assessor sought, in that case, to assess the property, and this court, in the opinion, says: "There is no doubt from the proof that the property upon which this assessment by the local assessor was made was of the class denominated 'railroad track,' and alone assessable by the state board of equalization, and that it was assessed by such board, and the tax under that assessment paid, so that the assessment by the local assessor was null and void." The same doctrine is adhered to in the case of *Chicago & A. R. Co. v. People*, 129 Ill. 571, 22 N. E. 864, and 25 N. E. 5. In the present case, the appellant complied with the request of the state board of equalization to return to it its schedule of property, which it appears was made in proper form, and all of the property

in controversy was assessed by the state board of equalization, and the tax on the assessment thus made has been paid by appellant. We hold in this case that the only legal assessment made of appellant's property was that made by the state board of equalization, assessing the property of appellant as "railroad track," and therefore the assessment made by the local assessor was null and void, and the county court should have sustained the objections made by the appellant to the rendering of judgment against this property for delinquent taxes. For the errors indicated, the judgment of the county court is reversed. Reversed.

(156 Ill. 555)

SPEAR v. FARMERS' & MECHANICS' BANK.¹

(Supreme Court of Illinois. June 15, 1895.)

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

An agreement between two creditors of a common debtor that each will share the loss, if any, which the other sustains on his claim against such debtor, is a "promise to answer for the debt, default or miscarriage of another person," within the statute of frauds. 49 Ill. App. 509, affirmed.

Appeal from appellate court, Second district. Bill by Solomon Spear against the Farmers' & Mechanics' Bank and others. Complainant obtained a decree, which was modified by the appellate court. 49 Ill. App. 509. Complainant appeals. Affirmed.

The following statement of facts is taken from the opinion of the appellate court: "In this case appellee filed a bill against Farmers' & Mechanics' Bank and John V. Farwell Company, appellants, and I. P. Norton, to compel the defendants to pay to him attorney's fees included in judgment notes taken by them from Thompson & McLean when the makers were insolvent, and afterwards reduced to judgment and collected, and to enforce an alleged verbal agreement between complainant and the president of said bank that the bank should pay complainant one-half of any loss he might sustain through failure to collect from said Thompson & McLean certain debts due from them. The bill alleged that complainant recovered a judgment in vacation, January 21, 1891, against Thompson & McLean, for \$4,200 damages and costs, on which execution was issued the same day, and returned June 15, 1891, satisfied as to \$624.91, and unsatisfied as to the balance, which judgment remained in full force; that Thompson & McLean had been insolvent since January 1, 1891; that on January 19, 1891, they gave John V. Farwell Company a judgment note for \$2,473.83 and \$250 attorney's fee, upon which the payee, knowing the insolvency, entered judgment January 21, 1891, and collected the same out of the property of

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

said insolvents; that on January 20, 1891, said insolvents gave I. P. Norton a judgment note for \$220, and \$25 attorney's fee, on which judgment was entered January 21, 1891, which was collected in full; that on January 21, 1891, said insolvents gave to the bank a judgment note for \$2,043.67, and \$102.18 attorney's fee, on which judgment was entered the same day, and which was collected in full; that said Thompson & McLean on December 1, 1890, and prior thereto, were indebted to complainant about \$4,000 on account of his being surety for them with one Johnson, as Johnson, Thompson & McLean, to said bank, John V. Farwell Company and Locke, Hulet & Co., and were also indebted to said bank on other notes on which complainant was not surety, and on which the bank had no security; that about January 17, 1891, it was agreed between complainant and the bank that nothing should be done by either towards collecting said indebtedness until Thompson & McLean should complete an inventory of stock then being made, and that they would work together in protecting their claims, and, in case of loss on either of said claims, would bear it equally; that the bank disregarded its agreement, and obtained said note and judgment, covering only the unsecured debt to it, and sued Johnson, Thompson & McLean and complainant on the note on which complainant was surety, then amounting to \$3,671.89; that complainant had been compelled to pay Locke, Hulet & Co. \$237.80 on his said liability as surety for them; and that complainant's total loss, after deducting the amount collected on execution, and the profit realized by him on goods purchased at sheriff's sale, amounted to \$2,400, one-half of which the bank should pay, under said agreement. The prayer of the bill was that the defendants should be decreed to pay complainant said attorney's fees, and that the bank should be decreed to pay to him one-half of his said loss. The bank, in its answer, denied the making of the alleged agreement, as well as the authority of any officer of the bank to make an agreement of that kind, and pleaded the statute of frauds as a defense to such alleged agreement. The answer of John V. Farwell Company denied any knowledge on January 19, 1891, of the insolvency of Thompson & McLean, and admitted the taking of the judgment note, with attorney's fee, but averred that it was taken in renewal of previous notes given when complainant represented the makers to be insolvent, which contained provisions for attorney's fees. The court, on a hearing of the cause, found that the complainant was entitled to the relief prayed for, and referred the cause to the master to state the account, and find the net loss of complainant because of his suretyship. The master reported that complainant, as surety for Thompson & McLean, was compelled to pay the bank \$3,500, and Locke, Hulet & Co. \$237.80; that after crediting \$624.71 realized on execution, \$900 profit made on sale of

goods, \$250 attorney's fee to be paid back by John V. Farwell Company, and \$25 attorney's fee to be paid back by Norton, the amount paid by complainant as such surety was \$1,988.86; and that there was due complainant from the bank, under the agreement, one-half of that sum, or \$969.43. Objections and exceptions to said report were overruled, and the court decreed that John V. Farwell Company pay complainant \$250; that I. P. Norton pay \$25, and that the bank pay \$969.43; and that on payment of said sum by the bank it should be subrogated to the rights of complainant, to the extent of one-half of the indebtedness due him from Johnson, Thompson & McLean. From this decree the Farmers' & Mechanics' Bank and John V. Farwell Company appealed. The evidence showed that at the time complainant took his note, and entered judgment thereon, he was surety on the note for \$3,500 to the bank, and had guarantied the account of Locke, Hulet & Co. for \$237.80, and was also on a written guaranty to the amount of \$1,000, covering part of the indebtedness included in the judgment of John V. Farwell Company, and that Thompson & McLean were insolvent, but he had not then paid any of said liabilities. The judgment note was given for the purpose of indemnifying him for what he would have to pay, and it was taken and judgment entered for that purpose. Before the hearing he paid the judgment on the \$3,500 note, amounting to \$3,976.66, and the account of \$237.80." The appellate court affirmed the decree as to John V. Farwell Company, and reversed the decree as to the Farmers' & Mechanics' Bank, and Solomon Spear appealed. The question before this court is on the judgment of the appellate court on the contention between Spear and the bank.

Williams, Lawrence & Williams, for appellant. G. W. Thompson, for appellee.

PHILLIPS, J. (after stating the facts). The principal question presented for consideration is whether the alleged agreement between Spear and the bank, as alleged in the bill, is within that provision of the statute of frauds and perjuries, "that no action shall be brought * * * whereby to charge the defendants upon any special promise to answer for the debt, default or miscarriage of another person," unless the promise be in writing, and signed by the person to be charged. The determination of this question is dependent on whether the agreement is an original and independent one, or whether collateral to the agreement of another person, whereby the promise is to answer for the debt or default of that other. In the first case, it is not within the statute; in the second, it is. *Eddy v. Roberts*, 17 Ill. 505; *Resetter v. Waterman*, 151 Ill. 169, 37 N. E. 875. The question whether an agreement is an original and independent one is often attendant with much difficulty in its determination. In this case

Thompson & McLean were primarily liable, and the principal debtors, and, if the agreement was made as claimed, their liability was in no manner changed thereby. By their discharge of their indebtedness, neither party to the agreement would have had to pay any sum to the other, even if the agreement had been in writing, and a sufficient consideration for the promise of each to the other. The promise, if any was made by the bank, was a collateral promise. There was no change in the original indebtedness, the original debtors remaining liable to the original creditors, precisely the same as when the indebtedness was originally contracted. Spear had no lien of any kind, and gave up and yielded no right he had against the debtors, but, as he says, he orally undertook to share with the bank its loss, if any, on the \$2,000 note, and the bank, as Spear says, undertook orally to share with Spear any loss he might have by reason of his being security for debtors; that is, the promise of each was a collateral undertaking to be answerable for the debt of Thompson & McLean, and Johnson, Thompson & McLean, if Thompson & McLean should make default in payment. Such a contract is within the statute.

It is urged that the promise of the bank president was founded upon a new and independent consideration moving from appellee to appellant, by the agreement that each should share the loss jointly sustained, and each should delay action until a certain fixed time, and then to take action only upon consultation with the other, and that this promise was for the mutual advantage of the contracting parties. The promise to share the loss is the material thing promised, and that promise was collateral to the debt of Thompson & McLean to each of the parties; and, if it be admitted that the consideration of the promise of one to the other is sufficient as a consideration, still the requirement of the statute that the agreement shall be in writing is not complied with, and the promise would still be void. *Eddy v. Roberts*, supra. From a consideration of the record, we must affirm the judgment of the appellate court. Affirmed.

(156 Ill. 408)

FUNK v. BABBITT.¹

(Supreme Court of Illinois. June 13, 1895.)

PLEADING—AIDER BY VERDICT—NEGOTIABLE INSTRUMENTS—INSTRUCTIONS—REVIEW ON APPEAL—LEADING QUESTIONS.

1. Going to trial without formal issue being joined on a plea is a waiver of the formal joinder, and the irregularity is cured by verdict. 55 Ill. App. 124, affirmed.

2. An instrument in form of a bill of exchange, but naming no drawee, is, in effect, a draft by the drawer on himself, and may be sued on as an accepted bill, or as a promissory note.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

3. Recovery on such an instrument may be had under the common counts.

4. Allowing leading questions is a matter of discretion with the trial court,—not reviewable unless there has been a palpable abuse of discretion. 55 Ill. App. 124, affirmed.

5. The modification of instructions by adding an erroneous qualification is not reversible error, when made for the purpose of reconciling such instructions with other instructions asked for by the complaining party.

Appeal from appellate court, Third district.

Assumpsit by Erasmus D. Babbitt against Francis M. Funk and Ira Lackey. Plaintiff obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 124. Defendant Funk appeals. Affirmed.

Kerrick & Spencer and Fifer & Phillips, for appellant. John E. Pollock and A. J. Barr, for appellee.

BAKER, J. This was assumpsit brought by Erasmus D. Babbitt, appellee, against Francis M. Funk, the appellant, and one Ira Lackey, as partners under the firm name of Funk & Lackey. The 15 special counts of the declaration counted upon 15 promissory notes claimed to have been made by the firm to appellee, and the declaration also contained the common counts. The firm had been dissolved a year or more prior to the commencement of the suit. Lackey made default. Appellant interposed four pleas,—nonassumpsit, no consideration, that he did not execute the notes, and denial of joint liability,—and the two latter pleas were verified by affidavit. A jury trial resulted in a verdict and judgment in favor of appellee, and against both partners of the late firm, for \$4,240. There was an affirmance of the judgment upon appeal of Funk to the appellate court, and he then brought the case here by this appeal.

It is claimed that the circuit court committed error in proceeding to trial without issue being joined upon the plea of nonassumpsit and those in denial of the execution of the notes and of joint liability. All three of said pleas concluded to the country, and no formal similiter was added to either. It is the doctrine of this court that going to trial without formal issue being joined on a plea is a waiver of a formal joinder, and the irregularity is cured by the verdict. *Anderson v. Jacobson*, 66 Ill. 522; *Strohm v. Hayes*, 70 Ill. 41; *People v. Weber*, 92 Ill. 288.

It is assigned as error that the trial court permitted to be introduced in evidence six of the written instruments purporting to be signed by the firm of Funk & Lackey. These several instruments were, in form, substantially like this: "\$350.00. Bloomington, Ill., April 23, 1891. Thirty days after date, pay to the order of E. D. Babbitt three hundred and fifty dollars, for value received. Funk & Lackey." Said instruments were declared on as promissory notes. It is urged that they are not notes, or even prom-

ises to pay, and, not being directed to any one, do not constitute drafts or orders, and in fact amount to no more than blank pieces of paper. They are, undoubtedly, very irregular and informal instruments, but they are not void as written evidence of indebtedness. A person may draw a bill upon himself, payable to a third person, in which case he is both drawer and drawee. Here the firm drew bills, but did not address them to any third person or persons, and it is therefore to be regarded that they were, in legal effect, addressed to themselves, as drawees, and the signatures of the firm to the several bills bound the firm, both as drawers and acceptors. The instruments are inland bills of exchange, to which the firm sustain the triple relation of drawers, drawees, and acceptors. And, as the declaration contains the consolidated counts, the bills were admissible in evidence under them. Moreover, the drawers and drawees being the same, the bills are, in legal effect, promissory notes, and may be treated as such, or as bills, at the holder's option. 1 Daniel, Neg. Inst. §§ 128, 129.

Complaint is made that counsel were permitted, over the objections of appellant, to ask numerous leading questions of Babbitt, the plaintiff below. On both sides of the case the rule excluding such questions on the direct examination of witnesses was rather loosely enforced,—more so than is advisable. Greenleaf says (1 Greenl. Ev. § 435) that when and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error. And this court has held that a general objection to a question will not reach the objection of its being leading; and that trial courts must be allowed to exercise a large discretion on the subject of leading questions. *Parmelee v. Austin*, 20 Ill. 35; *Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186. We do not understand the law, as held in this state, to be that an assignment of error will not lie for permitting leading questions to be asked; but we do understand the doctrine to be that the matter of allowing such questions is so much a matter within the discretion of the trial court as that a judgment will not be reversed for a ruling in regard thereto, unless it is manifest that there has been a palpable abuse of discretion, and also a substantial injury done. Upon inspection of the record, we find that in almost every instance the objections interposed were general objections, and not placed upon the ground that they were leading. In a comparatively few instances the objections were put upon that specific ground. But, so far as we can discover, in every such instance either the objections were made after the questions had been answered, and no motions made to exclude, or the questions and answers were substantially repetitions of questions and

answers already in the record, or else the inquiries were in regard to minor and unimportant matters. Moreover, Babbitt, at the time of his examination, was over 82 years of age, and it is apparent from the record that the infirmities of old age made it difficult to get his testimony upon the real matters involved in the controversy without, to some extent, resorting to direct and pointed interrogatories. Upon the whole, we are unable to come to the conclusion that the action and the rulings of the court in the premises show such a palpable and injurious abuse of discretion as to constitute reversible error.

It is claimed that the court erred in allowing Lackey to testify, in answer to leading questions, over the objections of appellant, that the money he got of Babbitt "was used in firm business." The examination was thus: "Q. What was done with the money? A. Used to pay debts of the firm. (Objection and exception by defendant's counsel.) Q. Was it used in the firm? (Objection by defendant.) A. Yes, sir. (Defendant excepted.) The Court: That is all right, as far as it goes. (Defendant excepted.) Q. Was that money used in the firm business? (Objection by defendant, as calling for conclusion.) A. Yes, sir. The Court: I suppose it is a matter of fact, whether it was used that way or not. He may answer that. (Defendant excepted.)" We think that, from the standpoint of the views already expressed, this claim of error is not well made.

The 15 notes in suit—the first bearing date December 13, 1890, the last bearing date May 27, 1891, and the others bearing intermediate dates—were executed by Lackey, in the name of the firm, for moneys borrowed of appellee at said several times. The moneys were delivered in the form of checks on the People's Bank of Bloomington, signed by Babbitt, and payable to Funk & Lackey or bearer. Appellant and Lackey were, and for many years had been, partners in the retail drug business at Bloomington, under the firm name of Funk & Lackey. Lackey had the principal care and management of the business, Funk giving it but little personal attention. At the trial the theory of plaintiff below (appellee here) was that he had loaned his money to the firm, and had taken the firm notes therefor, the money being delivered to, and the notes signed, by Lackey, one of the partners, acting in behalf of, and as the agent of, the firm. The theory of the defendant was that Lackey had borrowed the money as an individual, and for his own personal use, under an agreement to give the firm notes as security therefor, and that appellee had cognizance of these facts at the time of the transactions. There was evidence tending to prove each of these theories of the case. The instructions that were given on motion of appellee are not challenged. Appellant tendered to the court an instruction which read as follows: "(4) The court instructs the jury that although

they may believe from the evidence that the plaintiff loaned the money to the amount of the notes offered in evidence, and took such notes therefor, yet if the jury further believe from the evidence that such money was in fact borrowed for the use of Lackey, and not of the firm, and that the plaintiff knew such fact, if it be a fact, or if the jury believe that the plaintiff knew, or had notice, that Lackey had no power so to bind the firm, or that the money, if any, was not in good faith loaned to the firm, then in either of such cases the jury should find the issues for the defendant." The court did not give said instruction, as asked, but modified it by adding thereto, at its end, the following words: "Unless the plaintiff has proven by preponderance of the evidence that the firm of Funk & Lackey did in fact receive and use the money of the plaintiff." And the court then gave the instruction, as modified, to the jury. And the court made a like modification to three others of the instructions submitted by appellant, before giving them to the jury. But the court also gave to the jury, at the instance and upon the motion of appellant, two other instructions, which read as follows: "(1) The court instructs the jury that if the plaintiff has failed to prove by a preponderance of the evidence that Funk & Lackey received money, and if the jury further believe from the evidence that the money was loaned to Ira Lackey personally, then in such case the jury should find a verdict for the defendant Funk. And that should be the verdict of the jury, although it may appear from the evidence that Ira Lackey, at each of the times of making the several loans, as security therefor, gave to the plaintiff a note signed 'Funk & Lackey.'" "(8) The court instructs the jury that, before the plaintiff can recover in the case, he must prove by preponderance of the evidence either one or both of the following: First, that the firm of Funk & Lackey actually received his money; second, that he actually loaned it in good faith to the firm of Funk & Lackey, and in good faith to receive their note therefor,—the law being that if the money was not received by the firm, and the money was loaned to Ira Lackey personally, then the plaintiff cannot recover, although at the time of making such loans the plaintiff, as security for his loans, took from Ira Lackey a note or notes signed by Funk & Lackey." The modifications made by the court to instructions 4, 2, 5, and 7 did not correctly state the law. One partner has power to borrow money for partnership purposes, and give the notes of the firm therefor. *Walsh v. Lennon*, 98 Ill. 27. But he cannot bind the firm of which he is a member by giving the firm note in satisfaction of, or as security for, his personal indebtedness. *Wittram v. Van Wormer*, 44 Ill. 525; *Wright v. Brosseau*, 73 Ill. 381. And in *Watt v. Kirby*, 15 Ill. 200, this court said that where the credit is originally given to one partner the creditor cannot hold the other

partners liable, although they may receive the benefit of the transaction; that the debt, being separate in its inception, does not become joint by the subsequent application of the funds to the purposes of the partnership. We think, however, that, although the modification made by the court misstated the law, yet that it did not constitute reversible error. This court has decided in numerous cases that a party cannot assign for error a ruling made at his own instance, and has no right to complain of an error in an instruction when like error appears in an instruction given at his request. *Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162, and cases there cited. Here it was not at the instance of appellee that an unsound proposition of law was incorporated in the instructions, but it was on the motion of appellant himself that it was brought into the case. That which the court thereafter did of its own motion was simply to harmonize the instructions tendered by appellant. Appellant makes quite a plausible argument for the purpose of showing that the language in the instructions given at his instance, i. e. "that the firm of Funk & Lackey actually received the money," and "that Funk & Lackey received the money," have reference only to the original reception of the money from Babbitt at the time of the loans; whereas the language of the modifications made by the court, i. e. "that the firm of Funk & Lackey did in fact receive and use the money," are broader, and include, not only the case of an original reception of the money by the firm from Babbitt, but also the case of a receiving by the firm from Lackey subsequent to an original reception of the same from Babbitt by Lackey, acting in his individual capacity, and not as agent of the firm. The state of the case was this: The testimony introduced by appellee tended to prove, among other things, that the money borrowed from Babbitt, although not entered on the firm books, was actually used for firm purposes,—in paying firm indebtedness, etc.,—while the testimony introduced by appellant tended to prove, *inter alia*, that the borrowed money could not be traced on the books, or to any use for firm purposes, and that it was appropriated to the personal and individual use of Lackey. It is to be noted that the instructions proffered by appellant did not use any such expression as "actually received the money in the first instance," or "original reception of the money from Babbitt," or "subsequent reception of the money by the firm from Lackey." They simply called the attention of the jury to this question,—whether or not there had been an actual reception of the money by the firm,—and left it wholly a matter of indifference whether such receiving of the money by the firm was from Babbitt, and at the time of the loans, or subsequent to the original loans, and from Lackey. The office of an instruction is to give knowledge and information to the jury, for immediate application to the subject-matter before

them. The test, then, is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary men and jurors understand the instructions. We think that in the light of the testimony above referred to the jury, when they were told in the instructions given at the request of appellant that they should pass upon the questions "whether the firm of Funk & Lackey actually received the money," and whether "Funk & Lackey received the money,"—their attention not being called to either the inquiry as to when it was received, whether at the time of the loan or thereafter, or to the inquiry whether it was received from Babbitt or from Lackey,—would understand that it was immaterial from whom, or at what time, the money was received, provided only that the result was that the firm got the money and the benefit thereof. We find no error in the record for which the judgment should be reversed. The judgment of the appellate court is affirmed. Affirmed.

(156 Ill. 492)

CITY OF CARLINVILLE v. McCLURE
et al.¹

(Supreme Court of Illinois. June 13, 1895.)

STREET IMPROVEMENT — SUFFICIENCY OF ORDINANCE—DESCRIPTION OF IMPROVEMENT.

An ordinance for paving a street provided that such street should "be excavated to the depth of 11 inches along the line thereof below the grade as shown by the profile of said street on file in the office of the city clerk." Said profile showed one line representing the proposed grade of the street; another line, at a uniform distance below it, showing the bottom of the excavation; and an irregular line, showing the present surface of the ground. The profile was drawn on paper divided into squares, so that the distance between the surface line and the grade line could be ascertained by comparing it with the distance between the grade line and the excavation line, representing 11 inches. *Held*, that the ordinance and the profile together sufficiently showed the position of the grade line with reference to the surface.

Appeal from Macoupin county court; Archelaus N. Yancey, Judge.

Petition of the city of Carlinville for confirmation of a special tax. Milton McClure and James A. McClure filed objections, which were sustained. The city appeals. Reversed.

M. Hoben and F. W. Burton, for appellant. John T. Rinaker and Lewis Rinaker, for appellees.

BAKER, J. The city of Carlinville adopted an ordinance for paving with brick East Main street, in said city, from the east line of the public square to the east line of East street, to the width of 21 feet on each side of the center line of said East Main street; and from the east line of East street to the

west line of Center street, to the width of 14 feet on each side of the center line of said East Main street; and it was provided that the cost of street intersections and crossings should be paid by general taxation, and the residue of the cost of the improvement paid by special taxation of abutting lots and parcels of land. The total estimated cost of the improvement was \$14,236.99, and of this the sum of \$2,000.33 was apportioned to the city and \$12,236.66 assessed and taxed against abutting real estate, to be paid in five installments. In this proceeding for the confirmation of the assessment roll there was judgment of confirmation by default as to all the property assessed, except that of Milton McClure and James A. McClure, who are the appellees now before us. The total assessment upon the real estate of Milton McClure was \$284.26, and that upon the real estate of James A. McClure, \$51.05. They interposed objections to confirmation, and the county court sustained the objection that the ordinance which provides for the improvement to pay the special tax as assessed is invalid, because the ordinance and the profile made a part of the ordinance do not contain a sufficient description of the nature, character, and locality of the proposed improvement, and that, therefore, there is no valid ordinance authorizing the imposition of said special tax. And the court refused judgment of confirmation as to the property of appellees, and dismissed the proceeding as to their lots and parcels of land. From that judgment the city prosecutes this appeal.

The ordinance provided that said East Main street, to the respective widths above indicated on each side of its center line, should "be excavated to the depth of eleven inches along the line thereof, below the grade as shown by the profile of said street on file in the office of the city clerk"; and that at the distance of 12 inches from the outer edges of the improvement, for the entire length thereof, the excavation should be of the depth of 15 inches,—said excavation to be in the form of a segment of a circle; and the portion of the street between said 12-inch lines and the outer edges of the street so excavated on both sides thereof to be graded and paved in a similar manner as the remainder of said street, so as to make a good and substantial gutter along said 12-inch lines. No mention is made in the ordinance of any city datum, or established grade, or any fixed object, natural or artificial, on the vertical plane of the city, other than the above reference to the profile of the street. The horizontal plane is, of course, made certain by references to the east line of the public square, the east line of East street, the west line of Center street, and the distances given on either side of the center line of East Main street. The provision in regard to the vertical location of the improvement simply is that the excavation is to be made along the center line of the street

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

to be improved to the depth of 11 inches below the grade of said street as shown by the profile of said street on file in the office of the city clerk. It is essential to the validity of the special tax that the ordinance providing for the proposed local improvement should specify the nature, character, locality, and description of such improvement. *Rev. St. c. 24, art. 9, § 19; Levy v. City of Chicago, 113 Ill. 650; City of Kankakee v. Potter, 119 Ill. 324, 10 N. E. 212; City of Carlyle v. County of Clinton, 140 Ill. 512, 30 N. E. 782; Village of Hyde Park v. Carton, 132 Ill. 100, 23 N. E. 590; Gage v. City of Chicago, 143 Ill. 157, 32 N. E. 264; Lake Shore & M. S. Ry. Co. v. City of Chicago, 144 Ill. 391, 33 N. E. 602.* It is the doctrine of the cases cited, and the numerous other decisions of this court, that the ordinance must give such a description of the improvement as that an intelligent and substantially correct estimate of its cost can be made. It is necessary that the grade of the street should be made to appear, in order to show what amount of excavation and fill, respectively, are required to be made in the construction of the improvement. But we do not understand that it is necessary that in the body of every ordinance providing for a local improvement upon a street by special assessment or special taxation the details of the grade of that street should be set out. A reference to an ordinance, monument, instrument, or other fixed thing that locates and witnesses that grade will suffice. It is difficult to perceive why, upon legal principle, a reference to a grade shown upon a profile in the office of the city clerk will not read that grade into an ordinance for a local improvement equally as well as a mere reference to a city datum, or to a grade established by another ordinance, or to a fixed monument of any kind that is dehors the ordinance for the improvement, will suffice for like purpose. In the case at bar, does the profile on file in the clerk's office so aid the ordinance as that said ordinance, when read in the light afforded by the profile, indicates the location of the grade line of the street on the vertical plane of the city? Is it anywhere disclosed how much above or how much below any given fixed point the grade of East Main street is? The claim of appellees, which was sustained by the county court, is that the profile fails to show that the grade thereon marked sustains any relation to any fixed point on the vertical plane in the city of Carlinville; that there is nothing thereon which shows where the grade of the street is with reference to the original surface at any point on the entire line of the improvement to be made. And appellees ask this question: "How would a stranger, a contractor, or an engineer who had no more information as to the location on the vertical plane of the grade of East Main street than the profile furnishes, tell the amount of excavation or filling necessary to be made in order to construct the

improvement provided for in the ordinance in question on the grade fixed in that profile?" We think it very plain from an inspection of the profile that the red line thereon represents the grade of the proposed street, that the solid black line represents the original surface of the street, and that the dotted black line represents the depth of the excavation. For confirmation of these conclusions, derived from mere inspection and ordinary knowledge of matters and business affairs, we may turn to the ordinance itself. It provides that East Main street "shall be excavated to the depth of eleven inches along the center line thereof, below the grade, as shown by the profile." The line of the grade and the line of the excavation, then, are equidistant from each other throughout the entire length of the improvement, and the uniform distance between them is 11 inches. Reverting to the profile, we find, both from inspection and from measurement, that the red line and the dotted black line are from end to end at uniform distance apart. The different points on the third and remaining line, which is the solid black line, are, on the other hand, at varying and unequal distances from both the red line and the dotted black line. The profile is made upon profile paper, which is divided into squares, both horizontally and vertically; and the horizontal lines subdivide each of these squares vertically into five equal divisions of spaces. Inspection demonstrates that there are ten of these spaces on the vertical plane between the red line, designating the grade of the street improvement, and the dotted black line, designating the bottom of the excavation. And, since the distance between the two lines last mentioned represents 11 inches, it follows that each one of the ten spaces represents one-tenth of 11 inches, or 1.8 inches. It must necessarily be that a simple calculation, based on the number of these small vertical spaces found between the dotted black line, representing the bottom of the excavation, and the solid black line, designating the surface of the ground, will show with substantial accuracy the amount of earth required to be excavated at each and every point along the line of the improvement. And a like calculation, based on the number of these vertical spaces between the solid black line and the red line, in the few places where the said solid black line falls between the red line and the black dotted line, will in like manner give the amount of earth required for the fillings at said several places. Moreover, from the data furnished, the relative positions at all points of the grade of the improvement and the original surface of the street, each to the other, are readily ascertainable. Our conclusion is that, when the ordinance and the profile are considered together, and the profile is read into the ordinance, and the ordinance interpreted in the light thus afforded, then the nature, character, locality, and description

of the East Main street improvement sufficiently appear in the ordinance. We think that the county court erred in sustaining the objections and in dismissing the petition for the confirmation of the assessment roll as to the property of appellees, and in rendering the judgment that it did. The orders and judgment are reversed, and the cause is remanded, with directions to overrule said objections, and render judgment confirming the assessment and special taxes as to the lots and real estate of appellees. Reversed and remanded.

(156 Ill. 608)

BRADLEY v. SATTLER.¹

(Supreme Court of Illinois. June 15, 1895.)

DEATH BY WRONGFUL ACT—DAMAGES—PARENT AND CHILD.

Where a minor is killed, leaving, him surviving, a mother, but no father, it is not necessary for her, in order to recover substantial damages for his death, to prove pecuniary loss, since she is entitled to his earnings, and therefore pecuniary loss will be presumed. 54 Ill. App. 504, affirmed.

Appeal from appellate court, First district.

Action on the case by Lisetta Sattler, administratrix of the estate of William Casparini, against Alexander O. Bradley. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 504. Defendant appeals. Affirmed.

This is an appeal from a judgment of the appellate court for the First district, affirming a judgment of the circuit court of Cook county for \$5,000, rendered against the defendant below, for negligence resulting in the death of plaintiff's intestate. The defendant was engaged in manufacturing mirrors, and in beveling glass, and the deceased, at the time of the injury, which caused his death, on April 27, 1887, had been in the service of the defendant at the factory about 2 weeks. He was 12 years and 3 months old. There was a shaft along the side of the wall, 15 to 18 inches from it, and the same distance above the floor. Connecting with this shaft by belts were five machines, similar to grindstones, for polishing glass, but the wheels were of wood or felt, on which pumice was used to polish the glass. On this shaft was a coupling, locked together by a pin, which pin, when properly adjusted, did not project, but was flush with the shaft; but at the time of the injury the pin projected out from one inch to two inches. It had been in the same condition about a year, but neither deceased nor the workmen knew it. The shaft revolved at the rate of 300 times a minute, and had no covering or protection over it. There was an ordinary flour barrel, filled with the ground pumice, standing between two and three feet out from the shaft, and between the machines. Access to the barrel was ob-

structed in front by a box higher than the barrel, and at times on the sides by the glass which the men were polishing. It was the duty of the boy to take the pumice from the barrel, and with a brush put it on the wheels upon which the glass was polished. He used a little box which, when filling, he placed on the box in front of the barrel. At the time in question, he went behind the barrel, between it and the revolving shaft, and while filling his little box with pumice from the barrel the projecting pin caught his overalls, and he was whirled around the shaft, and received such injuries that he died within a few hours. He had been warned by the workmen to keep away from the machinery, that it was dangerous, and that he might get killed, but he was not informed of the danger from this projecting pin, nor does it appear that he was instructed by any one how to get pumice from the barrel without danger to himself, or that he could have done so at all times where the barrel stood. The deceased left, him surviving, his mother and three brothers, of the ages at the time of the trial of 25, 21, and 12 years, respectively. His father had died 8 years before.

Wolseley & Heath (John N. Jewett, of counsel), for appellants. Brandt & Hoffmann and J. S. Kennard, Jr., for appellees.

CARTER, J. (after stating the facts). Much of the argument of counsel in this case is directed to questions of fact, which it is not claimed are open to review in this court. It is, however, insisted by counsel for appellant that the judgment should be reversed because the damages are "unreasonably and irrationally excessive"; and in this connection it is insisted that the trial court erred in not instructing the jury to find no more than nominal damages. Whether the damages assessed are excessive or not involves questions of fact, upon which the judgment of the appellate court is final. *Railroad Co. v. Eldridge*, 151 Ill. 546, 38 N. E. 246; *Railway Co. v. Gaeinowski* (Ill. Sup.) 40 N. E. 601. Whether or not the court erred in refusing the instruction mentioned is a question of law for review here. This instruction reads: "(16) The jury are instructed that the burden of proof lies upon the plaintiff in this case to show the pecuniary loss, if any, suffered by the next of kin of William Casparini, and if the jury believe from the evidence that all or any of such next of kin had not been receiving from him pecuniary assistance, and that there is no evidence showing that such next of kin, or any of them, are in a situation to require such pecuniary assistance, then it is immaterial how near the degree of relationship may be, as the jury in such case should only allow nominal damages, if they believe from the evidence that there has been no pecuniary injury." The argument is that as there was no evidence before the jury to prove any actual pecuniary loss to the next of

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

kin,—the mother or either of the three surviving brothers,—proof of the relationship only being made, under the law in this state nominal damages only can be recovered. Counsel quote the following from *City of Chicago v. Scholten*, 75 Ill. 471, as the rule in this case: "Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship would warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given," (citing *Railroad Co. v. Delaney*, 82 Ill. 198; *Stafford v. Rubens*, 115 Ill. 198, 3 N. E. 568; *City of Chicago v. Hesing*, 83 Ill. 207); and counsel then say that, as the deceased left no father, no recovery of substantial damages could be had without evidence of pecuniary loss; that the mother is not entitled to the services of her minor child, and therefore pecuniary loss cannot be presumed, but must be proved. We do not deem it necessary to review the authorities on this question. We are satisfied that the rule founded upon natural justice, and supported by the weight of modern authority, is that, upon the death of the father, the mother becomes the head of the family, and is entitled to the services and earnings of her minor children. *Buck v. Conlogue*, 49 Ill. 395; *Dufield v. Cross*, 12 Ill. 397; *Farmelee v. Smith*, 21 Ill. 620; *Day v. Everett*, 7 Mass. 145; *Gray v. Durland*, 50 Barb. 100; *Kennedy v. Railroad Co.*, 85 Hun, 186; *Furman v. Van Sise*, 56 N. Y. 435; *Simpson v. Buck*, 5 Lans. 337; *Cain v. Devitt*, 8 Iowa, 116; *Coughlan's Case*, 24 Md. 107; *Commissioners v. Hamilton*, 60 Md. 340; *Benson v. Remington*, 2 Mass. 113; *Nightingale v. Withington*, 15 Mass. 261; *Inhabitants of Dedham v. Inhabitants of Natick*, 16 Mass. 135; *Snediker v. Everingham*, 27 N. J. Law, 143; *Osborn v. Allen*, 26 N. J. Law, 388; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Hammond v. Corbett*, 50 N. H. 501; *Railroad Co. v. Cook*, 63 Miss. 38; *Clark v. Bayer*, 32 Ohio St. 299; *Matthewson v. Perry*, 37 Conn. 435; *Railroad Co. v. Tindall*, 13 Ind. 366; *Oldfield v. Railroad Co.*, 14 N. Y. 310; *Schouler*, Dom. Rel. § 239; 17 Am. & Eng. Enc. Law, 379; 14 Am. & Eng. Enc. Law, 765, note. By statute, the mother is liable for the expenses of the family, and of the education of the children, and may bind her child under 16 years of age as an apprentice. In the case at bar, the mother being entitled to the earnings of her son, to enable her to recover substantial damages it was not necessary to prove pecuniary loss; such loss will be presumed. The instruction was therefore properly refused. Complaint is made of the rulings of the trial court in refusing other instructions asked by defendant below, but we are of opinion that no error was committed in this respect. We have carefully examined these refused instructions,

and considered the argument of counsel respecting them, and are constrained to agree with the appellate and circuit courts in the rulings complained of.

The judgment of the appellate court is affirmed. Judgment affirmed.

(156 Ill. 575)

WRIGHT et al. v. HUTCHINSON et al.¹

(Supreme Court of Illinois. June 15, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

An insolvent debtor conveyed his land to a trustee by trust deed in the nature of a mortgage, to secure his creditors named therein, reserving the right to redeem any part of the land on payment of a named sum for each part, and, as additional security, he pledged certain personal property to such trustee. *Held*, that these transfers did not constitute an assignment for the benefit of creditors. *Farwell v. Cohen*, 28 N. E. 35, and 32 N. E. 893, 138 Ill. 216, distinguished.

Appeal from appellate court, First district.

Bill by Austin W. Wright and William W. Catlin, his assignee, against Charles L. Hutchinson, Ernest A. Hamill, Margaret F. Cudahy, and John Cudahy. There was a decree dismissing the bill on demurrer as to all the defendants except John Cudahy, and this decree was affirmed by the appellate court. 54 Ill. App. 535. Complainants appeal. Affirmed.

This is an appeal from the judgment of the appellate court of the First district affirming a decree of the circuit court of Cook county sustaining a demurrer interposed by appellees to a bill in equity filed by appellants against them and John Cudahy, and dismissing said bill as to appellees for want of equity. The following synopsis of the bill is taken from the opinion of the appellate court: "We adopt the statement of the bill made by appellants' counsel in their brief, as follows: It appears by the bill that on April, 1893, Wright and Cudahy entered into an agreement to buy and sell, on joint account, mess pork, on the board of trade, in Chicago, and to share equally in the profits and losses resulting from such venture. In accordance with what seems to be a not unusual custom on the board, each of them was to buy as he saw fit and sell pork on the board of trade, either for present or future delivery, each conducting his transactions in his own name and upon his own personal responsibility. At that time each of the parties had bought considerable pork, and it was agreed that their joint deal should cover the pork which they had each severally so purchased. This arrangement continued until about the last of May of the same year, when Cudahy represented to Wright that the financial condition was becoming such that it was difficult to borrow money, and the rumor that he was engaged with Wright in this venture made it more difficult for various firms and com-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

panies in which he was interested to carry on their business, and that those interested with him engaged in packing, etc., desired to have all the pork which he had bought, and which stood in his name, transferred so that the contracts therefor should stand in the name of Wright, which was accordingly done. Cudahy did not then express any intention of withdrawing from his part of the venture, but it was understood between him and Wright that all of these ventures were to be carried on strictly for the joint benefit and account of Cudahy and Wright, but solely in the name of Wright. Owing to the continued decline in provisions on the board of trade, Cudahy suspended on the 1st of August, 1893, and became insolvent; and, on the 2d of that month, Wright executed a voluntary assignment to his co-complainant Catlin. Prior to the insolvency of himself and of Cudahy, Wright paid out on account of losses incurred upon these joint ventures the sum of \$230,000. The unpaid indebtedness of him and Cudahy on account of such joint ventures aggregates \$350,000. Cudahy never paid out or contributed any sum whatever in payment of the losses so incurred. Wright's estate has paid a dividend of 5 per cent. to the creditors of Wright & Cudahy, and may possibly pay, perhaps, 3 per cent. more. Cudahy now claims that he is not jointly responsible with Wright, and declines to account with him or Catlin, or to settle the partnership accounts between him and Wright in any way. Soon after the failure of Cudahy, some time in the month of August last, he caused to be circulated among his creditors a paper commencing as follows: 'We, the undersigned, creditors of John Cudahy, hereby agree to accept in full settlement of claims and demands which we have at this date against him, individually or jointly with any one else, his notes for fifty per cent. of the amounts due us, and each of us, said fifty per cent. of our claims and demands being as follows.' Here follows a long list of signatures, with the amounts of various claims of the parties signing, figured on the basis of 50 per cent. The paper further provided that the payments should be secured by a trust deed given to Charles L. Hutchinson, one of the appellees, covering certain real estate in Cook county, which was described therein, and also that certain other securities should be placed in the hands of the trustees to secure the payment of these notes. The trustee was given power to sell and dispose of the real estate and other securities at any time before the maturity of the notes, whenever best in their judgment, and for the advantage of the creditors and Cudahy. It was further provided that, at any time before the disposition of said real estate and securities, Cudahy might release any of the same by paying into the hands of the trustees the amount in cash set opposite each piece of said real estate, and opposite each of the other securities, and thus have

the same released from the operation of the trust. Afterwards, Cudahy offered to each of his creditors his note for the remaining 50 per cent. of the indebtedness, as an additional security for the payment of all of his notes, his five notes, for \$100,000 each, payable in one, two, three, four, and five years after date, respectively, to be indorsed by his brothers, Michael, Patrick, and Edward Cudahy, and to be placed in the hands of Hutchinson, trustee. This arrangement was carried out and assented to by the great majority in number and amount of his creditors, and the property therein referred to was duly transferred and conveyed to Hutchinson, and the notes therein referred to duly executed; and on the 18th day of August, 1893, John Cudahy, with his wife, who was also a defendant to the bill, executed and delivered to Hutchinson a deed of trust conveying to him, in trust for the purposes of this arrangement, the real estate referred to in the first proposition to his creditors, which is more particularly described in the deed. Ernest A. Hamil, the third appellee, is successor in trust in this deed in trust. The bill further alleges that there was neither joint property nor any joint fund, owing to the method in which the business of the partnership between Wright and Cudahy was conducted; and that, by the assignment to Hutchinson, a trust is created in favor of the creditors of Wright & Cudahy, which should be enforced, in view of the fact that Wright has paid upwards of \$230,000 on account of the debts and losses of this partnership, and his estate has paid the further sum of \$20,000. It is also alleged, on information and belief, that Cudahy has large amounts of property other than that by him conveyed to Hutchinson, and that sundry persons named were, at the time this proposition was made to them by Cudahy, creditors of Wright & Cudahy as partners in a considerable amount. The bill prays an accounting of the partnership; that a receiver may be appointed; that Cudahy may be decreed to pay to such receiver such sum as shall upon a full accounting appear to be due from him; and that the transfer from Cudahy to Hutchinson be decreed to be an assignment for the benefit of all the creditors of Cudahy; and that Hutchinson be removed, and some suitable person appointed to administer upon the estate in the hands of Hutchinson, and act as receiver in the case. As to the defendant John Cudahy, who also demurred to the bill, the demurrer was overruled, presumably on the ground that as to him a case was made for a partnership accounting; but as to the appellees the demurrer was sustained, and the bill dismissed for want of equity."

Collins, Goodrich, Darrow & Vincent and Gregory, Booth & Harlan, for appellants. Dupee, Judah & Willard, for appellees.

CARTER, J. (after stating the facts). The questions here involved arose on the demur-

rer of appellees to appellants' bill of complaint. The bill has a twofold purpose: First, to compel an accounting and settlement of the alleged partnership matters between appellant Wright and John Cudahy; and, second, to have the agreement between Cudahy and his individual creditors and the deed of trust upon certain real estate and the pledge of certain additional securities, securing the payment of the promissory notes therein provided to be given, declared to be an assignment for the benefit of all the creditors of said John Cudahy. The first branch of the case is not involved in this appeal, as the trial court held the bill was properly brought as against John Cudahy to settle alleged partnership accounts, but dismissed it as to appellees Hutchinson, Hamill, and Margaret F. Cudahy. Hutchinson is the trustee, and Hamill his successor in trust, named in the agreements and trust deed which are alleged to constitute the assignment, and Margaret F. Cudahy is the wife of John Cudahy, who joined with him in the trust conveyance.

The principal questions raised on the appeal to this court are: First, whether or not said agreement and trust deed upon real estate and the pledge of certain choses in action mentioned in the bill constitute an assignment for the benefit of the creditors of John Cudahy, under the law of this state; and, second, if it be such assignment, whether or not Wright is in any sense a creditor of Cudahy, and entitled, for that reason or as the representative of the creditors of the alleged copartnership, to call upon a court of equity to have said instruments of writing construed to be an assignment, and the trust estate administered accordingly. While the arguments of counsel have been largely addressed to the second question, we do not think its solution important here, inasmuch as the first question is really the meritorious one, and would in this or some other proceeding probably have to be eventually solved. The deed of trust given to secure the promissory notes of John Cudahy contemplated by the agreement is not made an exhibit to the bill, nor is its substance stated; and from the terms of the agreement and allegations of the bill, and the rules of chancery pleadings, we must assume that, except so far as modified by the provisions of the agreement, it is in the ordinary form of a deed of trust upon real estate, in the nature of a mortgage, given to secure the payment of indebtedness therein described, and that it contains the usual condition of defeasance.

The question, then, is: Do the provisions of the agreement and the pledge as set out in the bill, taken in connection with such a deed of trust, when construed in the light of the facts alleged in the bill, constitute an assignment for the benefit of creditors? We are clearly of the opinion that this question must be answered in the negative. A defeasible, and not the absolute, title to both the real and personal property, is conveyed.

The payment of the notes is secured by the deed of trust, and the personal property is pledged as "additional security." The provision in the agreement that any piece of property should be released to the grantor or pledgor whenever he should place in the hands of the trustee its value, as fixed and set opposite its description attached to the agreement, was a mere provision for a particular redemption, and, so far from converting the writings into an assignment for the benefit of creditors, shows that not only was the equity of redemption retained by the grantor, but that he reserved the right to redeem each piece or parcel of property separately as he might be able. The questions at issue have been frequently reviewed by this court, and need not be elaborated here. In *Walker v. Ross*, 150 Ill. 50, 36 N. E. 986, in an opinion of the appellate court for the Third district, adopted by this court as a correct exposition of the law upon the subject, after reviewing the principal decisions of this court upon the question, it was, among other things, said: "The court has repeatedly said that the statute contemplates no such thing as constructive trust. These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned in trust for the benefit of creditors; and hence that absolute conveyance made directly to the creditor in payment, or any form of lien so given as security for the payment of a bona fide debt, though having the effect to give him a preference, is not an assignment for the benefit of creditors, within the meaning of the statute. Wherever such instruments have been held void under section 13, c. 10a, Rev. St., it has been upon the ground that, having been made in contemplation of an assignment in trust afterwards actually executed, they were to be deemed a part of it. *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 903; *Young v. Clapp* (Ill.) 32 N. E. 187. Otherwise a debtor, solvent or insolvent, notwithstanding the statute, may lawfully transfer any part of the whole of his property absolutely in payment, or incur it by mortgage, deed of trust in the nature of a mortgage, judgment confessed, or pledge as security for the payment of such debts preferred. *First Nat. Bank of Chicago v. North Wisconsin Lumber Co.*, 41 Ill. App. 383; *Young v. Clapp* (Ill.) 32 N. E. 187, and all the cases supra." We perceive no conflict between these cases, or any of them, and that of *Farwell v. Cohen*, 138 Ill. 216, 28 N. E. 35, and 32 N. E. 893, so much relied on by counsel for appellees as to what is necessary to constitute an assignment for the benefit of creditors. In the latter it is defined just as it is in *Weber v. Mick* (Ill.) 23 N. E. 646. And in its application to the instrument there in question, which was in the form of a bill of sale of a stock of goods from the debtor to one of his creditors, the court held that on its face it was an absolute transfer of

the whole interest, legal and equitable, in the property, without any condition of defeasance providing for its return upon payment of the debts mentioned, and was made to Cohen expressly in trust, as well as for the benefit of other creditors named, with preferences. And it was further said in that case that the instruments which were chattel mortgages did not in terms or effect absolutely transfer the whole interest of the debtor, legal and equitable, in the property. They did contain a condition of defeasance providing for its return upon payment of the debts mentioned. Counsel are in error in supposing that, under the rule laid down in *Farwell v. Cohen*, the writings in question should be construed to be an assignment for the benefit of creditors. The distinctions between them and the conveyance held in that case to be an assignment are the same in many respects as those pointed out in *Walker v. Ross*, *supra*. That the property was conveyed to a trustee with power to sell does not necessarily change the nature of the instruments, as a mere conveyance of property as security for the payment of a debt. The power of sale might be ineffectual under the statute, but the conveyance could be foreclosed in the same manner as any other mortgage. For the reasons stated, the judgment of the appellate court is affirmed. Judgment affirmed.

(156 Ill. 586)

MEACHAM et al. v. BUNTING.¹

(Supreme Court of Illinois. June 15, 1895.)

HUSBAND AND WIFE—CURTESY—EFFECT OF DIVORCE—ADVERSE POSSESSION—TRUSTS.

1. In 1856 a man bought land, and caused it to be conveyed to himself, "in trust for the use and benefit of" his wife. They had a child living at that time. *Held*, that he took a life estate in the land as tenant by the curtesy initiate.

2. A divorce granted to a husband for a cause which does not render the marriage void from the beginning does not terminate his estate by the curtesy initiate.

3. One who acquires possession of land as trustee for another cannot assert title by adverse possession against his *cestui que trust* without first surrendering and retaking possession.

Appeal from circuit court, Stephenson county; John D. Crabtree, Judge.

Ejectment by Prudence Bunting against Jessie Meacham and others. Plaintiff obtained judgment. Defendants appeal. Affirmed.

M. Stoskopf and H. C. Hyde, for appellants. H. C. Burchard and J. F. Lyon & Son, for appellee.

WILKIN, J. Urban D. Meacham and Prudence Geddis were married in 1836. They removed from Wisconsin to Freeport, this state, in 1852, and there lived as husband

and wife until 1862. One son, born of this marriage in 1836, is still living. On the 29th of November, 1856, the husband purchased of one Sindlinger lots 6 and 7 in block 5 in Wright and Purinton's addition to the city of Freeport, the deed conveying the same to him, "in trust for the use and benefit of Prudence Meacham," then his wife. Both went into possession of the property in 1857, and occupied it as a home until 1862, and the husband continued in possession until his death, in January, 1892. In 1864 he obtained a decree of divorce in the circuit court of Ogle county from his wife, and by a second marriage became the father of a daughter, Jessie, and a son, James. The mother of these children resided with the father on the premises until her death, and the children continued to live with him until he died. By a general devise in his last will their father gave these children the title he then held, if any, to the lots. The former wife also remarried, her present name being Prudence Bunting. In 1893 she brought action of ejectment in the court below, claiming said property as owner in fee, and making Jessie and James Meacham, with others, defendants. Issue being joined, and a trial by jury, the court directed a verdict for the plaintiff, and entered judgment accordingly. The defendants appeal.

By the pleadings the issue whether plaintiff's right of action was barred by the 20-years statute of limitations is properly raised, and is the controlling question in the case. The parties agree that by the terms of the deed from Sindlinger to Urban D. Meacham he became the naked trustee of his wife, Prudence, and that the legal title to the property conveyed would therefore, under the general rule, vest in her by force of the statute of uses. It is also conceded that, inasmuch as she was not *sui juris* under the law in force at the time the deed was executed, the title did not immediately vest in her, but was left in her husband for her use. But counsel for appellants say the statute took effect, and she became seised of the estate in her own right, upon the dissolution of the marriage, in 1864, and from that time the possession of the husband was adverse; therefore the statute then ran against her. On behalf of appellee it is contended that, even if the legal title did vest in her at the date of the decree of divorce, still, by reason of his marriage, and the prior birth of issue, her husband took an estate in the property upon the execution and delivery of the deed from Sindlinger, as tenant by the curtesy initiate, and hence this right of action did not accrue until his death. To the first of these positions opposing counsel insist that it is held the title does not, in such cases, vest in the *cestui que trust* immediately, for the very purpose of excluding all marital rights of the husband, and therefore Urban D. Meacham never became tenant by the curtesy; and, even if he did, the decree

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

of divorce destroyed that as well as all other marital rights in him. Appellee's counsel also deny that Urban D. Meacham's possession was at any time adverse to her.

First. Did Urban D. Meacham have a life estate in the premises prior to the divorce? If the statute of uses had operated at the time of the conveyance to vest the estate in the cestui que trust, the wife, there being issue then born, the husband would have become tenant by the curtesy initiate, precisely as though the deed from Sindlinger had been directly to her. But, being a married woman, the statute of uses did not execute the trust, and the legal title remained in her husband, the trustee, for her use. *Dean v. Long*, 122 Ill. 447, 14 N. E. 34; citing *Perry, Trusts*, § 310. This author says: "If an estate be given to trustees upon a trust for a married woman for her sole and separate use, * * * the legal estate will vest in the trustees, and the statute will not execute it in the cestui que trust. In all these cases the court will give this construction to the gift if possible, for, if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor. These are not the only words necessary to prevent the estate from vesting. Any words that show an intent to create an estate or a trust for the sole and separate use of a married woman will have the same effect." Other authorities are to the same effect, and it seems to be the settled rule that, where the trust is expressly "for the separate use" or "for the sole use and benefit" of a married woman, courts will not allow the statute to execute it in her, because the effect might be to let in marital rights of her husband, and thereby deprive her of the sole and separate use, contrary to the intention of the party creating the trust. Nevertheless, it is well understood that a husband's right to an estate by the curtesy may attach to an equitable as well as a legal estate held by his wife during coverture, and there can be no doubt that he may have such right in real estate conveyed to another for her use. Whether she holds the property by a direct conveyance, or as the cestui que trust therein, if it appears that the grantor intended to exclude the husband from the curtesy, courts will give effect to that intention. *Pool v. Blakie*, 53 Ill. 495; *Monroe v. Van Meter*, 100 Ill. 347. But the husband can be deprived of his marital rights only when the intention to do so clearly appears. *Carter v. Dale*, 3 Lea, 710; *Cushing v. Blake*, 30 N. J. Eq. 689; *Hill, Trusts*, 405; *Steadman v. Falling*, 3 Atk. 423; *Tyler, Cov.* There is nothing in the language of the deed in question to indicate a purpose on the part of the grantor to convey the property for the sole and separate use of Prudence Meacham. In fact, the fair inference is that Sindlinger, the grantor, had no purpose whatever in conveying the lots in trust, except to carry out

the wish of Mr. Meacham, who purchased them. That he (the husband) intended by the words, "in trust for the use and benefit of Prudence Meacham," to exclude himself from all right in the property by the curtesy cannot be presumed, and his conduct after the divorce was wholly inconsistent with any such intention. We think the authorities fully sustain the position that he, at the date of the Sindlinger deed, became tenant by the curtesy initiate in the premises.

Was that estate destroyed by the decree of divorce? While the evidence does not show the grounds upon which it was obtained, it does appear that it was upon the application of the husband, and must therefore have been rendered not for his fault, but that of the defendant, his wife. While many cases hold "a divorce a vinculo destroys the husband's right to curtesy," they speak of such a divorce as at common law, which rendered the marriage void ab initio. Although the only divorce known to our law is "a vinculo," it may, under the statute, be granted for causes arising after the marriage; and the decree does not avoid it from the beginning. The marriage is legal until dissolved, and we think rights acquired during its legal existence cannot be destroyed by its dissolution, unless the statute so expressly provides. This view is sustained by the case of *Walt v. Walt*, 4 N. Y. 95. The New York statute said, "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." The court of appeals held, where a divorce was granted for any other cause than the misconduct of the wife, she was entitled to dower, and said: "A divorce at common law avoided the marriage ab initio. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. * * * Until our statute, there was no such thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of law under whose authority it is granted. The common-law divorce avoided the marriage, and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights it conferred and obligations it imposed continue where the legislature has failed to interfere. In determining the question before us, therefore, we are to ascertain the will of the legislature, the intent and effect of the statute under which the divorce in question was granted. When a divorce is under the statute, the oper-

ation of the decree is wholly prospective. * * * If it was the intention of the legislature that, in case of a divorce under the statute, the wife should in no event be entitled to dower, why not make the provision general, instead of depriving the wife of dower only in case of her being convicted of adultery? 'Expressio unius exclusio alterius.' When the decree in question was obtained our statute provided: "If any woman shall be divorced from her husband for the fault or misconduct of such husband, except where the marriage was void from the beginning, she shall not thereby lose her dower, nor the benefit of such jointure; but if such divorce be for her fault or misconduct she shall forfeit the same; and when a divorce is obtained for the fault and misconduct of the husband, he shall lose his right to be tenant by the curtesy in the wife's lands, and also any estate granted therein by the laws of this state." Chancery Code (Scates, Treat & Blackwell's Ed.) St. 1853, No. 7, § 12, tit. "Dower." Certainly it did not take away the husband's right to be tenant by the curtesy in his divorced wife's lands, but clearly shows an intention by the legislature to secure him in that right, if the divorce was obtained for causes other than his fault or misconduct. As said in *Wait v. Wait*, supra, if the legislature intended that, in case of divorce under the statute, the husband should in no event be entitled to tenancy by the curtesy, why not make the provision general, instead of only in case of the divorce being obtained for his fault? The husband's tenancy by the curtesy initiate was not defeated by the decree of divorce in his favor, but terminated only upon his death; and therefore the appellee's right of action did not accrue until he died, in 1893. The possession of land by a tenant for life cannot be adverse to the remainder-man or reversioner. *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529, and cases cited.

We are also of opinion that, without reference to his tenancy by the curtesy, the possession of Urban D. Meacham was at no time adverse to appellee, within the meaning of the statute of limitations. He entered under the Sindlinger deed, and prima facie continued to hold possession under it. If the defendants below, claiming under him, denied that fact, the burden was upon them to prove it; and this they wholly failed to do. Adverse possession, sufficient to defeat the legal title, must be hostile in its inception, and continue uninterruptedly for 20 years. It must be acquired and retained under claim of title inconsistent with that of the true owner. *Turney v. Chamberlain*, 15 Ill. 271. See, also, *Morse v. Seibold*, 147 Ill. 318, 35 N. E. 369, and cases cited. He entered as trustee under the Sindlinger deed, and he could only afterwards claim to hold adversely to that title by surrendering the possession, and retaking it. *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Reynolds v. Sumner*, 126 Ill. 53, 18 N. E. 334. The entry was with appellee's consent, and there-

fore not adverse. *Timmons v. Kidwell*, 138 Ill. 12, 27 N. E. 756. The possession was consistent with the title of the real owner, and "nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner would render the possession, however long-continued, adverse." *Rigg v. Cook*, 4 Gilman, 351, followed by *Transportation Co. v. Gill*, 111 Ill. 541. No other verdict than that which the jury was instructed to return could have been properly rendered in this case. The judgment of the circuit court will be affirmed. Affirmed.

(156 Ill., 609)

LANGLOIS v. STEWART.¹

(Supreme Court of Illinois. June 15, 1895.)

TAX DEED—SUIT TO SET ASIDE—VENDOR AND VENDEE.

1. One who has executed a bond for a deed, and surrendered possession of the land to the obligee, may still maintain a bill to set aside a tax deed, since the legal title remains in him.

2. Where a bill to set aside a tax deed alleges that the complainant has tendered defendant all the money that has been paid out by him, with accrued interest, and this is not denied in the answer or disputed in the evidence, a decree setting aside the tax deed need not order complainant to pay defendant any further sum, the court being authorized to find that the sum tendered was the full amount due.

3. A sale, for delinquent taxes, of land which has not been advertised for sale as required by Rev. St. 1893, c. 120, § 182, is invalid.

Appeal from circuit court, La Salle county; Charles Blanchard, Judge.

Bill by Charles R. Stewart against Walter Langlois. Complainant obtained a decree. Defendant appeals. Affirmed.

The bill in this case seeks to set aside, as a cloud upon title, a tax deed upon a certain lot in the city of Streator, issued to appellant on the 8th day of December, 1892. It appears from the record in this case that the lot was sold on the 18th day of June, 1890, for the taxes of 1889. It further appears that this property was not advertised in the delinquent tax list of the year 1890 for the taxes of 1889. The bill, as originally filed, did not make any tender to appellant of the amount expended by him for the purchase of this lot at tax sale, and for other amounts expended by him in connection with the issuing and recording of the deed. An answer was filed in which the defendant admitted that he purchased the real estate described in the bill in 1890 for the taxes of 1889, and that subsequently, within three years thereafter, he received a tax deed from the county clerk of La Salle county, and denied that the complainant was entitled to any relief on his bill. To this answer a general replication was filed. Subsequently an amendment was filed to the bill, in which the complainant tendered to defendant an amount which was alleged in the amendment to be the entire amount paid out by defendant, with accrued interest thereon.

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

The same answer was refiled to the amended bill, no denial being made in the answer as to the amount tendered being sufficient. Nor does the answer, except in general terms, deny the allegation of the bill that the property was not duly advertised in the delinquent tax list of 1890. A decree was entered by the circuit court, in which the court found that the lot was not advertised for sale for taxes for which it was sold, and finding that complainant had tendered all the money paid by defendant on the purchase of said lot with interest thereon, and ordering the deed set aside, and declared null and void, as a cloud upon complainant's title, from which decree of the court this appeal was prosecuted.

Brewer & Strawn, for appellant. H. N. Ryon & Son, for appellee.

PHILLIPS, J. (after stating the facts). A number of objections are urged by appellant as reasons why the decree of the circuit court should be reversed. It is alleged that appellee did not own the real estate described in the bill at the time he filed his bill of complaint. It is true that one cannot maintain a bill to remove a cloud upon title to property of which he is not the owner, but it sufficiently appears in this case that appellee still held the legal title to the property in controversy, although he had executed a bond for deed to another party, and that party was in possession under the bond for deed. A bond for deed is only an agreement to make title in the future, and so long as it remains executory the title is vested in the original owner. The fact that appellee had executed a bond for deed to third party, who was in possession, did not prevent him from maintaining his bill to set aside a cloud upon the title to this property, so that he might fulfill the conditions of his bond, and make good title to the other party.

It is also alleged that the court below erred in entering a decree canceling the tax deed, without ordering that complainant first pay to the defendant the amount paid by him at the tax sale, and for subsequent taxes, and the fees for making and recording the tax deed, with legal interest on all. Section 224, c. 120, Rev. St., provides that "any judgment or decree of court setting aside any tax deed procured under this act, shall provide that the claimant shall pay to the party, holding such tax deed, all taxes and legal costs, together with all penalties, as provided by law, as it shall appear the holder of such deed or his assignors, shall have properly paid or be entitled to in procuring such deed, before such claimant shall have the benefit of such judgment or decree." The amendment filed to the bill alleged that the amount tendered was all the money which had been paid out by appellant, together with accrued interest. The answer filed by appellant made no denial of this allegation. The facts as to the amounts paid out by appellant were such matters as were within his own knowledge, not always

to be ascertained from the records; and, if he was dissatisfied with the amount tendered, it was his duty to have informed the court, by answer or by proof, of the true and correct amount. No proof was offered by defendant below, and the court was authorized to find, under the pleadings, that the amount tendered was in full of the amount due appellant.

It sufficiently appears from the record in this case that the premises on which the tax deed in controversy was issued were not advertised for sale in the delinquent tax list published in the year 1890. Section 182, c. 120, 2 Starr & C. Ann. St., makes provision for the advertisement, before judgment, of the delinquent tax list, in a newspaper published in the county, and such publication is one of the conditions precedent to a valid judgment. There being no advertisement of this property in the delinquent list of 1890, there was no valid judgment, and consequently the sale to appellant of this property for taxes of the year 1889 was invalid; and the deed executed to him by the county clerk under his certificate of purchase was illegal and void, and was properly set aside by the circuit court as a cloud upon appellee's title. Appellant, having had no valid tax deed, and having been repaid the amount of money paid out by him, to which amount he has heretofore raised no question, has suffered no injury. Perceiving no error in the record, or in the decree rendered by the circuit court, the judgment and decree of the circuit court are affirmed. Affirmed.

(156 Ill. 549)

CRIBBEN et al. v. CALLAGHAN.¹

(Supreme Court of Illinois. June 15, 1895.)

INJURY TO EMPLOYE — DEFECTIVE DECLARATION — AIDED BY VERDICT.

1. In an action by a servant against his master for personal injuries caused by the falling of the roof of a ladle oven while the plaintiff was inside the oven, an allegation in the declaration that it was defendant's duty to keep such roof "in a safe condition, so as not to be dangerous to the servants of said defendant whose duty it was to enter said room," if defective in so stating defendant's duty, is cured by verdict, the jury being instructed that the master is not an insurer of the servant's safety.

2. A pleading need not allege that a certain act or line of conduct is a duty, since the law will imply the duty from the facts stated.

3. Where there is a general verdict for the plaintiff on a declaration having two counts, a defect in one count is no ground for arresting judgment, if the other count is good.

Appeal from appellate court, First district.

Action on the case by Frank Callaghan against Henry Cribben and others. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal. Affirmed.

This is an action on the case brought by Frank Callaghan against Cribben, Sexton & Co., stove manufacturers, to recover damages

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

resulting from an injury caused by the falling of the roof of a ladle oven attached to, and forming a part of, the factory of appellants. On the 22d day of July, 1891, appellee entered the ladle oven, and while therein the roof of the oven fell in, partially; and a quantity of heated sand which was on the roof was thrown upon appellee, burning him about the head and face, and on the arm and ankle. The declaration is in two counts, and there was a plea of not guilty to both counts. Among the instructions given for the defendants was the following: "The jury are instructed, as a matter of law, that an employer is in no sense an insurer of the safety of his employes, but that the employer has, in this class of cases, fulfilled his duty to his employe when he has furnished for the use of such employe reasonably safe machinery and appliances for his use while in the line of his duty; and unless you find from the evidence that the defendants have failed, in this respect, to perform their duty towards the plaintiff, the plaintiff cannot recover." Judgment was rendered upon the verdict, and appeal taken to the appellate court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

Cutting, Castle & Williams, for appellants.
Arnd, Evans & Arnd, for appellee.

MAGRUDER, J. (after stating the facts).

1. It is contended by appellants that they were guilty of no negligence. This is a question of fact, which is settled by the judgment of the appellate court, and we are precluded from any consideration of it. By no motion made or instruction asked by the defendants below is the point raised that the evidence does not tend to show a cause of action.

2. It is claimed that the trial court erred in refusing to sustain the motion in arrest of the judgment. The first ground upon which it is claimed that the motion in arrest should have been sustained is that the declaration avers it to have been the duty of the defendant to keep the roof or cover of the ladle oven "in a safe condition, so as not to be dangerous to the servants of said defendants whose duty it was to enter said room." It is said that the declaration, in saying that it was the duty of the employer to keep the ladle oven in a safe condition, makes the employer an insurer of the safety of his employe, whereas the employer's duty, under the law, is alleged to be merely the duty of furnishing for the use of his employe reasonably safe machinery and appliances, or a reasonably safe place to work in. It is a general rule that where a declaration does not state a complete cause of action the defect may be taken advantage of, after verdict, by motion in arrest of judgment. *Wright v. Bennett*, 3 Scam. 258. But, while it is true that a verdict does not cure a statement in the declaration of a defective

cause of action, yet it is true that a verdict will aid a defective statement of a cause of action. *Barnes v. Brookman*, 107 Ill. 317. The averment in the declaration is not that it was the duty of the defendants to keep the roof of the oven in an absolutely safe condition, but in "a safe condition, so as not to be dangerous to the servants of said defendants whose duty it was to enter said room" or oven. The qualifying clause explains the meaning of the words "in a safe condition"; that is to say, such a condition as that those whose duty it is to enter the oven will not be at the same time running into danger, or incurring danger to themselves. A room is reasonably safe when it is not fraught with danger to those who are obliged to enter it. In *Smith v. Car Works*, 60 Mich. 501, 27 N. W. 668, it is said that in large manufacturing establishments "the proprietors or masters are bound to furnish a suitable place in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as actually carried on." See, also, *Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162. Substantially the same language is used in 14 Am. & Eng. Enc. Law, p. 902. So, in *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, the allegation in the declaration that it was the defendant's duty to keep a row of barrels in such condition that they would not fall upon the plaintiff was held to be an allegation of the duty on the part of the employer to furnish his employe a reasonably safe place to work in. The duty of the employer is to furnish a suitable place where the employe may perform his work without exposure to dangers that do not come within the obvious scope of the employment in the business as actually carried on. In the case at bar the declaration, in averring that it was the duty of the defendants to furnish the plaintiff with such a room as would not be dangerous to him when entering it for the purpose of performing his duty, may have defectively stated the cause of action, but it did not state a defective cause of action. After verdict, on a motion in arrest of judgment, the court will intend that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial. *Addington v. Allen*, 11 Wend. 375. After verdict, judgment will not be arrested for any defect in the declaration which, by reasonable intendment, must be considered to have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration. *Morey v. Homan*, 10 Vt. 565, and other cases in note A to 2 Tidd, Prac. p. 919. Where the plaintiff states his cause of action defectively, it will be presumed after verdict that all circumstances necessary, in form or substance, to complete the title so defectively stated, were

proved at the trial, as they must have been proved in order to entitle the plaintiff to recover. 2 Tidd, Prac. p. 919. The ordinary presumption which obtains after verdict, and by operation of which a defective statement of a good cause of action is said to be cured, may sometimes be excluded by the character of the instructions given. *Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Libby, McNeill & Libby v. Scherman*, supra. The converse of this must also be true, namely, that such presumptions will be indulged in where the instructions favor them, and do not exclude them. Here the jury were instructed on behalf of the defendant that an employer is not an insurer of the safety of his employes, and that he fulfils his duty where he has furnished for their use reasonably safe machinery and appliances. But, while we have discussed the case as though the allegation of duty was a material one, it is to be remembered that really it is unnecessary to allege that a certain act or line of conduct is a duty, because the law implies the duty from the facts stated. A conclusion of law need not be pleaded. *Railway Co. v. Coit*, 50 Ill. App. 640.

The second count of the declaration is objected to upon the alleged ground that it does not show that the foreman of the defendants, who is mentioned in that count, was not a fellow servant of the plaintiff. It is not necessary to discuss the objection thus made to the second count, because no such objection lies to the first count, which makes no reference to the foreman. The declaration need not show affirmatively, by express averments, that the injury complained of was caused by the negligent acts of agents or servants of the defendants who were not fellow servants of the plaintiff. *Libby, McNeill & Libby v. Scherman*, supra. Hence the first count is not defective, although it fails to contain such an averment, even if it should be held that the second count is bad in this respect. The first count, after verdict, is sufficient to sustain the judgment. The verdict here is a general verdict on both counts. "Where a general verdict is given on several counts, the same shall not be set aside or reversed, if any one or more of the counts be good." Rev. St. c. 110 (as to "Practice"), § 57; 2 Starr & C. St. p. 1822; *Snyder v. Gaither*, 3 Scam. 91; *Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472. The judgment of the appellate court is affirmed. Affirmed.

(156 Ill. 620)

PEOPLE ex rel. KERN, County Treasurer, v. RYAN.¹

(Supreme Court of Illinois. June 15, 1895.)

SPECIAL ASSESSMENT—APPLICATION FOR JUDGMENT—DEFENSES.

1. Rev. St. 1893, c. 24, § 153, which declares that, upon application for judgment upon a special assessment, no defense or objection

shall be made or heard which might have been introduced in the proceedings for the making of such assessment, or on the application for its confirmation, prohibits the introduction of evidence that the assessment was excessive.

2. Where the record of the special assessment proceedings shows on its face that proper notice was given, a property owner cannot, on application for judgment for a delinquent installment of such assessment, show that he did not in fact receive notice. *Clark v. People*, 35 N. E. 60, 146 Ill. 348, followed.

Appeal from Cook county court; Frank Scales, Judge.

Application of the people of the state of Illinois, on the relation of Charles Kern, county treasurer of Cook county, and ex officio county collector, for judgment for delinquent taxes and special assessments. M. W. Ryan filed objections, which were sustained in part. The people appeal. Reversed.

J. F. Holland and J. M. Palmer, for appellant.

CRAIG, J. This is an appeal from a judgment of the county court of Cook county sustaining, in part, objections to the application of the county collector for judgment against lands for a delinquent first installment of a special assessment levied upon the land of appellee for curbing, grading, and paving St. Louis avenue from Ogden avenue to West Twelfth street, in the city of Chicago. On the hearing the court permitted the objector to introduce evidence tending to prove that his lots were assessed more than they were benefited. We think this was error. The last clause of section 153 of the cities and villages act is as follows: "Said report [the delinquent list] when so made shall be prima facie evidence that all the forms and requirements of the law in relation to making said return have been complied with, and that the special assessments mentioned in said reports are due and unpaid, and upon the application for judgment upon such assessment no defense or objection shall be made or heard which might have been introduced in the proceedings for the making of such assessment or the application for the confirmation thereof." If the property of the objector was assessed more than it was benefited, that question should have been raised in the application for a confirmation of the assessment, and, not having been raised at that time, the judgment of confirmation is a bar. *People v. Brislin*, 80 Ill. 423; *Lehmer v. People*, Id. 601.

The court allowed the objector to testify that he had received no notice of the special assessment proceedings, and this ruling is relied upon as error. On an application for judgment against delinquent lands, where the record shows on its face that the proper notice was given in the assessment proceedings, the owner cannot impeach the judgment of confirmation by showing that in fact he did not receive notice. *Clark v. People*, 146 Ill. 348, 35 N. E. 60. The judgment of the county court will be reversed, and the cause remanded. Reversed and remanded.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

(156 Ill. 511)

HILER v. PEOPLE.¹

(Supreme Court of Illinois. June 13, 1895.)

CRIMINAL LAW—RECORD—BIGAMY—INDICTMENT—EVIDENCE—WITNESS.

1. Where a motion to quash the indictment because no evidence on which it could be based was introduced before the grand jury is incorporated in the bill of exceptions, but the affidavit on which the motion was based is not so preserved, the ruling on the motion cannot be reviewed, the record not showing the character of the evidence before the grand jury.

2. An indictment for bigamy, which charges that the defendant did unlawfully and feloniously marry G., "the said L., said former wife, being then alive," sufficiently alleges that the first wife was alive at the time of the second marriage.

3. Under Rev. St. 1893, c. 38, § 29, which provides that in prosecutions for bigamy either marriage "may be proved by such evidence as is admissible to prove a marriage in other cases," in order to prove a common-law marriage in such a prosecution there must be evidence of a contract *per verba de praesenti*, with proof of cohabitation. Proof that the parties lived together as husband and wife, and spoke of each other as such, is not sufficient.

4. In a prosecution for bigamy the defendant's first wife is not a competent witness against him.

Error to circuit court, McLean county; Thomas F. Tipton, Judge.

Indictment of John T. Hilier for bigamy. Defendant was convicted and he brings error. Reversed.

R. L. Fleming, for plaintiff in error. M. T. Moloney, Atty. Gen., and John A. Sterling, State's Atty. (T. J. Scofield and M. T. Newell, of counsel), for the People.

PHILLIPS, J. At the April term, 1894, of the circuit court of McLean county, the grand jury returned into court an indictment against John T. Hilier for bigamy. The indictment was indorsed "A true bill"; the indorsement signed by the foreman, and the names of five witnesses indorsed. On motion the first, second, and third counts were quashed, and on May 25th a trial was had on the remaining counts, and a verdict of guilty under the fifth and sixth counts was found by the jury, and the punishment of the defendant fixed at imprisonment in the penitentiary for the term of one year. A motion for new trial, as also in arrest of judgment, was overruled by the court, and a judgment on the verdict was entered, and the defendant sued out this writ of error.

One of the causes assigned for quashing the indictment was that no evidence was introduced before the grand jury upon which the indictment could have been based. One of the errors assigned presents for our consideration that question. The following affidavit was copied into the record by the clerk, which is claimed to have been filed with the motion to quash: "John T. Hilier, being first duly sworn, on his oath deposes and says: That he

is the defendant in the above-entitled cause. That he is informed and believes that said indictment herein was procured from the grand jury herein upon illegal evidence, and without certain material and necessary evidence. Affiant says: That he is informed and believes that the grand jury which indicted him had before them no competent evidence of a former marriage between this defendant and the alleged Lizzie Hilier, or between this defendant and any other woman, known or not known, to said grand jurors; nor had they any evidence before them as to whether or not said parties were living at time of marriage to Grace Washburn, or as to whether or not said former marriages, or either of them, were or were not legally dissolved. That neither the said Lizzie Hilier nor the said Adelia Karr were present and testified before said grand jury. That the only other witnesses are Wm. Kane, Grace Washburn, and Robert Maxton, all of Bloomington, Ill. Affiant says that these parties named are known to the state's attorney, and were so known at and for a long time prior to the commencing of said grand jury, and that their places of residence are known and were then known to him; and that the facts herein are known to said witnesses, Lizzie Hilier, and Adelia Karr, and this fact was known to the state's attorney. John T. Hilier." Subscribed and sworn to. The motion to quash was incorporated in the bill of exceptions, and thus became a part of the record; but this affidavit was not incorporated in the bill of exceptions, and hence is no part of the record. There was, therefore, nothing before the court showing or tending to show the nature or character of the evidence introduced before the grand jury, so far as appears from this record.

It is also claimed that the court erred in overruling the motion to quash the sixth count of the indictment, because it fails to aver in direct and positive terms that the first wife was still alive, as was held to be necessary in *Prichard v. People*, 149 Ill. 52, 36 N. E. 103. There the averment of the indictment, "the defendant, well knowing the said Eliza Ann Ferguson, his former wife, was then alive," was held to be insufficient. Here, however, the indictment is different. After averring that the defendant did unlawfully and feloniously marry Grace Washburn, then follows the following: "The said Lizzie Myers, said former wife, being then alive, and the said John T. Hilier well knowing that said Lizzie Myers, his former wife, was then alive, and the said John T. Hilier never having been legally divorced from the said Lizzie Myers and the * * *." We regard this averment as sufficient.

It is next contended that no prior marriage was established by the evidence. Section 28, c. 38, of the Criminal Code (Hurd's Rev. St. p. 470) provides: "Whoever having a former husband or wife living marries another person or continues to cohabit with such second husband or wife, in this state, shall be

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

deemed guilty of bigamy." Section 29 provides: "It shall not be necessary to prove either of the marriages by the register or certificate thereof or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases." As has been seen, the charge in the indictment, in substance, was that John T. Hiler, on the 20th day of September, 1893, did marry one Lizzie Myers, and her, the said Lizzie Myers, then and there had for his wife, and the said John T. Hiler afterwards, to wit, on the 21st day of February, 1894, in the county of McLean, and state of Illinois, feloniously and unlawfully did marry one Grace Washburn, and to her, the said Grace Washburn, was then and there married; the said Lizzie Myers, his former wife, being then alive. It appears from the evidence that the defendant was a resident of Grand Haven, Mich. He composed music, played on the piano, and was a good singer. He attended county fairs, where he sold music. He seems to have been married at one time to Mrs. Jennie Graham, and obtained a divorce from her on April 14, 1893. On Sunday, September 10, 1893, the defendant was at Appleton, Wis., stopping at the Sherman House. After dinner he went into the parlor, and met Lizzie Myers and Miss Stillman. He sang, and played on the piano, and then suggested a walk. Another young man joined the party, and the four went to the park. The defendant and Lizzie Myers walked together. They remained at the park during the afternoon, and returned to the hotel in the evening for supper. The defendant testified that on Sunday afternoon he and Miss Myers talked matters over. He talked about marrying her. On cross-examination, in reply to questions asked, he said: "Did you ask her that afternoon?" "I asked her if she would keep company with me." "What did she say?" "She said she was going with a gentleman by the name of Bissell." "Did you say then you would marry her?" "It was pointing in that way." "Did you say that?" "Yes, sir." "She said, 'All right?'" "Yes, sir." "That was on Sunday afternoon?" "Yes, sir." It also appears from the evidence of the defendant that on Sunday afternoon he arranged with Miss Myers to go with him the next day to Hortonville. On cross-examination he further testified: "The next day I went to Stillman's, and took her to Hortonville. She introduced me as her husband. As we went to Hortonville, we talked over matters. After we arrived at Hortonville, we talked about her introducing me as her husband. I didn't object, but said that would be all right. She is as much to blame as I am, and she did introduce me as her husband, and I agreed to it. We occupied the same bed that night. We went back to Appleton, and staid there two nights. At Stillman's, there she introduced me as her husband, and I said, 'We

are married.' We went from there to Oshkosh. I telegraphed for her to come down there and help me, on the 18th. She came the 19th. I was there until the 22d. She left on the morning of the 22d. I went to Sheboygan. I was there three days at the fair, and she helped me. I went to Milwaukee. Was there two weeks, and from there we went to Chicago. I introduced her as my wife from place to place, and occupied the same bed. We went from there to Mrs. Carle's, at Chicago, and introduced her as my wife, and I introduced her to the visitors who came in to see her, and we occupied the same room and the same bed. When I was at Mrs. Carle's, I slept with Lizzie always, when I was there; every night. We rented furnished rooms, and Lizzie kept charge of them, and cooked my meals all the time. After we had been there a while, I went on the road, and then I wrote the letters that have been read, and then got replies, and that continued up to February 23d. The last letter I wrote was from Bloomington, on the morning of the 23d of February, three hours before I met Miss Washburn." Mrs. Carle testified that they came to her home in Chicago in September, 1893. He introduced her as his wife; stopped there; and they did their own cooking. The witness further testified: "He would always be away a week or two at a time. He was selling music. I think the last time he was gone over a month. He went to different towns in Illinois. They kept up a correspondence while he was gone. I saw the letters that he wrote to her. I know his handwriting. He always introduced her as his wife, Mrs. Hiler. That occurred whenever they met other people coming in to see me. I never knew of him introducing her in any other way. They slept in the same bed, of course. She told me they were married in Oshkosh, just the same as she has stated here. Of course, I thought they were married; everybody thought so. I never saw any marriage certificate. I asked him what he had done with his marriage certificate. He said he had sent it to his mother." A large number of letters, written by the defendant to Lizzie Myers after they had assumed the relation of husband and wife before the public, were read in evidence, in which the defendant frequently addressed her as "Mrs. Lizzie Hiler," "Mrs. John T. Hiler," or "My Dear Wife." These were the leading facts proven on the trial tending to prove a common-law marriage between defendant and Lizzie Myers. Evidence was then introduced that in February, 1894, the defendant met Grace Washburn, a young lady of Bloomington, at a grocery store in that place, and was introduced to her. That evening he called at her house, and proposed marriage. She replied that she was not ready. The next afternoon they met again at the grocery store. He walked down town with her. He again proposed

marriage. She told him to wait awhile. But he did not wait. That afternoon, between 5 and 6 o'clock, they were married. Does the evidence establish a common-law marriage between the defendant and Lizzie Myers?

To constitute the offense charged in this indictment it is incumbent upon the prosecution to show against the defendant two successive marriages; one legal and innocent, the other penal. Both must be actual. The first marriage must be valid and binding, and a marriage in fact. Marriage with capacity and consent, proved by direct testimony, as by the evidence of witnesses who saw and heard the marriage celebration performed between the parties, or record evidence, with identification, would be evidence of actual marriage in fact. Under the decisions of this court, a marriage legal at common law is recognized as valid and binding in this state. What constitutes such common-law marriages, legal and valid has been recognized by repeated adjudications. To constitute a marriage legal at common law, the contract and consent must be *per verba de praesenti*. Or, if made *per verba de futuro cum copula*, the copula is presumed to have been allowed on the faith of the marriage promise, and that as the parties at the time of the copula accepted of each other as man and wife. *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hopworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737. Under the evidence in this record it is not shown that any marriage ceremony was performed. No actual marriage in fact is proven between the defendant and Lizzie Myers. The evidence discloses the fact that the defendant and one Lizzie Myers lived together as husband and wife, etc., spoke of and introduced each other to others, and letters from the defendant to her so designated her as his wife. They were by repute husband and wife during this cohabitation. On many questions, cohabitation and repute are adequate evidence from which marriage is presumed. For the determination of many cases, declarations, whether verbal or in writing, with evidence of cohabitation and repute, are adequate evidence of marriage. The manner in which persons living together as husband and wife are received among their friends and neighbors as being married, their reputation and declarations, most commonly spring from the fact of cohabitation. As expressed by Mr. Bishop in his work on *Marriage, Divorce and Separation* (volume 1, § 839), they "are shadows attending on cohabitation, and they should be simultaneous therewith." On the trial of any issue involving the question of marriage all these shadows of and resulting from cohabitation may be introduced in evidence. From the fact of cohabitation, with the attendant shadows, for many purposes there follows the presumption of marriage. This presumption increases through the lapse of

time through which the parties are cohabiting as husband and wife. In this record, there is no actual marriage in fact proven, no proof of a contract *per verba de praesenti*; nor is there any evidence *per verba de futuro cum copula*. In the absence of such evidence, there remains in this record only evidence of cohabitation with its attendant shadows, from which springs a presumption of marriage. The marriage to Grace Washburn as an actual marriage in fact is shown. Cohabitation and its attendant shadows are shown. Two cohabitations are proven from the evidence, from the first of which a marriage of the defendant to Lizzie Myers would be presumed, and from the second of which the marriage of the defendant to Grace Washburn would be presumed; and, in the absence of proof of a contract *per verba de praesenti*, each presumption is similar; the first establishing a marriage, the second disproving the presumption of such first marriage. Where a marriage legal at common law is sought to be shown on which to base a conviction for bigamy, all the elements necessary to constitute such common-law marriage must be proven. There must be evidence of a contract *per verba de praesenti*, with proof of cohabitation. In prosecutions for bigamy direct proof of the fact of marriage is required. *Harman v. Harman*, 16 Ill. 85. Where proof of marriage legal at common law is sought to be shown, it must be absolute proof of marriage. *Hayes v. People*, 25 N. Y. 390. In the discussion of this evidence we have wholly omitted from consideration the evidence of Lizzie Myers, which was admitted, and, after the defendant closed his case, and the evidence in rebuttal was introduced, the evidence was then excluded. The wife was not a competent witness against the defendant. *Miner v. People*, 58 Ill. 59. The effect of her evidence was prejudicial to such an extent that the defendant did not have a fair trial.

It is unnecessary to discuss the question raised on the instructions, as they are materially erroneous as given for the state, on account of entirely disregarding the distinction between a presumption arising from facts proven and disregarding presumptions arising from other facts shown by the evidence. The judgment of the circuit court is reversed, and the cause is remanded. Reversed and remanded.

(156 Ill. 595)

COMMERCIAL INS. CO. OF CALIFORNIA
v. FRIEDLANDER et al.¹

(Supreme Court of Illinois. June 15, 1895.)

FIRE INSURANCE—EVIDENCE—FRAUD—ARBITRATION—ACTION ON POLICY.

1. The mere fact that the insured, in his proofs of loss, valued the property destroyed at

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

\$9,840 while the real loss, as found by the jury, was only \$1,277, does not establish a fraudulent overvaluation.

2. Where the insured refuses to enter into arbitration, but agrees to the appointment of persons to appraise the property remaining after the fire, such appraisal does not deprive the insured, in an action on the policy, of the right to introduce evidence of the quantity, quality, and value of the property insured.

3. The jury cannot, in estimating the amount of the loss, consider the amount for which the insured sold the policy after the loss.

Appeal from appellate court, First district.

Action by J. Friedlander and S. Newman, for the use of William Reed, against the Commercial Insurance Company, of California. Plaintiffs obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

Schuyler & Kremer, for appellant. Seth F. Crews, for appellees.

CRAIG, J. This was an action brought by J. Friedlander and S. Newman, for the use of William Reed, against the Commercial Insurance Company, on a policy of insurance issued October 14, 1889, on a stock of leaf tobacco in a certain three-story brick building in Fullerton avenue, Chicago. In the proofs of loss furnished by assured after the fire, the total loss was estimated at the sum of \$9,840; but on a trial before a jury plaintiffs recovered a judgment for \$1,277.80, which, on appeal, was affirmed in the appellate court. The policy sued on contained the following: "And any false representation, by assured, of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, shall avoid this policy. All fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claims under this policy." "Persons sustaining loss or damage by fire shall forthwith give notice thereof to the company, in writing, and, within thirty days after the loss shall have occurred, render a particular account of such loss, signed and sworn to by them, stating whether any, and what, other insurance has been made on the same property, giving notices of the written portion of all policies thereon, also the actual cash value of the property." In the argument of counsel for appellant in the appellate court, the following grounds were relied upon to reverse the judgment, and the same are relied upon here: (1) That the insured were guilty of fraud and false swearing and misrepresentation and overvaluation of the loss within the conditions of the policy, and that the court erred in not granting a new trial for that reason. (2) That the evidence offered on behalf of the plaintiffs failed to show that the award of the arbitrators was fraudulent, was inadmissible, and that the award was not conclusive

and binding on the plaintiffs. (3) That the trial court erred in not setting aside the verdict and granting a new trial, for the reason that the same is manifestly against the weight of the evidence. (4) That the trial court erred in not granting a new trial in said cause, on the ground of newly-discovered evidence, shown by the affidavit read on behalf of the defendant. (5) That the trial court erred in refusing to instruct the jury as requested on behalf of the defendant.

In regard to the first point relied upon, it is claimed in the argument, as the assured, in their proofs of loss, estimated the amount at \$9,840, and the jury returned a verdict for only the sum of \$1,277.80, the discrepancy is sufficient to establish a fraudulent overvaluation, within the meaning of the policy. The mere fact that the assured, in the proofs of loss, has made an overvaluation of the property destroyed, will not defeat a recovery on the policy for the actual loss sustained. If the assured, in making proofs of loss, acts in good faith, on the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such overvaluation cannot be held to be fraudulent, and it will not defeat a recovery. *Insurance Co. v. Nelson*, 75 Ill. 548; *Insurance Co. v. Vaughn*, 92 U. S. 516. There are numerous cases found in the books where the recovery has been sustained, although much less than the amount of loss as the same was estimated in the proofs of loss. *National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673; *Moore v. Insurance Co.*, 29 Me. 97; *Dogge v. Insurance Co.*, 49 Wis. 501, 5 N. W. 389; *Helbing v. Insurance Co.*, 54 Cal. 158. Whether the overvaluation found on proofs of loss was fraudulent was, as held in *Insurance Co. v. Weides*, 14 Wall. 375, a question of fact to be determined by the jury. At the request of the insurance company the jury made the following special findings: "(1) Do you find from the evidence that, at the time of the alleged fire at 193 Fullerton avenue, there was eight thousand pounds of tobacco in the basement of the building described by the witnesses for the plaintiff in this case? Yes. (2) Do you find from the evidence that the witness Friedlander has willfully testified that there was more tobacco in the basement of the building at 193 Fullerton avenue at the time of the fire than was actually there at the time of the fire? No. (3) Do you find from the evidence that J. Friedlander and S. Newman, in their proofs of loss, have willfully and falsely sworn to the amount of the loss and damage covered by the policy in question? No." Under these findings of the jury, the question of fact was settled against the insurance company.

The next point relied upon is that the court erred in admitting evidence of the quantity, quality, and value of the tobacco insured, because such evidence tended to impeach the

award made by the arbitrators. If the assured and the insurance company had submitted to arbitration the amount of damages which the assured had sustained by the fire, and the arbitrators had heard the evidence, and honestly and fairly determined the amount by an award, according to the terms of the submission, the award of the arbitrators might be held conclusive between the parties, and a bar to an action on the policy. But as we understand the record that was never done. The plaintiffs refused to enter into an arbitration, but agreed to the appointment of three appraisers to appraise the tobacco remaining after the fire. The mere fact that three men were selected to appraise the value of the property remaining after the fire would not, in our opinion, deprive the plaintiffs of the right to introduce evidence of the quantity, quality, and value of the tobacco embraced in the policy; nor did such evidence tend to impeach an award. The third point relied upon presents purely a question of fact which was settled by the decision of the appellate court, and it is not reviewable here.

It is next insisted that the court erred in not granting a new trial on the ground of newly-discovered evidence. A motion for a new trial is never granted unless it appears that due diligence was used to procure the evidence. The newly-discovered evidence must be of a controlling character, and not merely cumulative. Here, the newly-discovered evidence related to the amount of the tobacco, which was one of the controverted questions before the jury, and hence it was merely cumulative. Moreover, it is manifest from the affidavits if proper diligence had been exercised the evidence might have been procured and introduced on the trial. Under the facts as they appear, we do not regard the decision of the court erroneous.

The last question relied upon is that the court erred in refusing defendants instruction No. 15. The policy in question was sold by the assured to William Reed, and the action was brought on the policy for his use. The instruction directs the jury that, in arriving at the value of the tobacco covered by the policy, they may take into consideration the amount paid Reed for the policy, etc. Money considerations may have actuated the holders of the policy to sell regardless of the value of the tobacco covered by the policy. They may have been pressed for money, they may have sold to relieve themselves of a lawsuit; indeed, various other matters no doubt entered into and had a bearing on the fact of making a sale of the policy. Under such circumstances, the mere fact that a small amount or a large amount was paid for the policy would not determine the value of the tobacco embraced in the policy, and a direction of that character to the jury was properly refused.

The judgment of the appellate court will be affirmed. Affirmed.

(156 Ill. 624)

ILLINOIS STEEL CO. v. O'DONNELL et al.¹

(Supreme Court of Illinois. June 15, 1895.)

INSOLVENT CORPORATIONS—DIRECTORS AS CREDITORS—JUDGMENT BY CONFESSION.

1. An insolvent corporation may convey property to a creditor, in payment of its debt to him, where the property is not worth more than the debt, even though a majority of the directors are sons of the creditor.

2. Where judgment is entered by confession on a note which is not due, and on which interest up to maturity has been paid in advance, the unearned portion of such interest should be deducted.

3. A manufacturing corporation which, although insolvent, is still engaged in business, may give judgment notes to its directors for money lent to it by them, in good faith, for the purpose of carrying on its business while it was insolvent, and may also give them judgment notes in renewal of similar notes given by the corporation while it was solvent.

Error to appellate court, Second district.

Bill by the Illinois Steel Company against James L. O'Donnell, assignee of Henry Fish & Sons, Henry Fish, George M. Fish, Charles M. Fish, and Henry M. Fish (copartners heretofore doing business as Henry Fish & Sons), Cornelia A. Miller, Mary V. Fish, the Joliet Enterprise Company, John Y. Brooks, and Francis H. Connell. Complainant obtained a decree for part of the relief prayed, and this decree was modified by the appellate court. 53 Ill. App. 314. Complainant brings error. Modified.

E. P. Prentice (Williams, Holt & Wheeler, of counsel), for plaintiff in error. E. A. Otis (Geo. S. House and P. C. Haley, of counsel), for defendant in error James L. O'Donnell.

BAKER, J. This writ of error to the appellate court of the Second district, wherein the Illinois Steel Company is plaintiff in error and James L. O'Donnell, assignee of Henry Fish & Sons, and others are defendants in error, brings before us the same record and decree that are in part reviewed in the appeal of Blair v. Steel Co., 53 Ill. App. 314. A statement of the case will be found within the report of that appeal. The principal matters for consideration on this writ of error are the claims that the preference given by the insolvent Joliet Enterprise Company to Mary V. Fish was unlawful and invalid, and that the judgment for \$176,420.96 rendered on the 30th day of November, 1892, against the Joliet Enterprise Company, and in favor of Henry Fish & Sons, was and is illegal, and should be set aside, as an unlawful preference. On November 30, 1892, the Joliet Enterprise Company was insolvent. At that time, and for some time prior thereto, it was indebted to Mary V. Fish in the sum of \$15,000, for borrowed money, and she held the judgment note of the corporation

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

therefor. She was the mother of Charles M. Fish, George M. Fish, and Henry M. Fish,—three of the five directors of the company. On the day mentioned the corporation, through its directors and officers, conveyed to her certain real estate in payment of the indebtedness due her, and she accepted the deed in satisfaction of her claim. The value of property conveyed was not greater than the amount of the debt for which it was given.

It is the settled law of this state that the directors and officers of an insolvent corporation have the power to dispose of corporate property in good faith for the purpose of paying or securing corporate debts, and that they may do this even though the result is that some creditors are given a preference over others. *Reichwald v. Hotel Co.*, 106 Ill. 439; *Bouton v. Smith*, 113 Ill. 481; *Burch v. West*, 134 Ill. 258, 25 N. E. 658; *Ragland v. McFall*, 137 Ill. 81, 27 N. E. 75; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Warren v. Bank*, 149 Ill. 9, 38 N. E. 122; *Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 153; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992. And the fact of relationship of the person to whom preference is given to one or more of the directors or officers of the corporation does not invalidate the transaction, if it is otherwise fair and free from fraud. *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Ragland v. McFall*, *supra*; *Gottlieb v. Miller*, *supra*; *Blair v. Steel Co.*, 42 N. E. —. There was no error in sustaining the validity of the conveyance to Mrs. Fish.

The firm of Henry Fish & Sons was composed of Henry Fish, the father, and his three sons, George M. Fish, Charles M. Fish, and Henry M. Fish, and it was engaged in the banking business at Joliet. The Joliet Enterprise Company was engaged in carrying on an extensive business in the manufacture of barbed wire. Said George M., Charles M., and Henry M. were, as already stated, three, and a majority, of its board of directors. The firm had for some years been loaning large sums of money to the corporation. On the morning of November 30, 1892, the firm held six judgment notes of the company, for \$29,000 each, amounting in the aggregate to \$174,000. At that time it was manifest that both the bank and the corporation were insolvent, and that both would be compelled to suspend payment. Among other things that were done during the morning of that day, a judgment was entered upon said judgment notes, in favor of Henry M. Fish & Sons, for \$176,420.96 and costs, and execution immediately issued thereon, and a levy made on the property of the corporation. Later in the day the firm of Henry Fish & Sons made a voluntary assignment for the benefit of its creditors, and James L. O'Donnell, the principal defendant in error herein, became the assignee. In the decree in equity that was afterwards entered in the circuit court of Will county, the judgment by confession was sustained to the extent of \$116,000, and to

that extent only, and for the amount for which it was sustained it was given priority. But the court found and decreed that the Joliet Enterprise Company was insolvent on and after March 31, 1892; that while four of the judgment notes were renewals of like notes for loans made prior to said date, yet the other two of said judgment notes of \$29,000 each, upon which the judgment by confession was based, were for loans made after that date, and after insolvency; and that said corporation then had no power to make said two last-mentioned judgment notes, because three of the partners in the banking firm of Henry Fish & Sons were directors and officers of the insolvent corporation. And the court also found and decreed that an attorney's fee for \$1,000 was unlawfully and improperly included in the judgment, and also that \$1,420.96 interest was wrongfully included therein. O'Donnell, the assignee of Henry Fish & Sons, appealed from the decree to the appellate court, and both errors and cross errors were assigned in that court. The judgment of the appellate court sustained the findings and decrees of the circuit court in regard to the sums of \$116,000 and \$1,420.96, respectively, but reversed its findings and decrees in regard to the two notes of \$29,000 each, and in regard to the attorney fee of \$1,000. It reversed the decree as to the judgment by confession, and remanded the cause, with directions to sustain said judgment for the amount for which the same was entered, except \$1,420.96, which had erroneously been included as interest, and which was ordered to be deducted as of the date of said judgment, leaving said judgment as of such date at the sum of \$175,000; and which judgment, with interest thereon, was ordered to be preserved as a lien upon the property of said Joliet Enterprise Company, in favor of said firm of Henry Fish & Sons and their assignee under the judgment, execution, and levy.

It is conceded by all parties that the deduction of \$1,420.96 was properly made from the judgment by confession. It was included in that judgment as interest, whereas the notes were not due at the time of rendition of judgment, and interest on them up to times of maturity had been paid. The judgment also contained another element of double and unlawful interest, which a court of equity should correct. Interest had already been paid in advance up to the dates of the maturity of each of the six notes, respectively; and, upon the entry of judgment before maturity at the election, and by the voluntary act, of the payees of the notes, this unearned interest should have been subtracted. The directions given by the appellate court are so modified as that the just and equitable proportion of the interest paid should be deducted from the face of the notes and the judgment.

The circuit court, in its decree, found that the Joliet Enterprise Company was insolvent on the 31st day of March, 1892, and from and

after that date. For the purposes of the decision, we will assume the correctness of this finding. Four of the judgment notes on which the judgment was based, the principal of said notes amounting to \$116,000, were renewals of other like judgment notes, and represented money actually loaned to the corporation by said banking firm of Henry Fish & Sons; said notes having their origin in loans made and judgment notes given on December 18, 1890, October 3, 1891, October 31, 1891, and February 16, 1892, respectively. The giving of a judgment note is the giving of a security or preference. *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372. Although this may be so, yet there can be no serious question of the propriety of the action of both of the courts below in sustaining the judgment, so far as it has for its foundation the four renewal notes mentioned above. The renewal judgment notes were only continuations of the original judgment notes giving during the solvency of the company. The substance of the matter is that each loan of money, and judgment note given therefor, continued to be one and the same transaction, without reference to the number of like judgment notes given in renewal, and without regard to the fact that the last renewals may have been after corporate insolvency. *Saylor v. Daniels*, 37 Ill. 331. And the law is that the directors or officers of a solvent corporation, acting in good faith, may deal with it, and loan it money, and take security therefor, and that the subsequent insolvency of the corporation will not affect their rights of action to recover such loans, or enforce their securities. *Bank v. Schott*, 135 Ill. 655, 26 N. E. 640. The circuit court found that two of the judgment notes for \$29,000 each had their origin in loans made by Henry Fish & Sons to the insolvent company,—one on June 13, 1892, and the other on October 4, 1892. It held that the taking of security for such loans by way of warrants of attorney to confess judgment, or by way of judgment notes, was inequitable and unauthorized, as against the creditors of the Joliet Enterprise Company, and forbidden by law. And it therefore set aside and canceled the judgment as to \$58,000, that being the amount of the principal debts secured by said two notes. Upon the appeal of O'Donnell, the assignee of the insolvent firm of Henry Fish & Sons, the appellate court held otherwise in regard to said two notes, as already herein sufficiently appears. The two loans of money amounting in the aggregate to \$58,000 were made by the banking firm to the corporation in good faith, and the judgment notes were given therefor at the times that the loans were respectively made. The assets of the corporation were not diminished by the transactions. It got the benefit of the moneys so borrowed, and they were used in completing the new plant that it constructed at a cost of some \$280,000, and in conducting and keeping on its feet its large manufacturing business. The banking firm

did not obtain or anticipate receiving any advantages to itself by loaning the money to the corporation, other than that of getting interest on the money that it loaned. The corporation, at the time of these transactions, was embarrassed for want of means,—in fact, insolvent, in the sense that its liabilities exceeded its assets,—and it was forced to adopt various temporary shifts and expedients for the purpose of raising money. At the same time it was a going concern; had an extensive plant, which had cost it over a quarter of a million of dollars, and was unincumbered; was employing some 300 workmen; had on hand manufactured products worth about \$200,000; and was doing a large business, and meeting its commercial obligations. The securities that were given by the corporation to the banking firm, i. e. judgment notes, were not outside of the usual order of things, for the evidence shows that it was, and for many years had been, the custom and usage of the banking firm to require judgment notes in all cases of actual and absolute loans of money, and that the same custom and usage obtained with all of the other banks and banking firms doing business in the city of Joliet. There is a marked difference between a case where a mortgage or other preference is given by an insolvent corporation to a director or officer to secure a pre-existing indebtedness, and a case like this, where the corporation, though in fact insolvent, in the sense above stated, is a going corporation, that is seeking to accomplish the objects of its incorporation, and the security is given to directors for moneys actually and in good faith loaned at the time the security is given to such embarrassed corporation, and for its benefit. In *Harts v. Brown*, 77 Ill. 226, the coal company had expended all of its means in sinking its shaft, etc., and owed debts to the amount of from \$23,000 to \$33,000. This court held that the directors had power to borrow money from one of their number, and execute to him a mortgage on the corporate property. It was there said: "The company had expended all their means, and had failed to realize their expectations, and had reached a point at which the enterprise must be abandoned, unless means could be procured to further prosecute the work; and, so far as we can see, there was nothing reckless or unbusinesslike in effecting this loan for the time at the rate of interest or on the security given. They all seem to be according to the usual course of business." In *Oil Co. v. Marbury*, 91 U. S. 587, the corporation became very much embarrassed, and borrowed money from Marbury, who was one of its directors, and secured him by a note and trust deed. The court found that the loan was made in good faith to assist the corporation in its embarrassments, and held that no rule of law prohibited a director from loaning money to the corporation in good faith, when it was needed for its benefit, and that such a rule would deprive a corporation of the aid of those most

interested in it, and most likely to render it assistance. The views we entertain in respect to the particular matter now under consideration are well expressed in certain language used by Justice Harlan in delivering the opinion of the circuit court of appeals in the late case of *Manufacturing Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496. We quote the language referred to, which is as follows: "A corporation is not required, by any duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be obtained by further effort upon its part. It is in the line of right and duty when attempting, in good faith, by the exercise of its lawful powers, and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and, by a mortgage upon its property, secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind, a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Richardson's Ex'r v. Green*, 133 U. S. 30, 43, 10 Sup. Ct. 280; *Oil Co. v. Marbury*, 91 U. S. 587, 588." A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith, and for the apparent benefit of such corporations, from loaning them money, and at the same time taking from them security for repayment, the terms and the securities being such as are in accord with the usual course of business, would be highly injurious to corporations themselves, and frequently detrimental to the interests of their creditors. The line of demarcation that separates valid from invalid preferences to directors or officers of insolvent corporations lies between already incurred liabilities, and liabilities assumed by going corporations at the time the security is given and taken. In our opinion, there was no error in the ruling of the appellate court that the judgment notes given for the moneys lent and advanced on June 13, 1892, and on October 4, 1892, were legal and valid securities and preferences, even as against the claims of the general creditors of the corporation. It is not intended or considered that anything herein decided or said is in conflict with the decisions in *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, and subsequent cases in line therewith.

Some other and minor objections to the decree are suggested, but we think that a part of them are, in principle, disposed of by what

we have already said, and that the others are not well taken, and do not require special notice. With the slight modification in the directions to the circuit court that has already been adverted to, the judgment and order of the appellate court is affirmed. The plaintiff in error will pay the costs made in this court. Affirmed.

(156 Ill. 448)

**DISTILLING & CATTLE FEEDING CO. v.
PEOPLE ex rel. MOLONEY,
Attorney General.¹**

(Supreme Court of Illinois. June 13, 1895.)

**COMBINATIONS IN RESTRAINT OF TRADE—WHISKY
TRUST—CORPORATIONS—QUO WARRANTO
—PLEADING.**

1. A trust combination organized in order to obtain control of the manufacture and sale of distillery products, by purchasing the stock of various distillery companies, and placing it in the hands of trustees, is illegal, as creating a monopoly.

2. Where such a trust combination is changed into a corporation, which is organized, owned, and controlled by the trustees of the combination, and to which all the property controlled by the combination is transferred, such corporation is also illegal.

3. A corporation authorized by its charter to engage in the general distilling business in Illinois and elsewhere, and to own the property necessary for that purpose, has no right to buy up substantially all the distilleries in the country, so as to acquire a virtual monopoly of the business.

4. In quo warranto proceedings against a corporation for abusing its franchises, and usurping powers and franchises which do not belong to it, a plea which expressly admits many of the allegations of the information, expressly denies the rest, and closes with a large number of affirmative allegations, is demurrable as being neither a plea of justification nor a disclaimer.

5. A plea which alleges that the defendant exercises its powers, privileges, and franchises by virtue of the articles of incorporation set out in the information, and denies that it was organized for the purpose of creating a monopoly, or that it had done any of the acts charged with any such purpose, is demurrable as tendering an immaterial issue.

Appeal from circuit court, Cook county; John Gibbons, Judge.

Quo warranto by the people of the state of Illinois, on the relation of M. T. Moloney, attorney general, against the Distilling & Cattle Feeding Company. There was judgment of ouster. Defendant appeals. Affirmed.

This was a proceeding by quo warranto, brought in the name of the people of the state of Illinois, by the attorney general, against the Distilling & Cattle Feeding Company. The defendant appeared and filed a number of pleas, to all of which demurrers were sustained; and, the defendant electing to abide by its pleas, judgment was rendered against it, ousting it from its franchises, and for costs. From that judgment, the defendant now appeals to this court.

The information alleges that on May 10,

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

1887, there were existing and doing business in various parts of this state five different corporations organized under our laws, also one corporation organized under the laws of the state of Missouri, and one corporation organized under the laws of the state of Ohio, and a copartnership and an individual also doing business in that state, all of which were then engaged in operating distilleries, in the purchase of grain, and in the manufacture and sale of alcohol and other distillery products, and that for the purpose of forming and creating a trust, and with the design of controlling and regulating the output, manufacture, and sale of distillery products, and of establishing a monopoly in the manufacture and sale of the same, the owners of the capital stock of those corporations, together with the firm and individual above mentioned, entered into and executed a trust agreement as follows:

"Whereas, it is designed to form a trust to be known as the 'Distillers' and Cattle Feeders' Trust,' for the purpose of securing intelligent co-operation in the business of distilling spirits from grain or other material, malting, and the feeding of live stock, and the sale of the products thereof in home and foreign markets, and to do all other business incidental to those enumerated: Therefore, it is mutually agreed by all who may sign this agreement, or become at any time the holders of the certificates of trust herein provided for, as follows:

"First. The trust herein created shall be vested in nine trustees.

"Second. William H. Hobart, George K. Duckworth, Lewis H. Green, Peter J. Hennessy, Alfred Davis, Joseph B. Greenhut, Warren H. Corning, Adolph Woolner, and John H. Francis are hereby appointed trustees, to hold their office until the 1st day of May, A. D. 1888, or until their successors are elected and qualified.

"Third. The trustees shall prepare certificates which shall show the interest of each beneficiary in said trust, and deliver them to the persons entitled thereto. The certificates shall be divided into shares of the par value of \$100.00 each, and shall be known as the 'Distillers' and Cattle Feeders' Trust Certificates.' The trustees shall have full power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be executed, attested, and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement, and by the by-laws herein provided for.

"Fourth. No certificates shall be issued except for stock, as hereinafter provided, and the par value of the certificates issued shall represent as nearly as possible the actual cash value of the stock held by the trustees in trust. The certificates shall be the best evidence of the amount of interest of the beneficiaries in the trust. No duplicate certificates shall be issued by the trustees ex-

cept upon surrender of the original certificate and cancellation of the same, or upon satisfactory proof of the loss thereof, and the giving of a satisfactory bond of indemnity.

"Fifth. Each subscriber hereto agrees to assign and transfer absolutely to said trustees the number of shares of capital stock of the particular corporation or corporations indicated in article 6 of this agreement, in consideration of which said trustees do hereby agree to execute and deliver to each subscriber trust certificates, as above specified, for the number of shares, which certificates, at the par value thereof, shall represent the cash value of the stock so delivered. The value of the capital of any corporation whose stock shall be assigned to said trustees shall be first agreed upon between said trustees and the stockholders willing to transfer the same, and, after it is agreed upon, there shall be no discrimination in the purchase price as between stockholders of the same corporation transferring their shares at the same time.

"Sixth. This agreement shall take effect as soon as those holding a majority of stock in the following corporations, formed or to be formed, to wit: The Storrs Distilling Company, by the Mill Creek Distilling Company; the Maddux-Hobart Company, by Maddux, Hobart & Co.; the White Mills Distilling Company, by George K. Duckworth; the Great Western Distilling Company; Monarch Distilling Company; Woolner Brothers' Distilling Company; Peoria Distilling Company; Birmingham Distilling Company, by Chicago Distilling Company; Missouri Distilling Company, by Mound City Distilling Company,—have transferred the same to said trustees. Thereafter the said trustees and their successors shall have power to purchase other stocks of the same companies, or of companies organized for conducting the same business, or any of the businesses hereinbefore specified, and may issue therefor certificates of trust equal at par value to the cash value of the stocks so purchased, or shall have power to lease the premises of such companies, paying therefor such rental as they may deem proper, whenever, in their judgment, it is for the best interests of the trust to lease rather than purchase.

"Seventh. All stocks sold and transferred to said trustees shall be held by them and their successors for the benefit of all the owners of said trust certificates. No stocks so held by said trustees shall be sold or surrendered by said trustees, during the continuance of this trust, without the consent of a majority, in number and value, of the holders of trust certificates: provided, however, that said trustees may from time to time assign such shares of stock as may be necessary to qualify any person or persons chosen or desired to be chosen as directors of any companies, the stocks of which are held by said trustees.

"Eighth. That said trustees shall have

power to cause corporations to be formed for the purposes and with all or any of the powers specified in section 1 of this agreement: provided, that the stock of such corporation shall be issued for cash or for property at its cash value, and shall be issued to or be purchased by said trustees in the manner provided in section 6 of this agreement.

"Ninth. Said trustees shall receive and safely keep all moneys received from dividends or interest upon stocks or moneys held in trust, and shall distribute the same, as well as all moneys received from sales of trust property, by declaring and paying monthly dividends upon said trust certificates as funds accumulate which are not needed for the uses and expenses of the trust. The trustees shall, however, keep separate accounts of receipts from dividends and interest, and of receipts from sales of trust property, and, in declaring any dividend in which moneys derived from sales of trust property are included, shall render the holders of trust certificates a statement showing what amount of the fund distributed was derived from such sales or transfers.

"Tenth. The trustees shall render to the holders of trust certificates at each annual meeting a statement of the receipts and disbursements of the trust for the year. They shall, also, whenever demanded by a majority in value of the holders of trust certificates, furnish a true and perfect inventory and appraisement of all property held in trust, and a statement as full as possible of the financial affairs of the various companies whose stocks are held in trust.

"Eleventh. Said trustees shall exercise supervision, so far as their ownership of stocks enables them to do, over the several corporations or associations whose stock is held by said trustees. As stockholders of said corporations, they shall elect, or endeavor to elect, honest and competent men as directors and officers thereof, who shall be paid a reasonable compensation for their services. They may elect themselves as such officers and directors, and shall endeavor to secure such judicious and efficient management of such corporations as shall be most conducive to the interests of the holders of trust certificates.

"Twelfth. None of the powers of the trustees can be exercised except by unanimous vote of their full number, either in person or by proxy, except in the election of officers as provided in the by-laws: provided, that no proxy to represent a trustee can be given to or be voted by any person other than a trustee. And, in case of a disagreement among the trustees upon any matter, a majority of such trustees may call a special meeting of the holders of the certificates, as herein provided for, to whom shall be submitted the matter of disagreement; and a decision of a majority in value of the holders of trust certificates present in per-

son or by proxy shall be final, or such matter of disagreement may be submitted at any regular meeting. The whole or any part of the foregoing provision of this article may be modified by any by-law now or hereafter adopted by the certificate holders. The said trustees may appoint from their own number an executive committee, and may appoint other committees composed wholly or partly of persons not of the board of trustees, and delegate to such committees such of their powers as they may deem advisable. A majority of each committee may exercise all the powers conferred upon such committee.

"Thirteenth. The trustees may employ and pay all such agents and attorneys as they may find it necessary to employ in the management of said trust.

"Fourteenth. Each trustee shall be entitled to a salary for his services of \$10 per day: provided, however, that such salary may be increased by a majority of the certificate holders at any regular or special meeting. All salaries and expenses connected with and growing out of the execution of the trust shall be paid by the trustees from the trust fund.

"Fifteenth. The board of trustees shall have its principal office in the city of Chicago, subject to change by a vote of the trustees, at which office, or in a place of safe deposit adjacent thereto, the stocks held in trust shall be kept.

"Sixteenth. All powers and duties vested in the trustees herein named shall vest in, and be exercised by, the successors of said trustees, appointed as herein prescribed.

"Seventeenth. Elections for trustees to succeed those herein appointed shall be held annually. At the first annual election, three trustees shall be elected to hold their office for one year, three to hold their office two years, and three to hold their office for three years. Thereafter three trustees shall be elected annually to take the places of those retiring, to hold their office for three years, except those elected to fill a vacancy arising from any cause except expiration of term, who shall be elected for the balance of the term of the trustees whose places they are elected to fill. Every trustee shall hold his office until his successor is elected and qualified.

"Eighteenth. No person shall be eligible to the office of trustee unless he shall at the time of his election be the actual owner of at least five hundred shares of trust certificates, which shall stand in his name on the books of the trust, and which certificates, or an amount of not less than five hundred shares, he shall continue to be the actual owner of during his term of service, and the ownership shown as above provided.

"Nineteenth. Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates who shall be registered

as such on the books of the trustees may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names; but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books shall be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such elections shall elect.

"Twentieth. The annual meeting of the owners of said trust certificates, for the election of trustees and for other business, shall be held at the office of the trustees on the Wednesday nearest the 15th day of April of each year, and said meetings may be adjourned from day to day until its business is completed. Special meetings of the owners of trust certificates may be called by a majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of the holders of trust certificates whenever requested so to do by a petition signed by the holders of 33⅓ per cent. in value of such certificates. The business of special meetings shall be confined to the objects specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given by mailing a notice to the address of each certificate holder, so far as known, at least ten days before such meeting.

"Twenty-First. At any meeting by-laws may be made, amended, and repealed by not less than two-thirds in value of the holders of trust certificates: provided, however, that said by-laws shall be in conformity with this agreement. By-laws may be also adopted by the trustees: provided, however, that said by-laws shall not be inconsistent with any by-laws which have been or may be adopted by the holders of trust certificates, nor with this trust agreement.

"Twenty-Second. Whenever a vacancy occurs in the board of trustees from any cause other than the expiration of the term of office, the remaining trustees may appoint a trustee to fill the vacancy until the next annual meeting, or, at their option, may call a meeting of the owners of trust certificates for the purpose of electing a trustee to fill the vacancy or vacancies.

"Twenty-Third. If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill a vacancy or vacancies, the trustee or trustees so appointed shall hold his or their office or offices only until his or their successor or successors shall be appointed or elected in the manner above provided for.

"Twenty-Fourth. It shall be obligatory upon all trustees to attend each and every meeting of the board of trustees, either in person or by proxy; and in the event of any trustee absenting himself from three successive meet-

ings, or failing to be represented by proxy at such meetings, then, in such case, the office held by such trustee shall be considered vacant, and the vacancy be filled as heretofore provided.

"Twenty-Fifth. Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof; but formal transfer shall be made, and it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee, or the executor or administrator of any deceased trustee, to make such transfer.

"Twenty-Sixth. The trust shall continue for twenty-five years from this date, and shall thereafter continue until terminated by a vote of 66⅔ per cent. in value of the holders of certificates, at a meeting called for that purpose. After 66⅔ per cent. in value of the holders of trust certificates shall vote to terminate the trust as aforesaid, they may at the same meeting, or at a subsequent meeting called for that purpose, decide by a vote of 51 per cent. of their number the mode in which the affairs of the trust shall be wound up, and whether the trust shall be distributed, or whether it shall be sold, and the value thereof distributed, or whether part, and, if so, what part, shall be divided, and what part shall be sold, and whether such sales shall be public or private. The trustees, who shall continue to hold their offices for that purpose, shall wind up the affairs of the trust in the mode agreed upon by the holders of trust certificates as aforesaid."

Appended to and forming a part of the foregoing agreement was a draft or form of the trust certificate therein provided for, by the terms of which the parties therein named were entitled to the number of shares therein designated in the equity of the property held by the trustees, transferable only on the books of the trustees and surrender of the certificate; and it was expressly provided that it was issued upon condition that the holder or any transferee thereof should be subject to all the provisions of the agreement creating the trust, and of the by-laws adopted in pursuance thereof, as fully as if the holder or transferee had signed the trust agreement.

The information further alleges that within one year after May 10, 1887 (the date of the trust agreement), there had been drawn into and absorbed by the trust and combination, upon the terms and provisions of the trust agreement, 81 different distillery companies organized under the laws of the various states in which they were respectively located, and which had theretofore been organized for the purpose of carrying on and operating the distillery business, and of producing alcohol, spirits, high wines, and all other distillery products from the distillation of grain, and were engaged in the sale of such

products; that among the 81 distillery companies thus drawn into and absorbed by the combination, and which had transferred all their capital stock to the Distillers' and Cattle Feeders' Trust, were not less than 22 organized under the laws of this state, in addition to those who were parties to the original trust agreement, several of those companies being located in the county of Cook; that the owners of the capital stock of each of the corporations entering into or absorbed by trust, and the officers and directors thereof, consented and agreed to the scheme of the trust, and became parties thereto, and that, to carry out the scheme and combination of the trust, each of the corporations conveyed its real estate to some person to hold in trust for such persons as were then the holders of its capital stock, and that such trustee executed back to the corporation a lease of the real property for the term of 25 years, and the stockholders of the corporations thereupon surrendered the entire capital stock of the corporation to the Distillers' and Cattle Feeders' Trust in exchange for trust certificates, and thereby the trustees of the Distillers' and Cattle Feeders' Trust became the holders of all the capital stock of all of the corporations; that thereafter, and until about February 11, 1890, the trustees of the trust held, owned, and controlled the capital stock of all of said corporations, and thereby, during all that time, elected from their own number a majority of the directors of each of the corporations, and directed and controlled the business of all of them, and were enabled to and did exercise and control all the franchises and powers of each of said corporations.

The information further alleges that in the month of February, 1890, a special meeting of the certificate holders of the trust was held at Peoria, to consider the advisability of changing the form of organization into a corporation, and of continuing the unlawful trust under a corporate form; that at such meeting the following preamble and resolutions were adopted: "Whereas, the trustees of the Distillers' and Cattle Feeders' Trust have recommended the formation of a corporation under the laws of the state of Illinois, to be called the 'Distilling and Cattle Feeding Company,' with a capital stock of thirty-five million dollars; and whereas, it is deemed advisable and for the best interests of the holders of the certificates of the Distillers' and Cattle Feeders' Trust that said corporation should be formed, as recommended by the trustees, and that all the property now in the hands or under control of or represented or managed by the trustees of the said Distillers' and Cattle Feeders' Trust should be transferred to said corporation when formed and organized according to law, and that the certificates now held of the said Distillers' and Cattle Feeders' Trust should be exchanged for the stock of said corporation when issued (the said certificates being of the par value of one hundred dollars each, and the said shares

of stock also of the par value of one hundred dollars each), giving to each certificate holder for each certificate of the par value aforesaid one share of the stock of said corporation of the par value aforesaid: Therefore, now be it resolved, by the holders of certificates of the Distillers' and Cattle Feeders' Trust now here present, that the trustees of the Distillers' and Cattle Feeders' Trust be, and they are hereby, authorized, empowered, and instructed, upon receiving from the corporation known as the 'Distilling and Cattle Feeding Company' all the capital stock of said company, to sell, convey, assign, transfer, set over, and deliver to the Distilling and Cattle Feeding Company all of the right, title, and interest of the trustees, as trustees, of the Distillers' and Cattle Feeders' Trust in and to all property, real, personal, and mixed, of every nature, kind, and description, including moneys and bills receivable; and that said trustees also cause such proceedings to be had by the various companies interested in the Distillers' and Cattle Feeders' Trust, by the stockholders and directors thereof, as to convey all the property of said companies to the said Distilling and Cattle Feeding Company, including therein all leaseholds, leases, contracts, and every nature, kind, and description of property, including the good will of the business of the several companies, which companies shall be received and accepted by the said Distilling and Cattle Feeding Company in full payment for the entire capital stock thereof. And resolved, further, that, upon receiving the stock of said company as aforesaid, the said trustees proceed with all reasonable dispatch to exchange it for the certificates of the Distillers' and Cattle Feeders' Trust, share for share, and that the certificates of the said Distillers' and Cattle Feeders' Trust when received upon said exchange be held by the said trustees until such time as a complete exchange is effected of the stock of the said Distilling and Cattle Feeding Company for all the outstanding certificates of the trust; and when such exchange has been made, and all the property has been transferred and conveyed to said corporation, as contemplated herein, the said certificates of the Distillers' and Cattle Feeders' Trust shall be canceled by said trustees. Resolved, further, that the remaining portion of the capital stock of the Distilling and Cattle Feeding Company, after making the exchange for the certificates aforesaid of the necessary amount, be used by the said trustees in protecting and taking care of, as they shall deem best and most advisable, the outstanding contracts and obligations of the trustees and the various companies interested in the Distillers' and Cattle Feeders' Trust; and, should they deem it for the best interests of all parties, they are hereby authorized to transfer said surplus of stock to the Distilling and Cattle Feeding Company, upon condition that the latter shall assume and agree to carry out all the outstanding

contracts of the trustees and of the various companies interested in the trust, and shall protect the trustees and the several companies against the same. Resolved, further, that it is distinctly understood, in the reorganization into a corporation under the laws of Illinois, such agreements shall be made by the trustees with the new corporation as shall require the latter to assume all obligations and contracts of the trustees and the various plants, and keep and carry out the same to the same extent as the trustees and various companies are obligated to do. Resolved, further, that in case any of the holders of certificates of the Distillers' and Cattle Feeders' Trust refuse or neglect to exchange certificates for shares of stock, as herein provided, said trustees, as trustees for such persons, shall hold such shares of stock, and receive the dividends thereon, for the use and benefit of the holders of such certificates, and said shares of stock, with the accumulated earnings thereon, shall be turned over to such certificate holders whenever ready and willing to exchange their certificates for such shares of stock; and whenever a complete exchange has been made by the trustees, and when all outstanding contracts of the trustees and of the various companies interested in the trust have been fully provided for and protected, the trustees shall then wind up the affairs of the trust, and the trust agreement shall be considered as annulled and canceled. And the trustees are hereby directed to proceed with all reasonable diligence to carry out the instructions aforesaid; and, when they have so done, they shall be deemed completely discharged from all further liability and duties as trustees."

It is further alleged that, in pursuance of these resolutions, for the purpose of more perfectly establishing the combination and making the monopoly thereof more complete, and of exercising more fully the power of regulating the production of alcohol, spirits, and other distillery products, and of more effectually preventing competition in the distillery business, and in order to clothe the unlawful combination in a legal garb, the trustees of the Distillers' and Cattle Feeders' Trust organized the defendant corporation under the general incorporation law of April 18, 1872, and the acts amendatory thereof; and the information sets out in full the certificate of incorporation executed by the secretary of state under the great seal of state, and also the several documents accompanying and forming a part thereof. From these documents it appears that the statement required to be made for the purpose of effecting incorporation under the statute was signed and acknowledged by three of the trustees of the Distillers' and Cattle Feeders' Trust, and that it was thereby stated that the name of the proposed corporation was the "Distilling and Cattle Feeding Company"; that the objects for which it was formed was "to carry on a general business

of distilling, redistilling, and rectifying high wines, alcohol, spirits, gins, and whiskies, of every kind and description, and deal in the same in the state of Illinois and elsewhere, and owning the property necessary for that purpose, and also to engage in feeding and dealing in cattle and other live stock; also malting and dealing in malt, and doing any other business incident to the main purpose of this corporation"; that the capital stock should be \$35,000,000, the amount of each share \$100, and the number of shares 350,000; that the location of the principal office of the corporation should be in Peoria, and the duration of the corporation 99 years. It also appears from the documents appended to the certificate of organization that, upon filing the statement, the secretary of state appointed the three persons who executed it commissioners to open books of subscription to the capital stock of the proposed corporation, and that thereupon all the stock was subscribed by the nine trustees of the Distillers' and Cattle Feeders' Trust, eight of them subscribing for 43,750 shares each, and the ninth for 500 shares; that, at a meeting of the subscribers thereupon duly called for the purpose of electing the directors of the corporation, the nine trustees of the trust were elected such directors for the term of one year.

The information alleges that the persons who were the trustees of the trust at the time of the organization of the corporation subscribed for all the stock in the corporation, and elected themselves its directors; that, at the same time, they, or so many of them as were necessary to constitute a majority of the directors of each of the corporations composing the trust, were directors thereof, and holders of all the stock in such corporations, and that they directed a conveyance of all the property of every kind and description which those corporations held to the Distilling and Cattle Feeding Company, and that, as directors of those corporations, they executed or caused to be executed to the Distilling and Cattle Feeding Company, of which they were also directors, a conveyance or transfer of all of the property of the several constituent corporations, but that they made no transfer or assignment of the stock of those various corporations so held by them, but that they, who were at the same time directors of those respective corporations and of the Distilling and Cattle Feeding Company, continued to hold and still hold the stock of those several corporations; that, immediately after the organization of the Distilling and Cattle Feeding Company, the holders of certificates in the Distillers' and Cattle Feeders' Trust were called together, and that their trust certificates were surrendered to the trustees of the trust, and that there were thereupon issued to the holders, in lieu thereof, shares of the capital stock of the Distilling and Cattle Feeding Company, share for share, the directors of the

last-named company agreeing to assume and discharge all the contracts and obligations of the Distillers' and Cattle Feeders' Trust to the former owners of the stock of each of the corporations which were members of the trust; that those several corporations still continue as corporations in form, but have not been operated by their directors since the organization of the Distilling and Cattle Feeding Company, and since the transfer of all their property to the last-named company; that the franchises of those corporations, since they were drawn into the trust as above stated, have been paralyzed and held dead and useless in the hands of the directors of the Distilling and Cattle Feeding Company; and that that company directs, controls, and manages the property of those corporations as fully and completely, and with the same intention and design, and for the accomplishment of the same purposes, as the property and business of those respective corporations were managed, operated, and controlled under the trust agreement above set forth; and that the Distilling and Cattle Feeding Company is in fact a direct continuation of the Distillers' and Cattle Feeders' Trust. The information further alleges that the Distilling and Cattle Feeding Company has continued to procure and obtain, from time to time, by purchase or otherwise, the entire distillery property and business of still other distillery corporations organized under the laws of the various states; that in May, 1891, it acquired by purchase or otherwise, the entire distillery property and business of H. H. Shufeldt & Co. and of the Calumet Distilling Company, both of which were corporations organized and doing business under the laws of this state, and located at Chicago; that at the time of making these purchases, and as a part consideration therefor, it exacted from the holders of the principal part of the capital stock of those corporations contracts that they would not at any time within five years from the date of the purchases, either jointly or severally, directly or indirectly, engage in the business of distilling, at any place in the United States within 1,000 miles of Chicago, and would not, during that time, have, own, or be interested in the capital stock of any corporation engaged in that business within said 1,000 miles, except the stock of the Distilling and Cattle Feeding Company; and that such contracts were in illegal restraint of trade.

It is further alleged that the Distilling and Cattle Feeding Company has been so managed and operated by its said directors that it has come into the control and substantial monopoly of the business of manufacturing high wines, spirits, and other distillery products from grain in the United States, and has succeeded in obtaining, by the methods above set forth, the ownership and control of every distillery product that in November, 1892, was in active operation in the United States north of the line of the Ohio river; that in

November, 1892, and at the present time, it was and is in control of the business of distilling high wines, spirits, and alcohol, so that it produced or controlled, and now produces or controls, 95 per cent. of the entire production of those articles in the United States, and that, in the course of its business in the year 1892, it disposed of those products to an amount in excess of 45,000,000 gallons; that it has been the policy of the company, carried out by its officers and directors, since its organization, for the purpose of preventing competition, and regulating and controlling the production and output of high wines, spirits, and alcohol, to dismantle and keep idle a large number of distillery plants which it has purchased, or of which it came into control and possession as aforesaid, that being only a continuation of the policy for which the Distillers' and Cattle Feeders' Trust was created, and upon which it operated; that it has obtained by purchase and exchange for its stock, the distillery plants, property, and rights of the various corporations above mentioned, not for the purpose of using them in the distillery business, but to dismantle them, and prevent their being used; that it has introduced a system of disposing of its output, by which, through various distributors in different parts of the United States, its productions are sold, and with each sale there is presented to the purchaser a rebate voucher promising to pay to the purchaser the sum of seven cents per gallon on the quantity purchased at the end of six months upon the condition that the purchaser shall, from the date thereof to the time of its payment, have bought all of his supply of such products as are produced by the company, and all compounds thereof, exclusively of one or more of the dealers whose names are printed on the back of such voucher, and who are the authorized distributors of the output of the products of the company; that, by means of this rebate system, the company brings under its control every dealer who becomes its patron, so that he is thereafter forced to continue to it his exclusive patronage, or subject himself to a greater or less loss of money which he would otherwise obtain from his rebate voucher, and thus the company has not only obtained the absolute control of the different corporations owning distilleries, and of the output of the manufacture of high wines, spirits, and alcohol, but the business has been so operated as to subject all the patrons thereof to such conditions that the company has grasped, and continues to grasp, nearly the entire distillery product trade, and has been enabled to dictate, and does dictate, prices to all consumers at pleasure. The information further alleges that the defendant company, by means of the combination and methods aforesaid, has exercised, and now exercises, such power and control over the output of distillery products, and over consumers of the same, as to destroy all competition in the manufacture, furnishing, and sale of such distillery prod-

ucts in this state and throughout the United States; that, for 12 months past, it has misused and perverted the powers and privileges conferred on it by law, and still continues to misuse and pervert such powers and privileges, and has usurped and willfully and unlawfully exercised, and continues to usurp and willfully and unlawfully exercise, powers, liberties, and franchises not conferred on it by law, to wit, the power, liberty, and franchise of obtaining by purchase and in exchange for its stock, and holding and owning, the whole of the property and rights of the Birmingham Distilling Company and five other distilling corporations, particularly named, and causing the nonuse of their powers and franchises, in such manner as to put those corporations and the property and rights thereof under one management and control, and to destroy all diversity of interests and competition between them, and the distilleries, property, and plants which were held and owned by them, in the manufacture and sale of high wines, alcohol, spirits, and all other distillery products, and hath, by means of its unlawful control and possession of the property and rights of those corporations, and by virtue of its also having the control and management of the property and rights of the other corporations above mentioned situate in this and other states, unlawfully perverted and destroyed all competition between them, and holds and exercises the power of maintaining a monopoly in the production of high wines, alcohol, spirits, and other products, to the injury of the inhabitants and public of the county of Cook, and the inhabitants and public of the state of Illinois.

The information prays that the Distilling and Cattle Feeding Company may be summoned to answer the people of the state of Illinois by what warrant it has so misused and perverted its powers and franchises, and has assumed and now assumes to exercise the aforesaid powers, liberties, privileges, and franchises.

The defendant's pleas, being held insufficient on demurrer, were amended; and, demurrers being again sustained to them, they were amended a second time. To the pleas thus amended, the attorney general interposed a special demurrer, which being sustained to all the pleas, the defendant elected to abide by its pleas, and the questions presented by the record arise upon the information and the pleas as thus amended. The pleas are five in number, and, with the exception of the fifth, are quite voluminous.

The first plea admits that on May 10, 1887, there were existing and doing business in this state, in Ohio, and in Missouri the seven corporations, the copartnership, and the individual alleged in the information, and that on that day they entered into the trust agreement above set forth; that within one year from May 10, 1887, the trust agreement embraced about 81 different distillery companies,

persons, and firms that had at some time prior thereto been engaged in the distillery business; that among them were the several Illinois corporations named in the information; that those corporations had all become parties to the trust agreement prior to February 11, 1890, and that each of them conveyed their real estate to some person to be held in trust for the persons who were then stockholders in their respective corporations, and that the trustee executed back to the corporation a lease of such real estate for the term of 25 years, and that the respective stockholders sold and surrendered their capital stock, except so much as was necessary to be retained to qualify for a minority of the directors, to the trustees named in the trust agreement and their successors; that the said trustees owned and controlled the stock in these various corporations; that special meeting of the holders of trust certificates of the Distillers' and Cattle Feeders' Trust was held in February, 1890, at Peoria, to consider the advisability of adopting a recommendation of the trustees to form a corporation with a capital stock of \$35,000,000, and that at such meeting the preamble and resolutions set out in the information were unanimously adopted; that the defendant was organized as stated in the information, and that its charter is therein correctly set forth; that the first board of directors of the Distilling and Cattle Feeding Company, incorporated as alleged, were the same individuals who had been trustees, and that they so continued until the annual election of directors; that the defendant subsequently purchased the property and business of H. H. Shufeldt & Co. and the property of the Calumet Distilling Company as alleged; that the defendant had dismantled the plants of the Chicago Distillery Company and of some 15 other companies; and that it had adopted the form of rebate voucher in the information set forth.

The plea then denies that all the firms and individuals mentioned as signing the trust agreement were on May 10, 1887, engaged in operating distilleries, in the purchase of corn, and in the manufacture of spirits, and in the sale of the same. It denies that the trust agreement was signed by said persons and corporations for the purpose of forming and creating a trust with the design of controlling and regulating the output, manufacture, and sale of distillery products in the county of Cook, and state of Illinois, and in the United States of America. It denies that the agreement was entered into for the purpose of establishing a monopoly in the manufacture and sale of alcohol, spirits, and high wines, and all other distillery products. It denies that the 81 distilling companies mentioned in the information were at the time they became parties to the agreement, or had been for several years prior thereto, carrying on and operating the distilling business, and producing alcohol, spirits, and high wines, and all other distillery products from

the distillation of grain, or that they were then engaged in the sale of such products. It denies that all of said distilling companies transferred their capital stock to the Distillers' and Cattle Feeders' Trust. It denies that the real estate of the respective corporations named in the information was conveyed to any trustee for the purpose of carrying out any scheme of combination and trust, or that the stock of such corporations was sold and transferred to the trustees of the trust for the purpose of effecting or carrying out any unlawful organization. It denies that the properties formerly belonging to the several corporations were transferred to the defendant under and by virtue of, or in accordance with, the preamble and resolutions set out in the information as having been adopted by the certificate holders in February, 1890. It denies that in pursuance of such resolutions, and for the purpose of more perfectly establishing said combination and making the monopoly thereof more complete, and exercising more fully the power of regulating the production of alcohol, spirits, and high wines, and of more effectually preventing competition in the distillery business, and in order to clothe the unlawful combination in a legal guise, the trustees organized the defendant corporation, and it denies that the defendant was formed with any such purpose or intent as charged in the information. The plea further denies that the trustees of the trust executed, or caused to be executed, to the defendant company, transfers and conveyances of all the property, of every kind and description. It denies that the individuals who were trustees of the trust, and who were directors of the defendant, or who were directors of the respective corporations above mentioned, continued to hold or still hold any stock in those corporations; and it denies that the individuals who were at the time to transfer, and did transfer, all the property of the respective corporations to the defendant, then were and still remain directors of those corporations, and then were and still are directors of the defendant. It denies that the holders of certificates in the trust were called together, and that their certificates were surrendered to the trustees of the trust, and that there were issued to them in lieu thereof shares of the capital stock of the defendant, as alleged in the information. It denies that the several corporations which went into and became members of the trust still continue as corporations in form. It denies that the defendant controls and manages the property of those corporations, as stated in the information. It denies that the defendant manages said property, or any of it, as it was managed by the respective corporations while parties to the trust. It denies that the defendant is a direct continuation of the trust. It denies that the defendant has been so managed and operated by its directors as to have come into the control

and substantial monopoly of the business of manufacturing high wines, spirits, and other distillery products from grain in the United States. It denies that it has succeeded in obtaining, by means of the methods set out in the information, the ownership or control of every distillery property that in November, 1892, was in active operation in that portion of the United States north of the Ohio river. It denies that in November, 1892, and at the present time, it was and is in control of the business of distilling high wines, spirits, and alcohol, so as to produce or control, or to now produce or control, 95 per cent. of the entire production of the product of those articles in the United States. It denies that it has been or is its policy, for the purpose of preventing competition and controlling the production and output of high wines, spirits, and alcohol, to dismantle and keep idle, or that it has dismantled or kept idle, a large number of distilling plants which it has purchased or into the possession of which it has come. It denies that it is a part of the defendant's policy to dismantle any plants or prevent their being used, or that it has or does keep such property idle, that could be used without loss in the production of alcohol, spirits, and high wines. It denies that, by means of the operation of the rebate system, the defendant brings under its control every dealer who becomes its patron, or that he is thereafter forced to continue his exclusive patronage or subject himself to a greater or less loss of money which he would otherwise obtain.

The plea further denies that the defendant had obtained the absolute control of the output and manufacture of high wines, spirits, and alcohol. It denies that the defendant has been so operated as to subject all its patrons to such condition that it has grasped and continues to grasp nearly the entire distillery product and trade. It denies that the defendant has been or is now enabled to dictate prices to consumers at pleasure. It denies that the defendant has exercised or now exercises such power of control over the output of distillery products and over consumers of the same as to destroy all competition in the manufacture, furnishing, and sale of distillery products. It denies that for 12 months last past, at the county of Cook, the defendant had misused and perverted the powers and privileges conferred on it by law. It denies that it still continues to misuse and pervert its powers and privileges, or that it has usurped and willfully exercised, or still continues to usurp and willfully exercise, powers, liberties, privileges, and franchises not conferred by law. It denies that the defendant has in any manner and form, as stated in the information, abused its powers and privileges, contrary to the statutes of the state or the common law of the land. It denies that it has destroyed all diversity of interest and of competition between the distilleries, proper-

ties, and plants which are held and owned, or which were held and owned, by their former owners. It denies that the defendant has unlawfully misused and perverted its powers and franchises, and usurped to itself, and still unlawfully usurps, holds and exercises, the power of maintaining a monopoly on the production for sale of high wines, alcohol, spirits, and other distillery products. It denies that the defendant has, in any sense as charged in the information, attempted to monopolize, or had any purpose of monopolizing, the manufacture and sale of distillery products. It denies that the powers and franchises granted to the defendant in and by its charter have been for 12 months last past, and still are, perverted and abused by the defendant, its stockholders, directors, and managers, for the purpose of establishing a monopoly in the distilling business. It denies that the defendant has, by the means stated in information, or in any other way, created and established, and now maintains, in the county of Cook, a virtual monopoly on the business of producing for sale and of selling high wines, alcohol, spirits, and other distillery products, contrary to law, and against the peace and dignity of the people of the state of Illinois.

The plea then alleges, on the contrary, that the defendant uses its franchises, powers, and privileges in the state of Illinois under and by virtue of the charter set out in the information, which charter is made a part of the plea, and under and by virtue of no other power of authority than that conferred by said charter and the laws of the land; that, after its incorporation, the defendant purchased the various plants of the companies, persons, and firms named in the information for a good and valuable consideration, for the purpose and with the intention of utilizing and using such plants in producing distilled spirits, high wines, and alcohol, and for no other purpose whatever; that it found on investigation that some of the plants so purchased, on account of their location and construction, could not be operated without loss, and thereupon the defendant did dismantle some of them, and used the machinery therein in refitting and repairing the other plants purchased of the corporations and persons in the information mentioned; that said plants were not dismantled for the purpose of preventing competition, but for the purpose of using their machinery in repairing and refitting other plants better located for the business, and in which distilling could be carried on more economically and successfully; that, prior and at the time the defendant purchased the properties described in the information, the producing capacity in the territory in the information mentioned was at least four times greater than the demand in this country for distilling spirits, alcohol, high wines, and other products of the still, by reason whereof a large number of the plants, to wit, 48, had been for a long time idle, and portions of their machinery had be-

come useless, and they were valuable only for such machinery as had not been injured by nonuse, and was capable of being used in refitting other distilleries as above stated; that the defendant's sole and only purpose in purchasing said properties was to operate distilleries to meet the demand of the public, and to secure only fair remuneration and returns for the investment, and not to create a monopoly, or prevent in any manner any other persons, parties, or corporations from engaging in like business in the territory described in the information.

The plea further alleges: That in the purchase of all of these properties, except that known as the "H. H. Shufeldt & Co. Property" and the "Calumet Distillery Property," the defendant placed no restrictions upon the sellers from going into the same business at any time and anywhere in the United States. That it purchased the Shufeldt property from the firm composed of Henry H. Shufeldt and John Lynch; and that, in the purchase of that property and the good will of the business, the sellers contracted not to engage in the same business within 1,000 miles of Chicago for the limited period of five years, and a similar contract existed with the Calumet Distilling Company; and that these were the only two properties touching which any condition or restraint was imposed upon the sellers in the purchase of the several properties. That all of the properties purchased from corporations were purchased under and by direction and authority of the stockholders and directors of the several corporations. That prior to the sale of the property, to wit, in the months of February and March, 1890, the stockholders in each of the companies adopted substantially the following resolutions: "Whereas, it is deemed best, and for the best interests of the stockholders of this corporation, to transfer all its property, of every nature, kind, and description, including all brands and good will of the business, to the Distilling and Cattle Feeding Company, a corporation organized under and by virtue of the laws of the state of Illinois: Now, therefore, be it resolved, by the stockholders of this company, that the board of directors be, and they are hereby, authorized to provide for the conveyance and transfer, in a proper and legal manner, of all the property of this company to the said Distilling and Cattle Feeding Company; and we, the stockholders, hereby fully authorize and empower said board of directors, in any manner they may deem advisable, to make said sale, conveyance, and transfer; and we hereby ratify and confirm all their acts in that behalf; and we also hereby empower and authorize the president of the board of directors to transfer any and all leasehold interests held by this corporation in any and all real estate and contracts and agreements to the said Distilling and Cattle Feeding Company, under the seal of this corporation. Resolved, that so soon as the sale, conveyance, and transfer of said property,

and of said leases and leasehold interests are made in accordance with the provisions hereof, and contracts and agreements are provided for, the board of directors shall provide for the cancellation of all outstanding stock of this corporation, as soon as the same is canceled, to surrender the charter held by this company, and so notify the secretary of state." That the directors of each of the corporations thereafter, in pursuance of the foregoing preamble and resolutions, did, in the months of February and March, 1890, adopt substantially the following preamble and resolutions: "Whereas, the stockholders of this corporation did on the — day of February, A. D. 1890, at the office of the corporation, at which all the stock of the corporation was represented, by resolution unanimously adopted, empower the directors to provide for the sale, conveyance, and transfer of all the property of this corporation, of every nature, kind, and description, including assignment of leases and leasehold interests, to the Distilling and Cattle Feeding Company: Now, therefore, be it resolved, by the board of directors, that the president be, and he is hereby, authorized and empowered to make a proper bill of sale, in the name of the corporation, of all the property, of every nature, kind, and description, and good will of the business, to the Distilling and Cattle Feeding Company, and also to assign, transfer, and set over any and all leases held by this corporation to the said Distilling and Cattle Feeding Company, conditioned that the latter shall carry out and keep the covenants of said leases, and shall pay all rents that may become due thereon. Resolved, further, that upon so conveying and transferring said property, and assigning said leases, and providing for the assuming of all outstanding contracts and agreements of this company, the president be, and he is hereby, authorized and empowered to cancel the outstanding stock of this corporation in compliance with the resolution of the stockholders in that behalf; to wind up the affairs of the corporation; and to certify to the secretary of the state of Illinois that the stock is canceled, that said corporation has discharged all its legal liabilities, ceased to do business, and claims no further powers or privileges under or by virtue of its charter."

The plea further alleges that the defendant acquired its property under and by virtue of the foregoing resolutions, by proper conveyances made by the officers of the respective corporations named in the information, and not otherwise; that, immediately upon the transfer of the properties being made to the defendant, the stock of the several corporations mentioned in the information was duly canceled, and the business of the corporations wound up; that no stock in any of those corporations has been in existence or outstanding or held by any person or parties since May 1, 1890, and the secretary of state of Illinois has been notified by affidavit that all of those corporations organized under the

laws of this state have paid their debts, canceled their stock, and ceased to do business, and no longer claim any rights under their respective charters, and that the secretary of state is at liberty to use any of their names for any new corporation. The plea further alleges that the defendant has not at any time since its incorporation produced to exceed 65 per cent. of the alcohol, spirits, and high wines required by the trade or consumers; that it has not at any time, and does not now, monopolize the trade in spirits, alcohol, and high wines in the territory named, or elsewhere in the United States; but, on the contrary, shows that there are, and were at the commencement of this proceeding, in active competition with the defendant, in the production of alcohol, spirits, and high wines, some 18 distillery companies, the names and places of business of which are particularly set forth in the plea, having in the aggregate the capacity for the daily consumption of 34,750 bushels of grain, equal to the production of at least two-thirds the entire demand for alcohol, spirits, and high wines in the country, and that those companies are in active competition with the defendant in the business, and that the defendant does not monopolize the business of producing spirits, alcohol, and high wines in the territory named in the information or elsewhere; that, in addition to the above, two distillery plants are in process of erection,—one at Terre Haute, Ind., and the other at Peoria, in this state,—with an aggregate capacity of 11,000 bushels of grain per day, both of which are designed for and intended to enter into the production of alcohol, spirits, and high wines, in active competition with the defendant. The plea further alleges that the defendant has not sought to enhance prices to dealers and consumers, and that the average price to the dealer and consumer since the organization of the defendant has been less than the average price for the 10 years preceding its organization; that the adoption of the rebate vouchers mentioned in the information is designed only to secure and retain so much of the trade as it legitimately might and could in competition with other distilleries, designing thereby only to seek a market for its goods, without placing any restraint upon the sale of goods produced by other persons, parties, firms, and corporations in competition with the defendant; that the defendant has a fixed price, from time to time, for its goods, based upon the cost of production; and that it has sought only, in fixing such price, to secure fair returns upon the money and labor invested in the business; and that it has not sought at any time to dictate or control the prices at which the goods produced by any other person, firm, or corporation should be sold in the market; and that it has not sought to control the market any further than by fair and open competition in the markets of this country and of the world.

The second plea is substantially like the first, omitting the several averments therein contained expressly denying matters alleged in the information; while the third plea merely repeats in substance the several denials contained in the first. The fourth plea is in substance like the first, omitting the express admissions and the express denials therein contained. The fifth plea alleges simply that the defendant exercises its powers, privileges, and franchises of a corporation under and by virtue of the articles of incorporation set out in the information, and denies that the defendant was organized for the purpose of creating, continuing, perpetuating, or being a monopoly in the manufacture and sale of distilled spirits, alcohol, and high wines, or that it has done at any time any of the acts charged in the information with such purpose and design.

The attorney general, in his demurrer to the foregoing pleas, alleges numerous special grounds of demurrer, and, among others, that the pleas are evasive; that they are argumentative; that they are double; that they undertake to answer the information by way of confession and avoidance, and by way of denial and traverse of the material allegations of the information, in one and the same plea, and thereby tend to great and unnecessary prolixity of pleading; that they attempt to put in issue matters of inference from the facts alleged, and matters not properly issuable, and do not confess and avoid the substantial matters in the information alleged, nor disclaim or justify those matters; that the first, second, and fourth pleas do not conclude to the country; that the third plea undertakes to tender divers and several distinct issues, wholly immaterial and incapable of trial in this action; that it does not undertake to justify the usurpation of franchises charged in the information, nor does it disclaim the right, liberty, or privilege to exercise the franchise which the information charges the defendant with exercising and usurping; that the fifth plea sets forth matters not capable of trial, and upon which apt or material issues cannot be taken. The demurrer being sustained to all the pleas, judgment of ouster was entered against the defendant, as above stated.

Stevens & Horton and Runnells & Burry, for appellant. M. T. Moloney, Atty. Gen. (Samuel Richolson, T. J. Scofield, and M. L. Newell, of counsel), for appellee.

BAILEY, J. (after stating the facts). This proceeding being brought against the defendant by its corporate name, the regularity and legality of its organization as a corporation is impliedly admitted (*People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843); and not only is this so, but the information sets out the defendant's charter and the proceedings which resulted in its incorporation in express terms, thus expressly admitting the pur-

poses of its organization and the scope of its corporate powers. The question, then, of the defendant's organization, and of its right, not only to exercise the franchise of being a corporation, but to use and exercise the several powers conferred by its charter, is not raised by the information, and is not in controversy here. But the information charges the defendant with abusing its franchises, and with usurping and exercising powers, privileges, and franchises which do not belong to it; and, assuming for the present that those charges are sufficient to require an answer from the defendant, the first question presented is whether the court below properly sustained the demurrer to the defendant's pleas.

The tendency of the courts in modern times being to regard an information in the nature of a quo warranto in the light of a civil remedy, invoked for the determination of civil rights, although still retaining its criminal form and some of the incidents of criminal proceedings, the better doctrine now is that the pleadings should conform, as far as possible, to the general principles and rules which govern in ordinary civil actions. High, Extr. Leg. Rem. § 710. And this is especially so in this state, in view of section 10 of our practice act, which provides that in cases of this character it shall be sufficient to summon the defendant to appear and answer the plaintiff in an action of quo warranto, and that the issues shall be made up by answering, pleading, or demurring to the petition, as in other cases. 2 Starr & C. Ann. St. p. 1779. It has been repeatedly held in this state that in proceedings of this character the defendant must either disclaim or justify. If he disclaims, the people are at once entitled to judgment, and, if he justifies, he must set out his title specially. *Clark v. People*, 15 Ill. 213; *Illinois Midland Ry. Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 484; *Carrico v. People*, 123 Ill. 198, 14 N. E. 66. See, also, High, Extr. Leg. Rem. § 716. In our opinion, none of the pleas in this case conform to this rule. The first plea, the substance of which is set out at length in the foregoing statement, is partly a plea of justification, and partly a disclaimer, but is neither a complete plea of justification nor a full disclaimer; and very much the same thing may be said of all the other pleas. As was said in *Illinois Midland Ry. Co. v. People*, supra: "Such pleas must be consistent, and not allege defenses repugnant to each other. This one contains some matters tending to show justification, and others tending to show a disclaimer. In that respect the defenses set up are repugnant and inconsistent with each other, and for that reason the plea is bad." But, in addition to this, all the pleas, with perhaps the exception of the fifth, contain various defects of form, which are sufficiently pointed out by the special demurrer. The first plea, and to a lesser extent the second, third, and fourth pleas, show an evident attempt to follow the usual form of an answer in chancery, rather than

that of a plea at law. The first plea commences with an express admission of many of the allegations of the information. Then follow a large number of express denials of particular facts alleged in the information, those denials, as far as they go, being in the nature of a disclaimer; and the plea closes with express allegations of a large number of affirmative facts, intended apparently to serve by way of justification. But, even if the disclaimer and the justification were both full and complete, they constitute repugnant and inconsistent defenses, and the attempt to join them in the same plea renders the plea obnoxious to demurrer. The second plea is substantially like the first, omitting the denials. The third plea embodies simply the denials contained in the first, and the fourth contains the affirmative allegations appearing in the first. Various of the allegations of these pleas are evasive and argumentative, and constitute negatives pregnant. It would be tedious to discuss at length the various defects of form in these pleas pointed out by special demurrer, and one or two must serve by way of example. Thus, the denial that all the firms, individuals, and corporations mentioned as signing the trust agreement were on May 10, 1887, engaged in operating distilleries, in the purchase of corn, and in the manufacture of spirits and the sale of the same, may be true, and yet all the distillery companies, firms, and individuals but one may have been engaged in all those lines of business, and that one may have been engaged in part of them. Of the same character is the denial that all of the distillery companies joining the trust transferred their capital stock to the trust. This may be true, and yet all but one may have made such transfer of their stock. Various other similarly evasive averments might be cited. The pleas are double, in that they attempt to raise a great variety of issues, some material and some immaterial, thus tending to great and unnecessary prolixity of pleading. That pleas containing such defects were obnoxious to both general and special demurrers seems too clear to require extended argument.

The fifth plea differs somewhat from the others, and should be considered separately. It alleges that the defendant exercises its powers, privileges, and franchises of a corporation under and by virtue of the articles of incorporation set out in the information and denies that it was organized for the purpose of creating, continuing, perpetuating, or being a monopoly in the manufacture and sale of distilled spirits, alcohol, or high wines, or that it has done at any time any of the acts charged in the information with any such purpose or design, and it denies all abuse and misuse of its powers as charged in the information. When this plea is analyzed, it will be found that it wholly fails to tender any material issue, either by way of justification or disclaimer. It seeks to justify under its articles of incorporation, at the same

time denying that it was incorporated for the purpose of creating a monopoly, or that it has done any of the acts charged with that purpose; thus seeking to raise an issue upon the purposes and motives which actuated those who were instrumental in its organization, or who have conducted its affairs, without reference to the legal character and consequences of the acts charged. If the defendant is guilty of usurping and exercising powers and franchises not conferred upon it by law, the purpose or design with which it has done so is of little materiality. The denial that the defendant has abused and misused its powers as charged is not coextensive with the charges of the information, as the defendant is there charged, not only with abusing and misusing the powers conferred, but also with usurping and exercising powers not conferred upon it. It thus appears that the issues tendered by the fifth plea are either evasive or immaterial, and that the demurrer to that plea was also properly sustained.

Counsel for the defendant, as we understand them, practically admit the informality and insufficiency of their pleas, but insist that the information is materially defective, and that it is insufficient on its face to warrant or sustain the judgment of ouster, and they claim that the demurrer ought therefore to have been carried back and sustained to the information. It is undoubtedly the rule that, in proceedings of quo warranto, as in other suits at law, a demurrer reaches back to the first defect in pleading, so that a demurrer to a plea may reach defects in the information. *People v. Mississippi & A. R. Co.*, 13 Ill. 66; *People v. Whitcomb*, 55 Ill. 172. The attorney general, on the other hand, insists that, as no motion was made in the court below to carry the demurrer back to the information, it is too late to raise the question here. As the case is presented in this court, we do not regard it a matter of any material consequence whether the demurrer is technically carried back to the information, since the defects alleged by the defendant, if they exist, are such as may be taken advantage of on error, whether previously challenged by demurrer or not. They go to the sufficiency of the information, in point of substance, to sustain the judgment, and are available either on demurrer, on motion in arrest of judgment, or on error. The question, then, is fairly presented, whether the information is sufficient to sustain the judgment of ouster.

There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. No one who intelligently considers the scheme of this trust as detailed in the information can for a moment doubt that it was designed to be, and was in fact, a combination in restraint

of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create or tend to create a virtual monopoly in the manufacture and sale of products of that character. No other business principles can be suggested upon which the development of such an elaborate and far-reaching scheme can be accounted for. No rational purpose for such organization can be shown consistent with an intention to allow business to run in its normal channels, to give competition its legitimate operation, and to allow both production and prices to be controlled by the natural influence of supply and demand. And the results, as shown by the information, were such as might be anticipated. The trust obtained possession of nearly all the distilleries, and of nearly the entire distillery product of the United States; thus enabling it to dictate prices and the amount of production, and to thus draw to itself the substantial control of the distillery business of the country.

Combinations of this character have been frequently made the subject of judicial investigation within the last few years, and, while the proceeding has most generally been against some one of the corporations entering into the trust, the courts, so far as they have had occasion to speak on the subject at all, have held such trusts to be illegal. Among cases of this character reference may be had to *State v. Nebraska Distilling Co.*, 29 Neb. 700, 48 N. W. 155. The defendant in that case was one of the corporations entering into and forming the trust now under consideration; and while it was held that the action of the defendant corporation in entering into the trust was an abuse of its corporate powers, and so *ultra vires*, and the judgment of ouster was sustained on that ground, still the court, in its argument, take the position broadly that the trust, having a tendency to destroy competition and to create a monopoly, was contrary to public policy and unlawful; and the inference fairly arises that, if the exigencies of the case had required it, the court would unhesitatingly have placed its judgment on that ground. Another case of a similar character is *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279. The defendant in that case was an Ohio corporation, which had become a member of the Standard Oil Trust,—a trust organized upon very much the same plan as the one under consideration here. There the defendant was ousted from its power to make or perform the trust agreement, on the ground that such agreement was *ultra vires*. But the court, in its opinion, in speaking of the Standard Oil Trust, says: "Its object was a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products, throughout

the entire country, and by which it might not merely control the production, but the price at pleasure. All such associations are contrary to the policy of our state, and void." The case of *People v. North River Sugar-Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, was a proceeding brought to vacate the charter of the defendant corporation for its action in becoming a member of the "Sugar Trust,"—an association organized upon substantially the same plan as the trust in this case. It was held by Barrett, J., at special term, and by Daniels, J., at general term, that the trust was organized for an unlawful purpose, and that the action of the defendant corporation in entering into the association justified its dissolution. The judgment in this case was subsequently affirmed by the court of appeals, the latter court placing its decision solely on the ground of *ultra vires*, without expressing an opinion as to the legality of the trust. *People v. North River Sugar-Refining Co.*, 121 N. Y. 587, 24 N. E. 834. In *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, a corporation known as the Diamond Match Company was organized under articles of incorporation which stated that its business was to manufacture, buy, sell, and deal in friction matches, and all articles entering into the composition and manufacture thereof, and also in machines and machinery, whether applicable to the manufacture of friction matches or to certain other purposes, and to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery applicable thereto and to other purposes, and to buy, sell, own, and deal in any real or personal property necessary or convenient to the prosecution of the business. It appeared that the real object of the corporation was to buy up the property of all corporations or individuals engaged in the manufacture of friction matches, exacting from the seller in every case a bond that he would not, for a term of years, engage in, or aid any one else in, the manufacture of matches in any place where his action might conflict with the interest or diminish the profits of the Diamond Match Company. Suit was brought in Michigan to restrain the defendants from disposing of certain stock in the match company held by them as security for a loan to the complainant, to enable him to purchase the stock, and the circuit court granted the injunction. On appeal, the purposes of the company were declared to be unlawful, and it was held that any contract made to further them was void as against public policy, and such as the court would neither enforce while executory nor relieve against when executed. It was held that a corporation organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled and opposition crushed, and the whole business of the country in that line engrossed by the corpora-

tion, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had in fact reduced the prices of friction matches; that such policy may have been necessary to crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree; and that such combinations have frequently been condemned by courts as unlawful and against public policy. In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, the defendant corporation was organized under the general incorporation law of this state, for two purposes, as expressed in its articles of incorporation: (1) For the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and (2) "to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights, and franchises, of any gas works or gas company or companies, in Chicago or elsewhere," etc. The company sought to exercise the powers claimed under the second clause only, and, for that purpose, bought a majority of the shares of the stock in all the gas companies in Chicago, being four in number, whereby it might have the control of all the gas companies in the city, and thus destroy competition and monopolize the gas business; and it was held that the corporation so formed was not organized for a lawful purpose, and that all acts done by it towards the accomplishment of such object were illegal and void. Many other decisions of similar import might be referred to, but the foregoing will suffice. They are sufficient, in our opinion, to establish the conclusion, in which the courts of the country with very great unanimity seem to concur, that trusts of the character of the one described in the information as existing prior to the organization of the defendant corporation are against the policy of the law, and are therefore illegal and void.

But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, has purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal, rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the

corporations, and as a majority of the directors of each, controlled each corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity; and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies as before. The trust then being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country, over production and prices, and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and remain as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before, and is illegal still, and for the same reasons.

But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization, it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not clearly given is by implication denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power by its charter to enter on a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its char-

ter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the state by quo warranto, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed. Judgment affirmed.

(164 Mass. 170)

KEENE v. NEW ENGLAND MUT. ACC. ASS'N.

(Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1895.)

ACCIDENT INSURANCE—WALKING ON RAILROAD TRACK.

Deceased, who was killed in attempting to cross railroad tracks near a station where, with the permission of the company, they were commonly crossed by the public, was "walking or being on the roadbed," within the meaning of a policy providing that, for injuries received while walking or being on the roadbed of any railway, the beneficiary shall be entitled only to the death loss provided in the classification for railway employes.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Action by Carrie E. Keene, administratrix, against the New England Mutual Accident Association, on an accident insurance policy issued by defendant to plaintiff's intestate. There was a verdict for plaintiff, and defendant excepts. Exceptions sustained.

The policy, among other things, provided that, "for injuries received while * * * walking or being on the roadbed or bridge of any railway, the certificate holder or his beneficiary shall be entitled only to the indemnity or death loss provided in the classification of this association for railway employes insured to cover such risks." Deceased was killed while crossing railroad tracks at a station at a place where they were commonly crossed by people with the permission of the company.

E. M. Johnson and J. W. Keith, for plaintiff. Ramsey & Clark, for defendant.

HOLMES, J. The rulings asked are disposed of by the former decision in this case. *Keene v. Association*, 161 Mass. 149, 36 N. E. 891. So, also, are most of the matters excepted to in the charge. The jury were instructed that if there had been such a universal, uniform, and long-continued use by the general public, for a crossing, of the land where Keene, the deceased, was killed, as to give it the character of a line of travel, and such that it fairly might be inferred to be known to the railroad company, the deceased would be presumed to have known of the fact, and to be where he was rightfully, and not as a trespasser. If this were an action against the railroad company, and Keene had been upon the track simply as a member of the public, these instructions would be open to the criticism made in *Chenery v. Railroad*

Co., 160 Mass. 211, 212, 35 N. E. 554. See, also, *Wright v. Railroad Co.*, 142 Mass. 296, 7 N. E. 866. But the question is with regard to the rights of a passenger to get off the location of the railroad within which he finds himself by right. With regard to that, it already has been decided to be a question for the jury. It is not necessary to consider whether the mode of statement which was adopted was right in its way of reaching the result. The result was right as applied to this case. See, also, *Wheelock v. Railroad Co.*, 105 Mass. 203, 208.

The instructions as to what constituted voluntary exposure to unnecessary danger followed the former decision. Cases as to what would be negligence as between the deceased and the railroad are not in point.

The only question left open by the former decision is whether Keene was "walking or being on the roadbed" of a railway, within the meaning of the policy. If he had been walking along the track longitudinally, he clearly would have been within the clause. *Piper v. Association*, 161 Mass. 589, 37 N. E. 759. Perhaps, if he had been crossing where there was a public way, he would not have been within it. This case is nearer to the line. The words of the policy contain no exception, and in view of the plain purpose of the provision, which is to exclude liability for a well-known danger, we are of opinion that the implied exception, if any, does not extend to this case. On this point the exceptions must be sustained, unless the plaintiff consents to a reduction of the judgment to \$1,500.

Exceptions sustained.

(164 Mass. 142)

WHIPPLE v. BOND.

(Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1895.)

PREFERENCES BY INSOLVENT—VALIDITY.

1. Under Pub. St. c. 157, § 96, providing that preferences given a creditor by a debtor, "being insolvent or in contemplation of insolvency," within six months before the filing of a petition in insolvency, shall be void when the creditor has a reasonable cause to believe that the debtor is "insolvent or in contemplation of insolvency," and that the preference is in fraud of the insolvency laws, if the jury find that the debtor was insolvent at the time the preference was given, and that the person to whom the preference was given had reasonable cause to believe that the debtor was insolvent, they will generally be authorized in finding that the preference was in fraud of the insolvent law.

2. Under Pub. St. c. 157, § 96, the fact that the person to whom a preferential mortgage was given assumed a new liability by taking the mortgage as immaterial, if the mortgage was also given as security for a pre-existing liability.

Exceptions from superior court, Suffolk county; Ellisha B. Maynard, Judge.

Action of tort by Sherman L. Whipple, assignee of John E. McDougall, against Joseph T. Bond. There was a verdict for plaintiff,

and defendant excepts. Exceptions overruled.

There was evidence tending to show that a mortgage was given by plaintiff's insolvent assignor to defendant to secure him for a payment made to a firm to which the insolvent was indebted to the amount of \$500, and that defendant agreed to take up a \$200 note of the mortgagor upon which defendant was indorser. Regarding the balance of \$890 named in the mortgage, defendant contended that it was paid by check or in cash by him to the insolvent after the date of the mortgage.

S. L. Whipple and W. R. Sears, for plaintiff.
W. Howland and C. H. Innes, for defendant.

LATHROP, J. The first, second, and fourth requests for instructions were properly refused. The plaintiff relies upon the case of *Gorham v. Stearns*, 1 Metc. (Mass.) 366. That case was decided under St. 1838, c. 163, § 10, where these words occur: "In contemplation of his becoming insolvent, and of obtaining a discharge under the provisions of this act." It was held that it must be shown that the debtor contemplated going into insolvency and obtaining a discharge. This was changed by St. 1841, c. 124, § 3, so as to read: "Being insolvent, or in contemplation of insolvency." See *In re Jordan*, 9 Metc. (Mass.) 292. As the law stands to-day (Pub. St. c. 157, § 96), it is enough to show that the debtor was insolvent; that the conveyance was made within six months before the filing of the petition, and was with a view to give a preference; that the person to whom the conveyance was made had reasonable cause to believe the person making the conveyance to be insolvent; and that it was made in fraud of the laws relating to insolvency. As is said by Chief Justice Shaw, in *Denny v. Dana*, 2 Cush. 160, 171: "Contemplation of insolvency is one of the cases in which a preference shall be avoided, but it is not the only one. The other is the being in fact insolvent, under the circumstances and with the incidents mentioned. Actual insolvency of the debtor, and reasonable belief on the part of the creditor that he is so, without contemplation of insolvency, constitute a fraudulent preference." And it is generally the rule that, if the jury find that the person making the conveyance was insolvent at the time that it was made with a view to give a preference over other creditors, and that the person to whom the conveyance is made had reasonable cause to believe that his grantor was then insolvent, they will be authorized in finding that the conveyance was in fraud of the insolvent law. *Abbott v. Shepard*, 142 Mass. 17, 6 N. E. 826. The third and sixth requests were properly refused. The fact that the defendant assumed a new liability by taking the mortgage cannot avail him, if the mortgage was also given as security for a pre-existing liability. *Denny v. Dana*, 2 Cush.

160, 172; *Forbes v. Howe*, 102 Mass. 427, 436; *Peabody v. Knapp*, 153 Mass. 242, 26 N. E. 696. The fifth request for instructions was properly refused. It is taken from *Smith v. Merrill*, 9 Gray, 144, though it omits all reference to the question whether the conveyance was made with a view to a preference or not, which appears in the instruction in *Smith v. Merrill*. In view of the evidence, we are of opinion that the judge gave all the instructions necessary upon this point. Exceptions overruled.

(164 Mass. 54)

CRANDELL v. WHITE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

PURCHASE OF STOCKS ON MARGINS — SUIT TO RECOVER PAYMENTS — EVIDENCE ADMISSIBLE AGAINST ONE DEFENDANT ONLY — LIMITATION BY REQUEST.

1. An action for money had and received is an action of contract, within St. 1890, c. 437, allowing one who has lost money in dealing in margins to recover the same "in an action of contract."

2. St. 1890, c. 437, allowing one who buys or sells on credit or margin securities or commodities, without intending to receive or deliver the same or pay the price, or one who employs another so to buy or sell for him, to recover in an action of contract the money so paid out, is not unconstitutional, as giving principals a remedy against their agents, or as making certain conduct prima facie evidence of the existence of a certain fact.

3. Where testimony is properly admissible against one only of the defendants, the other defendant should request the court to so restrict its effect.

4. In an action to recover money lost in dealing in margins, as authorized by St. 1890, c. 437, it appeared that the money was lost in several transactions within a short period of time. *Held*, that evidence of similar transactions between the same parties during the five days preceding this period is admissible to show that the defendant had reasonable cause to believe that no intention existed to actually perform the contracts.

Exceptions from supreme judicial court, Suffolk county.

Action by Edwin H. Crandell against Fred M. White and others. From a verdict against him alone, defendant White brings exceptions. Exceptions overruled.

The suit was against White and Tibbetts as copartners under the name of F. M. White & Co., and also against Wonson. In the superior court, before Bond, J., the court ruled that there was nothing to show that Tibbetts was a partner with White, and permitted the case to go to the jury on the fourth count only, as against White and Wonson. The fourth count was to recover \$11,800, money had and received to the plaintiff's use. The money which plaintiff sought to recover was paid out as "margins" to defendants in stock transactions. It appeared that the controversy arose out of seven separate transactions for shares in different railroad companies. The court admitted, under objection by defendant, evidence of Wonson, who was de-

defendant's clerk, to the effect that, when plaintiff gave orders to witness, the latter had no intention of actually buying the stocks. The verdict was against the defendant White alone in the sum of \$12,858.04, and defendant excepted.

G. A. O. Ernst, for plaintiff. J. E. Hanly and J. F. Libby, for defendant.

MORTON, J. (after stating the facts). The plaintiff was allowed to go to the jury only upon the fourth count, which was for money had and received; and the first question is one of pleading. At the conclusion of the evidence, the defendant White asked the court to rule that the count did not come within St. 1890, c. 437, and that the plaintiff could not recover. The court refused the ruling, and the defendant duly excepted. The statute on which this action is based provides that "whoever contracts to buy or sell upon credit or upon margin any securities or commodities having at the time of contract no intention to perform the same by the actual receipt or delivery of the securities or commodities, and the payment of the price, or whoever employs another so to buy or sell on his behalf, may sue for and recover in an action of contract," etc. An action for money had and received is an action of contract, and comes literally within the terms of the statute. There was no bill of particulars annexed to the count, and no advantage was taken of that fact by the defendant, either by way of demurrer or by objection that the evidence by which it was sought to sustain the action was not admissible under the count as it stood, as was the case in *Rogers v. Inhabitants of Newbury*, 105 Mass. 533. If a bill of particulars had been called for, very likely the respects in which the various transactions were illegal would have appeared from it. If not, the objection could have been met by a motion for additional specifications. The defendant's request was in effect for a ruling that an action for money had and received could not be maintained under the statute. A majority of the court think that it was rightly refused, and that it came too late, and that the objection should have been taken by way of demurrer.

2. The defendant asked the court to rule that the statute was unconstitutional, and duly excepted to its refusal to do so. We discover no ground on which the statute can be held to be unconstitutional. The legislature may well have deemed the transactions referred to in it a species of gambling; and it is too well settled that laws aimed at the suppression of gambling are constitutional to require discussion. The fact that the statute gives parties a remedy against agents whom they may employ does not render it unconstitutional. A remedy is given against them only so far as they are participants in transactions coming within the condemnation of the statute. Neither is the objection valid,

which there is nothing in the exceptions to show arose in regard to any evidence that was offered, that the statute is unconstitutional because it makes certain conduct prima facie evidence of the existence of a certain fact tenable. *Holmes v. Hunt*, 122 Mass. 505.

3. The objection to Wonson's testimony was a general one. If it was admissible, therefore, in any aspect of the case, the objection was rightly overruled. He was employed by the plaintiff to buy and sell on his behalf, and was therefore properly made a party defendant, under the express terms of the statute. As a person employed by the plaintiff to buy and sell, it was competent for the plaintiff to show that he had no intention to perform the purchase by the actual receipt of the securities and payment of the price, and his own testimony to that was, from the nature of the case, the best attainable. If the defendant White wished the testimony to be limited to its effect as against Wonson himself (assuming that it should have been so restricted), he should have requested the court to so limit it.

4. The defendant White also objected to the introduction of evidence relating to the transactions during the five days next preceding that on which those in suit began. It is a general rule that separate and distinct acts, unconnected with those in suit, are not admissible for the purpose of raising an inference that a party did the particular things which he is charged with doing. But we think in this case that those objected to were so near in time to those in suit, and so connected with them, that they might fairly be regarded as having some tendency to show that the defendant White had reasonable cause to believe that no intention existed to actually perform the contracts. Under the carefully guarded instructions of the presiding justice, we do not see how the jury could have given them any other effect than that to which they were properly entitled. Exceptions overruled.

(53 Ohio St. 189)

STATE ex rel. RICHARDS, Attorney General,
v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Ohio. June 25, 1895.)

QUO WARRANTO—RIGHT OF CORPORATION TO
STATE CANAL LANDS—LIMITATIONS—GRANT TO
CITY—RIGHT OF ALIENATION—ABANDONMENT—
FORFEITURE.

1. An action in quo warranto will lie against a railroad corporation to contest its claim to exercise a right or privilege to or in the canal lands of the state.

2. Neither the 5-years nor the 20-years limitation prescribed in section 6789, Rev. St., bars an action in quo warranto, where its object is to oust a corporation from an unwarranted claim to a right or privilege in lands belonging to the state.

3. By force of the provision of section 8 of the act to provide for "the internal improvement of the state of Ohio by navigable canals" (23 Laws, p. 57), whenever the state actually occupied a parcel of land for canal purposes, a

fee-simple title thereto at once, and by virtue alone of such occupancy, vested in the state.

4. By the act of March 24, 1863 (80 Laws, p. 44), and the conveyance afterwards executed by the governor pursuant thereto, the only right granted to the city of Cincinnati was to enter upon, improve, and occupy the land described therein, forever, as a public highway and for sewerage purposes, the title to the lands remaining in the state subjected only to such use. The city acquired no right or interest that it could transfer to another; and if the city, after entering upon the occupancy of such lands under the deed, abandoned them in respect to either of the uses specified, the right of the city to that extent became forfeited.

(Syllabus by the Court.)

Quo warranto on the relation of the attorney general to oust the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company from the possession of state canal lands. Judgment of ouster.

The attorney general, for the purpose of testing the right of the defendant to occupy that part of the Miami & Erie Canal which lies between Broadway street, in the city of Cincinnati, and the Ohio river, filed in the court the following petition:

"Petition in Quo Warranto: Now comes John K. Richards, attorney general of the state of Ohio, by direction of the general assembly of the state of Ohio, and gives the court to understand and be informed:

"(1) That the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, is a consolidated railroad company, being a corporation engaged in operating a railroad in the state of Ohio and in other states, formed on the 28th day of August, 1890, by the consolidation, under and in accordance with the laws of Ohio, of the Pittsburgh, Cincinnati & St. Louis Railway Company, hereinafter referred to, a railroad corporation then and prior thereto owning and operating a railroad within the state of Ohio and other states, and the Chicago, St. Louis & Pittsburgh Railroad Company, and the Cincinnati & Richmond Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company.

"(2) That, in the year 1869, the said Pittsburgh, Cincinnati & St. Louis Railway Company, one of the constituent companies of the defendant corporation, leased perpetually the line of railroad of the Little Miami Railroad Company, a corporation formed under the laws of Ohio, and then owning and operating a line of railroad from Cincinnati, Ohio, to Columbus, Ohio, together with all the rights, privileges, and contracts belonging to said Little Miami Railroad Company, and at that time entered into the enjoyment thereof under said lease, and so continued up to the time of its merger by consolidation into the defendant corporation, when the defendant entered upon the enjoyment thereof, and still continues so to enjoy the same.

"(3) That, on and prior to the 24th day of March, 1863, the state of Ohio was the owner in fee and in full use and possession of that part of the Miami & Erie Canal extending

from the east side of Broadway street, in the city of Cincinnati, to the Ohio river, including the width thereof, as then owned and held by the state, the same being a part of the canal system and public works of the state of Ohio.

"(4) That on said 24th day of March, 1863, the general assembly of the state of Ohio passed the following act (80 Ohio Laws, p. 44):

"An act—To authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie canal as a public highway and for sewerage purposes.

"Section 1. Be it enacted by the general assembly of the state of Ohio, that authority and permission shall be granted, in the manner hereinafter pointed out, to the city of Cincinnati, to enter upon, improve, and occupy forever, as a public highway and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio river, including the width thereof, as owned or held by the state; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict: provided, that no work shall be done by said city authorities on the premises hereby granted until the plan of improvement shall be approved of by the board of public works.

"Sec. 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by "an act to provide for leasing the public works of the state," passed May 8, 1861, or by the instrument of lease executed in pursuance of said act, except as and to the extent that they may be interfered with as said city may, from time to time, enter upon, improve, and occupy any part of said grant.

"Sec. 3. Whenever the council of said city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known its decision to the governor, and thereupon the governor, in behalf of the state, shall execute and deliver to the city of Cincinnati a grant of the part of said canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this act. The attorney general shall prepare the form of said grant.

"Sec. 4. This act shall not be construed to

confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use as aforesaid of said canal.

"Sec. 5. This act shall take effect from and after its passage.

"Passed March 24, 1863."

"(5) That, in accordance with the provisions of section three of the act last mentioned, the council of the city of Cincinnati, by a vote of not less than two-thirds of the whole number of members thereof, decided to use said part of said canal as authorized in the act, and made known its decision to the governor of the state, and thereupon, on the 28th day of April, 1863, David Tod, then governor of Ohio, on behalf of the state, executed and delivered to the city of Cincinnati the following grant of the part of the canal described in the act, for the uses and purposes, and upon the terms and conditions, specified in said act:

"Deed—From the state of Ohio to the City of Cincinnati to part of the Miami & Erie Canal.

"Know all men by these presents, that whereas, by an act of the general assembly of the state of Ohio, passed on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixty-three, authority and permission was granted to the city of Cincinnati to enter upon, improve, and occupy forever, as a public highway, and for sewerage purposes, all or any of that part of the Miami & Erie Canal which extends from the east side of Broadway in the said city, to the Ohio river, including the width thereof, as owned or held by the state, and the said grant made subject to all outstanding rights or claims, if any, with which it might conflict; and the revenues derived from the water privileges in said canals, thereby expressly reserved; and that the said city in the use of said canal or any portion thereof should not obstruct the flow of water through the same, nor destroy nor injure the present supply of said water for milling purposes; and that the said city should be liable for all damages that might accrue from such obstruction or injury; and that whenever the council, by a vote of not less than two-thirds of the whole number of members thereof, should decide to use said canal as in said act authorized, should make known its decision to the governor; and that thereupon the governor, in behalf of the state, should execute and deliver to the city of Cincinnati a grant of the part of said canal in said act described, for the uses and purposes before mentioned, and upon the terms and conditions specified in the said act.

"And whereas the said council of the city of Cincinnati, on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixty-three, decided to use said canal as in said act authorized, according to the conditions thereof, and has made known its decision to me as required by said act,

"I, David Tod, governor of the state of Ohio, in behalf of said state, by virtue of the authority conferred upon me in the premises, do hereby grant unto the said city of Cincinnati, all or any part of that part of the Miami & Erie Canal extending from the east side of Broadway in said city to the Ohio river, including the width thereof as owned or held by the state, to enter upon, improve, and occupy the same forever, as a public highway and for sewerage purposes, upon the conditions, and subject to all the rights, claims, reservations, and restrictions, mentioned in said act.

"In testimony whereof I have hereunto set my hand officially, and affixed the great seal of said state of Ohio, at Columbus, this 28th day of April, A. D. 1863.

"By the Governor:

David Tod.

"W. W. Armstrong, Secretary of State."

"(6) That the city of Cincinnati duly accepted said grant, and on the 19th day of February, 1864, for the purpose of entering upon, improving, and occupying the part of the canal described in said act, as a public highway and for sewerage purposes, passed the following ordinance:

"Ordinance No. 321—To open, widen and establish Eggleston avenue the full width of ninety (90) feet from the Ohio river to Broadway.

"Be it ordained by the city council of the city of Cincinnati, that Eggleston avenue be opened, widened and established the full width of ninety (90) feet from the Ohio river to the east line of Broadway.

"Sec. 2. That, for the purposes aforesaid there be, and is hereby condemned to such public use all the real estate lying along and in the line of the Miami & Erie Canal from the Ohio river to the easterly side of Broadway as it is included between two lines parallel to a line drawn through the center of the canal locks as now located, the one being distant thirty-nine (39) feet to the northeast of said lock line, and the other distant fifty-one (51) feet to the southwestward of said lock line, as marked and designated upon a plat on file in the office of the city civil engineer, making a strip of ground ninety (90) feet in width between the said termini to be appropriated for the use and purposes of a public street.

"The city solicitor is hereby instructed to institute the necessary legal proceedings to obtain full possession of said premises with the assessment of the damages to be paid therefor, and the damages and cost as found shall be assessed upon the lands bounding and abutting said street in proportion to the value of the said several lots as assessed for taxation upon the general tax duplicate of the county.

"Done at the council chamber in the city of Cincinnati, this 19th day of February, A. D. 1864."

"(7) That the city of Cincinnati, having, in accordance with the act of March 24, 1863, submitted to the board of public works of

the state of Ohio its plan for the improvement of the part of the canal described in said act, and the same having been duly approved by said board, proceeded to and did enter upon that part of the Miami & Erie Canal extending from the east side of Broadway to the Ohio river, under the said grant from the state, and proceeded to and did improve and occupy the same, in pursuance of the ordinance quoted, as a public highway and for sewerage purposes, in the manner and to the extent hereinafter described, and not otherwise. Land lying along and adjacent to the canal was condemned by the city of Cincinnati sufficient to open Eggleston avenue the full width of 90 feet from the Ohio River to Broadway. Along Eggleston avenue and within the limits of the canal, the city, between the years 1869 and 1873 or 1874, constructed a large sewer from Broadway to the Ohio river, and over this sewer a covered raceway to conduct the water leased by the state for power purposes prior to the grant aforesaid. About this time the city filled the gullies and ditches of the canal and partially graded Eggleston avenue from Fifth street to Broadway.

"For the improvement of Eggleston avenue, the city expended in all the following sums:

For the construction of Eggleston avenue sewer and raceway between 1869 and 1873 or 1874.....	\$728,494
For grading from Fifth street to Broadway in 1872 or 1873, about..	9,115
For inspection and incidentals, approximately	5,000
For condemnation	13,000
Total	\$753,609

"The city has never permanently graded and paved said street for use as a public highway, as are other improved streets of the city. Excepting the construction of the sewer and raceway aforesaid, no work whatever in the way of improving Eggleston avenue, between Pearl street and the Ohio river, has ever been done by the city.

"(8) That, on November 15, 1867, the city of Cincinnati, by resolution of its common council, granted to the said Little Miami Railroad Company, a corporation under the laws of Ohio, then owning and operating a line of railroad from Cincinnati, Ohio, to Columbus, Ohio, the right to lay down and use a railroad track on Eggleston avenue, extending from Pearl street north to Broadway, the said Little Miami Railroad Company being the lessor of the Pittsburgh, Cincinnati & St. Louis Railway Company, one of the constituent companies of the defendant consolidated corporation. In the year 1876 the said Pittsburgh, Cincinnati & St. Louis Railway Company, then the lessee of the Little Miami Railroad Company, built said railroad track along the said portion of Eggleston avenue, and it and the defendant company have ever since continued to use the same for railroad purposes, and have constructed for many property owners on and near Eggleston avenue

connecting tracks leading from said line on Eggleston avenue into the private property of said persons, for use in the conduct of their business, and large outlays have been made, both by said railroad companies and by said persons, upon the faith of said grant by said city. Since the construction and use of said railroad track along Eggleston avenue a number of factories and warehouses have been located and built on and near the avenue, because of the existence of the track and the railroad facilities thereby afforded.

"(9) That, prior to the building of the tracks mentioned in the last paragraph, namely, on the 1st day of December, 1871, the city of Cincinnati passed the following ordinance, vacating Eggleston avenue and Kilgour street between Front and Pearl streets (said Kilgour street not being involved in this controversy), and granting the same to the Newport & Cincinnati Bridge Company and the Little Miami Railroad Company and its lessees, for railroad, bridge, and depot purposes, subject, however, to the rights of the state of Ohio, and upon certain conditions and under certain restrictions which are set out in the ordinance:

"Ordinance No. 629—To vacate Eggleston avenue and Kilgour street between Front and Pearl streets.

"Whereas, on the 22nd day of September, A. D. 1871, the Newport & Cincinnati Bridge Company filed its petition with the common council of the city of Cincinnati, praying for the vacation of Eggleston avenue between Front and Pearl streets, and of Kilgour street between Front and Pearl streets; and

"Whereas, notice of the pending and prayer of said petition has been given by publishing the same in the Cincinnati Daily Times and Chronicle, a paper published in said city, for six consecutive weeks preceding, according to the statute in such cases made and provided; now, therefore,

"Be it ordained by the common council of the city of Cincinnati, that Kilgour street, as laid out and dedicated by plat and subdivision of Kilgour, dated November 18th, 1835, and recorded in Book 68, page 52, Hamilton County Recorder's Office, from the north line of Front street to the south line of Pearl street, and Eggleston avenue, from the north line of Front street to the south line of Pearl street, as described in an ordinance passed by the city council on the 19th day of February, A. D. 1864, entitled "An ordinance to open, widen and establish Eggleston avenue the full width of ninety (90) feet from the Ohio river to Broadway," be and the same are hereby vacated in order that the same may hereafter be used and occupied by the said Newport & Cincinnati Bridge Company and the Little Miami Railroad Company and its lessees, for railroad, bridge and depot purposes.

"Provided, however, that this vacation and grant to the said bridge company and railroad companies is made expressly subject to

all the rights of the state of Ohio, and of any and all persons lawfully claiming under or through it, to or in said streets or either of them, or to any easement in or over the same, and also subject to the legal rights of any other person or persons injured thereby.

"Provided further, that the said bridge company shall, at its own expense, cause Butler street to be widened to the width of ninety-nine (99) feet from Pearl street south to the wagon approach to the said bridge; and also the said bridge company shall at any and all times hereafter permit its bridge and approaches to be used for railroad purposes on reasonable and equal terms as to tolls and charges by all railroad companies whose roads terminate in or pass through the city of Cincinnati, desirous so to do; and it is expressly understood, and the grant herein contained is upon the consideration, that the trustees of the Cincinnati Southern Railway any lessee thereof, shall have the right to use said bridge and the approaches thereto, on terms as favorable as those granted any other railroad.

"And provided further, that in no case will the said companies use or permit the said grounds to be used as a stock yard or depot for the shipment, transfer or reception of animals of any kind, or for any other use than for depot buildings and for railway purposes.

"And provided further, that said bridge company and railroad companies, or either of them, shall not, in any manner, hinder or prevent the city from going upon the grounds so vacated, and completing, maintaining and preserving the sewers or water ways already constructed or projected, or for carrying out any of its plans for sewers, or discharging any of its obligations for water ways or powers, that are now or may be hereafter fixed or determined from any rights now in existence.

"Provided, that this ordinance shall take effect on the Newport & Cincinnati Bridge Company and the Little Miami Company and its lessees filing with the city clerk a written acceptance hereof.

"Passed December 1st, A. D. 1871."

"(10) That, immediately thereafter, the Newport & Cincinnati Bridge Company and the Little Miami Railroad Company and its lessees filed with the city clerk of Cincinnati a written acceptance of the said ordinance vacating Eggleston avenue and Kilgour street between Front and Pearl streets, and thereupon the said companies entered into possession of that part of Eggleston avenue lying between Front and Pearl streets in the city of Cincinnati, and have ever since occupied and used the same for railroad, bridge, and depot purposes, the part of said grounds occupied and used by the Little Miami Railroad Company and its lessees and the nature of the occupation and use being described in the next succeeding paragraph.

"(11) Included in the part of Eggleston ave-

nue between Front and Pearl streets vacated, as aforesaid, by the city of Cincinnati, was the following described real estate, which was formerly a part of the Miami & Erie Canal, the use of which was granted to the city of Cincinnati for a public highway and for sewerage purposes by the act of March 24, 1863, as already set forth:

"Being a tract of land in the city of Cincinnati, in Hamilton county, Ohio, lying within the limits of Eggleston avenue, as established by ordinance No. 321 of the city of Cincinnati, passed April 19, 1864, and between front and Pearl streets in said city, and described as follows: 'Commencing at a point on the southeasterly line of Pearl street, eleven feet northeasterly from the intersection of said line of Pearl street with the southwesterly line of Eggleston avenue; thence northeasterly along said line of Pearl street a distance of seventy-two feet to a point seven feet distant from the intersection of said line of Pearl street with the northeasterly line of Eggleston avenue; thence in a southeasterly direction on a line parallel with and seven feet distant from the northeasterly line of Eggleston avenue, as defined in the ordinance aforesaid, but since vacated, a distance of one hundred and twenty-four and three-fourths feet; thence southwesterly on a line parallel with the southeasterly line of Pearl street a distance of seventy-two feet to a point eleven feet distant from the southwesterly line of Eggleston avenue, as defined in the ordinance aforesaid, but since vacated; thence northwesterly on a line parallel with and eleven feet distant from the southwesterly line of Eggleston avenue, as defined in the ordinance aforesaid, but since vacated, a distance of one hundred and twenty-four and three-fourths feet to the point of beginning; being a strip seventy-two feet wide and one hundred and twenty-four and three-fourths feet long, formerly a part of the Miami & Erie Canal, extending from the southeast side of Pearl street a distance of one hundred and twenty-four and three-fourths feet in the direction of the Ohio river, the use of which was granted by the state of Ohio, by the act of March 24, 1863, to the city of Cincinnati for a public highway and for sewerage purposes, but now occupied by the permanent train shed of the passenger depot of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.' Also, a tract of land in the city of Cincinnati, Hamilton county, Ohio, lying within the limits of Eggleston avenue, as established by Ordinance No. 321, of the city of Cincinnati, passed April 19, 1864, and between Front and Pearl streets in said city, and described as follows: 'Commencing on the northwesterly line of Front street at a point eleven feet northeasterly from the intersection of said line of Front street with the southwesterly line of Eggleston avenue, as defined by the ordinance aforesaid, but now vacated; thence northeasterly along said line a distance of seventy-two feet, to a point

seven feet distant from the intersection of the northwesterly line of Front street with the northeasterly line of Eggleston avenue, as defined by the ordinance aforesaid, but now vacated; thence in a northwesterly direction on a line parallel with and seven feet distant from the northeasterly line of Eggleston avenue, as defined by said ordinance aforesaid, but since vacated, a distance of ninety-four feet; thence in a southwesterly direction on a line parallel with the northwesterly line of Front street a distance of seventy-two feet to a point eleven feet distant from the southwesterly line of Eggleston avenue, as defined by said ordinance, but since vacated; thence in a southeasterly direction on a line parallel with and eleven feet distant from the southwesterly line of Eggleston avenue, as defined by said ordinance, but since vacated, a distance of ninety-four feet to the point of beginning; being a strip of land ninety-four feet long and seventy-two feet wide, formerly a part of the Miami & Erie Canal, extending from the northwesterly line of Front street a distance of ninety-four feet in the direction of Pearl street, the use of which was granted by the state of Ohio, by the act of March 24, 1863, to the city of Cincinnati for a public highway and for sewerage purposes, but now occupied by the permanent freight depot of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.' Upon the land above described (and adjacent land) the Little Miami Railroad Company and its lessee, the Pittsburgh, Cincinnati & St. Louis Railway Company, and the defendant corporation, some years ago constructed, and for a long time have been and now are occupying and using in their railroad business, a permanent stone, brick, and iron passenger depot, and a permanent brick freight depot, each containing railroad tracks. The tract of land first above described, running from the south line of Pearl street a distance of one hundred and twenty-four and three-fourths (124 $\frac{3}{4}$) feet in the direction of the Ohio river, is at present wholly occupied by a part of the permanent train shed of the passenger depot of the defendant company in Cincinnati; the tract of land second above described, running from the north line of Front street a distance of ninety-four (94) feet in the direction of Broadway, is at present wholly occupied by a part of the permanent freight depot of the defendant corporation. As indicated in the ordinance vacating Eggleston avenue, the sewer and raceway theretofore constructed down Eggleston avenue still pass through and under the ground above described, to the Ohio river, and are still used for their original purposes. By reason of such occupation and use of said land for depot purposes, it has become and is impossible to use the same, or any part thereof, as and for a public highway.

"(12) That that part of Eggleston avenue between Front street and the Ohio river, including a part of the Miami & Erie canal, extending from Front street to the Ohio river,

the use of which was granted by the state of Ohio by the act of March 24, 1863, to the city of Cincinnati for a public highway and for sewerage purposes, some years ago was taken possession of, and since then and for a long time, has been and is now occupied wholly by the yard tracks, side tracks and switches of the Pittsburgh, Cincinnati & St. Louis Railway Company and the defendant corporation, and has for a long time been and now is used exclusively by said railroad companies for railroad purposes, the city of Cincinnati having abandoned the use of said street as a public highway, although the large sewer constructed down Eggleston avenue still passes under this abandoned portion to the Ohio river, and, by reason of such use and occupation, it has become and is impossible to use said premises as and for a public highway.

"(13) The plaintiff avers and charges that, subject to the rights, privileges and easements therein, which were granted to the city of Cincinnati by the state under the act of March 24, 1863, excepting, however, such of the rights, privileges, and easements thus granted as, by reason of the facts hereinbefore stated, have since then been released, abandoned, or forfeited by said city, the state of Ohio has been, since the said 24th day of March, 1863, and now is, the owner in fee and entitled to the full use and possession of that part of the Miami & Erie Canal extending from the east side of Broadway in the city of Cincinnati to the Ohio river, including the width thereof, as owned and held by the state on said date.

"(14) Plaintiff further avers and charges that the city of Cincinnati had no power or authority to grant to the Little Miami Railroad Company or its lessees the right to lay and use a railroad track or tracks in Eggleston avenue as aforesaid on canal property, belonging to the state, which the state had permitted the city of Cincinnati to enter upon, improve, and occupy only as a public highway and for sewerage purposes; and that the construction and use of said railroad tracks by the Pittsburgh, Cincinnati & St. Louis Railway Company and the defendant corporation as aforesaid, was and is inconsistent with the use granted to the city of Cincinnati, and in violation of the rights of the state and in contravention of law.

"(15) Plaintiff further avers and charges that the vacation of Eggleston avenue between Front and Pearl streets, as aforesaid, was an abandonment by said city of the same, and of the canal property of the state embraced therein for use as a public highway and that the construction by the Little Miami Railroad Company and its lessee and the defendant of a permanent passenger depot and a permanent freight depot, as aforesaid, on land belonging to the state, already described, was and is an unauthorized and wrongful occupation and use of the property of the state, which was granted to the city of Cincinnati

for use only as a public highway and for sewerage purposes; and that such occupation and use of said canal land by the defendant was and is inconsistent with the use granted the city of Cincinnati, and was and is repugnant to and subversive of the rights of the state and of the public in said land, and in contravention of law.

"(16) Plaintiff further avers and charges that the occupation and use of Eggleston avenue and the canal property of the state within its limits between Front street and the Ohio river, by the yard tracks, side tracks, and switches of the defendant corporation, was and is an abandonment of the same by the city of Cincinnati as a public highway, and was and is inconsistent with the use granted and permitted to the city of Cincinnati, and was and is without authority and in contravention of law, and repugnant to and subversive of the rights of the public and the state in said land.

"(17) The plaintiff further avers and charges that the defendant railway company, in locating, constructing, and operating its railway tracks and switches, as aforesaid, in and along Eggleston avenue and the part of the Miami & Erie Canal embraced therein between Broadway and Pearl streets; and in constructing, occupying and using its permanent passenger depot and permanent freight depot, as aforesaid, on the part of the Miami & Erie canal before described, embraced within the limits of Eggleston avenue between Pearl and Front streets, as originally established; and in locating, constructing and operating its yard tracks, side tracks, and switches as aforesaid, on, across, and over that part of the Miami & Erie Canal embraced within the limits of Eggleston avenue between Front street and the Ohio river, as originally established, is now and has been for some time past, usurping and unlawfully exercising and using rights, privileges, and franchises in contravention of law.

"Prayer: The plaintiff prays the advice of the court in the premises, and that the defendant railroad company be compelled to answer by what warrant it claims to have, use, and enjoy the rights, privileges, and franchises aforesaid; and that it be ousted from exercising the same, and be compelled to remove its tracks and switches from the part of the Miami & Erie Canal embraced within the limits of Eggleston avenue between Broadway and Pearl streets; and be compelled to remove its passenger depot and freight depot and railroad tracks from the part of the Miami & Erie Canal, before described, embraced within the limits of Eggleston avenue between Pearl and Front streets, as originally established; and that it be compelled to remove its side tracks, yard tracks, and switches from that part of the Miami & Erie Canal embraced within the limits of Eggleston avenue between Front street and the Ohio river, as originally established. And the plaintiff further prays that such other re-

lief be granted in the premises as to the court may seem just and proper.

"John K. Richards,
"Attorney General.

"Joseph B. Foraker,
"David K. Watson,
"Of Counsel."

To this petition the defendant demurred on the grounds: (1) That the court had no jurisdiction of the subject-matter of the action. (2) That the "power of franchise" from the exercise of which defendant was sought to be ousted had been exercised by it, and its corporate predecessor, for more than 20 years next before this action was begun, as shown by the petition. (3) That the petition does not state facts sufficient to constitute a cause of action.

The demurrer was overruled, whereupon the defendant answered as follows:

"For the first defense: (1) The defendant denies the allegations, and each thereof, contained in paragraphs 13, 14, 15, 16, and 17 of the petition, and the defendant denies that the plaintiff, on and prior to the 24th day of March, 1863, or at any time was or is the owner in fee of the real estate, or any part of the real estate, mentioned in the petition; but, on the contrary, says that the plaintiff has not, and never had, any interest or estate therein, except the right to use and occupy a portion thereof for canal purposes; that no compensation was ever paid therefor by the plaintiff, and that no title in any of said real estate was ever conveyed to the plaintiff, or otherwise acquired by it.

"(2) About the year 1833 the Miami & Erie Canal, which had been constructed southwardly to a point at or near Broadway, in the city of Cincinnati, was extended to the Ohio river. But by reason of the great fall, said extension was found to be impracticable. It was used for navigation a short time only, and under great difficulties, and was gradually abandoned, and fell into decay. There were 9 locks of 11 feet fall each between Broadway and the river, making a total fall of 99 feet. For 10 years or more prior to the passage of the act of March 24, 1863, mentioned in the petition, said canal between Broadway and the river had become and was wholly abandoned for purposes of navigation, and was used only for supplying water for milling purposes, and for the discharge and carriage of sewage from certain portions of the city of Cincinnati, largely from slaughter-houses located along the side of the canal and Deer creek, which adjoined the canal. And said act of March 24, 1863, was passed for the purpose of securing an abatement of the public nuisance which had been so created and was existing, and of providing a trunk sewer at the only available site therefor in the eastern part of the city of Cincinnati. And the defendant says that all the reservations and conditions in said grant in favor of the plaintiff have been carefully preserved and fulfilled, that ample provision is

made for the flow of the water of the canal, and for the maintenance of the supply of water for milling purposes. At the time of the passage of the ordinance of the city of Cincinnati of December 1, 1871, mentioned in the petition, the city of Cincinnati had constructed a trunk sewer along the site of the canal from Broadway to the river; but had not filled in over such sewer south of Pearl street, and the top of said sewer lay at a distance about 40 feet below the grade of Pearl street, leaving a gully about 40 feet deep and 70 feet or more in width at the top. There was a wharf and landing at Butler street and immediately west of Butler street, but there was not, and never had been, any landing at or near the mouth of the canal; and that having become the mouth of said trunk sewer, any use of the river at that point for a landing was wholly impracticable.

"(3) There was not and never had been any occasion for highway communication between Pearl street and the river along the course of said gully. The Newport and Cincinnati bridge, however, was then being constructed across the Ohio river so as to enter Cincinnati with its approach at Butler street, which street extended from the river northwardly to and across Pearl street, and lay ——— feet west of the line of Eggleston avenue. Said Butler street was of sufficient width to furnish proper and commodious access to said bridge; and said ordinance of December 1, 1871, was passed for the purpose of securing and providing highway facilities at that point, where they were needed, in exchange for the gully along the site of Eggleston avenue south of Pearl street, where no highway facilities were required. The real estate for the widening of Butler street was provided by joint arrangement between the bridge company and the railway company, and at their joint expense, and at great cost, it being then occupied by improvements consisting of factories and other buildings, which it became necessary for the railway and bridge companies to acquire by purchase at heavy expense. And the value of the property at that time, contributed by the railroad and bridge companies to the widening and improvement of Butler street was threefold the value of the premises given to them in exchange.

"(4) Thereupon the railway company and the bridge company, having accepted said ordinance of December 1st, 1871, as alleged in the petition, at their own expense did widen and improve Butler street, as provided in said ordinance, and entered into possession of that portion of Eggleston avenue lying between Pearl street and Front street, and they have ever since continuously used and occupied the same for railroad purposes.

"(5) Said arrangement and agreement with the said railway and bridge companies was one which the city and the companies were authorized by law to make, and was for the great benefit and advantage of the city and

the public, as well as of said railway and bridge companies, as servants of the public.

"(6) The railway company, on the faith of said ordinance and agreement with the city of Cincinnati, filled up said gully south of Pearl street, and at great expense acquired the real estate between Butler and Kilgour streets and Pearl and Front streets; and in good faith constructed thereon the railroad tracks, train sheds, passenger depot and freight depot, mentioned in the petition, and other terminal facilities at a cost of \$400,000, in addition to the cost of the real estate.

"(7) In addition to the expenditures aforesaid, and relying upon their right to occupy and use said premises, the Little Miami Railroad Company and its lessee purchased large quantities of real estate near said depot grounds, and have constructed at a great expense thereon, and connected with said depot buildings, terminal tracks and facilities. If the order asked for in the petition is granted, and the defendant compelled to remove its freight and passenger depot buildings and tracks from said premises between Pearl street and Front street, the result to the defendant's possessions and property will be the absolute destruction of the new freight depot and of the tracks and train sheds leading into the passenger depot, located at the corner of Butler and Pearl streets, and thus render the passenger depot practically inaccessible and the entire destruction of its whole terminal plant, and the demolition and ruin of the structures, buildings, and terminal arrangements upon which the defendant has expended such large sums of money.

"(8) The defendant owns the real estate abutting the former site of the canal between Pearl street and the river, and the premises sought to be recovered are not needed or desired for highway purposes, and would be wholly useless for such purposes.

"(9) As to that portion of Eggleston avenue between Pearl street and Broadway, the defendant says that the use by it of said portion is simply the maintaining a single track thereon, four feet nine inches in width, from rail to rail, with connecting tracks leading into the property of abutting owners; and that its occupation and use of said portion of said street is only the use provided for by the laws of the state, and such a use of a street as has been repeatedly sanctioned and upheld by the adjudications of this court, and is wholly consistent with the purposes of the said act of March 24, 1863, and the deed made in pursuance thereof.

"(10) The said Pittsburgh, Cincinnati & St. Louis Railway Company built said track under and pursuant to a grant by the city of Cincinnati, in good faith, and relying upon the authority and power conferred by the statutes of the state upon municipal corporations in such matters; and has expended, in the purchase of grounds for its yards and upon its said tracks and its yards at the head of Eggleston avenue, the sum of over

\$100,000. Said grant by said city was within its municipal power, and was duly and legally made, and was accepted and acted upon by said railway company in the belief that it conferred the right upon said company to occupy and use said street for said purpose, and in the same good faith, reliance, and belief, a number of owners of property abutting on said portion of Eggleston avenue have built factories and warehouses on their premises, and the railway company has put in side tracks or switches connecting therewith, which have ever since been in use.

"(11) At the December term, 1877, and before certain of the said factories and warehouses were built, and before certain of said side tracks and switches were constructed by the said railway company, this court, in the case of *Richards v. Cincinnati*, 81 Ohio St. 506, held that the said grant of the use of said Eggleston avenue between Pearl street and Broadway, by said city, to the Little Miami Railroad Company was authorized and proper.

"(12) On November 7, 1884, the city council of Cincinnati, by joint resolution, ordered the city officers to remove said track in Eggleston avenue from Pearl to Court street or Broadway. The said Pittsburgh, Cincinnati & St. Louis Railway Company duly brought an action in the superior court against the city of Cincinnati, on the 8th day of November, 1884, to enjoin the city from taking action for such removal, and the city filed a cross petition, praying that the railway company be perpetually enjoined from maintaining or using said tracks. The said court, in general term, held in said action that the city had by law authority to consent to the laying of said railroad track by said company in Eggleston avenue, and branches thereof to private property; that the city had duly consented thereto, and entered a decree, which is in full force, in favor of said railroad company, forever enjoining said city from making said removal, and dismissing the cross petition. 16 Cin. Law. B. 367. The city of Cincinnati prosecuted error to this court, and this court affirmed said decree November 18, 1890. A part of said factories and warehouses, and tracks connecting with the same, have been built since the entering of said decree by said superior court. Said Eggleston avenue, between Pearl street and Broadway, is 90 feet wide, and said railroad track is, from rail to rail, 4 feet and 9 inches wide, and does not interfere with the free use of said avenue by the public, and said portion of Eggleston avenue is now being used, and ever since said track was laid has been used, strictly in conformity with the provisions specified in said act of March 24, 1863, and said deed, to wit, as a public highway and for sewerage purposes.

"(13) The acts hereinbefore recited as having been done in the premises by the said

railroad companies, and the sums of money so by them expended, were all done and expended under the belief that the plaintiff had no claim upon said premises or any part thereof.

"(14) Said railroad companies did not, nor did either of them, have any knowledge or notice during the time said acts were being done and said money expended that plaintiff made any claim whatever to said premises or any part thereof; nor did they or either of them have any knowledge or notice thereof until about the time the general assembly passed the joint resolution authorizing this proceeding, to wit, in January, 1893.

"(15) The board of public works of the plaintiff had, at the time of the passage of said act of March 24, 1863, and ever since has had, charge of the canals of the state, with full power to maintain and protect the same, and the defendant avers that said board had knowledge of said acts being done and said sums being expended by said railroad companies, as aforesaid, at the times the same were done and expended, and made no objection thereto; nor did said board or any member thereof or agent thereof ever make any claim that the plaintiff had any interest in said premises, or any right to any control thereof, from the time of the execution of the said deed by the governor of the state down to about the time of the passage of said joint resolution.

"(16) During the time of the occupancy of said premises by the Little Miami Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company and the defendant, the plaintiff has received revenue from said companies in the way of taxes levied upon said buildings, improvements, and rights of way; wherefore this defendant avers that the state of Ohio ought to be and is estopped from asserting any right or title to said real estate, if any it has, which this defendant wholly denies.

"(17) As to that part of said premises lying between Front street and the Ohio river, defendant says that on the 1st day of November, 1853, the plaintiff sold to one E. S. Hamlin the land bounding and abutting upon said canal on the west from Front street to the river, and at the same time, and as a part consideration of the sum paid by said Hamlin to the plaintiff, the plaintiff agreed, in writing, that said Hamlin and his assigns should have the right to culvert or build over said canal from Front street to the Ohio river, and to use the same in such way as not to interfere with the navigation of the canal. Through subsequent conveyances and assignments the Little Miami Railroad Company, on the 8th day of July, 1864, became seised, and is now seised in fee of said lands bounding and abutting on said portion of said canal, and by a like assignment acquired, and is now possessed of, the said right to culvert or build over said portion of said canal.

"Second defense: The defendant and its

corporate predecessors have for more than 20 years next preceding the beginning of this action continuously used and exercised the powers and franchises mentioned in the petition.

"Third defense: The defendant, if this action is decided in favor of the plaintiff, claims the benefit of the occupying claimant law, and of the equitable principles which that law recognizes and enforces.

"Ramsey, Maxwell & Ramsey,
"Watson, Burr & Livesay,
"Defendant's Attorneys.

"State of Pennsylvania, Allegheny County, ss.: J. T. Brooks, being duly sworn, says that he is the second vice president of the defendant above named; that the denials, facts stated and allegations set forth in the foregoing answer are true, as he verily believes.

J. T. Brooks.

"Sworn to before me and subscribed in my presence by the said J. T. Brooks, this 1st day of June, A. D. 1894.

"I. M. McKibben,
Notary Public."

"[Seal.] To this answer a demurrer was filed, on the ground that it did not state facts sufficient to constitute a defense to the action, and it was also attacked by a motion to strike out the larger part of its averments, because of their immateriality.

J. K. Richards, Atty. Gen., J. B. Foraker, and D. K. Watson, for relator. Ramsey, Maxwell & Ramsey, Watson, Burr & Livesay (Harmon, Colston, Goldsmith & Hoadly, of counsel), for defendant.

BRADBURY, J. (after stating the facts). The first and principal question to be determined in the case arose upon the demurrer to the petition, and respects the jurisdiction of this court over the subject of the action. That the original jurisdiction of this court cannot be enlarged or diminished by legislative action, but is such, only, as the constitution confers, was settled at an early day after the present constitution was adopted. *Kent v. Mahaffy*, 2 Ohio St. 498; *Wheeler v. Lynn*, 8 Ohio, 393. The jurisdiction thus conferred is confined to proceedings in "quo warranto, mandamus, habeas corpus and procedendo." Const. art. 4, § 2. Therefore the subject-matter of an original action in this court must fall within the scope of one or the other of those four specified proceedings, or its jurisdiction falls. True, Okey, J., in *Knapp v. Thomas*, 39 Ohio St. 377, expressed an opinion that the extent of the jurisdiction of this court "in habeas corpus, as well as the manner of its exercise, is undoubtedly, in some measure, within legislative control." If this opinion is not in direct conflict with *Kent v. Mahaffy*, 2 Ohio St. 498, supra, and the other decisions of this court upon the question of its original jurisdiction, nevertheless it must be regarded as announcing a principle that can operate only within ex-

tremely limited boundaries, and if not confined to proceedings in habeas corpus, yet cannot be invoked to clothe this court with original jurisdiction over any substantially new subject-matter, on the assumption that it falls within either of the other three heads of original jurisdiction.

The subject-matter of the present inquiry, if within the jurisdiction of the court at all, falls properly within an action in quo warranto. It relates to a right or privilege claimed and exercised by the defendant, a body corporate under the laws of this state, in respect of lands that now, or formerly did, constitute a part of the public canal system of this state, and calls upon the defendant to set forth the grounds upon which it claims such right or privilege. This is a proper office of a proceeding in quo warranto. Quo warranto was anciently employed by the king to question the title of individual proprietors to lands of the crown, as well as to nearly every other privilege or franchise that emanated from or was held under the crown. However, no modern instance of its exercise in England for the former purpose has been shown. 2 Reeve, Eng. Law, 211; *People v. Bristol & R. Turnpike Co.*, 23 Wend. 240.

By the statutes of this state in force when our existing constitution was framed and adopted, quo warranto would lie against a corporation "whenever it shall have misused any franchise or privilege conferred, or exercise any franchise or privilege not conferred upon it by law." 36 Ohio Laws, p. 69. Privilege is a comprehensive term; and to enter upon and occupy lands that form a part of the canal system of the state by any one is exercising a privilege, in one sense of that term, and if this is done without authority from the state, it is exercising a privilege not conferred by law. The statute on the subject in force now is more specific. Its language authorizes an action in quo warranto to be brought against a corporation "when it claims or holds, by contract or otherwise, * * * a franchise, privilege or right in contravention of law." This would seem to expressly declare that any specific contractual right asserted by a corporation to which it had no legal right might be made the subject-matter of an action in quo warranto, at least if it concerned the public. We have seen, however, that the legislature has no authority to enlarge the jurisdiction of this court in quo warranto. It has been suggested in this connection that the later act of the general assembly is merely a legislative construction of the earlier one,—that in force at the time of the adoption of our present constitution. This suggestion, however, has little or no value in solving the question under consideration, for where the general assembly is without authority to alter a statute directly, it cannot accomplish the same end indirectly, by an attempt to construe its meaning. This question of jurisdiction does not so much concern the ultimate rights of

the parties as it does methods of procedure. The right of suitors respecting the subject-matter in dispute will be determined by applying to the facts, when ascertained, the same principles and rules of law, whether the action was commenced in this court in quo warranto or in the court of common pleas by a real action. What the proper practice might be if the controversy was between the state and a private person, we need not stop to discuss, the case before us being one where a corporation, a mere creature of the state, is occupying lands admitted to have formed a part of the canal system of the state, and required to set forth the grounds by which its occupation is justified. The practice of bringing in this court proceedings in quo warranto to determine controversies similar in all essential respects to that involved in this action originated nearly a score of years ago. In *State v. Cincinnati C. Ry. Co.*, 37 Ohio St. 157, a case like the one under consideration, the original jurisdiction of this court was successfully invoked. True, the jurisdiction of the court does not seem to have been challenged in that case,—a circumstance doubtless weakening its force as an authority. Since that decision was rendered, however, and upon its authority, the jurisdiction of this court, in cases involving the same question, has been exercised a number of times. And in the unreported case of *State v. Toledo & W. V. R. Co.*, the jurisdiction being assailed was sustained, after argument.¹ The validity of a number of judgments rests solely upon this jurisdiction. If the jurisdiction did not subsist, those judgments are absolutely void. In view of the serious consequences that would follow from overruling those cases, it should not be lightly done.

The statute in force when the constitution was adopted, as we have seen, authorized proceedings in quo warranto against a corporation whenever it exercised any "franchise or privilege" not conferred upon it by law. The contention that the word "privilege" was used advisedly by the legislature as more comprehensive than "franchise," and, in a sense broad enough to comprehend a specific claim in respect of public property, is not without reason for its support. If the word "privilege" was employed as synonymous with "franchise," its use was superfluous. If not employed as synonymous with franchise, in what sense was it employed? In this connection, it may prove profitable to refer to the difference between the language this statute used to authorize a proceeding in quo warranto and that employed to limit the time within which to bring the proceeding. 36 Ohio Laws, p. 69, § 8, and page 73, § 26. The action may be brought whenever a corporation exercises a "franchise or privilege not conferred upon it by law." The limitation of time is made to apply to the exercise of a "power or franchise" under its charter. The phrase, "franchise or privilege not con-

ferred * * * by law," is more comprehensive than the words "power or franchise * * * under its charter." The former phrase, according to the sense it ordinarily bears, doubtless includes many things not embraced by the latter. This marked difference of phraseology should not needlessly be attributed to accident. If the general assembly intended that where a corporation merely exercised a power or franchise under—that is by virtue of—its charter this power or franchise should not be challenged by the state after 20 years' user, and also intended that an action in quo warranto might be brought against a corporation, and that too, without limitation of time, whenever it claimed or exercised an unwarranted right or privilege respecting the property of the state, it chose, in the language just quoted, an appropriate medium to express such intention. The former decisions of this court sustaining its jurisdiction in this class of cases must be based upon doctrines of the common law or upon the provisions of the statute just referred to, which were in force when the present constitution was adopted. If we concede that the common-law doctrine had become obsolete at the time the constitution was adopted, then the court heretofore, in entertaining original jurisdiction in this class of controversies, must have held that it was authorized by that. The ancient rule of the common law authorizing proceedings in quo warranto by the crown against a subject asserting some right respecting lands claimed by the crown, together with the aptness of the proceeding to advance the inquiry, are not wholly immaterial upon this question of statutory construction. If it once existed and had become obsolete, that, together with its appropriateness as a remedy, may have been the cause of legislative action on the subject. In view of these considerations, we adhere to the former decisions of the court upon the question of its original jurisdiction in this class of cases.

Having sustained the jurisdiction of the court, the other grounds urged in support of the demurrer to the petition present but little difficulty. True, the petition discloses that the defendant has occupied lands forming a part of our public canal system, under a claim of right, for more than 20 years; but statutes of limitation do not run against the state, unless the intention that they shall so run is obvious. The limitation of time within which an action in quo warranto is to be begun is found in section 6789, Rev. St., which reads: "Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed; nor shall an action be brought against a corporation for exercising a power or franchise under its charter which it has used and exercised for a term of twenty years." As the present proceeding does not

¹ No opinion.

seek a forfeiture of the charter of defendant, the 5-years limitation does not apply. Neither does the 20-years limitation apply, because the proceeding is not directed against the exercise of a "power or franchise under" the charter of the corporation. Its object is to oust the defendant from a right it was exercising in respect of the canal lands of the state, and no limitation is prescribed to the bringing of an action to secure that end.

Whether the petition states a cause of action depends upon the title the state acquired in the lands in controversy when it appropriated them to canal purposes, and the construction that should be given to conveyance it made to the city of Cincinnati. That the title of the state to its canal lands is one in fee simple is a question of law. The only fact to be ascertained is whether the lands were in fact a portion of the canal system. How the acquisition was made is not material. The mere seizure and appropriation of a parcel of land for canal purposes, by force of the statute under which our canals were constructed, was alone sufficient to vest in the state a fee-simple title to them. Nor could any other title than one in fee simple be received by the state for lands to be devoted to a canal. A mere occupation of lands by the state for canal purposes was a seizure and appropriation of it to that purpose, and to be devoted to that purpose was to give to the state a fee-simple title thereto. No conveyance was necessary. The seizure and occupation transferred to the state the entire estate in the lands so seized and occupied, leaving to the former owner simply a claim for compensation. 23 Ohio Laws, p. 56, § 8; *Malone v. City of Toledo*, 28 Ohio St. 648; *Id.*, 34 Ohio St. 541.

The lands, the occupation of which is the subject of controversy in this action, were a part of the canal lands of the state, to which, as before stated, the state had a fee-simple title. The statute of 1863 (60 Ohio Laws, p. 44) did not authorize a conveyance in fee to the city of Cincinnati of the parcel of land in controversy, nor did the deed of the governor, made pursuant thereto, purport to convey such title. The statute, as well as the deed, expressly describes the interest conveyed. It was an "authority and permission to the city of Cincinnati to enter upon, improve and occupy forever as a public highway and for sewerage purposes" the land in controversy. No other estate, right, or interest was granted or intended to be granted than that just recited. Grants made by the state are not to be extended by construction. The grant was of a right to occupy and improve this strip of land for two specified purposes,—for sewerage and a public highway,—the fee remaining in the state. No power of sale passed to the city, nor any power to barter this strip of land for another strip or parcel lying elsewhere, although the latter should be used for street or sewerage

purposes. The limit of the rights of the city under the conveyance was to improve and use the land conveyed for sewerage and street purposes. It could use or apply it to no other purpose itself, nor could it grant to another any right whatever in these lands. The city, by the ordinance of December 1, 1871, vacated Eggleston avenue from the north line of Front street to the south line of Pearl street. That was a direct abandonment of the right which had been conveyed to the city by the state to improve and use for a street the portion thus vacated; and by the use to which it permitted the defendant to appropriate that portion of the strip which is situate south of Pearl street, it may be fairly inferred that the city has abandoned that also. The city having abandoned this right, it reverts to the state from which the right emanated. The state was the absolute owner in fee of the whole estate and interest in this strip of land; it conveyed to the city a right to use it for two specified purposes only. Upon the abandonment by the city of either purpose, the interest to that extent returned to the grantor. By the express terms of the deed made to the city, as well as by the terms of the statute authorizing it, the city was authorized to enter upon, improve, and occupy all or any part of the strip of land which is the subject of controversy; so the fact that the city has abandoned a part of the land for street purposes does not work an abandonment of the whole. Nor is the use to which the city has permitted the defendant to devote that part of the land which lies between Broadway and Pearl streets inconsistent with its continued use by the city for street purposes; and therefore such use by the defendant does not work an abandonment of the city's rights. But as the right granted to the city only authorized a use by the city itself of the premises granted, the city could grant no right to the defendant to lay its track thereon, and therefore such use of the premises by the defendant is without authority of law. These views require us to overrule the demurrer to the petition.

We now pass to a consideration of the answer, which, as we have seen, is attacked by both a demurrer and a motion.

The first defense, among other things, denies the allegations of the 13th, 14th, 15th, 16th, and 17th paragraphs of the petition. These paragraphs, excepting the 13th, state no facts upon which relief is predicated, but are in the nature of conclusions drawn by the pleader from material facts before averred in the petition; and their denial, therefore, raises no material issue. The 13th paragraph of the petition is in the following words: "(13) The plaintiff avers and charges that, subject to the rights, privileges, and easements therein, which were granted to the city of Cincinnati by the state, under the act of March 24, 1863, excepting, however, such of the rights, privileges, and ease-

ments thus granted as, by reason of the facts hereinbefore stated, have since then been released, abandoned, or forfeited by said city, the state of Ohio has been, since the said 24th day of March, 1863, and now is, the owner in fee, and entitled to the full use and possession, of that part of the Miami & Erie Canal extending from the east side of Broadway in the city of Cincinnati to the Ohio river, including the width thereof, as owned and held by the state on said date." To deny the averments of this paragraph would seem to put in issue the title of the state to land occupied by the defendant. The first defense of the answer not only denies the averments of this paragraph, but proceeds as follows: "And the defendant denies that the plaintiff, on or prior to the 24th day of March, 1863, or at any other time, was or is the owner in fee of the real estate, or any part of the real estate mentioned in the petition; but, on the contrary, says that the plaintiff has not and never had any interest or estate therein, except the right to use and occupy a portion thereof for canal purposes, that no compensation was ever paid therefor by the plaintiff, and that no title in any of said real estate was ever conveyed to the plaintiff, or otherwise acquired by it." We have already adverted to the method by which the state acquired its canal lands. No conveyances were required, nor was any legal or formal proceeding of any kind necessary. It simply occupied such as the canal commissioners desired. This occupancy, by force of the statute (23 Ohio Laws, p. 56, § 8), vested the legal title in the state. No direct averment of title was necessary. From the fact alone that a tract of land was occupied by the state for the purposes connected with its canal system it followed, as matter of law, that the state owned it in fee simple. Under this state of the title, to simply deny that the state had a title in fee was to deny a conclusion of law. To contest the state's title, the party must deny that the lands were part of the canal system of the state, and the answer falls short of doing so. In fact, when the whole answer is considered, the connection of the lands occupied by the defendant with the canal system of the state as clearly appears as it does on the face of the petition. The attempted denial of title, therefore, is not sufficient to raise a material issue, and the demurrer to it should be sustained.

The remainder of the answer contains no matter entitled to an extended discussion. The defendant knew, or had the means of knowing, the terms of the conveyance made by the state to the city of Cincinnati. They appear not only in the conveyance itself, but also in the act of the legislature by which the conveyance was authorized. It made the arrangement with the city by means of which it entered into occupancy of these lands, and expended its money in erecting structures and placing railroad tracks there-

on at its peril. If in any case the property of the state can be lost by an estoppel predicated upon the negligence or bad faith of one of its officers or agents, the facts of this case do not create one. Neither was the state a party to any of the cases which are claimed to sustain the defendant in its contention that practically the whole interest and title of the state passed to the city by virtue of the deed made to it for these lands, and that the defendant acquired, by its contract with the city, the same rights. Doubtless, if the city had any rights in the premises which it could convey, they passed by the deed to the defendant; but, as the city had no rights therein other than that of occupancy by itself for specified purposes, and such rights not being subject to a conveyance, of necessity nothing passed by its deed. The demurrer to the answer should be sustained.

This disposes of the answer. True, the larger part of it might be stricken out as immaterial, but we deem it unnecessary to consider it with a view to that end. The defendant, upon the day the cause was finally submitted, asked and obtained leave to file the following amendment to its answer: "The defendant, for amendment to its answer, says, in addition to the allegations thereof, that this proceeding and the laws purporting to authorize the same are in contravention of the constitution of the United States, and especially of the fifth and fourteenth articles of amendment." As our attention has not been directed to any inconsistency between the proceeding under consideration, or the statute by which it was authorized, and the constitution of the United States, and as we perceive none, we enter upon no discussion of the question. Judgment for relator.

(156 Ill. 561)

CITY OF CENTRALIA v. WRIGHT.¹

(Supreme Court of Illinois. June 14, 1895.)

DAMAGES—EMINENT DOMAIN—MUNICIPAL CORPORATION—WATER COURSES.

Where a city which is authorized by law to establish a system of waterworks, and to maintain the same indefinitely, erects a dam for the purpose of procuring a water supply, a property owner who is injured by the erection of such dam may recover damages both past and prospective.

Appeal from appellate court, Fourth district.

Action on the case by Thomas A. Wright against the city of Centralia. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

This action was brought by Thomas A. Wright against the city of Centralia to recover damages to certain lands caused by the construction of a dam across a certain non-navigable stream near the city of Centralia,

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

whereby plaintiff alleges water was set back upon his premises, and a ford across said stream and a private way to his land thereby rendered impassable. On a trial before the court, a jury having been waived, plaintiff recovered a judgment for \$250, which was affirmed in the appellate court, to reverse which the city of Centralia appealed.

Samuel L. Dwight and Frank F. Noleman, for appellant. W. F. Bundy, for appellee.

CRAIG, J. It appears from the record that appellee owns 45 acres of land near Centralia, through which a stream of water known as "Crooked Creek" runs. Appellee was a butcher, and used this land for pasturing cattle and other animals purchased for his butcher shop. Several years ago, the Illinois Central Railroad Company constructed a dam across Crooked creek, a short distance below the premises, erected a pump house, established a small system of waterworks, and procured water for their shops, roundhouse, and yards at Centralia. Appellee had a ford where he crossed the creek going to and from his lands, but the dam so erected by the railroad never backed the water over the ford. On the 4th day of March, 1893, the Illinois Central Railroad Company entered into a contract in writing with the city of Centralia, under which the city secured the use and control of the property of the railroad company where its waterworks were located, and all of its plant and machinery, for a period of 20 years, for the purpose of enlarging the waterworks plant, and furnishing a supply of water to the city, and also to the railroad company. The city, among other things, agreed: "(1) That it will, as soon as practicable, proceed to establish a system of waterworks upon said demised premises and elsewhere in the said city of Centralia, for the purpose of supplying the public, including the said party of the first part, as hereinafter specified, in the said city of Centralia, with an adequate supply of water; and to that end, and for that purpose, it will alter, improve, and increase the said system of waterworks herein demised, improving and increasing the capacity of the reservoir formed in the channel of Crooked creek, by raising the top of said dam to within about four feet of the top of said creek banks, by purchasing and erecting another large boiler and pump, also a large stand pipe and suitable water mains to be erected and placed, so that an adequate supply of water may be furnished to the public and the said party of the first part, at convenient points in the said city of Centralia, and from time to time during the continuance of this contract, increase its said system of waterworks and its facilities for furnishing water, as the demands for the same and the consumption thereof shall require." Under this contract, the city of Centralia secured competent mechanics, and removed the top of the old dam until a solid

foundation was reached, and then began the construction of a solid stone dam across the entire stream. This dam was raised eight feet, to a point within four feet of the top of the banks of the stream. As a result of the construction of the dam, at the ford where appellee had been in the habit of crossing, the water was three feet, eight inches deep, and spread out sixty feet wide; and, when the creek was raised by rains, the lands of appellee were overflowed.

On the trial in the circuit court, it was contended by the defendant that plaintiff could only recover such damages as had been sustained up to the time the suit was commenced; while, on the other hand, plaintiff insisted he was entitled to recover in the one action all damages for the past, present, and the future. Upon this question the court held in favor of the plaintiff, and this ruling presents the principal question—indeed, the only question of any importance—presented by the record. Under the statute, the city of Centralia, for the purpose of establishing a system of waterworks, had the power to procure and hold all necessary lands, by purchase, lease, condemnation, or otherwise. *Hurd's Rev. St. 1893*, p. 301. After the lands were acquired for a plant, the city had the power to construct a suitable dam across the stream, for the purpose of obtaining a proper supply of water. But article 2, § 13, of the constitution, provides that private property shall not be taken or damaged for public use without just compensation. While the city of Centralia was empowered to purchase or lease from the railroad company its plant, and improve the same in such manner as the demands of the public required, yet if, in making the improvement, a private land owner was damaged, the constitution gave him a remedy for the injury sustained. But to recur to the question in dispute,—whether the recovery shall be confined to such damages as had been sustained at the time the action was brought, or shall a recovery be had for all past, present, and future damages? The solution of this question, as we understand the law, depends upon another question, and that is whether the injury is permanent in its nature, or merely of a temporary character. If the former, all damages may be recovered; if the latter, only such damages as had accrued up to the time the action was brought. Thus, in *Railroad Co. v. Maher*, 91 Ill. 312, where an action was brought to recover damages to a lot alleged to have been sustained by the erection of a pier for a bridge, it was held, where an injury to real estate is permanent in its nature, and not of a temporary character, the owner may recover, not only for the present, but also for future, damages, and such a recovery will be a bar to any other action for damages growing out of the continuance of the cause of the injury. In *Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, where a similar question arose, it was held: If a private structure or other

work on land is the cause of a nuisance or other tort to the plaintiff, the law will not regard it as permanent, no matter with what intention it was built, and damages can therefore be recovered only to the date of the action. But in the case of permanent injury caused by lawful public structures, properly constructed, and permanent in their character, damages may be allowed for the whole injury, past and prospective. So in *Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, it was held: "In an action brought for a deterioration in value of real estate occasioned by a nuisance of a permanent character, or which is treated as permanent by the parties, all damages for the past and future injury of the property may be recovered, and one recovery in such case is a bar to all future actions for the same cause." In *Railroad Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67, a similar question arose, and it was there held: "In case of an injury arising from a nuisance, where the original nuisance to land is of a permanent character, a recovery must be had for the entire damages in one action; but where the nuisance is transient, rather than permanent, the continuance of the injurious acts is regarded as a new nuisance, for which a fresh action will lie." There are many other cases where the same doctrine has been laid down, but the law on this subject is so well settled that a reference to other cases is not deemed necessary.

Here the city of Centralia procured the plant where it could establish a system of waterworks to supply the inhabitants of the city and the railroad company with water, not for a day, a week, or a year, but continuously. A dam was constructed, which seemed to be of a permanent character. Pipes were laid and other improvements made, which all seemed to be of a permanent character. It is true the plant was leased, as is provided in the lease, only for 20 years, but that is unimportant. It may be renewed, as its terms indicate the parties intend shall be done; but, if it is not renewed, it is apparent from the lease itself that the waterworks plant will remain and be continued after the lease expires, as a permanent "plant." The lease provides: "(10) Should the parties hereto elect not to renew this contract at the expiration of said term, then the said party of the first part shall purchase the permanent improvements, other than machinery, etc., which it is herein provided that said party of the second part shall have a right to remove, provided, however, that such permanent improvements shall be of a kind and quality as are reasonably fit and suitable for such a system of waterworks as the party of the first part may require at that time; and, if said parties shall be unable to agree upon the value thereof, then said parties shall each select an appraiser, who shall determine amount," etc. Whether the lease is renewed or not, it is apparent that the dam which caused the injury, and the waterworks plant,

will continue as a permanent structure. But, aside from these considerations, it is not necessary to establish the fact that the structure erected by the city shall continue forever in order to determine that the structure is permanent. It is enough that the city had the legal right to erect and maintain the system of waterworks perpetually. When the lease expires it is not bound to surrender the plant to the railroad company; but it may condemn the lands, and thus acquire the absolute title, and continue for all time, if it so desires. What was said in *Railroad Co. v. Horan*, 131 Ill. 301, 23 N. E. 621, applies here. In the discussion of what structures may be regarded as permanent, it is said: "It cannot be doubted that the roadbed, embankments, bridges, culverts, and other appurtenances of a railroad constructed and maintained in pursuance of lawful authority are to be regarded in law as permanent structures. This is not so because it is certain that they will in fact continue to subsist in their present condition forever, or that they are not liable to be changed in many respects by the proprietors of the railroad company whenever they see fit, or by natural causes, but it is so because the railroad company has a legal right to maintain them perpetually." Here the city of Centralia was authorized by law to establish and maintain a system of waterworks, and it has the power to continue them perpetually. We think, therefore, the erection of the dam which caused the damages was a permanent structure; and the circuit and appellate courts properly held that damages, past, present, and prospective, were recoverable. The judgment of the appellate court will be affirmed. Affirmed.

(156 Ill. 540)

HOGUE v. CORBIT.¹

(Supreme Court of Illinois. June 14, 1895.)

ATTACHMENT LEVY—VALIDITY—RETURN OF SHERIFF—LIEN OF JUDGMENT—COLLATERAL ATTACK.

1. An execution sale of land to satisfy a judgment in attachment is not subject to collateral attack because the affidavit for attachment did not state the nature of the debt or give the defendant's residence, since such defects, being amendable, render the proceedings merely voidable.

2. Nor is such sale affected by the sheriff's omission to state in his levy that the land attached belonged to the defendant.

3. Nor is it affected by the fact that the sheriff did not return the writ until after the return day.

4. The date of the return of a writ is the date when it is placed by the sheriff in the office from which it was issued.

5. Where a judgment in attachment gives the right of execution to the defendant instead of to the plaintiff, and the execution incorrectly states the date of the attachment writ, these errors, being manifestly clerical, may be corrected by the court at a subsequent term.

6. Where there is personal service on the defendant in attachment it is proper to render

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

personal judgment against him, and the lien of such judgment relates back to the levy of the attachment.

Appeal from circuit court, Union county; J. P. Roberts, Judge.

Ejectment by Emma E. Corbit against L. P. Hogue. Plaintiff obtained judgment. Defendant appeals. Affirmed.

Crawford & Dodd, for appellant. Karrakes & Lingle, for appellee.

BAKER, J. This is ejectment for 80 acres of land, prosecuted in the Union circuit court by Emma E. Corbit, appellee, against L. P. Hogue, the appellant. A trial resulted in judgment for the former, and from that judgment this appeal was taken. The parties claim from a common source of title,—one Edwin W. Thornton. On November 15, 1887, appellee sued out of said circuit court a writ of attachment against the real and personal estate of said Thornton, returnable to the March term, 1888, of said court. Upon the same day the sheriff levied the writ upon the land in controversy, and filed a certificate of the levy with the recorder of the county. At the March term, 1888, the cause was continued. There was personal service on Thornton to the September term, 1888, and he filed pleas. A trial was had at the March term, 1889, upon the issue joined between the parties to the attachment suit, and a judgment was rendered in favor of appellee and against Thornton for \$1,091.66 and costs. The title of appellee exhibited in this ejectment suit is based on a sale made in satisfaction of that judgment. Appellant relies upon alleged defects in the attachment suit and proceedings, and upon a title which has its origin in a deed from Edwin W. Thornton to his brother, Richard Thornton, which was acknowledged before a notary public on November 18, 1887, and filed for record on that day.

The statute (Rev. St. c. 11, § 9) provides that when a writ of attachment is levied on real estate a certificate of the levy shall be filed with the recorder of the county where the land is situated, and that such levy shall take effect, as to creditors and bona fide purchasers without notice, from and after the filing of the same, and not before. Here, as we have already seen, the attachment writ in the suit against Edwin W. Thornton was levied on the land, and a certificate of the levy filed with the proper recorder on the 15th day of November, 1887, whereas the deed from said Thornton was not filed for record until the 18th day of said November, which was three days after the lien of the attachment levy had become effective. It is urged, however, that on account of various alleged irregularities and defects in the attachment proceedings the levy in the attachment suit never did become a lien, or, even if it did, was not so availed of in the subsequent proceedings as to accrue to the benefit of appellee by means of the sheriff's deed that was

afterwards executed to her. The objections insisted upon in that behalf are quite numerous. The affidavit for attachment was very manifestly defective, and not in conformity with the requirements of the attachment act. It did not state the nature of the indebtedness for which the suit was brought, nor did it state either the place of residence of the defendant, or that it was not known, or that the plaintiff, upon diligent inquiry, had not been able to ascertain the same. It did state, however, the names of the parties, the amount of the indebtedness after allowing all just deductions, that the defendant had concealed himself so that process could not be served upon him, and that the plaintiff did not know his whereabouts and post-office address. The statute expressly makes provision for the amendment of affidavits for attachment. Here it is evident that there was an attempt to comply with the requirements of the statute, though some of these were omitted and others defectively stated. The affidavit, under the statute and under the doctrine of *Booth v. Rees*, 26 Ill. 45, and other cases, was clearly amendable. The validity of the writ depended upon the validity of the affidavit; and the affidavit, it being amendable, was voidable merely, and not void. *Bassett v. Bratton*, 86 Ill. 152. The affidavit, the writ, and the levy of that writ gave the court jurisdiction over the subject-matter of the attachment. A thing that is voidable has force and effect, but, in consequence of some inherent quality or defect, it is liable, upon proper steps being taken, to be legally annulled or avoided. But the steps to avoid it must be taken by the proper party, and by means of a direct attack upon it. Here Hogue, the appellant, was a stranger to the attachment suit, to the affidavit and the writ that was levied, and to the judgment that the court, with full jurisdiction of both the subject-matter and the parties to the litigation, afterwards rendered; and he cannot, in this collateral action, call in question and impeach this writ and affidavit, which are not null and void, but endowed with force and vitality. See *Durham v. Heaton*, 28 Ill. 264, and authorities there cited. In the case just named this court said that acts done under erroneous or voidable process are binding, and cannot be successfully assailed, except by a direct proceeding.

It is urged that no valid levy of the attachment writ was made on the land, because neither the levy indorsed on the writ nor the certificate of levy filed states whose property was levied on. The levy made by the sheriff was as follows: "By virtue of the within writ of attachment, I have levied on the east half of the northeast quarter of section twelve (12), township twelve (12) south, range one east of the third principal meridian, Union county, Illinois, November 15th, 1887." The command of the writ to the sheriff was that he should "attach * * * the estate, real or personal, of the said Edwin W. Thorn-

ton," to be found in his county. And the sheriff made return that by virtue of that writ of attachment he had levied on certain designated property. He had no authority, under the writ, to levy upon any property other than that of said Thornton, and it would have been a violation of official duty, and a tort, for him to have done so. The rule is that, where the legality of the acts of a public officer are brought collaterally in question, he is presumed to have done his duty. *People v. Auditor of Public Accounts*, 2 Scam. 567; *Harlow v. Birger*, 30 Ill. 425; *People v. Newberry*, 87 Ill. 41. And see, also, *Ballance v. Underhill*, 3 Scam. 453; *Lieb v. Henderson*, 91 Ill. 282; and *People v. Walsh*, 96 Ill. 232. There is no express requirement in the statute that the return shall state in terms that the property levied upon is the property of the defendant in attachment. Rev. St. c. 11, §§ 8-10. While it is the better practice that it should appear in words from the return that the property attached was the property of the defendant, or levied upon as his property, yet the omission of such express words would not—at all events, in a collateral suit—invalidate a title the basis of which is the levy.

The concluding portion of the indorsement made and signed by the sheriff that appears on the writ of attachment is, "And return Edwin W. Thornton not found in my county, November 15th, 1887." The writ was returnable on March 5, 1888. The file mark shows that it was filed with the clerk on March 8, 1888,—three days after the return day. The return of an officer to process is not simply his indorsement upon it, but is the actual placing of it in the office from which it was issued, and the file mark of the clerk indicates the date of the return. *Nelson v. Cook*, 19 Ill. 440; *Cariker v. Anderson*, 27 Ill. 358. We agree with counsel that the date of the file mark is in this case to be taken to be the date of the sheriff's return; but we do not sustain their contention that, because the writ was not returned by the sheriff until after the return day, therefore the levy and the attachment failed. The rule is, where there is no peculiar statute to the contrary, that the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment. *Drake, Attchm.* (7th Ed.) § 204, and authorities cited in footnote 3.

The judgment in attachment was rendered at the March term, 1889, and at the succeeding September term of the court, in a proceeding by appellee against Edwin W. Thornton and Hogue, the appellant here, to amend and correct said judgment and the special execution issued thereon, it was ordered that said judgment, as entered of record, should be amended by striking out the word "defendant" and inserting the word "plaintiff" in the next to the last line of the judgment, so that the last lines of the judgment should read as follows: "Ordered that the plaintiff

have a special execution on said judgment." And it was further ordered that the special execution should be corrected by striking out "the 11th day of March, A. D. 1889," in giving the date of the issuing of the writ of attachment, and by inserting "the 15th day of November, A. D. 1887"; and by striking out the word "eleventh" and inserting in the special execution the word "nineteenth," in giving the date of the judgment. The amendments ordered to be made were corrections of manifest mistakes and negligences of the clerk of the court in making up the record of the judgment and in issuing final process, and there was ample, even superabundant, material in the record to amend by.

The judgment in the attachment suit, as it stood after the amendments substituting "plaintiff" for "defendant" in its last sentence was, in part, as follows: "Therefore it is considered by the court that the plaintiff do recover a judgment for one thousand ninety-one and ⁶⁶/₁₀₀ dollars damages, together with her costs in and about this suit expended, and she shall have execution therefor. It is ordered that the plaintiff have a special execution on said judgment." As we understand the last of the claims that is urged by appellant, it is that the judgment was only a general and personal judgment against the defendant, and only became a lien on property of the defendant from and after March 19, 1889, the date of its rendition; and that, since the judgment did not specifically order the sale of the property levied on under the attachment writ, the personal judgment operated to quash the attachment and release the property that had been levied on. This claim is without merit. There was personal service on and appearance by Thornton. In that state of the record the plaintiff was entitled to, and in fact recovered, a judgment in personam. The statute (chapter 11, § 34) expressly provides that in such case "execution may issue thereon, not only against the property attached, but other property of the defendant." And in the judgment in question the court, in furtherance of the statute, not only awarded "execution" for the damages and costs, but also made an additional order "that the plaintiff have a special execution on said judgment." Neither the writ of attachment nor the levy thereon was ever quashed. The attachment was never dissolved by giving bond or otherwise. The property was never released. The levy still continued to be a lien up to and at the time of the rendition of the judgment. And even after final judgment the attachment lien still remained effectual for the purpose of preserving the priority of lien. Such judgment relates back to the levy. *Julliard v. May*, 130 Ill. 87, 22 N. E. 477; *Conn v. Caldwell*, 1 Gilman, 531; *Martin v. Dryden*, Id. 187; *Young v. Campbell*, 5 Gilman, 80; *Kerr v. Swallow*, 33 Ill. 379. The case of *Wasson v. Cone*, 86 Ill. 46, is not here in point. That was not an attachment suit commenced in

a court of record, under the provisions of the act approved December 23, 1871 (Laws 1871-72, p. 176), but an attachment commenced before a justice of the peace, under the provisions of the act in regard to attachments before justices of the peace, approved February 9, 1872 (Laws 1871-72, p. 185); and the case was not controlled by section 34 of the act of 1871, but by sections 8 and 11 of the act of 1872, the last of which sections requires that, if judgment be given against the defendant, then the justice of the peace "shall order a sale of the property attached, or so much thereof as will satisfy the judgment and all costs of suit." The fact that in the attachment proceeding now in question the sheriff indorsed a levy upon the land on the special execution neither destroyed nor strengthened the already existing levy and lien. All that was required of him, or that could have force and effect, was that he should carry into execution the mandate of the process that he held. In the record before us we find no error in the rulings of the circuit court in regard to the admission or exclusion of testimony or otherwise. The judgment is affirmed. Affirmed.

(156 Ill. 444)

HABBERTON et al. v. HABBERTON.¹

(Supreme Court of Illinois. June 14, 1895.)

PARTITION PROCEEDINGS—APPORTIONMENT OF COSTS.

1. Rev. St. 1893, c. 106, § 40, provides that in partition proceedings, when the rights and interests of all the parties in interest are properly set forth in the bill, the court shall apportion the costs, including a reasonable solicitor's fee, among the parties in interest, so that each party shall pay his equitable portion thereof, unless the defendants, or some of them, shall interpose a good and substantial defense. *Held*, that where the bill correctly stated the rights and interests of all parties, except that it failed to state that some of the defendants could not take any interest, because they were aliens, and this defect was corrected by an amendment, and there was no real contest as to the respective rights of the parties, it was proper to apportion the costs and solicitor's fees.

2. A partition decree allowed \$450 as solicitor's fees, and declared that the parties should pay that sum "in accordance with their respective interests in the premises, said sum to be a lien upon the lands in this decree." *Held*, that the land of each party was burdened with a lien to the extent of his proportion only of the sum to be paid.

Appeal from appellate court, Fourth district.

Bill for partition by Sarah L. Habberton against W. P. Habberton and others. There was a decree of partition, which allowed a solicitor's fee, and this decree was affirmed by the appellate court. Defendants appeal. Affirmed.

Mundy & Organ, for appellants. Creighton & Kramer, for appellees.

CRAIG, J. This is a writ of error to appellate court to reverse a judgment of that court affirming a decree of the circuit court of Wabash county allowing a solicitor's fee of \$450 in favor of complainant's solicitor, William T. Bonham, in a proceeding for partition of lands brought by Sarah L. Habberton against W. P. Habberton et al. in the circuit court of Wabash county.

In 1889, section 40 of the act of 1874, in regard to partition, was amended to read as follows: "In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including a reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, shall interpose a good and substantial defense to said bill or petition; in such case the party or parties making such substantial defense shall recover their costs against the complainant according to equity." Laws 1889, p. 215. Under this statute, it is apparent that the court is not authorized to apportion solicitor's fees among the parties when the bill or petition falls properly to set out the rights and interests of all persons in the lands, or when some one of the defendants shall interpose a good and substantial defense. But, on the other hand, where the rights and interests of all the parties are properly set out in the bill or petition, and where no defendant shall interpose a good and substantial defense, then solicitor's fees may be apportioned against all the owners. The object of the statute seems to be to allow an apportionment of solicitor's fees against all persons in interest in such cases, and such only where it is not necessary for the defendants, or any of them, to employ counsel to protect their interest in the lands.

Here the bill as originally filed failed to set out correctly the rights and interests of the different owners of the lands, but this defect was obviated by an amendment of the bill. It is true an answer was prepared and filed for the purpose of correcting the allegations of the bill in regard to the interest of the owners. But, as to the necessity of filing an answer and the facts in regard to the amendment of the bill, the court, from the evidence, made the following finding: "That the filing of the amended bill by complainant's attorney notified the attorneys for the defendants that he proposed amending his bill so as to correctly state therein interests, and that the filing of an answer by defendants was unnecessary, and that the first amended bill correctly states the interests of complainant in every respect, and that of the defendants in every respect, except that it failed to recite the fact that a portion of said defendants were aliens, and thereby cut out from inheriting their share of said property; that complainant's attorney had notified defend-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ant's attorneys, some time prior to the filing of the answer, that the fact of a part of the defendants being allens would be set up by him so soon as he could present the amendment to the court; that the amendment was brought into court by complainant's attorney, was recognized by the court for the purpose of noting the filing of the amendment; the attorneys for the defendants had noted the filing of an answer, and that, after the noting of the filing of the amendment, the former answer was refiled, without modification to the amended bill; that there was no contest at any time between the complainant and respondent as to the shares to which they were entitled, nor was there at any time any contest between the defendants in relation thereto." This finding of the court was in the main maintained by the evidence. It thus appears that there was no real contest between the complainant in the bill and the defendants in regard to the rights and interest of the defendant parties in the lands; and, after the amendment of the bill, no answer was required. From the facts as they appear in the record, the case is one falling within the terms of the statute which authorizes the court to apportion the costs and attorney's fees among the parties in interest.

It is also claimed that the decree is erroneous because the whole amount allowed is made a lien on all the lands, and does not permit the defendants to discharge their lands by the payment of their proportional share. The portion of the decree bearing on this question reads as follows: "That the parties hereto pay the sum in accordance with their respective interests in the premises, as found by the decree of this court entered herein at the April term, 1893, said sum to be a lien upon the lands in this decree." The language used in the decree will not bear the construction counsel attempt to place upon it. The amount is made a lien on all the lands, but no one owner can be required to pay more than an equal proportion of the amount, in view of the amount of land he owns; and, when he has paid that amount, his part of the land will be free from the lien. We think the judgment of the appellate court correct, and it will be affirmed. Affirmed.

(153 Ill. 614)

PEOPLE ex rel. MOUSCHENROSE et al. v. COMMISSIONERS OF BIG LAKE SPECIAL DRAINAGE DIST.¹

(Supreme Court of Illinois. June 14, 1895.)

REVIEW ON APPEAL—BILL OF EXCEPTIONS.

In quo warranto to test the legality of the annexation of certain land to a drainage district, a refusal to have the question whether the land needed to be drained determined cannot be assigned as error, where there is no bill of exceptions to show that the court was ever asked to submit such an issue, or that any exception there-to was taken.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Appeal from circuit court, Jackson county; O. A. Harker, Judge.

Proceedings in the nature of quo warranto by the people, on the relation of P. J. Mouschenrose and others, against the drainage commissioners of the Big Lake special drainage district. Defendants obtained judgment. Relators appeal. Affirmed.

J. M. Herbert, State's Atty., and R. J. McIlvain, for appellants. R. J. Stephens, for appellees.

PER CURIAM. This was a proceeding in the name of the people, on the relation of certain named parties, by petition in the nature of quo warranto, to test the validity of the action of the commissioners in annexing certain lands to Big Lake special drainage district. It is claimed in the argument that the lands of relators which were annexed to the district did not require drainage, and no necessity existed for annexing such lands to the district; and the only error relied upon in the argument is that the court erred in refusing to permit that question of fact to be determined by the court or a jury. If the relators desired to present that question for determination in this court, the uniform practice required them to enter a motion in the circuit court requesting the submission of the question to be tried before the court or a jury, or in some other appropriate mode present the question, and obtain the judgment of the court upon it; then embody the motion, the ruling of the court, and the exception in a bill of exceptions. If this course had been pursued, the action of the court on the application of the relators would become a part of the record, and thus be seasonable here. But that course was not pursued. This record contains no bill of exceptions. There is therefore nothing to show that the question was ever presented or decided by the circuit court. The recital by the circuit clerk in the transcript that relators moved the court to submit issues of fact, and excepted to the ruling and judgment of the court, does not make the motion, judgment, or exception a part of the record. Moreover, the final judgment of the court shows that the proceeding was dismissed for the want of prosecution. In the absence of a bill of exceptions showing the contrary, it will be presumed that the judgment was properly rendered. No error, therefore, appearing on the record, the judgment will be affirmed.

(156 Ill. 568)

RENDLEMAN v. RENDLEMAN.¹

(Supreme Court of Illinois. June 14, 1895.)

DEED—PROCUREMENT BY DURESS—RESCISSION—WANT OF CONSIDERATION.

1. Plaintiff executed a deed after being threatened with arrest by a pretended officer,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

and after the man demanding the deed had slapped him, and shown him a pistol; but these threats occurred some little time before the deed was executed, and in the meantime a disinterested man had come in, and was consulted by the grantor as to the propriety of executing the deed. *Held*, that there was no such duress or fraud as would avoid the deed.

2. A grantor who has been tendered one dollar as a consideration for his deed cannot have it set aside for want of consideration where it does not appear that he expected any other consideration.

Error to circuit court, Jackson county; J. P. Robarts, Judge.

Bill by Jerome F. Rendleman against Elizabeth Rendleman to set aside a deed. Defendant obtained a decree. Complainant brings error. Affirmed.

W. W. Barr, for plaintiff in error. Hill & Martin, for defendant in error.

BAKER, J. On October 26, 1883, appellant and his wife conveyed to appellee certain lands situated in Jackson county. Thereafter appellant filed this bill, making appellee party defendant, to set aside and cancel that deed, on the alleged ground that he had been coerced into signing it through fraud and duress. Appellee thereupon filed a cross bill alleging a mistake in the description contained in the deed as to part of the land intended to be conveyed. Answers and replication were filed to the original and cross bills. At the first hearing of the cause, the court, after hearing the evidence, dismissed both the original and cross bills. A rehearing was applied for and obtained. The cause was again heard upon the same evidence, and the same decree entered as at the first hearing. To reverse that decree, this appeal is prosecuted.

At the hearing, appellant's wife was permitted to testify in his behalf. This, manifestly, was error, and her testimony is therefore to be disregarded. It appears that appellant and his wife lived about 1½ miles from the town of Makanda; that, on the date of the execution of the deed in controversy, one J. A. Wilson and Dennis Rendleman, son of appellee, with one Izri Hagler, a justice of the peace, went to the home of appellant. Wilson arrived there about dark. Dennis Rendleman and Hagler came later. Dennis Rendleman did not go into the house, but remained outside, and sent Hagler in, telling him there was a man in there who would inform him for what he was wanted. Appellant testified that, when he met Wilson in the house, the latter told him that he was a United States officer, and had been sent there by the court at Springfield, to get a deed from him and his wife to Mrs. Rendleman. Upon appellant's refusal to make the deed, Wilson said that, if he could not get it one way, he could another; that he would have him looking through the bars if he did not sign it. It further appears that, after a half hour's rather stormy conversation between appellant and Wilson, Hagler, the jus-

tice of the peace, came in. Appellant called him aside, and they, accompanied by appellant's wife, went into an adjoining room, leaving Wilson where he was. Appellant then asked Hagler's advice as to what he had better do about making the deed, and he replied that he would not tell him what to do, for fear he would tell him wrong. Appellant next appealed to his wife, who said that she would have to do what he did. After a moment's reflection, he said that he believed he would sign the deed. They then returned to Wilson, in the other room, where, after some further parleying between appellant and Wilson, it was finally agreed that the deed should be made. Hagler thereupon drew up the deed, which was then signed by appellant and his wife, and acknowledged by them before Hagler. As a consideration for the deed, Wilson tendered appellant one dollar, which the latter refused to accept. Appellant testified that Wilson had slapped him, and shown him a pistol. There was, however, no third person present at the time these acts are alleged to have been done, nor was Wilson in court to deny or affirm the truthfulness of appellant's statement. Granting that he testified to the truth, yet the slapping and showing of the pistol occurred some time prior to the entrance of Hagler and to the determination on appellant's part to make the deed.

The question presented for our determination is whether or not the foregoing state of facts constitutes such fraud or duress as should avoid the deed. In *Willemin v. Dunn*, 93 Ill. 511, it was held that mere mental weakness will not authorize a court of equity to set aside an executed contract, if such weakness does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence. And in *Stever v. Mitchel*, 45 Ill. 213, and *Kerting v. Hilton*, 152 Ill. 658, 38 N. E. 941, it was held that, in order to constitute duress or such undue influence as will avoid an executed contract, such a pressure must be brought to bear upon the person seeking such avoidance as to interfere, in some way, with the free enjoyment of his rights of person or of property. The record before us does not show that any such pressure was brought to bear upon appellant as could have interfered in any way with the free enjoyment of his rights, either of person or of property. At most, he was but threatened, vexed, and annoyed. The threats, moreover, were made some time prior to the entrance of Hagler and the execution of the deed. How they could have so affected his mind with terror as to have induced him to afterwards sign the deed is not easily understood, for at its execution both his wife and Hagler, a disinterested person, were present, and one Smith, an employé of appellant's, and likewise a disinterested person, was about the house; and so there could not possibly have been any ground for believing there was present

danger. And mere threats of imprisonment, for which there is no ground, do not constitute duress, as the person threatened could not be put in fear thereby. Nor do threats of criminal prosecution constitute duress when neither warrant has been issued nor proceedings commenced. 6 Am. & Eng. Enc. Law, p. 64, note 1, and cases cited. In *Hamilton v. Smith*, 57 Iowa, 15, 10 N. W. 276, it was held that, where the evidence showed the conveyance was an intelligent, voluntary act, the facts that the deed was executed reluctantly, and after some threats had been made, were insufficient to establish undue influence or duress. See *Baldwin v. Murphy*, 82 Ill. 485. The case of *Bane v. Detrick*, 52 Ill. 19, relied upon by appellant, was different in its facts and far stronger than the case at bar. There the threat of arrest and imprisonment was made by the sheriff, having in his hand at the time a warrant for the arrest of plaintiff, Detrick, and also a writ of attachment, under which he was about to remove his goods. The evidence of terror produced upon the mind of the plaintiff was unmistakable. For that, and the further reason that the mortgage was executed through a perversion and abuse of criminal process, it was held to be void.

The vexation and annoyance to which appellant was subjected will not justify the setting aside of this deed, for it was knowingly executed and acknowledged in due form. In *Brower v. Callender*, 105 Ill. 88, it was held that, under such circumstances, there would be no justification for canceling a deed, unless it were shown that the mind was in that condition that, by reason of such vexation and annoyance, a state of insanity was produced, which existed at the time of the executing and acknowledging the deed. The evidence in this record could not possibly be so read as to show that appellant was in any such state of mind at the time he signed and acknowledged the deed. On the contrary, it appears that he had judgment enough to consult both his wife and Hagler, to argue with Wilson, and to think over the matter himself, before he finally signified his willingness to do what Wilson demanded.

Appellant cannot be heard to say that, because he refused to accept the proffered dollar, there was no consideration, and the deed should, for that reason, be canceled, for his seal upon the instrument imports a consideration, and by this he is bound, because there was no fraud practiced upon him. It does not appear that he expected any consideration other than the one dollar, and he cannot blame appellee for his own act in not accepting it when it was tendered him. *Fitzgerald v. Ferristal*, 48 Ill. 228; *Willemin v. Dunn*, *supra*.

We are of the opinion that appellant has not made out such a case as would entitle him to the relief prayed for. The decree of the circuit court will therefore be affirmed. Affirmed.

CHEMICAL NAT. BANK OF CHICAGO v. HARTFORD DEPOSIT CO.¹

(Supreme Court of Illinois. June 14, 1895.)

NATIONAL BANKS — INSOLVENCY — DISSOLUTION — ACTION FOR RENT — PARTIES — RECEIVERS.

1. The appointment of a receiver for an insolvent national bank, under Act Cong. June 30, 1876, § 1, which authorizes the comptroller, when satisfied of the insolvency of a banking association, to appoint a receiver, "who shall proceed to close up such association, and enforce the personal liability of the shareholders," does not dissolve the corporation.

2. A national bank which, when a receiver is appointed for it, is in arrears for rent under an existing lease, may be afterwards sued for damages caused by its failure to carry out the provisions of the lease.

3. The receiver is not a proper party to such action.

Appeal from appellate court, First district.

Assumpsit by the Hartford Deposit Company against the Chemical National Bank of Chicago and Eli C. Tourtelot, as receiver of the Chemical National Bank of Chicago. Defendants obtained judgment, which was reversed by the appellate court as to the bank and affirmed as to the receiver. The bank appeals. Affirmed.

Duncan & Gilbert, for appellant. Burnham & Baldwin, for appellee.

CRAIG, J. This was an action brought by the Hartford Deposit Company against the Chemical National Bank of Chicago and Eli C. Tourtelot, as receiver of the bank, to recover damages for a failure to pay rent alleged to be due under a written lease from August 1, 1893, to April 31, 1894. The facts were agreed upon, and they are substantially stated in the opinion of the appellate court, as follows: "The Chemical National Bank of Chicago entered into a lease dated November 18, 1892, with the Hartford Deposit Company, of a banking office in a certain building owned by the said Hartford Deposit Company. In accordance with its terms, the bank paid \$2,500 on the delivery of said lease. The term was for a period of five years from May 1, 1893, at an annual rental of \$12,000, payable in equal monthly installments of \$1,000, in advance, exclusive of and in addition to said first payment of \$2,500. The bank entered into and took possession of said premises on May 1, 1893, the first day of said term, and the first installment of rent fell due and was payable on that day. This installment was not paid when due, nor had it or any part of it been paid when, on May 9, 1893, the bank became insolvent, and a national bank examiner took possession of its assets and of said premises. On July 21st a receiver was duly appointed, and on July 27th he notified the Hartford Deposit Company of his election to terminate said lease after July 31, 1893, so far as he, as receiver, was concerned. On the same day, namely, July 27th, said re-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ceiver paid to the Hartford Deposit Company the sum of \$2,709.68, which was, as agreed, the ratable amount of rent due for the period May — to July 31st, inclusive. No other or further rent was paid under said lease by any other person or at any other time. The premises remained vacant until May 1, 1894, when they were relet at a reduced rental."

It will be observed that nothing was done by the lessor to terminate the lease. The receiver gave notice of his election to terminate the lease on July 31st, so far as he, as receiver, was concerned. This action, however, on his part, had no effect on the lease as respects its validity or binding force between the lessor and the Chemical National Bank. There was a contract in writing existing between these parties, which fixed their obligations and determined their rights and liabilities, and the receiver was clothed with no power to do any act which would impair the obligation of that contract. It may be conceded, as held in *Trust Co. v. Armstrong*, 35 Fed. 567, if the charter of the Chemical National Bank had been forfeited, and the corporation dissolved by decree of a court of competent jurisdiction, the lease might be regarded as terminated, for the reason that, after the dissolution of the corporation, no lessee existed. But such is not this case. No proceeding has been instituted to forfeit the charter of the Chemical National Bank, and no decree dissolving the corporation has ever been rendered. It is, however, insisted that the appointment of a receiver of a national banking association by the comptroller of the currency on account of its insolvency amounts, for all practical purposes, to a dissolution of such association. The comptroller of the currency has such supervisory power over national banks, and such only, as has been conferred by the acts of congress, and in determining the effect to be given to his action in the appointment of a receiver it is necessary to go to the statute. If congress intended that the mere act of appointing a receiver on the part of the comptroller should forfeit the charter of a national bank, and work a dissolution of the corporation, surely that deliberate body would, in the enactment of the law, have used language indicating an intention of that character. The following sections of the acts of congress have been cited in the brief, as showing the authority of the comptroller to appoint receivers. Section 1 of the act of congress approved June 30, 1876 (Pratt, Dig. p. 120), provides as follows: "That whenever any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section 5239 of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record and made application, accompanied by a certificate from the clerk of the court stating that such judg-

ment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 5234 of said statutes." Section 5234 of the Revised Statutes of the United States (Pratt, Dig. p. 84) provides as follows: "Sec. 5234. On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claim belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association on such terms as the court may direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller." There are certain other cases specified in sections 5141, 5151, 5191, 5195, 5201, and 5205 of the national banking act under which a receiver may be appointed, but they have no special bearing on the question involved. We find nothing in any of the sections of the law wherein a receiver is authorized to be appointed which in the slightest degree indicates that an appointment should be treated, for any purpose whatever, as a dissolution of the corporation. When a receiver has been appointed, the statute makes it his duty to proceed to close up such association. This is done by collecting all debts and obligations due the bank, enforcing the personal liabilities of the stockholders, if necessary, and then paying off its liabilities. After a receiver has been appointed, and entered upon the discharge of his duties, the corporation has no authority to transact any new business. It cannot issue bills, receive deposits, make loans, or discount commercial paper. But, after the receiver had collected the indebtedness due the bank, and discharged its liabilities, the bank still exists as a corporation, and will continue to exist until dissolved by the judgment of a court, or until its stockholders voluntarily surrender its charter. Moreover, section 5239 points out the mode in which a charter of a national bank may be forfeited. That section is as follows: "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents or servants of the association

to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved." If a judgment of a court is necessary to dissolve a corporation on the ground specified in the foregoing section, upon what principle can a judgment be dispensed with when some other ground of forfeiture is relied upon? But, disregarding other reasons, a sufficient answer to the position of counsel is the banking act nowhere provides that the appointment of a receiver shall work a dissolution of the charter of a banking association. It is not pretended that the appointment of a receiver for an ordinary corporation will operate as a dissolution of such a corporation, and, in the absence of an act of congress providing otherwise, we perceive no reason why one rule should be applied to an insolvent national bank, and a different rule applied to other insolvent corporations. In the absence of a statute or act of congress, all insolvent corporations should stand on the same footing.

But it is said, a claim, to be entitled to be proven up and paid by dividends out of the assets of a national banking association in the hands of a receiver, must be one which, at the date of the suspension of the association, was an existing demand, and the claim for rent under this lease is not such a demand. The lease executed between the bank and appellee was a valid contract. The premises were leased for a term of five years from May 1, 1893, at \$12,000 per annum, payable in monthly installments of \$1,000, in advance. The bank went into the possession of the premises on the 1st day of May, 1893, and \$1,000 was due on the rent on that day. The money was not paid, and there was then a breach of the contract, for which an action might have been maintained; and this occurred nine days before insolvency. There is, therefore, no foundation for the position of counsel that the claim of appellee was not an existing demand at the time the bank suspended. The amount of damages may not have been as large on the 1st day of May, 1893, as at a later period, but on that date there was a breach of the contract, and a right of action for such breach. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, fully sustains the right of appellee to maintain the action. It is there, among other things, said: "Express power to sue and be sued, complain and defend, in any court of law and equity, is conferred on such associations by the eighth section of the act providing for their organization; and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for

that purpose by virtue of the appointment of a receiver by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is anywhere in terms conferred upon the receiver, nor upon the comptroller of the currency in any case except when he institutes a suit to forfeit the rights, privileges, and franchises of the association; and in that case the provision is express that the suit shall be in his own name. Beyond doubt, the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking. But the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners." See, also, *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686.

It is claimed by appellee that the court erred in not rendering judgment against the receiver as well as the bank. The purpose of this action was to establish the demand of appellee in a court of competent jurisdiction against the bank. The receiver was not a necessary party to this action, and, not being a necessary party, it was not error to refuse judgment against him. The judgment of the appellate court will be affirmed. Affirmed.

(164 Mass. 92)

PIERCE et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1895.)

LAND TAKEN FOR PARK—RECOVERY OF DAMAGES —EVIDENCE OF VALUES—EXPERT WITNESS— COMPETENCY—CROSS-EXAMINATION.

1. Where a witness as to the value of the property taken for a public purpose states that one of the reasons for the valuation placed by him on the property was that lots in that locality were in demand and had been disposed of readily, and it appears that he has had such a lot in his hands for sale for one or two years, the price asked for that lot, as compared with the valuation placed by him upon the property taken for public use, is admissible, as tending to control the grounds upon which his opinion was based.

2. An expert carpenter who has seen the outside, but not the interior, of a building, may testify as to the value of the building, upon a description being given of the interior.

3. How much the fact that an expert builder testifying to the value of a building has not seen the interior should affect the weight of his testimony, is for the jury.

4. On a petition to assess damages for land taken for public use, sales of property located in the vicinity made two years previously is admissible, where it appears that no more recent ones have been made, though the property may have risen somewhat in value since those sales.

5. The prices obtained for other properties in the vicinity are not inadmissible because such properties are much larger than the property taken, and differently located, and have located on them buildings dissimilar to those on the lot taken.

6. Evidence that a witness, called to establish the value of real estate taken for public use, told a person two years before that he was not acquainted with real estate values in that vicinity, is incompetent.

7. The distance which a house has been moved, upon the taking of the land on which it was located for a park, is inadmissible to show the strength of the building as an element contributing to its value.

8. On a petition to assess damages for property containing a house and barn, which is taken for a public use, where the price which a neighboring lot sold for is admitted as bearing on the question of value, the question whether the latter lot is large enough for both a house and a stable is inadmissible.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Petition by Clarissa Pierce and others against the city of Boston for the assessment of damages for land taken by the city for a public park. A verdict having been rendered, plaintiff brings exceptions. Exceptions overruled.

This was a petition for the assessment of damages for land taken by the city of Boston for a public park, consisting of 28,790 square feet, situate at the corner of Pond and Prince streets, Jamaica Plain, with a dwelling house and stable thereon. Roswell S. Barrows, a witness for petitioners, valued the land at 75 cents a foot, the house at \$7,500, and the stable of \$1,500, stating that his reasons for placing the value of the land at 75 cents a foot were, first, that small lots in that locality had been and were in very good demand; that there had been few places in that locality placed on the market, and these had been disposed of quite readily. On cross-examination the witness testified that he had had the Clark estate, upon the opposite corner of Pond and Prince streets, in his hands for sale for between one and two years before the taking in April, 1892; that he had, during the whole time, and up to within a month of the taking, an asking price for the Clark estate, house and all included, that he was instructed by the owners to ask for it. The defendant then put the following question: "I don't ask you the amount of it; but that asking price, taking the 100,000 feet, throwing in the buildings and all,—was it quarter of the price per foot that you put on this place?"—to which the petitioners objected; but the court admitted the question, and the witness answered "Yes." The defendant then asked the witness: "Was it a third, throwing in the buildings and all?"—to which the petitioners objected; but the witness was allowed to answer, and answered "Yes." The defendant then asked the following question: "Wasn't it just about a third of the price per foot, and the buildings, the house that is on it, and the stable, etc., thrown in?"—to which the petitioners objected; but the court admitted the question, and the wit-

ness answered, "Well, when it was first placed in my hands, possibly it was about a third." The petitioners did not object to the form of this answer. The petitioners offered to show the distance of Custer street from the petitioners' land, for the purpose of showing the strength and character of the construction of the building, so far as the same could be inferred from the fact that the building was moved so far; but the court, on defendant's objection, refused to permit the petitioners to ask the question, to which the petitioners excepted. The defendant claimed at the trial that the house was very old, and that some of the timbers were decayed. The defendant having brought out, on cross-examination of one of petitioners' witnesses, the price for which a parcel of vacant land on the corner of Orchard and Pond streets had been sold by Brewer to Gill, the petitioners called a witness, Philip H. Downes, who testified that he had lived in Jamaica Plain for 20 years, and was engaged in the real-estate business, and was familiar with the Gill estate; and that the same consisted of a little less than 10,000 feet of land. The petitioners then asked the witness "whether the lot was large enough for both a house and stable," to which the defendant objected, and the court excluded the question, saying that the witness could describe the physical characteristics of the lot as fully as possible. The defendant called as a witness George Merritt, who testified that he was a carpenter and builder; that he had visited the estate and had measured the exterior dimensions of the dwelling house on petitioners' land, and examined it thoroughly from the outside, but was unable to get in, so had not examined the inside of the house. The witness, having said that from what he saw of the exterior and from the description of the interior he could give a judgment of the value of the house, was asked, after a description of the interior was given, what he considered the value of the house. The defendant called as a witness Francis B. Beaumont, who testified that he had bought the estate known as the "Duff Estate," on Burroughs street, in May, 1887, and sold it in May, 1890. The defendant then asked the price at which the estate was sold. No evidence of a sale had been offered by the petitioners, and it appeared from the statements of experts on both sides that no sale had occurred in the vicinity for some time previous to the taking, and none in the immediate vicinity, except those to the city, for a great many years. The defendant called as an expert Frederick H. Vieux, who testified that he was a real-estate broker, and had been and was familiar with real-estate values in Jamaica Plain; and the witness testified, on cross-examination, that in 1890 he was trying to purchase a large estate in Jamaica Plain known as the "Curtis Estate"; that he knew L. L. P. Atwood, and knew that Atwood had made several sales of estates on Centre street near the Curtis place; and went

to Atwood, at his office in Jamaica Plain, for the purpose of verifying the prices which he had heard that Atwood had obtained at said sales; that he asked Atwood about the prices that certain lots had sold for, and got Atwood to go with him to Centre street and show him the estates which had been sold. He denied that he ever told Atwood that he was not acquainted with real-estate values in Jamaica Plain, but said that he called on him as a local broker whom he knew, for information concerning Atwood's sales and prices. The petitioners called Atwood in rebuttal, and asked him whether Mr. Vieux had told him in the above conversation that he was not acquainted with real-estate values in Jamaica Plain.

R. M. Morse, for petitioner. T. M. Babson, for defendant.

MORTON, J. The petitioners do not rely much upon their exceptions to the exclusion of the question to Atwood as to the distance of Custer street from their land, or the question to Downes whether the land sold by Brewer to Gill was large enough for a house and stable, or on the question to Atwood as to the statement made to him by Vieux; and we think it only necessary to say that, after considering them, we discover no error in the rulings.

1. The witness Barrows was offered by the petitioner as an expert regarding the value of the land and buildings, and, after stating what in his opinion they were worth, stated on direct examination, among other things, as reasons for his opinion, "that small lots in the locality have been, and I would say are at present, in very good demand. There have been few places in that locality that have been placed on the market. They have been disposed of quite readily." It appeared on cross-examination that he had had for one or two years the estate on the opposite corner in his hands for sale, with an asking price, including the house and land, which he was instructed by the owner to ask for it. Thereupon the defendant was permitted to ask him, first, if that asking price, throwing in the buildings, was not a quarter of the price that the witness put on the land and buildings in suit, and then whether it was not about one-third; and the witness answered that possibly it was about one-third. We think that the evidence was admissible, not for the purpose of showing the asking price of land in the vicinity, but as tending to control the reasons for the opinion which the witness had previously expressed as to the value of the land and buildings in controversy. *Brown v. Worcester*, 13 Gray, 31.

2. The question put to the witness Merritt was properly admitted. It was for the jury to say how much the fact that he had not

seen the interior should affect the weight to be given to his testimony. As an expert carpenter and builder he would have been competent to express an opinion without having seen the house at all. *Cook v. Castner*, 9 Cush. 286.

3. The petitioner objects that the sales of the Pratt and Duff estates were not admissible—First, because too remote in point of time; and, secondly, because the estates were not similar to that of the petitioner. The fact that the sales were about two years before the taking did not of itself render them incompetent. *Benham v. Dunbar*, 103 Mass. 365. There was testimony tending to show that, with the exception of the purchases by the city, no sales had occurred in the immediate vicinity for a great many years previous to the taking, and none in the vicinity for some time before that, so that none more recent than those in question were obtainable. The rise in values does not appear to have been so great as to render them incompetent; and while the introduction of electric cars had affected values on the streets through which they ran and on streets adjacent thereto, it is sufficient to say that the petitioner's estate was not on such streets.

The question of similarity presents more difficulty, but we cannot say that they were so dissimilar as to render the admission of the sales clearly wrong. The fact that the two estates were considerably larger than the petitioner's estate, and were not on the pond, would not of itself make the sales incompetent. Nor would the fact that the buildings might not have been precisely like those on the estate of the petitioner. *Patch v. Boston*, 146 Mass. 52, 14 N. E. 770. There may have been material considerations common to and affecting the value of all estates in the vicinity, which, upon examination of the plans and maps and a consideration of the other evidence, in the opinion of the presiding judge, rendered the prices paid for the two estates competent, notwithstanding some differences between them and the estate of the plaintiff. In all such cases much must be left to the discretion of the court, and we cannot say that this discretion in this instance was erroneously exercised. See *Lyman v. City of Boston*, 41 N. E. 127; *Bowditch v. City of Boston*, 41 N. E. 132.

4. The fact (if it was a fact) that the witness Vieux may have told the witness Atwood, in 1890, two years or thereabouts before the taking, that he was not acquainted with real estate values in Jamaica Plain, related to a collateral and immaterial matter, and was properly excluded by the court. *Davis v. Keyes*, 112 Mass. 436; *Brooks v. Acton*, 117 Mass. 204; *Roberts v. City of Boston*, 149 Mass. 346, 21 N. E. 668. Exceptions overruled.

(164 Mass. 176)

ROBERTS v. INHABITANTS OF CITY OF CAMBRIDGE.(Supreme Judicial Court of Massachusetts.
June 28, 1895.)**ACTION AGAINST CITY — CONTRACT TO FURNISH WATER—APPROPRIATION OF STREAM—POWERS OF CITY—RATIFICATION OF CONTRACT.**

1. Defendant city, pursuant to St. 1884, c. 256, appropriated a stream in which plaintiff had water rights, but thereafter, by vote of the water board, agreed to furnish plaintiff a limited quantity of water from said stream. Afterwards the city failed to fulfill its contract with plaintiff. *Held*, that in a suit for specific performance plaintiff could show that he had not received compensation for his rights in the whole stream, but that the commissioners, in awarding damages, deducted for the subsequent allowance of water to plaintiff.

2. The water board of the city of Cambridge contracted to allow plaintiff a certain quantity of water from a stream which it had taken from him under St. 1884, c. 256. The city, in pursuance of the vote, supplied the water for some time. *Held*, that the contract, if outside the powers of the water board, was ratified by the city.

3. The city of Cambridge contracted to allow plaintiff a certain quantity of water from a stream which it had taken from him under St. 1884, c. 256. *Held* that, if the city was not authorized under section 1 of said statute to make the contract, it was within the scope of its general powers.

Report from supreme judicial court, Middlesex county; John Lathrop, Judge.

Bill by William Roberts against inhabitants of city of Cambridge for specific performance. Decree for plaintiff.

Bumpus, Trask, Simes & Adams, for plaintiff. G. A. A. Pevey, for defendant.

HOLMES, J. This is a bill for the specific performance of an alleged contract. The material facts are as follows: The defendant had taken the water of Stony brook under St. 1884, c. 256, subject to prior rights given to other towns. See St. 1884, c. 257. Before the damages were assessed, the defendant's water board passed the following votes, which were communicated to the plaintiff, and assented to by him.

"Voted, that on December 19, 1887, we will open the four-inch gate at the gatehouse of our dam at Stony brook, and allow thereafter a quantity of water to pass through from the reservoir above the dam to Roberts' Mill, sufficient for washing and steam purposes, to take the place of the water heretofore furnished to him by us for such purposes.

"Voted, that the president be instructed to write to Mr. William Roberts informing him of the action of the board, and furnish him an attested copy of the foregoing votes."

At the hearing before the commissioners on the amount of damages to be paid to the plaintiff by the defendant, these votes were put in evidence, were relied on by the counsel for the defendant, were treated by the commissioners as an agreement by the city, and led the commissioners to eliminate the

plaintiff's claim for damages in respect of water for washing or steam purposes, with the result of lessening the amount of the commissioners' award. The city paid the award, and for a time supplied the plaintiff with water as agreed. Since then, however, it has neglected and refused to fulfill the contract, to the great inconvenience and expense of the plaintiff.

The defendant objected to evidence of the foregoing facts, but, as it does not appear how they were proved, it is to be assumed that they were proved by proper evidence, if the facts, however proved, were competent. There is no question before us of inquiries addressed to a commissioner as to the ground of his decision.

It is objected that no evidence was admissible of the facts, because the commissioners were to assess all the damages suffered by the plaintiff. But, if there was a binding contract to give the plaintiff a part of the water embraced in the taking, such a contract would have the same effect as a valid exception of the same amount of water from the original taking, and would cut down the damages accordingly. See *Ex parte Morse*, 18 Pick. 443, 447; *Railroad Co. v. Miller*, 125 Mass. 1, 5; *Bicknell v. Railroad Co.*, 161 Mass. 428, 37 N. E. 378; *Huston v. Railroad Co.*, 21 Ohio St. 235; *Mills, Em. Dom.* (2d Ed.) §§ 112, 113.

It is found as a fact in the report that the transaction amounted to a contract,—a finding warranted by the evidence. The accepted vote purported to be a contract. By the statute and the city ordinance, the water board had all the powers of the city under the act. St. 1884, c. 256, § 10; *Cambridge Ordinances* 1880, c. 39, § 3. If it should be doubted whether, supposing the city to have had power to make the contract, the power was one of those conferred on the water board, there was evidence of ratification. The city acted in pursuance of the vote by opening the four-inch gate, and allowing the plaintiff sufficient water for washing and steam purposes, it argued from it to the commissioners, and it paid the award as diminished in consideration of the vote, although, no doubt, the argument for the city to the commissioners, in part at least, seemed to present the vote rather as affecting the probabilities of all the water being used than as conferring a right. At that time, *Howe v. Inhabitants of Weymouth*, 148 Mass. 605, 20 N. E. 816, had not been decided.

It is urged that the city had no power to make the contract, and that it could not sell water for any purposes except those public ones mentioned in section 1 of the act, of which this was not one. But we see nothing beyond the power of the city in the vote, and still less anything unlawful. The power to make such a contract with a stranger might be limited to the surplus naturally incident to the taking of water for public

use. But this contract was made with one from whom more water was taken at the same time, and therefore, in its practical effect, merely cut down the amount taken from the plaintiff, and to be paid for by the defendant,—a perfectly lawful object.

The city having made a lawful contract to the effect set forth in the vote, there seems to be no reason why the contract should not be specifically enforced, according to its legal import. *Raphael v. Railway Co.*, 2 Oh. App. 147. No objection to the jurisdiction is taken in the answer. *Massachusetts General Hospital v. State Mut. Life Assur. Co.*, 4 Gray, 227. The damages, if any, suffered by the plaintiff, may be assessed, in order to give him full relief.

Decree accordingly.

(184 Mass. 188)

WARDENS, ETC., OF ST. PAUL'S
CHURCH v. ATTORNEY
GENERAL et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. July 17, 1895.)

CHARITABLE BEQUEST—VALIDITY—CONSTRUCTION
OF TRUST—ADVERSE POSSESSION BY TRUSTEE—
ACCUMULATIONS FOR CHARITABLE USES.

1. A conveyance of property to a religious corporation, in trust to invest the rents thereof to form a permanent fund, and to pay one-half the income thereof to the grantor, or any heir of the grantor of the same name who may demand the same, and, in case no demand therefor is made, to invest said income so as to increase and accumulate the fund, and providing that the remaining half of said income should be either invested in order to increase and accumulate the fund or expended on charitable objects, is, as to one-half the fund, a valid charitable trust, subject to an illegal discretion as to the accumulation for the benefit of the grantor or his descendants, which will be rejected; as to the other half, an invalid trust was created, the beneficial interest therein resulting to the owner.

2. The fact that the grantor subsequently executed a deed to the corporation, assigning his interest in the fund for a term of years, to be used for a certain legitimate purpose, referring therein to the previous deeds "as deeds in trust to form a fund for charitable uses," did not affect the interpretation of the prior deed, or validate the entire trust.

3. A gift of money to be appropriated for the foundation of a trust fund previously established is subject to the same legal interpretation as the original fund.

4. A subsequent conveyance of land, providing that one-half of the income of the fund arising therefrom should be paid over to the issue of the grantor as designated in a former deed of trust, and that the other half should be invested in a library, to be open to certain classes of persons, and to be used by the public generally, created a valid charitable trust, but did not affect the disposition of the fund before created.

5. Where a trust was express, and the trustees continuously admitted that they held one-half the income for the grantor and his family, there was no such adverse user of the funds by the retention of such income as to set the statute of limitations in motion in favor of the trustees.

6. A will provided that the income of a certain trust should be, when demanded, "the sole property of my heirs having the right to receive the same successively, as described in said trust," and devised all the residue of his estate

to trustees upon certain other trusts. *Held*, that where the beneficiaries could not take for invalidity of the bequest, the resulting trust created in favor of the grantor passed to the trustee under the residuary clause in the will.

7. One who has created an invalid trust, the beneficial interest in which has resulted to him, cannot explain in a will subsequently executed that his real meaning was something different from what his words implied, and without any words of devise to allow the creation of a new trust by a new interpretation of the old deed.

8. The limits of an accumulation for the benefit of a charity are subject to the order of a court of equity.

9. The conveyance of property in trust, with direction that the income should accumulate to form a fund the income of which should be paid over annually to charitable purposes, is not such an unreasonable accumulation as to require a court of equity to terminate it.

10. Where a conveyance is made to a church in trust for a designated purpose, which is invalid, the church will not retain the beneficial interest, but it will result to the donor and his heirs.

Bill in equity by the wardens and vestry of St. Paul's Church against the attorney general and others to obtain the instructions of the court in relation to certain trusts.

J. C. Gray, for wardens, etc., of St. Paul's Church. G. C. Travis, Asst. Atty. Gen., for Attorney General. Trask & Simes, for Trinity Church. R. Olney, for F. R. Sears. J. L. Thorndike, for David Sears. R. S. Gorham, for proprietors of St. Paul's Church.

LATHROP, J. This is a bill in equity, filed on August 7, 1891, to obtain the instructions of the court in relation to certain trusts created by David Sears. The defendants are the attorney general of the commonwealth, the proprietors of St. Paul's Church in Boston, the surviving executor of the will of David Sears, the trustees under his will, his eldest grandson, his heirs at law, and Trinity Church. On March 1, 1821, David Sears conveyed, by six separate deeds, six pews in St. Paul's Church in Boston to the wardens and vestry of said church, and their successors in office, in trust to lease the pews, and invest the rents thereof to form a permanent fund. The deeds then provided as follows: "And the said wardens and vestry and their successors in office shall make a statement of said fund, and of the income thereof, and shall pay over to said Sears, or his nearest heir by the name of Sears, for the time being, who shall demand it, the one-half of said income, for his or her use and benefit; that is to say, any heir of said Sears, of his name, who may demand the said one-half of said income, shall be entitled to receive it, but his or her right to it shall be superseded and annulled whenever a nearer heir of the same name shall make a similar demand. And provided neither said Sears, nor any of his heirs as above, nor any person authorized by him or them, shall demand said income within six months after it shall have been due and paid over to said wardens and vestry, then the said wardens and vestry shall invest

said income in stock, etc., as above, to increase and accumulate the fund aforesaid. And the remaining half of said income arising from said fund as aforesaid the said wardens and vestry shall either invest in stock, etc., as above, to increase and accumulate the fund aforesaid, or shall and may expend, from time to time, on any charitable or benevolent object or objects, in such manner and under such regulations as to their wisdom may seem advisable. It being the intention of said Sears to give to said wardens and vestry and their successors in office the uncontrolled liberty of appropriating from time to time the remaining half part of said income from said fund." On March 5, 1821, this gift was formally accepted by the plaintiffs as a gift "in trust for charitable uses." At some time previously to November 12, 1822, Mr. Sears delivered to the plaintiffs a deed (known as the "deed in the parchment envelope") bearing date March 1, 1821. By this deed he assigned to the plaintiffs, for the term of 19 years (or for his life should he not live so long), all his right, title, and interest to his half part of the income arising from the fund by this deed, and by the deeds of the pews, to be expended for sacred music. The previous deeds were referred to as deeds "in trust to form a fund for charitable and other uses." It was further declared that this deed and the previous deeds were to be operative only on the condition that the plaintiffs should be governed by the definition of the phrase "nearest heir" set out in this deed. This definition was, in general, to the effect that the eldest of male descendants should be preferred. This deed was formally accepted by the plaintiffs on January 13, 1823. On November 9, 1822, Mr. Sears made a gift of \$100, to be appropriated for the foundation of the trust fund established on March 1, 1821, by the deed just referred to. This was formally accepted on November 18, 1822, by the plaintiffs as a "donation * * * towards a fund for charitable uses." Up to January 1, 1824, one-half of the income of the trust fund was expended in sacred music, and the other half expended for charitable objects, or accumulated. On January 1, 1824, Mr. Sears conveyed a parcel of land adjoining the church to the plaintiffs as "actuaries of the Sears fund," "subject to the following conditions, limitations, and restrictions," namely, that one-half of the income of the fund should be paid "over to the parties being issue of said Sears," as before designated, "and provided, if at any time hereafter it should so happen, from any cause whatever, that said income cannot be so paid over, or that any of said parties should in any way be prevented, excluded, or prohibited, or should in any manner be debarred from their several successive rights, or if any of said parties as they may become successively entitled to said income from said fund and said account of said fund, should not receive the same within one year

after demand thereof," then the whole fund should "be immediately forfeited to, revert to, and be reinvested in" David Sears and his heirs. Power was given to the wardens and vestry to exchange or sell the lot of land if it should be found advantageous or expedient, "provided, always, that the proceeds of such exchange or sale shall be reinvested in real estate for the use and benefit of said fund." The deed further stated that the wardens and vestry, by their acceptance, declared "that the above are the terms, conditions, limitations, and restrictions and tenure" of the said fund as understood by them in addition to, and in explanation of, the previous deeds; and that the wardens and vestry, by their acceptance, promised that half of the "remainder of said income" should be invested in buying books for a library, to be open to the proprietors of the church, to all clergymen, men of letters, and members of government, and to be used by the public generally under such rules as might be deemed expedient, "the wardens and vestry reserving the other half part of said remainder of said income to be appropriated" as expressed and authorized in the former deeds. From January 1, 1824, to February 27, 1854, the plaintiffs received the rents from the pews, and invested the same as part of the trust fund. One-half of the income thereof was, in accordance with the provisions of the deed of March 1, 1821, expended for sacred music until 1840, and thereafter it was added, by the direction of David Sears, as an accumulation to the trust fund. One quarter part of said income was expended in the purchase of books for the library, in accordance with the provisions of the deed of January 1, 1824. The remaining quarter part of said income was expended by the plaintiffs for charitable objects, or added by them as an accumulation to the fund. On May 1, 1843, David Sears executed and delivered a deed, witnessed and recorded, by which he, for himself and his heirs, "having a right of forfeiture," purported to assign to Trinity Church, in Boston, or, in certain contingencies, to the Protestant Episcopal Churches in Boston, "the contingent and conditional interest" in the fund and the real estate. The provisions of this deed will be more fully stated later. On May 10, 1847, David Sears, by a letter to the wardens and vestry of St. Paul's Church, released them from any obligation to appropriate one-quarter part of the income to the purchase of books for the "public library," and authorized them to appropriate to such purpose so much only of the income as they might deem judicious, and to apply the remainder of such part of the income in their judgment to any honorable purpose. This letter also contained a reiteration of the trust, and approved the accounts of the plaintiffs. It does not appear that this letter was acted on by the plaintiffs, except to request a deed of confirmation. On February 25, 1854, David Sears executed, and

on February 27th acknowledged and delivered, a deed to the wardens and vestry in confirmation of this letter. After reciting the letter, the trusts, etc., the grantor gave certain directions as to the management of the fund, and authorized the wardens and vestry to expend the one-half part of the income of the fund in "their discretion, in such objects of utility, benevolence, or expediency as they in their judgment may from time to time see fit for the benefit of the church"; discharging them from the obligation of investing one-quarter part of the income in books, and from all responsibility as to errors, omissions, etc., as to past acts and appropriations, with the proviso that the grantees were entitled to one-half part of the income on the condition that they paid over the other half of said income to David Sears and his heirs who may demand the same, according to the provisions of the deed dated March 1, 1821, and delivered at some time before November 12, 1822, if not demanded to be accumulated according to the terms of the trust. The deed further authorized "the use of the hall originally intended for the library in the vestry building" for any purpose the wardens and vestry should see fit. The deed closed by declaring that it was to be regarded as affirmative only, and that nothing therein contained was to be so construed as to alter or diminish in any degree the rights reserved to the donor and his heirs by the original deeds, nor the tenure of the trust, nor the claims of the parties to his benefits hereafter. From February 27, 1854, to the present time, the plaintiffs have continued to receive and invest the pew rents as a part of the trust fund. No income has ever been received from the real estate. Up to April, 1860, one-half the income of the fund was accumulated, as no demand was made for it by David Sears. On that date, a demand having been made by him, and thereafter until his death, on January 14, 1871, the said one-half part of the income was paid to him. In 1871 and 1872 that half of the income was paid over to David Sears, Jr., the eldest son of David Sears, the founder of the fund. Since the death of David Sears, Jr., early in the year 1873, this half of the income has been accumulated as a separate fund due the Sears family, at the request, oral, and written, of one Cotting, acting for the Sears family. On June 9, 1893, a formal demand was made on the plaintiffs by said Cotting, in behalf of the trustees under the will of David Sears, and of the heirs and next of kin of said Sears, or any of them entitled, for the payment of all said one-half of the income of the trust fund heretofore received by the plaintiffs or hereafter to be received by them. The other half part of the income of said trust fund has been expended by the plaintiffs from said February 27, 1854, to the present time, for objects of utility, benevolence, or expediency, for the benefit of St. Paul's Church. No part of the income during said

period (except a payment in March, 1854) has been expended for the purchase of books. David Sears, by his will, devised his residuary real and personal estate to trustees upon certain trusts therein declared. The testator also, by his will, defined the terms "nearest heir" and "eldest lineal male descendant" in his will, and wherever else he may have used these terms, to mean, first, his son, David Sears, and his male issue successively, etc. The provisions of the will will be more fully stated hereafter.

1. The first question which arises in the case is as to the validity of the trust created by the six deeds executed by David Sears in 1821. The grantees in these deeds are the wardens and vestry of St. Paul's Church, in Boston, and their successors in office. The church itself was incorporated in 1820 as a Protestant Episcopal society and body politic. St. 1819, c. 77. Since Prov. St. 1754, the churchwardens of Protestant Episcopal churches are bodies corporate, authorized to take in succession "all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them or their successors"; and, when the vestry is joined with them in the grant or donation, the churchwardens and vestry together constitute the corporation. 3 Prov. Laws (State Ed.) 778; Anc. Chart. 605; St. 1785, c. 51; Rev. St. c. 20, § 39 et seq.; Gen. St. c. 31; Pub. St. c. 80. In *Sohler v. Wardens, etc., of St. Paul's Church, 12 Metc. (Mass.) 250*, a bequest to the wardens and vestry of St. Paul's Church, "to be received and held by the legatees as the formation of a fund" for the support of a city missionary of the Protestant Episcopal church, was held to be a valid charitable gift. See, also, *Saltontall v. Sanders, 11 Allen, 446*; *Weber v. Bryant, 161 Mass. 400, 37 N. E. 208*. It is clear that the grantor could not create a trust for the benefit of his descendants forever. *Kent v. Dunham, 142 Mass. 216, 7 N. E. 730*. Nor could he create a trust for one of a series of his descendants, successively, unless such a one could be ascertained within a life in being and 21 years afterwards. *Dungannon v. Smith, 12 Clark & F. 546*. It cannot be certain that there would be an heir by the name of Sears within the legal period, or that a demand would be made in that period for any income due. This demand clearly appears to have been a condition precedent. *Ibbetson v. Ibbetson, 10 Sim. 495, 5 Mylne & C. 26*; *Thomson v. Shakespeare, Johns. Eng. Ch. 612*; *Wainman v. Field, Kay, 507*. See *Lovering v. Lovering, 129 Mass. 97*. This is not a case of definite successive limitations. The limitation is general for the benefit of all the descendants of David Sears answering to a particular description.

It is contended that, as the grantees were given discretion to apply one-half of the income either to the accumulation of the fund, one-half of the income of which was intended for the benefit of the grantor or his descend-

ants, or to apply it to charitable or pious uses, the entire trust is invalid. There is undoubtedly a class of cases where a fund is given for purposes which are charitable or for other purposes, in the discretion of the trustees, which are legal, but are not charitable. In these cases the whole gift is held void for uncertainty. *Morice v. Bishop of Durham*, 10 Ves. 522; *In re Hewitt's Estate*, 53 Law J. Ch. 132; *Nichols v. Allen*, 130 Mass. 211; *Chamberlain v. Stearns*, 111 Mass. 267. But it is settled by a long line of decisions in England that, where trustees are given discretion to apply a fund either to a legal or an illegal object, the law forbids them to apply the fund to the illegal object, and the trust is valid for the legal object. The leading case on this subject is *Sorresby v. Hollins*, 9 Mod. 221, where a discretion was given to executors to settle by purchase of lands or otherwise, as they should be advised, an annuity of £50, to be distributed in charity. The discretion to purchase lands was illegal, as violating the mortmain act. Lord Hardwicke said: "Can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for, if one bequest is lawful, that shall be pursued, and take effect." To the same effect are the following cases: *Attorney General v. Parsons*, 8 Ves. 186; *Curtis v. Hutton*, 14 Ves. 537; *Salisbury v. Denton*, 3 Kay & J. 529; *Carter v. Green*, Id. 591; *Attorney General v. Goddard*, Turn. & R. 348; *Ingleby v. Dobson*, 4 Russ. 342; *Mayor, etc., of Faversham v. Ryder*, 5 De Gex, M. & G. 350; *University of London v. Yarrow*, 1 De Gex & J. 72; *Lewis v. Allenby*, L. R. 10 Eq. 668; *In re Hedgman*, 8 Ch. Div. 156. See, also, *Williams v. Williams*, 8 N. Y. 525. And in *Jackson v. Phillips*, 14 Allen, 539, 556, it is said by Mr. Justice Gray: "When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law." This is not a case where the charitable trust is of a surplus remaining after an invalid gift has been satisfied. In such cases the validity of the gift to charitable purposes will depend on whether the amount required for the prior gift can be ascertained in order to fix the amount of the surplus, or on whether the prior gift is merely "honorary," as it is termed, and not a legal charge on the fund. *Chapman v. Brown*, 6 Ves. 404; *Fisk v. Attorney General*, L. R. 4 Eq. 521; *Hunter v. Bullock*, L. R. 14 Eq. 45; *Dawson v. Small*, L. R. 18 Eq. 114; *In re Williams*, 5 Ch. Div. 735; *In re Birkette*, 9 Ch. Div. 576. There is, therefore, as to one-half of the fund, a valid charitable trust, subject to an illegal discretion as to accumulation for the benefit of the grantor or his descendants, which will be rejected. This trust could not be altered in its terms by the trustees or by the creator of the trust. *Sewall v. Roberts*, 115 Mass. 262. As to the other half

of the fund, an invalid trust being created, the beneficial interest resulted to the donor. *Nichols v. Allen*, 130 Mass. 211, 212; *Olliffe v. Wells*, Id. 221, 223; *Lassence v. Tierney*, 1 Macn. & G. 551, 564, 565. It is contended, however, that, as the whole fund was given to a charitable corporation, the corporation would retain the beneficial interest if any part of the trust could not be carried out. See *Attorney General v. Trinity College*, 24 Beav. 383, 399. While it is true that a gift to a church *eo nomine* is a gift to a charity (*Baker v. Fales*, 16 Mass. 487, 496; *Jackson v. Phillips*, 14 Allen, 439, 553), yet it does not follow that it may not be given for a purpose that is invalid, and in such case the church cannot take (*Society v. Crocker*, 119 Mass. 1), although it might well take the beneficial interest as well as the legal title, if no particular trust or use had been designated (*Sohler v. Wardens, etc., of St. Paul's Church*, 12 Metc. 250, 259).

2. The deed dated March 1, 1821, which was not delivered until some time before November 12, 1822, cannot affect the interpretation of the deeds relating to the pews, nor can it make the invalid trust valid.

3. The gift of \$100, made on November 9, 1822, became a part of the fund, and is subject, with it, to the legal interpretation before mentioned.

4. The terms of the deed of January 1, 1824, cannot affect the disposition of the fund before created, or impose new conditions, or alter the terms of the former deeds, so far as the valid charitable trust is concerned. The wardens and vestry had by the former deeds discretion in the selection of charitable objects. By the deed now under consideration they agreed with Mr. Sears to devote one-quarter of the income of the fund to a library. If such a library as is described in the deed is a charitable object, we can see no objection to their action. If it is not, then the agreement, so far as the prior deeds are concerned, is a nullity. We have no doubt that the deed in this respect created a valid charitable trust. While a limited and definite class of beneficiaries is first mentioned, the final provision is that it is to be used by the public generally. There is, therefore, not a gift for the benefit of a definite class or of shareholders only, as in the cases of *Carne v. Long*, 2 De Gex, F. & J. 75, and *In re Will of Dutton*, 4 Exch. Div. 54, but for the public, and such a gift is unquestionably valid. *Drury v. Natick*, 10 Allen, 169; *Fairbanks v. Lamson*, 90 Mass. 533; *Cary Library v. Bliss*, 151 Mass. 364, 373, 374, 25 N. E. 92. See, also, *Brown v. Pancoast*, 34 N. J. Eq. 321. The question of difficulty arising under this deed, so far as the land is concerned, is whether the limitation to the grantor and his heirs created a condition giving a right to terminate by re-entry the estate previously granted, or whether a trust was created in favor of the grantor and his heirs. This question, for reasons herein-after stated, we find it unnecessary to decide.

5. The deed to Trinity Church may be briefly disposed of. What Mr. Sears attempted to do was to make Trinity Church a trustee in the event of the plaintiffs not fulfilling their trusts. He conveyed to the grantee no right of his own, but "the contingent and conditional interest in said property and fund which the above-named wardens and vestry of St. Paul's Church now hold and enjoy." The subsequent language of the deed amounts merely to an agreement on his part to waive a breach of any conditions on the part of the wardens and vestry of St. Paul's Church existing at the time the title to the fund should vest in Trinity Church. The language is as follows: "It being the intention of this deed, and the meaning of the grant herein made, that the right of forfeiture which may accrue to said Sears and his heirs from any act or omission on the part of said wardens and vestry of said St. Paul's Church will not be exercised or exacted, provided said Trinity Church * * * accept said trust, and undertake to perform and do perform all duties and obligations of said trust according to the true meaning and object of its founder, and not otherwise." Other language in the deed shows that the new trustee was to take upon the same terms, conditions, and forfeitures as in the original deeds. If this conveyance had been simply of the premises conveyed in the preceding deeds, it might operate to destroy the right of forfeiture, if any existed in David Sears. *Rice v. Railroad Co.*, 12 Allen, 141. See, also, *Guild v. Richards*, 16 Gray, 809, 817; *Van Rensselaer v. Ball*, 19 N. Y. 100, 103; *Schulenberg v. Harriman*, 21 Wall. 44. Construing the language of the deed as a whole, we are of opinion that the deed does not convey or purport to convey any right of reverter then remaining in Mr. Sears. As to the other questions in the case we do not see that the deed is of any importance. Mr. Sears had reserved no right to nominate or appoint a new trustee; nor does it appear that Trinity Church has ever accepted the trust or attempted to act under it.

6. The effect of the deed of February 27, 1854, could not alter the charitable trust already declared. The other half of the fund was again made subject to an express trust void for remoteness, and the beneficial interest again resulted to the grantor. The condition, if any, was void, as creating a perpetuity. *Brattle Square Church v. Grant*, 3 Gray, 142, 158; *Otis v. Prince*, 10 Gray, 581; *Cartwright v. Cartwright*, 3 De Gex, M. & G. 982; *Poor v. Mial*, 6 Madd. 32; *Egerton v. Brownlow*, 4 H. L. Cas. 1. The deed, however, would operate as a release as to matters of account prior to its date. It also may operate as a release from the obligation voluntarily entered into by the wardens and vestry, in their discretion, by the deed of January 1, 1824, to expend one-quarter of the income of the original fund for the purchase of books for the library. Released from such

obligation, the wardens and vestry were free to apply the income to objects of charity, in their discretion, according to the original deeds of trust. If the language used in the deed now under consideration, stating the purposes for which the income was to be applied, indicates purposes not charitable, such language is of no effect to vary the trust declared in the deeds of March 1, 1821.

7. On the facts stated, it appears that the wardens and vestry have continuously admitted that they held the one-half of the income of the fund, which by the terms of the deeds was for the benefit of Mr. Sears and his heirs, and, consequently, one-half of the income-bearing fund itself, as trustees, and not adversely, under any claim of right in themselves, inconsistent with a fiduciary relation. We leave out of consideration for the moment the land, as this did not produce any income. It is well settled that in the case of an express trust the statute of limitations does not run in favor of the trustee against the cestui que trust, unless the user of the former has been open and notorious against the claim of the latter. In the case of implied or constructive trusts, however, unless there has been a fraudulent concealment of the cause of action, the law is otherwise. *Society v. Harriman*, 125 Mass. 321, 329; *Davis v. Coburn*, 128 Mass. 377, 380; *Dickinson v. Bank*, 152 Mass. 54, 25 N. E. 12; *Currier v. Studley*, 159 Mass. 17, 33 N. E. 709. But, independently of the statute of limitations, courts of equity will not assist a person who has slept upon his rights, and has acquiesced for a great length of time. *Spindel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610; *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 173, 4 Bligh. 1. The trust in the case at bar is an express trust, and there has been no such open and adverse user as is necessary to set the statute in motion. The claim of David Sears to one-half of the income has always been recognized by the plaintiffs, and they have also, since his death, recognized that in some way the Sears family had a claim under the trust. The resulting trust in the case at bar is not a constructive trust. It was not forced upon the plaintiffs by operation of law against their will, but was assumed by them. They have never contended that they were not trustees. The trust deeds showed that the declared trusts were invalid, and they therefore held for other cestuis que trustent than those declared. This fact distinguishes the case from that of *Churcher v. Martin*, 42 Ch. Div. 312, 318, where the invalidity of the trust was due, not to the terms of the deed, but to the fact that the deed was rendered void because it was not enrolled according to statute; and, therefore, any holding under the terms of the deed was, of necessity, adverse from the start. It was not a question between trustee and cestui que trustent. Where the possession of property is held by a trustee, not by virtue of any personal right or personally asserted right on

his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the cestui que trust is of very little importance, but the relationship is all-important; and, so long as the relation of trust exists, it is a case of express trust, no matter who the cestui que trust may prove to be. *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Lister v. Pickford*, 34 Beav. 576, 582; *Patrick v. Simpson*, 24 Q. B. Div. 128; *Soar v. Ashwell* [1893] 2 Q. B. Div. 390; *Warner v. Morse*, 149 Mass. 400, 21 N. E. 960. In the case at bar it is true that the only duty of the plaintiffs from the start was to pay over one-half of the trust fund to David Sears, yet by their continued acknowledgment of an existing trust relation, and by making no assertion of any adverse claim, they induced a reliance on the existence of the fiduciary relation by virtue of which they expressly held the property. As to the land conveyed to the plaintiffs by the deed of January 1, 1824, we do not think that sufficient appears to enable us to determine what should be done with it. It is stated in the agreed facts that up to the date of the filing of the bill it has yielded no income, and has not been taxed. What has been done with it is left uncertain. We might infer from the language of the deed of February 25, 1854, that it had been used for church purposes, but even this is uncertain. No demand appears ever to have been made for it, and it may be that the use has been such as to amount to an adverse use, or that the defendants' rights, if any, have been lost by laches. We intend to express no opinion on these points. All that we can determine now is that enough does not appear to enable us to pass upon the question of title.

8. David Sears, in his will, provided, in article 17, that the beneficiary incomes of trust funds established by him should be, when demanded, "the sole property of my heirs having the right to receive the same successively, as described in said trusts." By articles 20 and 21 all the residue of his real and personal estate is given to trustees upon certain trusts therein set forth. The provisions of article 17 are open to the same objections as the original trust to the same effect. It is impossible to determine that they must take effect within the lawful period. The resulting trust in favor of David Sears must therefore pass to those entitled under the residuary clause. *Thayer v. Wellington*, 9 Allen, 283; *Lovering v. Lovering*, 129 Mass. 97. It is, however, contended that the language of article 5 of the will leads to a different result. This is: "It is to be understood in the will, and wherever else I may have used the like terms, that by the terms 'nearest heir' and 'eldest lineal male descendant,' I intend, first, my son, David, and his male issue successively, in order of seniority, in infinitum" (with the same definition as to his other sons and his daughters successively in default of issue of each). "Said issue so receiving property

to assume the name of such one of my sons deceased, as he may at the time elect." It is argued that as this term "nearest heir" was used in the deeds of March 1, 1821, and in the deed of February 25, 1854, this provision of the will supplied an interpretation clause to these deeds, so that they should read as if they contained a limitation of one-half of the fund and its income to David Sears for life, remainder to his son, David, for life, remainder to his male issue successively, in order of seniority; and that, therefore, under the decisions in *Lovering v. Worthington*, 106 Mass. 86, and *Tollemache v. Coventry*, 2 Clark & F. 611, David Sears, Jr., took an estate for life, with remainder over. So far as any interest of David Sears, Jr., is concerned, it is of no importance whether he took a life estate or not, inasmuch as he received one-half of the income during his life, with the acquiescence of all parties, and it is now too late to raise the question of the legality of these payments. *Attorney General v. Old South Soc.*, 13 Allen, 474, 475. It is a question of importance whether his eldest son, the defendant David Sears, 8d, is entitled to a life estate, before the beneficial interest under the trust falls, and becomes finally vested in those entitled under the residuary clause of the will of David Sears. We are not able to adopt the view that he is so entitled. The so-called "interpretation clause" of the will is in no sense a devise or bequest of the interest of the testator in the fund. It would be highly dangerous to allow a man who created an invalid trust, the beneficial interest in which had resulted to him, to explain 50 years later in his will that his real meaning was something different from what his words implied, and, without any words of devise, to allow the creation of a new trust by a new interpretation of the old deed. The deeds were complete, and not incomplete as in *Bizzev v. Flight*, 3 Ch. Div. 269. It is clear, therefore, that all rights under the resulting trust are now vested in the trustees under the residuary clause of the will of David Sears, unless the fact that the testator in this clause excepted from the residue "any of the trust funds by me created during my life, or the incomes thereof, which are to be disposed of according to the trusts concerning the same, without reference to this item," leads to a different result. But we are of opinion that it does not. The reason for this provision is that the testator supposed that the trusts he had created were valid, and could be carried out. If so, they would not fall within the residuary clause. The resulting trust to the testator is not provided for except by the general words of the residuary clause, and it falls within them.

9. The plaintiffs state that in their opinion further accumulation of income, if not compulsory, would be injurious, and undesirable. They give, however, no reasons for such a conclusion. The founder of the trust, David Sears, provided that the income from the

pews and land should be added annually to the trust fund, to accumulate forever. As to one-half of the fund aside from the land, no question arises, as the plaintiffs must convey and transfer it to those entitled thereto. There will consequently be no further income to accumulate. All income accumulated by special deposit with the trust company will not be added to the fund, as it belongs, under this decision, to the trustees under the will of David Sears. As to the other half of the fund, the question directly arises, how far is a provision to accumulate for a charitable purpose valid? In England the period within which accumulations are valid is defined by St. 39 & 40 Geo. III. c. 98, commonly called the "Thellusson Act," and the provisions relating thereto apply to accumulations for charities. *Martin v. Margham*, 14 Sim. 230. In the absence of statute, there is no definite limit to accumulations for charities, so far as the decisions are concerned. The few cases bearing at all on the subject afford little assistance. *Hawes Place Cong. Soc. v. Hawes Fund*, 5 Cush. 454; *Odell v. Odell*, 10 Allen, 1; *Harbin v. Masterman*, L. R. 12 Eq. 559; 1 *Perry, Trusts*, § 399; *Scott, Trusts for Accumulation*, §§ 74-83. In regard to this matter, one of three rules must be true: the accumulation must be valid forever, or it may be controlled by the court within reasonable and desirable bounds, or it must be subject to the same rules as an accumulation for private purposes. There is good reason to suppose that the rule last named should not apply, for, if the object is not subject to the rule against perpetuities there is no good reason why an accumulation for that object should be. It certainly would be as much the policy of the law to favor an accumulation for charitable objects as to favor charitable objects. It often happens that the charitable purpose cannot be carried out without accumulation of a fund, sometimes for a long period of time. There are also good objections to a compulsory perpetual accumulation, even for a charitable purpose. Much would depend on the terms under which the accumulation was to be made. There would be great public danger in allowing an accumulation indefinitely for a charitable purpose that was not to be carried out within some definite time. Such a purpose would be practically no charitable purpose at all. On the other hand, however, there are cases where the income from property might be directed to be accumulated to form a fund, the income of which fund was to be annually applied to charitable purposes, as in the case at bar. Such an accumulation, it is evident, is less objectionable, as the income from the accumulating fund is constantly being applied to the charity year by year in larger amount. There seems to be no more objection to such an accumulation than to the holding of property constantly increasing in value for the benefit of the charity. We are of opinion, however, that the proper

course is to hold that the limits of an accumulation for the benefit of a charity are subject to the order of a court of equity. By this method of solving the difficulty, on the one hand an unreasonable and unnecessary trust for accumulation can be restrained, and on the other hand a reasonable accumulation can be allowed to carry out the intention of the benefactor and to secure the accomplishment of the trust in the best manner. In *Woodruff v. Marsh*, 63 Conn. 125, 137, 26 Atl. 846, an accumulation of a reasonable part of the income was allowed for a hundred years. To apply this principle to the case at bar. It seems that to authorize equitable interference with the accumulation directed by the testator the accumulation should be unreasonable, unnecessary, and to the public injury. It is not enough that the trustees are not desirous to continue it, or that any one in behalf of the charity asks that it be not continued. The court must be satisfied that there is good cause why the testator's direction should not be carried out. Mr. Sears directed that the income from the pews and real estate should accumulate to form a fund, the income of which should be paid over annually. There is consequently no locking up of the trust property altogether. The income from it first passes into the fund, and then the income of that fund is paid out for charitable purposes. If the accumulations were stopped, the practical result would be to combine the trust property and the trust fund, and allow the whole income to be applied annually for charitable purposes. Such a proceeding would increase the annual income on one hand, and at the same time put an end to a constantly increasing income from the present "fund" so called. As this accumulation was to serve apparently no definite or special object, there seems no objection to putting an end to it, if there is good reason therefor. No reason, however, is given by the plaintiffs as to why such a course should be taken, and we are of opinion that the court should not act as requested under such circumstances. It must be borne in mind that hereafter the trust property and the trust fund held by the plaintiffs for charitable purposes will be one-half part only of the present fund. We do not intend to preclude the plaintiffs from presenting this question hereafter to the court, if they should see fit to do so; but merely to decide that as the case is presented enough does not appear to warrant the court in determining the question.

10. In regard to the continuance of the library, it is alleged in the bill that it is practically of no value, and is not used by any one; that the expense of employing attendants to keep it open, and of lighting and heating and other incidental outlays necessary to maintain it, greatly outweigh any possible advantage that can accrue from its use, and would be an unjustifiable employment of the plaintiffs' funds. As the case has been heard

on the bill as amended and the answers thereto, and certain agreed facts, and as the answers and agreed facts do not controvert these statements of fact, we must take these allegations to be true; and we are of opinion that it is no longer the duty of the plaintiffs to expend the income of the fund in the purchase of books for the library. It follows from these considerations:

(1) That one-half of the trust fund consisting of personal property, other than the library, is held by the plaintiffs in trust for the trustees under the residuary clause of the will of David Sears.

(2) That the remaining half of the trust fund is to be held by the plaintiffs in trust for charitable uses, the income to be appropriated according to their discretion.

(3) There need be no further appropriation of income for the support of the library.

(4) Enough does not appear to enable us to determine whether the income from the pews should be further accumulated.

(5) The income specially deposited by the plaintiffs is to be paid over to the trustees under the residuary clause of the will of David Sears.

(6) Enough does not appear to enable us to pass upon the title to the land conveyed by the deed of January 1, 1824.

Decree accordingly.

(164 Mass. 206)

COAN v. CITY OF MARLBOROUGH.

(Supreme Judicial Court of Massachusetts. Middlesex. July 23, 1895.)

INJURIES TO EMPLOYE—LIABILITY OF CITY.

In an action against a city by an employé for injuries received while at work in a sewer by its caving in because of defective shoring, it appeared that the city voluntarily assumed the construction of the sewer for the benefit of property abutting on the street, and received annual rentals from the owners, that plaintiff was a common laborer, that after each blast his superiors examined the shoring before allowing the workmen to again enter the trench, that considerable quantities of earth frequently fell, and that plaintiff had had experience in digging sewers. *Held*, that defendant was liable.

Exceptions from superior court, Middlesex county; Robert R. Bishop, Judge.

Action by one Coan against the city of Marlborough for personal injuries. From a judgment for plaintiff, defendant brings exceptions. Exceptions overruled.

This was an action of tort for personal injuries to plaintiff, a laborer in the employ of the defendant city, who was injured while at work in a sewer trench by a caving in of the earth on the sides of the trench. In the superior court, before Robert R. Bishop, J., the jury returned a verdict for the plaintiff, and defendant excepted.

Allin & Mayberry, for plaintiff. J. Lowell, Jr., and S. H. Smith, for defendant.

BARKER, J. 1. The defendant concedes that there was evidence that the sides of the trench were not sufficiently shored.

2. Whether the plaintiff knew and appreciated the danger from the lack of proper shoring was a question of fact. He knew that the trench was not close-sheathed, and saw what portions of its sides were not covered, knew the nature of the soil, and the depth of the trench, and that blasting was done to remove rock at the bottom, and that small quantities of earth frequently fell from the sides, and he had worked much in such trenches. These things make in favor of the contention that he knew and appreciated the danger, and assumed the risk of injury; but they are not conclusive, as there was evidence of other facts proper for the consideration of the jury. The plaintiff was a common laborer, working where he was told to work, and having no discretion as to where he should stand. He had a right to rely upon the inspection of the shoring, and of the condition of the sides of the trench, made by his superiors after each blast before allowing the workmen to again enter the trench, and he was not charged with the decision of the question whether there was danger. Neither the fact that inconsiderable quantities of earth were frequently falling, nor his experience in trenches can be said to show, as matter of law, that he appreciated the danger. See *Breen v. Field*, 157 Mass. 277, 278, 81 N. E. 1075; *Id.*, 159 Mass. 582, 35 N. E. 95; *Lynch v. Allyn*, 160 Mass. 248, 254, 35 N. E. 550; *Hennessy v. City of Boston*, 161 Mass. 502, 37 N. E. 668.

3. The defendant also contends that a verdict should have been ordered in its favor because the construction of the sewer was a public duty, undertaken for the public good and not for any pecuniary reward, and argues that the duty of maintaining a public sewer is of far more serious importance to the general public than the maintenance of a fire department, a workhouse, or a public hospital, in respect to each of which undertakings the doctrine for which it contends has been held to prevent a recovery, and in the case of the fire department even as to a laborer to whom the city, by contracting to hire him, had a duty, springing from an implied term of the contract of hiring, to use due care to furnish a safe place in which to do his work. See *Pettingell v. City of Chelsea*, 161 Mass. 368, 37 N. E. 380; *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781; *Benton v. City Hospital*, 140 Mass. 13, 1 N. E. 836. It has long been settled by our decisions that, because sewers are built and maintained partly for the private benefit and advantage of the abutters, who pay in part for such advantages, and because the charge of sewers is not an obligation imposed by law, without the assent of the municipality, but voluntarily assumed, a municipality is liable to a private action for negligence in building or maintaining them. *Child v.*

Boston, 4 Allen, 41; 52; Emery v. Lowell, 104 Mass. 13, 15; Murphy v. Lowell, 124 Mass. 564; Hill v. Boston, 122 Mass. 344, 359; Tindley v. Salem, 137 Mass. 171, 172; Curran v. City of Boston, 151 Mass. 505, 508, 24 N.E. 781; Breen v. Field, 157 Mass. 277, 278, 31 N.E. 1075. And in *Hennessy v. City of Boston*, 161 Mass. 502, 37 N.E. 608, in an action like the present, the point was not raised by the defendant. The sewer, in building which the present plaintiff was hurt, was one which the defendant had voluntarily assumed to construct, in respect of which the owners of estates whose particular drains enter it are bound to pay annual rentals. The case is governed by the doctrine of *Child v. Boston*, and *Murphy v. Lowell*.

Exceptions overruled.

(53 Ohio St. 249)

ROW et al. v. ROW.

(Supreme Court of Ohio. June 18, 1895.)

ACTION BY IMBECILE.

An action to recover property belonging to an imbecile must be brought by guardian, and not by a next friend.

(Syllabus by the Court.)

Error to circuit court, Perry county.

Action by Ellen Row, by Susannah Dorsey, her next friend, against Jerome Row and another. From a judgment for plaintiff, defendants bring error. Reversed.

The petition in the common pleas averred that on May 19, 1891, Philip Allen, who is made a defendant, was duly appointed and qualified as guardian of said Ellen Row; that on the 18th day of January, 1890, said Jerome Row and Lucy Row, his wife, obtained from said Ellen Row, aged 80 years, a large part of her property, without consideration, and in fraud of her rights; that on other days named other property was fraudulently obtained; that she is an imbecile, and was so at the time of such conveyances; that her said guardian, upon written request, refuses to begin an action to recover said property, and that, therefore, this action is brought in the name of said Ellen Row, by Susannah Dorsey, who prosecutes the suit for Ellen Row, an imbecile, as the next friend and only child of the said Ellen Row. The common pleas sustained a demurrer to this petition, for the reason that the plaintiff had no capacity to bring the action, and rendered judgment in favor of defendants. This judgment was reversed by the circuit court. A petition in error was thereupon filed in this court, seeking to reverse the judgment of the circuit court.

Ferguson & Johnson and H. D. Cochran, for plaintiffs in error. Charles Hoy, for defendant in error.

PER CURIAM. The action should have been commenced and prosecuted by the guardian of Ellen Row. Rev. St. § 4998. In case of the refusal of the guardian to bring

the action, he should be removed, and another guardian appointed. Upon motion, and showing that a guardian is neglecting to bring an action to recover the property of his ward, the probate court would remove such guardian, and appoint another, who would bring the proper action. It cannot be tolerated that the rights and property of an imbecile should be controlled by a next friend, in opposition to the wishes of the guardian. The guardian is responsible to the court for his conduct, but the next friend is responsible to nobody. The judgment of the court of common pleas was right, and the circuit court erred in reversing it. The judgment of the circuit court is reversed, and that of the common pleas affirmed.

(53 Ohio St. 278)

CITY OF CINCINNATI v. CINCINNATI GASLIGHT & COKE CO.

(Supreme Court of Ohio. June 25, 1895.)

CONSTRUCTION OF CONTRACT—PRACTICAL CONSTRUCTION—MISTAKE OF LAW AND FACT—VOLUNTARY PAYMENT.

1. A contract binds a gas company to furnish to a city "such quantity of gas as may be required by the city council for public lamps at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville, and Pittsburgh. *Held*, that this means the lowest cash price in each city, averaged by adding together such lowest cash prices, and dividing the amount by 5. Two-thirds of the quotient will be the price to be paid by the city to the gas company under the contract.

2. The practical construction placed upon a contract, in the performance thereof, by the parties who made it, should, in case of doubt, have great weight in its construction by courts; but the construction placed upon such contract by the successors of those who made it, or by public officers, is entitled to much less weight.

3. A payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and, if voluntary, cannot be recovered back.

4. A payment made "upon condition that it shall in no respect affect any claim by either party concerning any matter now in dispute in relation to the proper construction of the clause in the contract with regard to the charge for gas," is voluntary, and cannot be recovered back.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by the Cincinnati Gaslight & Coke Company against the city of Cincinnati. Plaintiff had judgment, and defendant brings error. Reversed.

The Cincinnati Gaslight & Coke Company brought its action in the court of common pleas of Hamilton county against the city of Cincinnati to recover for gas furnished to the city for the months of May and June, 1890, amounting to over \$23,000. The city, in the answer, avers that the bills for gas for said two months are incorrect, and grossly excessive, and therefore payment is refused. By way of cross petition the city alleges that bills previously rendered and paid within six years, were incorrect and excessive, and

that by mistake of fact the city paid monthly amounts largely in excess of what was due. For such excess, amounting to \$364,300, the city prays judgment. The gas company denied the averments of the cross petition of the city. A jury was waived, and the case submitted to the court, on consideration whereof the court found in favor of the gas company for the full amount claimed, and against the city on its cross petition. A motion was filed for a new trial, which was overruled, and judgment rendered in favor of the gas company, to which the city excepted. A bill of exceptions was taken containing all the evidence, and petition in error filed in the circuit court. On hearing, the circuit court affirmed the judgment of the common pleas. Thereupon a petition in error was filed in this court by the city to reverse both judgments below.

Frederick Hertenstein and W. H. Whitaker, for plaintiff in error. Paxton & Warrington, E. A. Ferguson, and Kittredge & Wilby, for defendant in error.

BURKET, J. This case was orally argued before the Second division of the court, and, there being a silent difference of opinion, the case was reserved to the full bench, and carefully considered upon the record and printed briefs. In the year 1841, the city of Cincinnati granted to James F. Conover and his associates a franchise to use the streets, lanes, commons, and alleys of the city for the purpose of supplying gaslight. The ordinance by which this franchise was granted was, in the course of its passage, amended in several respects, and, as finally passed, the second section reads as follows: "That in consideration of the privileges hereby granted to the said Conover, his associates, their heirs, assigns, and successors, they, the said Conover, his associates, their heirs, assigns, or successors, shall furnish to the city on the several streets, lanes, commons, and alleys, in which the leading or main pipes for supplying the citizens with gaslight shall be laid and in use, such quantity of gas as may be required by the city council for public lamps, at two-thirds of the lowest average price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville, and Pittsburgh, the lamp-posts, connecting pipes, meters, and lamps, being furnished by and at the expense of the said city." The controversy arises over the proper construction of so much of this section as compels the gas company to furnish the city "such quantity of gas as may be required by the city council for public lamps, at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburgh." In May and June, 1890, there were in New York seven different companies, four of which furnished gas to private indi-

viduals at \$1.25, and three at \$1.60. In Pittsburgh there were five companies, two of which furnished gas at \$1, one at \$1.50, one at \$1.30, and one at \$1.20. In New Orleans there were two companies furnishing gas at \$1.85 and \$3. In Louisville there were two companies, each furnishing gas at \$1.35; and in Baltimore there was only one company, furnishing gas at \$1.25. The gas company insists that a proper construction of the contract is to add together the seven prices in New York, and divide the amount by seven, and that the quotient will be the New York price. Also add together the five prices in Pittsburgh, divide the amount by five, and the quotient will be the Pittsburgh price. Also add together the two prices at New Orleans, divide the amount by two, and the quotient will be the New Orleans price. Louisville has but one price, and Baltimore but one. Then add this New York price, this Pittsburgh price, this New Orleans price, the Louisville price, and Baltimore price together, and divide the amount by 5, and the quotient will be the "lowest averaged price" of the five cities. The bills for May and June, 1890, were made out upon this basis, and the gas company insists that this is the correct construction of the contract.

The city did not receive and pay for gas under this contract until the year 1866, but from that date until May, 1890, the city received gas under this contract and paid the bills of the gas company made out and averaged from time to time in the same manner as the bills in dispute. From 1841 to 1866, the Conover contract was kept alive, but gas was received and paid for under special contracts. After the city began to receive gas under this Conover contract in 1866, there was some question made by the city authorities as to the manner of arriving at the lowest averaged price. Some of the gas companies allowed discounts for prompt payment, and the city claimed the benefit of such discounts in fixing the lowest averaged price. Robert Brown was officially connected with the gas company from 1866 to 1882, and he testified that the average was being made during all that time without taking into consideration the discounts, and that the average price was ascertained in the manner now claimed by the gas company. What he said about the matter is condensed by counsel for the gas company in their brief, and the same is here adopted as a fair epitome of the facts from 1866 to 1882, as follows: "After stating, then, that it was part of his duty to collect the bills against the city, he said he was required to go to the city engineer, to the city clerk, and the city auditor, before the latter would approve the bills, and then the money was paid by the city treasurer; and that at various times the bills were disputed upon different grounds. He said: 'In this particular matter of discounts there were several times, * * * probably ten or a dozen times.

* * * I think it probably arose in the very first bill. * * * Mr. Taten * * * was the city auditor. He raised the question when the first bill was rendered. * * * The bill was then rendered for the quarter's term. * * * He raised that question about the discount, and also about the question of lowest average. After so stating, he said this question of the lowest average was raised at other times, as officers changed, and our bills would be delayed in settlement until they could investigate that question. He also stated that the city officers were told what the prices were, and these discounts. In some cases they inquired for themselves. That these inquiries were so made, both in the five cities and at the gas office, and information obtained from both sources." From 1882 to 1887 the situation remained about the same. From December, 1887, to May, 1890, the bills for gas under the contract were audited and paid by the city, and received by the gas company without prejudice to either party as to the proper construction of the contract, as shown by the following, written upon each bill: "The above claim has been duly approved by the board of public affairs, at the regular meeting of December 31, 1887, and its payment by the comptroller authorized by them, upon condition that it shall in no respect affect any claim by either party concerning any matter now in dispute in relation to the proper construction of the clause of the Conover contract with regard to the price of gas. [Signed] Thomas G. Smith, President. Attest: D. W. Brown, Clerk." Also by the following receipt given for the warrant received in payment of each bill: "Received of the comptroller his warrant for \$16,190.23, for gas consumed in public lamps during the month of December, 1887, which is accepted by the Cincinnati Gaslight and Coke Company, upon condition that it shall in no respect affect any claim by either party concerning any matter now in dispute in relation to the proper construction of the clause in the Conover contract with regard to the charge for gas. [Signed] The Cincinnati Gaslight & Coke Co., per D. G. A. Davenport." The gas company claims that this course of dealing between the city and itself furnishes a practical construction of the contract by which the city is now bound. The full claim of the gas company is that its construction is the proper one, but that if it is not, then, that the contract is ambiguous, and that the city is bound by the practical construction so furnished by the course of dealing in its performance of the contract.

It is conceded by counsel for the gas company that, if the contract is not ambiguous, it must be enforced according to its terms, without regard to the construction heretofore placed upon it by the parties in the course of its performance. In determining the rights of parties under a written contract

it is not the duty of a court to seek for or create doubts and ambiguities, but rather to avoid them, and construe and enforce the contract according to its evident meaning, giving force to every word. When this course is pursued in this case, it is clear that the "lowest averaged price" here means the lowest price in each city, averaged. This is the plain common import of the words used, and the only reasonable construction in which any force can be given to the word "lowest." There is no force in the contention of the gas company that gas furnished to private individuals means all the individuals in the particular city, and that, therefore, all must be taken into consideration in order to fix the price in such city. The Consolidated Company of New York furnishes gas to private individuals at \$1.25. No other company furnishes it at a lower rate. This rate, therefore, fills the terms of the contract, no matter if there are other companies furnishing gas at the same or a higher rate. There is by far less difficulty in thus construing this contract than there would be in arriving at a satisfactory conclusion as to the proper effect which should be given to the course of dealing which it is claimed gives a practical construction to the contract. By the epitome of facts above taken from brief of defendant in error it appears that at various times the bills were disputed upon different grounds, and in the receipts given by the gas company for the different warrants received in payment of bills from December, 1887, to May, 1890, it is conceded that there is a dispute between the parties as to the proper construction of the Conover contract. The course of dealing relied upon to establish a practical construction is therefore much more ambiguous than the contract itself, and can furnish no safe guide for a construction different from the words themselves.

There is some looseness of expression in some of the reported cases as to what course of dealing will supply a practical construction. The case of Robinson v. U. S., 13 Wall. 363, cited and relied upon in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 256, as a case of practical construction, is a case involving the admission of evidence as to the existence of a custom in trade, and is not at all founded upon the doctrine of practical construction. To have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties. A right claimed by one party, and from time to time denied or disputed by the other, though, for the time being, conceded, cannot, from such concessions, be regarded as established. And when, as in this case, each concession for over two years is coupled with an admission by both parties that the right claimed is in dispute, it is clear that such concessions cannot be used to establish the right. It is not every captious doubt as to the meaning of a written instrument that will warrant a court in con-

cluding that the instrument is ambiguous, and therefore to disregard its words, and seek the intention of the parties in the course of business growing out of an attempted performance. The most exact and skillfully drawn document may, by able counsel, be so construed as to create what would seem to be reasonable doubts, when in fact it is perfectly clear to the parties, and, aside from the strained construction of counsel, also to the court. In such cases it is the duty of courts to disregard the strained construction of counsel, and to enforce the instrument according to the reasonable, plain, and manifest intention of the parties. Business does not usually deal in fine-drawn distinctions, but in plain, practical transactions. The reason of the rule of practical construction has its origin in the presumption that the parties to the contract, at and after the making thereof, knew what they meant by the words used, and that their acts and conduct in the performance thereof are consistent with their knowledge and understanding, and that, therefore, their acts and conduct show the sense in which the words were used and understood by them. In such cases acts sometimes speak louder than words. But the reason of the rule ceases when the acts or conduct are not those of the parties who made the contract, and are not presumed to know in their own minds what was in fact meant by the words used. The acts and conduct of the parties following after the parties who made the contract, must, in the nature of the case, be only their own construction of the words used, and not an acting out of the understanding of the words by the parties who used them. The same is true of public officers. They may put their own construction upon the words used, but in so doing they are not acting out the mental understanding of the sense in which the words were used by those who made the contract or written instrument. In such cases the acts and conduct of the parties in the performance of the contract are only their construction of the meaning of the words used, and their construction of words used by others should not override the construction to be placed thereon by the courts. So that, while the practical construction of the contract by the parties who made it is entitled to great weight, in case of doubt, the construction placed thereon by those who follow is of much less weight. We think, therefore, that in the case at bar there is no such practical construction by the parties as should change the import of the words used in the Conover contract, and that the meaning of the words is sufficiently plain to permit the court to enforce the contract according to the evident import. The "lowest averaged price," stipulated for in the contract, entitles the city to the benefit of such discounts as are, or may be, allowed to individuals by the company in each city furnishing gas at the lowest price. The terms being once settled and under-

stood, the city becomes a cash-paying customer, entitled to all discounts made for cash. The delay in payment since May, 1890, was caused by the unwarranted claim of the gas company, and not by the want of cash on part of the city with which to make payment. Hence the city is entitled to the discounts since May 1, 1890.

It is evident that the question of candle power did not enter into the terms of the contract when made, and has not become since injected therein. In New Orleans there are two companies, one furnishing gas to private individuals at \$3.70, and the other at \$3, with 20 per cent. discount. The price certified to the Cincinnati Gas Company by the New Orleans company, was \$1.85, instead of \$3.70. This was done by reason of the increased candle power of the New Orleans company, but defendant in error had no knowledge of this reduction in price, and the bills in dispute were made out with reference to the price of \$1.85, as reported by the New Orleans company. The company which supplies gas to the private individuals at New Orleans at \$3, with 20 per cent. discount, making \$2.40 net, is the one to be considered in making up the "lowest averaged price" in this case. At New York the lowest price is \$1.25, at Baltimore \$1.25, at Pittsburgh \$1, and at Louisville \$1.35, with 5 per cent. discount, making \$1.29 $\frac{1}{4}$ net. These prices constitute the basis for making up the bills for May and June, 1890, and the same principle will prevail as to all bills for gas thereafter.

The claim of the city on the cross petition is not allowed, and the judgments of the courts below were correct as to that claim, notwithstanding the stipulation that the warrant was signed "upon condition that it shall in no respect affect any claim by either party concerning any matter now in dispute in relation to the proper construction of the clause in the Conover contract with regard to the charge for gas." The payment was voluntary, and not compulsory. The condition is that it shall not affect the claim of either party as to the proper construction of the contract; not that, in case of a construction in favor of the city, the gas company will repay the money. The right sought to be saved by this condition is the right as to the construction of the contract, and not as to the repayment of the money after the proper construction shall have been settled and determined. If there was any mistake as to the payment made, such mistake was a mistake of law, and not of fact. The payments were also voluntary, and there is, therefore, a double reason why there should be no recovery back. The judgment of the circuit court is reversed, and, proceeding to render such judgment as the circuit court should have rendered, the judgment of the common pleas court in favor of the gaslight and coke company on its cause of action is reversed, and the judgment against the city of Cincinnati on its cross petition is affirmed, and this

cause is remanded to the court of common pleas for a new trial upon the cause of action of defendant in error against plaintiff in error. Judgment reversed.

SPEAR, J. (dissenting). My interpretation of the contract is that the term "lowest" means the cash price with discount deducted. The "lowest averaged price" in any city would be reached by adding together the lowest cash price of all the companies in such city, and dividing the amount thus obtained by the number of companies. The lowest average price in all the cities would be ascertained by adding the several lowest prices in the five cities and dividing by 5. Two-thirds of the sum so found would be the price for Cincinnati. But there seems to have been about as many interpretations as there have been minds applied to the problem. In such case it seems to me that the construction given by the dealings of the parties is as likely to be right as any. While not absolutely uniform, the general course of dealing has been in accordance with the judgment rendered by the trial court and affirmed by the circuit court. I think those judgments should be affirmed.

MINSHALL, O. J. (dissenting). A diversity of opinion prevails as to the proper construction of the contract between the gas company and the city. In view of this apparent uncertainty as to what was meant by the terms used as to the price at which gas was to be furnished the city, the construction that has been placed on it by the parties during a long period of time should be now adopted as the proper one. This is in accordance with the decided weight of authority in this court and elsewhere. To say that the language is plain, and should be followed, is simply to say that different minds cannot draw different conclusions. The answer to this is that in this case they have, and the rule of construction by the acts of the parties applies, or there is no room for its application in any case.

(53 Ohio St. 254)

LAKE SHORE & M. S. R. R. v. PLATT et al.

(Supreme Court of Ohio. June 25, 1895.)

BOUNDARY ON NAVIGABLE STREAM — HOW ESTABLISHED.

A conveyance of lands situated upon a navigable stream, the description being by courses and distances from a fixed monument, and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the central thread of the stream.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

Action by Platt and others against the Lake Shore & Michigan Southern Railroad. From a judgment of the circuit court affirming a judgment of the court of common pleas

in favor of plaintiff, defendant brings error. Reversed.

January 17, 1876, Platt et al. brought ejectment in the common pleas court of Lucas county to recover the subaqueous ground lying between the former and present dock lines along the Maumee river, and in front of a part of lot 11 in the city of Toledo. Each party asserts title in fee to such ground, and their rights depend upon the following material facts, as shown by the pleadings and the stipulations upon which the cause was submitted in the common pleas: In 1852 Harriet O. Hall was the owner in fee of lot 11, which included the premises in controversy. August 9, 1852, the Lake Shore Company (its predecessor) commenced proceedings in the probate court to appropriate lands for railroad purposes. The appropriation by metes and bounds carried the line of the company's property thus acquired to the former dock line, which was approximately parallel with the shore line, and where there was available, for purposes of navigation, a depth of water somewhat exceeding nine feet. The company at once took possession of the lands acquired for landing, dock, and terminal purposes (for which purposes they had been acquired), and built its dock upon the line established. June 21, 1855, Mrs. Hall executed to the company a deed for the same property for the express purpose of assuring its title. The description in this deed also carried the line to the former dock line, and granted the premises described "with all privileges and appurtenances to the same belonging." The company took possession, and constructed the docks necessary for traffic in connection with boats navigating the river and lakes, upon the dock line, which was established by authority. September 10, 1869, Mrs. Hall conveyed to Platt et al. a number of tracts of land, including lot 11, but expressly "reserving that portion of tract 11 which lies northwesterly of the center of the river road, the same being now in possession of the railroad company,"—such reservation including the premises now in controversy. Thereafter the dock line was changed for the purpose of accommodating vessels of greater draught, and the railroad company docked out to the new line thus established, completing the reconstruction of its dock in July, 1873. April 13, 1874, Mrs. Hall by quitclaim granted to Platt et al. all her interest in lot 11. In the court of common pleas, Platt et al. recovered, and that judgment was affirmed by the circuit court.

E. D. Potter, Jr., and Geo. C. Greene, for plaintiff in error. Frank H. Hurd, for defendants in error.

SHAUCK, J. At the dates of the appropriation by the company and the subsequent grant of June 21, 1855, Mrs. Hall, the grantor, and the railway company, the grantee, were alone interested in what is now the

subject of controversy. In the practical interpretation of its rights, acquired by the appropriation and the grant, the company took actual possession, not only of the bank of the stream, but of so much of the river as might be necessary to reach the established dock line at a depth of water of nine feet. By the deed of September 10, 1869, Platt et al. acquired no title to the premises in controversy, for they were expressly excepted from the operation of the deed. Not only so, but by the terms of the reservation or exception the grantees were notified that the grantor had, by a former conveyance, granted to the company the premises now in controversy. The exception was, not of "so much of tract 11 as the railroad company now occupies," but it was of "that portion of tract 11 which lies northwesterly of the river road, the same being now in possession of the railroad company." This was express notice to the grantees that the company was in possession, not only of the bank of the stream, but of all that portion of tract 11 which lay between the bank and the central thread of the stream. On April 13, 1874, when the defendants in error received from Mrs. Hall the quitclaim under which they now assert title, they found that the company had extended its docks over the disputed premises to the newly-established dock line. This had been done in the assertion of the rights acquired by virtue of the appropriation and the deed of June 21, 1855, and with the acquiescence of Mrs. Hall, to whom these parties now look as the common source of title.

The defendants in error took nothing by the quitclaim, because not only the terms of their former deed, but the actual possession of the company, affected them with notice of the rights now asserted by the company, which rights their grantor could not then contest, since she had acquiesced in the company's possession continuously from the date of the appropriation. But from a consideration of the rules which prevail in the construction of grants of this character, we think the premises in controversy passed to the company by the terms of the deed of 1855. It is true of that deed, as well as of the previous proceedings to appropriate, that the Maumee river was not named as the boundary of the lands appropriated or conveyed. But, by the strictest construction that could be placed upon the deed, it conveyed, not only the land upon the bank of the stream, but all that lay between the water's edge and the original dock line, projected where a depth of nine feet of water was available for the purposes of navigation. The terms of the grant do not admit of any broader claim on behalf of the grantor than that she did not expressly convey to the central thread of the stream. If title to the subaqueous lands, lying between the former and present dock lines, remained in her, it was by virtue of a presumption op-

erating in her favor, notwithstanding the location of the lands expressly granted, the obvious purposes of the grant, and the limited and incidental use of which alone the lands in controversy are susceptible. The lands were acquired by the company for landing, dock, and terminal purposes. That these purposes were within the contemplation of all the parties is indicated by the location of the lands upon a navigable stream, and the express grant of that portion of the stream which was necessary to make the grant available for that purpose.

The ground in controversy is insusceptible of absolute and unqualified dominion, being incidental to the shore, and subject to the public right to navigate the stream. Because of the permanent character of the riparian and public rights involved, the case is broadly distinguishable from those of grants bounded on streets and highways, which may be abandoned, and their sites thus restored to a condition in which they may be subject to absolute and unqualified dominion. For the same reason the case is distinguishable from those of grants of lands bounded by swamps, ponds, and lakes that are not navigable, and are subject to drainage. The use of the stream for the purposes of navigation was not only within the contemplation of the parties to the deed from Mrs. Hall to the company, but it was the principal and most obvious element of the value of the lands expressly granted. These considerations would seem to justify the presumption that a grant of this character is to the central thread of the stream, unless apt terms are employed to limit it. And such appears to be the settled view of the courts of the country. Well-considered cases in which this doctrine is held are: *Gavitt v. Chambers*, 3 Ohio, 496; *Walker v. Board*, 16 Ohio, 543; *June v. Purcell*, 36 Ohio St. 396; *Watson v. Peters*, 26 Mich. 508; *Luce v. Carley*, 24 Wend. 451; *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606; *Yates v. Milwaukee*, 10 Wall. 497; *County of St. Clair v. Lovington*, 23 Wall. 46. To the application of this doctrine it is quite immaterial whether the stream be named as a boundary of the lands granted, or there be a description by courses and distances from a fixed monument, whereby a line is established coincident with the stream. The doctrine regards the substance of the grant, and not its form. *Watson v. Peters*; *County of St. Clair v. Lovington*.

It is true that the common law regarded only those streams as navigable which are subject to the ebb and flow of the tides, and, in this view, the difference between riparian and littoral titles becomes unimportant, since they alike terminate at the water's edge, the title to the residue of the alveus being in the public. While this view has been taken in some of the American cases, it cannot be regarded as the view generally received, nor could it avail the defendants in error. The

manifest result of these cases is that riparian and alvean rights are inseparable, whatever may be the nature or extent of those rights. Alvean rights appertain to the riparian title, and do not depend upon title to the subaqueous land. That such rights are incapable of severance from the riparian title to which they are incident was distinctly held in *Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 200. The conclusion reached in that case was adversely criticised by the same court in *Hanford v. Railroad Co.*, 43 Minn. 104, 42 N. W. 596, and 44 N. W. 1144, where it was considered that the rights may be severed if they are of such a nature that they may be enjoyed separately from the adjacent land to which they were originally appurtenant. It was accordingly held that submerged lands, lying between the high land upon the shore and the line of navigation, might be severed from such high land; and that conclusion would result from the consideration that such submerged lands, being susceptible of reclamation without interference with public rights, might become the subject of the riparian title, to which access to and use of the navigable waters would attach as an incident. But it was not there held that one may own that which he cannot enjoy. Since a plaintiff in ejectment must recover, if at all, by virtue of his own title, the contention of the defendants in error would not be aided by the conclusion that the lands in controversy are incapable of private ownership.

Confining ourselves to the requirements of the case, we conclude that the lands in controversy passed to the plaintiff in error by the deed from Mrs. Hall because they were not by clear and apt terms excepted from its operation, and for the additional reason that, it being an express grant of her lands to the line of navigation, with all the privileges and appurtenances to the same belonging, the right asserted by the grantee is necessary to satisfy the express terms of the deed. *Gould, Waters*, § 179; *Wood, Nuis.* § 491; *Morgan v. Mason*, 20 Ohio, 402. The views expressed in *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, were not intended to have, and cannot have, any application to a case of this character. The lands there in controversy lay under water that was not navigable. By the clear terms of the syllabus the case was limited to lands thus situated, and in the principal opinion prominence is given to the consideration that the lake there in controversy was susceptible of private ownership, and the views here expressed were recognized as controlling in cases of navigable streams. It is not necessary to consider the evidence offered by the plaintiff in error in support of its plea of estoppel, as the right for which it contends is fully established by the stipulations.

Judgments of the circuit court and court of common pleas reversed, and judgment for plaintiff in error.

(53 Ohio St. 94)

STATE ex rel. v. BARGUS et al.

(Supreme Court of Ohio. June 11, 1895.)

SPECIAL LAWS—CONSTITUTIONAL LAW.

1. Laws providing for the public support of the poor are of a general nature.

2. An act by which the general assembly attempts to exempt counties from the operation of general laws on account of trivial differences in population is not of uniform operation throughout the state.

3. The act of May 14, 1894, to amend section 957 of the Revised Statutes (91 Laws Ohio, p. 237), is repugnant to section 26, art. 2, of the constitution.

(Syllabus by the Court.)

Application for mandamus by the state against one Bargus and others. Granted.

The relators are the qualified and acting infirmiry directors of Huron county, and the defendants are the commissioners of said county. The petition alleges the refusal of the defendants to perform certain duties enjoined upon them by the General Statutes, and admits that they are not required to perform such duties if "An act to amend section 957 of the Revised Statutes as amended May 1, 1894," passed May 14, 1894, is valid. Insisting that the act is void, the relators pray for a writ of mandamus commanding the defendants to perform the specified duties enjoined by the general law. The act is as follows:

"An act to amend section 957 of the Revised Statutes of Ohio, as amended May 1, 1894.

"Section 1. Be it enacted by the general assembly of the state of Ohio, that section 957 of the Revised Statutes of Ohio, as amended May 1, 1894, be amended so as to read as follows: 'Sec. 957. In every county in which there is a county infirmiry, there shall be a board of infirmiry directors, composed of three persons, one of whom shall be chosen every year, and shall hold his office for three years, commencing on the first Monday in January next after his election. They shall be chosen by the electors of the county, unless part of the county is not taxed for the support of the county infirmiry, in which case they shall be voted for only by residents of the territory so taxed; provided, however, that in counties which by the last federal census had, or which by any subsequent federal census may have a population of not less than 31,940 nor more than 31,960, and in counties which by the last federal census had, or which by any subsequent federal census may have a population of not less than thirty-five thousand four hundred (35,400) nor more than thirty-five thousand five hundred (35,500), no infirmiry directors shall hereafter be elected, and the terms of those now in office shall expire on the first Monday in January, 1895. And in all such counties the board of county commissioners shall, at the expiration of such terms, become the successor of the board of infirmiry directors, and shall perform all the duties, have the same powers, and be subject to the same obligations as devolve by law upon in-

firmly directors in counties where such boards continue to exist.'

"Sec. 2. That said section 957, as amended May 1, 1894, be and the same is hereby repealed, and this act shall be in force from and after its passage.

"Passed May 14, 1894."

The portion of section 957, as amended, preceding the proviso, is the general statute upon the subject. The proviso attempts to prevent the operation of the general statute in Huron and Erie counties, they being the only counties in the state whose populations at the last federal census came within the limits designated in the act. The amendment of May 1, 1894, was made with the object of preventing the operation of the general statute in Huron county; and by the amendment of May 14, 1894, it was attempted to create a like exception as to Erie county. The cause is submitted on a demurrer to the petition.

S. A. Wildman and Andrews Bros., for relators. L. C. Laylin and J. R. McKnight, for respondents.

SHAUCK, J. (after stating the facts). The question of first importance is whether this act meets the requirement of section 26, art. 2, of the constitution,—that "all laws of a general nature shall have a uniform operation throughout the state." The briefs of counsel present in a strong light the real and apparent conflict of decision, and comment upon the application of this section to statutes said to be repugnant to its provisions. But a number of the cases cited may be dismissed because they are really determined by the consideration believed to be due to other provisions of the constitution relating specially to the various subjects of the legislation whose validity was questioned, such as those relating to grants of corporate power, and those enjoining upon the general assembly the duty of establishing and maintaining public schools. Still, it would be difficult, if not impossible, to reconcile all the conclusions which have been reached concerning the effect of this section. Care seems to have been taken to avoid exact and comprehensive definitions of the phrases "general nature" and "uniform operation," and from a course of interpretation intended to leave questions of conformity to be determined, with respect to different statutes as they might arise, it has resulted that the apparent value of the legislation has sometimes affected the views that have been entertained respecting its validity. There may also be observed the effect of cautionary suggestions and admonitions supposed to be promotive of conservatism, if not helpful in the discovery of the truth, nor likely to contribute to harmonious interpretation. In various phrases, it has been said that the members of the lawmaking bodies have knowledge of the limitations upon their power, and are mindful of their

duty not to transcend them. Harmony is not likely to be found among conclusions which result from the application of a rule of inconstant force. Some contradictory conclusions upon this subject are the play of the balance in which deference to the constitution has been weighed against deference to the general assembly. Of these cautionary rules, one, however, is useful: Acts of the general assembly should not be adjudged void upon mere doubts as to their validity. But it does not appear to have been advertently held in any case that this section belongs to the class of constitutional provisions which it has sometimes been thought safe to regard as directory or—more accurately—advisory merely. On the contrary, there seems to be general acquiescence in the view expressed by Scott, J., in *Kelley v. State*, 6 Ohio St. 269, where he says that this section is "a general, unqualified, and positive prohibition or limitation of legislative power, forbidding the giving of a partial operation to any law of a general nature, or—in its own affirmative terms—requiring that a uniform operation throughout the state shall be given to all laws of a general nature." It is arguing in a circle to say that a law is not of a general nature because its operation is limited. It is implied in this section that there are subjects of legislation, of a general nature, as to which there is the imperative requirement that the operation of the laws shall be uniform, and coextensive with the subjects. Those who framed and adopted the constitution used the phrase "general nature" without definition, as though its meaning were well understood. Whatever doubts may have arisen since the adoption of the constitution as to the effect of this provision when applied to statutes, as a test of their validity, it is not supposed that the meaning of the phrase has changed. It is with evident propriety that counsel point to its prior and contemporaneous use in legislation, as indicating the sense in which it was employed in the constitution. Many members of the convention had been members of the general assembly, and others were entirely familiar with the course of legislation under the constitution of 1802. Unless terms which had a well-understood meaning, are regarded as used according to that meaning, interpretation becomes mere speculation. In volume 18, *Laws Ohio*, published in 1820, the acts of the general assembly were published under the titles of "Acts of a General Nature" and "Acts of a Local Nature," and these titles were used consistently during the 30 years following that date, and preceding the adoption of the present constitution. It can hardly be doubted that in this manner these terms became familiar to the people, and their meanings were determined by such familiar usage. The laws published as "acts of a general nature" were not always of uniform operation throughout the state, for that was not required by any provision of the constitu-

tion then in force. In the adoption of section 26, art. 2, of the present constitution, the phrase, "laws of a general nature," was employed in the sense then familiar to designate the acts which, as experience had demonstrated, should have a uniform operation throughout the state. It will not aid present purposes to enter the interesting field of inquiry suggested, further than to ascertain whether acts providing for public aid to the poor were regarded as of a general nature. In 18 Laws Ohio, at page 208, is a republication of an act entitled "An act for the relief of the poor," which had been passed February 10, 1816; and at page 223 of the same volume is a republication of an act entitled "An act to authorize the establishment of poor houses," which had been passed February 26, 1816. Both acts are published under the general title, "Acts of a General Nature." There was further legislation upon this subject January 26, 1827, January 19, 1829, and March 14, 1831, and all the acts were published under the same general title, as acts of a general nature. That this has been regarded as a subject for laws of a general nature, under the present constitution, appears from the general course of legislation upon the subject. So far as we have observed, all the legislation of the state prior to the act now called in question has accorded with the general belief that the poor are always and everywhere with us. Indeed, this act itself affords evidence that the belief continues to abide with the general assembly that laws upon this subject are of a general nature. If the subject were not general, the counties of Huron and Erie might have been named, instead of described.

It is contended that the act is of uniform operation throughout the state. Counsel for the defendants, with much reason, insist that uniform operation is not necessarily universal operation. In the provision which limits its operation to counties having infirmaries, the act before us affords a convenient example of legislation that operates uniformly, though not universally. The act, but for the proviso, is of uniform operation, because it operates universally where are found the conditions for which legislative provisions are made; that is, in all counties having infirmaries. But the petition shows that these counties have infirmaries, and the purpose of the act is to exempt them from the operation of laws applicable to other counties presenting the same conditions. Uniformity of operation requires that laws shall operate in all parts of the state where are found the conditions which are the subjects of the legislation. The case does not call upon us to determine whether the requirement of uniform operation forbids the reasonable classification of counties upon substantial differences in population. Isolation is not classification. The appearance of general and uniform legislation sought to be imparted to the act by the figures employed in the description

of these counties, and the regard that is paid to changes in population which may be disclosed by a subsequent federal census, do not at all affect the character of the act. Its validity must be determined, not by its form, but by its substance and practical operation. It provides exceptional legislation on the basis of a difference in population so trivial that no one supposes it to be the real ground of the distinction, and it applies to no counties but to Erie and to Huron.

With the wisdom or the policy which the general assembly has, through the provisions of this act, attempted to establish in the two counties named, we have nothing to do. If it be unwise, this section forbids its application to Erie and Huron counties, except by a law of uniform operation throughout the state, which shall affect the interests of all constituencies, and thus challenge the attention and judgment of all representatives. If it be wise, this section beneficently requires that the people of the whole state shall share in its benefits. We are aware of no decision of this court in conflict with these views. Demurrer overruled, and peremptory writ allowed.

(53 Ohio St. 151)

STEWART et al. v. WHEELING & L. E. RY. CO.

(Supreme Court of Ohio. June 11, 1895.)

LIS PENDENS—ACTION IN FEDERAL COURT—JUDGMENT LIEN—PRIORITY—ENFORCEMENT AGAINST RAILROAD PROPERTY—SUBROGATION.

1. Section 5056 of the Revised Statutes, which provides that "when any part of the real property, the subject-matter of an action, is situate in any county or counties other than the one in which the action is brought a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties before it shall operate therein as notice so as to charge third persons," or affect interests acquired by them in the property not situate in the county where the action was brought, relates to actions and judgments in the state courts, and not to those in courts of the United States.

2. A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder. The purchaser will take the property discharged from all such liens and interests, though the persons obtaining them be not parties to the suit. They must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to attention of the court by appropriate pleadings.

3. But a judgment recovered in a state court against the railroad company, prior to the commencement of the foreclosure suit, by a creditor who was not made a party, remains unaffected by the decree and sale. Such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots, and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale.

4. While in such case the judgment creditor may not, except as authorized by statute,

sell on execution the property to which his lien attached, either where it is part only of the corporate property, and is necessary, in connection with the balance of the property, to enable the corporation to accomplish the purposes of its creation, and discharge the duties it has assumed towards the public, or where the sale would materially impair the uses and value of the balance of the property, he may, by a proceeding in equity to which all persons in interest are made parties, enforce his lien by subjecting the whole of the property to resale, and obtaining a proper application of the proceeds.

5. In a proceeding for that purpose, the purchaser at the foreclosure sale may, if necessary for his protection, be subrogated to the rights of the mortgagee, to the extent of the purchase money paid; and the proceeds of the resale must first be applied to the satisfaction of incumbrances superior to the lien of the judgment creditor, if any there be, including those set up in the foreclosure suit, and if nothing then remains for the judgment creditor he cannot recover costs.

(Syllabus by the Court.)

Order to circuit court, Huron county.

Action by Charles H. Stewart, administrator, against the Wheeling & Lake Erie Railway Company and others. From a judgment for defendant railway company, plaintiff and the other defendants bring error. Modified.

On the 20th day of May, 1889, Charles H. Stewart, as the administrator of the estate of Hugh B. Wilson, deceased, commenced his action in the court of common pleas of Huron county against the Wheeling & Lake Erie Railroad Company, the Wheeling & Lake Erie Railway Company, the Central Trust Company of New York, the Mercantile Trust Company of New York, as trustee, John W. Cassell, William S. Fox, and Cyrus McNeely. The petition, after stating the due appointment and qualification of the plaintiff as administrator, and the corporate character of the several companies defendants, alleges that the defendant railroad company, prior to and during the year 1885, was the owner, and in possession of, and operating a line of railroad in and through Huron and other counties of the state, and was the legal owner and in possession of certain real estate situated in the county of Huron, consisting of its roadway and lands adjoining the same, depot grounds, and grounds occupied by its machine shops, station houses, car houses, engine houses, and other buildings; that at the October term, 1885, of the court of common pleas of that county, the plaintiff recovered a judgment against the said railroad company for the sum of \$4,049.84 and costs, which became a lien on the property of the railroad company, and remains in full force and unsatisfied; that, afterwards, on the 6th day of March, 1886, the plaintiff caused an execution to be issued on his judgment, which was returned unsatisfied, for want of goods and chattels or unincumbered lands whereon to levy, the property of the company then being incumbered to an amount exceeding its value, but, the incumbrances having been subsequently discharged, the plaintiff caused another execution to issue, which was on the 19th day of April, 1889, levied on the property

of the railroad company in Huron county. The petition then alleges that the other defendants each claim to have some lien on or right in the property, by reason of which a sale under the execution cannot be effected, and prays they may be required to set up their claims, or be barred, and for an adjustment of whatever liens may be set up, and a sale of the property, and for general relief.

The defendants Cassell, Fox, and McNeely, and J. L. Ames, who was made a party, each filed an answer and cross petition setting up judgments recovered by them, respectively, in the court of common pleas of Huron county, against the railroad company and the levy of executions issued upon them. The judgment of Fox was recovered on the 4th day of February, 1884, and was for the sum of \$739.50; that of Ames, on the 14th day of September, 1885, for \$1,427.18; that of Cassell, on the 25th day of October, 1885, for \$1,846.18; and McNeely recovered two judgments,—one on the 24th day of May, 1886, for \$590.70, and the other on the 21st day of February, 1887, for \$285.35. The executions issued on the judgments were all levied at the same time the plaintiff's execution was levied, and upon the same property, and the cross petitions contain substantially the same prayer as the petition. The railroad company filed no answer. The answer of the railway company to the petition and the several cross petitions denies generally their allegations, and avers: That on the 1st day of November, 1879, the railroad company executed its first mortgage bonds, 3,500 in number, each for the sum of \$1,000, payable on the 1st day of November, 1909, bearing interest at the rate of six per cent. per annum, payable semiannually on the 1st day of May and November in each year, and sold and delivered 2,800 of the bonds to bona fide purchasers. That, to secure the payment of the principal and interest of the bonds, the railroad company executed and delivered its mortgage or deed of trust to the Farmers' Loan & Trust Company, as trustee, and thereby conveyed to the trust company, its successors and assigns, all the railroad company's property, real and personal, of every description, including the real estate in Huron county in said petition described, "in trust for the benefit and security of the several persons, copartnership firms, and corporate bodies who should at any time be or become holders of any of the above-mentioned bonds, to secure the due and punctual payment of the principal and interest of said bonds according to the tenor and effect thereof. The mortgage or deed of trust contained a provision that in case default should be made in the payment of any of the installments of interest upon any of said bonds, and such default should continue for the period of six months, the principal of all the bonds secured thereby should become immediately due and payable; and it was duly recorded during the year 1880 in the office of the recorder of

deeds of Huron county, Ohio, and in each of the other counties in which any real property of said railroad company was situate. The railroad company failed to pay the interest which became due on the 1st day of November, A. D. 1883, and on the 8th day of July, A. D. 1884, the Farmers' Loan & Trust Company filed its bill of complaint in the circuit court of the United States for the Northern district of Ohio, Eastern division, against the Wheeling & Lake Erie Railroad Company, praying that all of the property and franchises hereinbefore described be sold, under a decree of said court, to satisfy the conditions of said mortgage or deed of trust, and on the same day said railroad company duly entered its appearance in said suit. That on the 13th day of January, A. D. 1886, a decree was rendered in said suit by said circuit court of the United States, finding the sum of three million two hundred and forty-two thousand seven hundred and sixty (\$3,242,760) dollars due upon said bonds hereinbefore described, and adjudging and decreeing that, if the said the Wheeling & Lake Erie Railroad Company should fail within the period of ten days thereafter to pay into said court said last-mentioned sum, all equity of redemption of said the Wheeling & Lake Erie Railroad Company in and to said mortgaged property and franchises should be barred and foreclosed, and said mortgaged property and franchises should be sold by Wilbur F. Goodspeed, special master commissioner, who thereafter, for the sum of five hundred and five thousand dollars, sold said railroad property and franchises, including the property in the petition described, to George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees; and on the 22d day of June, A. D. 1886, said circuit court of the United States duly confirmed said sale, and ordered said Wilbur F. Goodspeed, as special master commissioner, to execute and deliver to said trustees a deed of conveyance for said railroad property and franchises. That, in pursuance of the aforesaid order of said circuit court of the United States, said Wilbur F. Goodspeed, special master commissioner, on said 22d day of June, A. D. 1886, executed and delivered to said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, a deed conveying to said trustees the railroad property and franchises hereinafter specifically described, being the property described in said mortgage or deed of trust, and the same property described in said petition. Said deed was duly recorded by the recorder of deeds for the county of Huron, Ohio, on the — day of —, A. D. 1886, in volume — of Deeds, at page —. That on the twenty-fifth day of June, A. D. 1886, for a valuable consideration, the said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, executed and delivered to this defendant, the Wheeling & Lake Erie Railway Company, their certain deed, whereby they conveyed to this defendant all their right,

title, and interest in said railroad and property so sold and conveyed to them by said Wilbur F. Goodspeed, special master commissioner, being the property described in said mortgage or deed of trust, as well as in said petition. That said last-mentioned deed was recorded in the office of the recorder of deeds for the county of Huron, Ohio, on the — day of —, A. D. 1886, in volume — of Deeds, at page —. This defendant therefore denies that the judgments mentioned in the petition and cross-petitions ever became a lien on the real estate in the petition described, or on any part thereof." The answer of the Mercantile Trust Company sets up bonds to the amount of \$3,000,000, and a mortgage securing the same, executed by the railway company on the 6th day of July, 1886, which bonds, it is alleged, are in the hands of holders for value, and the mortgage embraces all the property purchased by the railway company, including that described in the plaintiff's petition. The mortgage was recorded in Huron county, and in each of the other counties in which any of the property is situated, in August, 1886. The defendant prays that its mortgage lien, and the interests of the holders of the bonds secured by it, may be protected. The Central Trust Company, in its answer, sets up a subsequent mortgage executed by the railway company on the same property to secure bonds to the amount of \$1,500,000, in the hands of holders for value, which mortgage was recorded in the several counties where the property is located, in May, 1888, and prays that its rights and those of the bondholders may be protected.

Demurrers to these several answers were filed by the plaintiff, and cross-petitioning judgment creditors, which were overruled, and replies were then filed controverting their allegations, and alleging that "if said defendants, or either of them, obtained the title or liens, or any of them, in their said answers pretended, the same were procured with full knowledge and notice of the prior rights, lien, and interest of the plaintiff" and the other judgment creditors of the railroad company.

After trial and judgment in the court of common pleas, the cause was taken to the circuit court on appeal, where it was submitted upon an agreed statement of facts; and that court also made and entered its findings of fact upon the issues joined, from which it appears that the allegations of the petition and of the several cross petitions filed by those having judgments against the railroad company, as they have already been stated, are true, and the averments, as they have been stated, in the answers of the railway company, the Central Trust Company, and the Mercantile Trust Company, are also true; and upon that state of facts the court held that neither the plaintiff nor either of the other judgment creditors was entitled to any relief, and rendered judgment against them for costs. A motion for a new trial filed by

them was overruled, and a bill of exceptions, at their request, was duly signed and allowed, and they are each asking the reversal of the judgment rendered against them.

G. T. Stewart, for plaintiff and cross petitioners in error. Swayne, Swayne, Hayes & Tyler, for defendant in error, Wheeling & L. E. Ry. Co.

WILLIAMS, J. (after stating the facts). The mortgage executed by the defendant railroad company to the Farmers' Loan & Trust Company, November 1, 1879, embraced all of the property of the mortgagor, including that which the plaintiff in the action below sought to have subjected to sale for the payment of his judgment. The mortgage was duly recorded in 1880 in each of the counties where any of the property was situated. The suit to foreclose that mortgage was commenced in the United States circuit court of the proper district, on the 8th day of July, 1884, and the appearance of the defendant duly entered on the same day. That suit, which was regularly and continuously prosecuted, resulted in a decree of foreclosure rendered on the 13th day of January, 1886, under which all of the property was sold, and the sale confirmed on the 22d day of June, 1886. The purchasers, after receiving their deed for the property, conveyed it in due form to the defendant railway company on the 25th day of June, 1886. These conveyances were properly recorded. The plaintiff below, and the several cross petitioners, except Fox, recovered their judgments against the railroad company after the commencement, and during the pendency, of the foreclosure suit, and none of them were made parties thereto. Fox recovered his judgment before the commencement of that suit, but was not made a party. It is claimed by the defendants in error that all of these judgment creditors, except Fox, are bound by the decree in the foreclosure suit, and whatever lien or right they acquired against the property by their judgments was divested by its sale under the decree, and the purchasers took the title discharged therefrom. That the court, in that suit, had jurisdiction of the parties, and of the property included in the mortgage, is not questioned; nor is it, that the prosecution of the suit was close and continuous. And it is well settled that all persons who, in such case, purchase or otherwise acquire an interest in the subject of the litigation, during its progress, take with constructive notice of the pendency of the suit, and will be bound by its result, though not made parties. The rule, as formulated by Lord Chancellor Bacon, and generally adhered to since, is that "no decree bindeth any that cometh in bona fide by conveyance from the defendant before bill exhibited, and is made no party, neither by bill nor the order; but where he comes in pendente lite, and while the suit is in full prosecution, and without any color of allowance or privity of the

court, there regularly the decree bindeth." The rule is founded in necessity, as well as upon public policy, since, without it, the judgment of the court could in all cases be frustrated, or rendered ineffectual, by conveyance or incumbrance made or suffered during the pendency of the suit. New suits would then become necessary against those so obtaining an interest in the subject of the action, who might, in the same way, compel still further suits, and so on, until there would be no end to the litigation. As was said by Chancellor Kent in *Murray v. Ballou*, 1 Johns. Ch. 566: "No doubt, the rule sometimes operates with hardship upon a purchaser without notice, but this seems to be one of the cases in which private mischief must yield to the general convenience." In general a suit is to be determined upon the state of case existing when it was instituted; and persons who procure an interest in its subject-matter during its pendency should, if they wish to assert any claim founded upon that interest, become parties, and bring it to the attention of the court by appropriate pleadings. The rule is quite as applicable to judgment creditors as it is to purchasers or other incumbrancers, and there is no reason why it should not be. The lien of the judgment attaches only to the right or title which the debtor had at the time of its rendition, and the position of the creditor is not more meritorious than that of a mortgagee or bona fide purchaser.

It is contended, however, by counsel for the plaintiff in error, that section 5056 of the Revised Statutes forbids the application of the rule in this case, and prevents the foreclosure suit brought in the United States court from operating as a lis pendens affecting the liens of the judgments recovered in Huron county. That section provides that: "When any part of real property, the subject-matter of an action, is situated in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons, as provided in the preceding section; but it shall operate as such notice, without record, in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute which does not require such record." The preceding section provides that: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." These sections belong to the Code of Civil Procedure, and it is obvious that they relate to actions brought and judgments rendered in the state courts, and not to those in the courts of the United States. Section 5056 is, by its terms, limited to

judgments recovered in one county concerning real property partly situated in another county; and actions of that nature are authorized by a preceding section of the Code (section 5022). In the federal courts, actions are not brought in counties, but in the district or circuit where jurisdiction of the parties and subject-matter may be properly obtained; and, throughout the territorial limits of that jurisdiction, their judgments operate as liens, and actions pending as constructive notice, like those of state courts within their appropriate jurisdiction. Similar statutes have received like construction elsewhere. A statute of the state of Virginia provided that: "No *lis pendens*, or attachment against the estate of a nonresident, shall bind or affect a purchaser of real estate, without actual notice thereof, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land and the name of the person whose estate is intended to be affected thereby shall be left with the clerk of the court of the county or corporation in which the land is situated, who shall forthwith record the said memorandum in the deed book, and index the same by the name of the person aforesaid." Code 1873, c. 182, § 5. When that statute was in force an assignee in bankruptcy brought suit in the federal court at Richmond to set aside, as fraudulent, a deed for certain real property in Petersburg. Pending the suit a third person, in good faith, purchased the property from a defendant, and paid full value for it, without notice of the fraud, or pending suit. The court held that he took nothing by his purchase, as against the decree in the federal court, notwithstanding no *lis pendens* was filed or recorded as required by the Virginia statute. *Rutherglen v. Wolf*, 1 Hughes, 78, Fed. Cas. No. 12,175. In the case of *Wilson v. Heflin*, 81 Ind. 35, it appeared that during the pendency of a suit in the federal court to reform a mortgage so as to embrace a tract of land not described in it, and foreclose the mortgage when so reformed, Wilson purchased the land, which was situated in a county where the federal court did not sit, and where, upon the records, the title was in the name of his grantor, and no incumbrance of the land appeared of record. His purchase was made in good faith, for value, and without actual notice of the mistake in the mortgage, or the pendency of the suit to reform and foreclose it. Subsequently, the court decreed reformation of the mortgage, and sale of the property. In an action brought by Wilson, who was in possession of the land, to quiet his title as against the decree of the federal court, he relied on a statute of Indiana which had not been complied with, similar in its provisions to that of Virginia, heretofore mentioned; but the court decided against him, holding that the statute had "no effect upon suits in the United States

courts." And in *Majors v. Cowell*, 51 Cal. 478, it was held that the clause of the practice act of that state "relating to the filing of a *lis pendens* does not apply to suitors, except in the state courts."

It follows that the judgments recovered against the defendant railroad company, while the suit was pending in the federal court to foreclose the mortgage embracing the property which it is sought to subject to their payment, created no lien, nor gave any right or remedy to those creditors that can now be enforced or be made effectual against the property. But Fox, whose judgment was recovered prior to the commencement of that suit, and who was not made a party to it, occupies a different position, and is not without remedy, unless it is to be denied upon some other ground. The nature, as well as the existence of that remedy, is well settled. It is the duty of a mortgagee to make all persons who appear of record to have a lien upon or interest in the mortgaged premises parties to his action of foreclosure, and, if he does not, their lien or interest remains unaffected thereby; and any such incumbrancer, whether prior or subsequent to the mortgage, who has not been made a party, may maintain an action to enforce his lien, and have a resale of the property for that purpose. If a subsequent incumbrancer, he is only entitled to have applied to the payment of his claim such part of the proceeds of the resale as may be necessary, which remains after the payment of the prior incumbrance and costs, and if nothing so remains he cannot recover costs; but he is not required, as a condition of his right of resale, to first pay such prior incumbrance. The purchaser at the first sale takes the title of the mortgagor and mortgagee, and may, for his protection, be subrogated to the rights of the latter to the extent of the purchase money paid. *Frische v. Kramer*, 16 Ohio, 126, 139; *Myers v. Hewitt*, Id. 449; *Childs v. Childs*, 10 Ohio St. 339; *Stewart v. Johnson*, 30 Ohio St. 24; *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841; *Vanderkemp v. Shelton*, 11 Paige, 28.

But it is contended the remedy cannot properly be enforced in this case, because the railroad company, when the judgment was recovered against it, was a public agency, whose property was essential to the exercise of its franchise, and the discharge of those duties it had assumed towards the public; and the railway company holds the property, it is claimed, impressed with the same public trust, and secured by the same right of exemption. There are authorities which maintain the general proposition that the real property of corporations classed as public agencies, such as railroad companies, which is essential to the exercise of their corporate franchise and the performance of their duties to the general public, cannot be sold on execution, without statutory authority; and, further, that a part only of the

property of such a corporation cannot be so sold, when the sale would practically destroy or seriously impair the uses and value of the remainder. Conceding, however, that considerations of public policy, or the peculiar nature, uses, and incidents of property owned by such quasi public corporations, forbid the sale upon execution of the whole or parts of the property, with or without the corporate franchise, it does not follow that a lien upon it may not be created by the recovery of a judgment against the corporation, which may be preserved in some mode, and enforced by some appropriate proceeding. If it could not be, it is evident the purposes of the corporation would generally, if not always, fail; for ordinarily, in conducting its business, it becomes necessary to contract debts and incur obligations, and, it being understood the creditor has no means of enforcing payment, the corporation could obtain no credit. As said by Gholson, J., in *Coe v. Railroad Co.*, 10 Ohio St. 372: "It may be true that a railroad corporation holds its property, in a certain sense, as a public trust, to answer the purposes of a public highway,—the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involves obligations to individuals, and, to meet those obligations, the property of the corporation must, in some form, be liable. The question is, in what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors, and operate as a shield to protect property from their just demands?" The court, in that case, distinguishes between the franchise of being a corporation, which, it is said, properly speaking, is a franchise of the incorporators, and the franchise to operate the road and make profits therefrom, and holds that the former cannot be conveyed or sold, while the latter may be. And with respect to the property of the corporation, after it has been mortgaged, and the respective rights of the mortgagee and subsequent lien holders, it is said: "The property must be subject in some form to the just claims against the party subsequently arising, and this will frequently and necessarily lead to interruption and disappointment in a prior arrangement, as to the time within which it is to be performed;" and, further, that the company "could not, by its own act, exempt from the claims of its creditors any part of its property," nor could the mortgagee "object to the creation of other legal liens upon the property embraced in the mortgage." In *Lane v. Baughman*, 17 Ohio St. 642, it is held that "the remedy of a judgment creditor of a railroad company, where its property is incumbered by mortgage, is in equity, to subject the interest of the mortgagor to the payment of the judgment, except where his claim is such as to entitle him to have it

paid out of the earnings of the company, when his appropriate remedy is to subject the earnings to its payment." And this court held in *Railroad Co. v. Lewton*, 20 Ohio St. 401, that a party who has a lien on a specific part only of the property of a railroad corporation is not entitled to a sale of such part, where the sale will have the effect to break the continuity of the road, and interfere with the public interests. The lien asserted in that case was in the nature of a vendor's lien on a piece of land used for the company's roadway. Speaking of the lien holder's remedy in such case, McIlvain, J., says: "The public has, and can have, no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road,—of the line of public travel and transportation. And this right is as well subversed if the ownership and management of the highway be in the hands of one party as another. Hence the public has no interest impaired by a sale of the whole line." And "because a part may not be sold, on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree a sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights and interests of other parties, either as owners or lien holders upon the road, can be protected, and their property or security saved from absolute destruction." In general, the liability of property for the owners' debts, except in so far as there are express legal exemptions, is as unlimited as the power of disposition, which is an inseparable incident of ownership, when there is no legal disability, for the incurring of indebtedness for the payment of which the property may be taken is but a mode of disposition by the owner. Under our laws, railroad companies are authorized to appropriate lands for their roadways, depots, workshops, and for various other uses, and to acquire by purchase or donation any lands in the vicinity of the line of the road, or through which it passes, deemed necessary or convenient for the right of way, or that may be granted to aid in the construction of the road, and to hold and convey the same in such manner as the directors may prescribe. Rev. St. §§ 3281, 3282. And that the lien of a judgment may attach to such property, as it does to that of an individual, is distinctly recognized in the legislation of this state. Thus it is provided by section 3398 of the Revised Statutes that the lien of certain mortgages and deeds of trust executed by the company shall be postponed to the lien of judgments recovered against the company for labor thereafter performed for it, or material or supplies thereafter furnished to it, or for damages or losses thereafter sustained by the misconduct of its agents, or in actions founded on its contracts or liability as a common carrier thereafter made or incur-

red. And the subsequent and supplemental sections point out the mode of enforcing the lien of the judgment, and preserving its priority. Sections 8516-35 declare that, if one company owning a railroad jointly with another company shall refuse to pay its part of the costs of making necessary additions and improvements as directed by the statute, judgment may be recovered therefor, which "shall be a valid lien upon the interests of the party so in default in said railroad or part of railroad owned jointly as aforesaid, and such interest may be sold at public sale as in other cases upon execution," and the purchaser shall enjoy "all the rights, privileges, and franchises which were exercised or enjoyed by the company owning the same at the time of the sale." Other instances may be found in sections 3299, 3866, 6449. By section 5375 of the Revised Statutes, a judgment is made a lien on all the lands of the debtor, and any vested interest he may have in lands, situated in the county where the judgment is rendered, either from the first day of the term of the court at which it is rendered, or from the day of its rendition. And we are of the opinion that judgments recovered against railroad corporations become liens upon their real property situated in the county where rendered, and that lands owned by such corporations for their roadways, rights of way, depots, and other purposes must be regarded as property of that character, and subject to such liens. We are also of the opinion that while the judgment creditor may not, except as authorized by statute, sell on execution the property to which his lien attaches, separate from the franchise of the company, nor when it is part only of the corporate property, and is necessary, in connection with the balance of the property, to enable the company to accomplish the purposes of its organization and perform the duties it owes to the public, or its sale will materially impair the uses and value of the balance of the property, he may, by a proceeding in equity, to which all persons interested are made parties, enforce his lien by subjecting the whole of the property and franchises of the corporation to sale. The pleadings do not seem to have been drawn with this view of the case. The property is not adequately described in the petition or cross petition of Fox, but such description is supplied by the answer of the railway company. Then, the recovery of Fox's judgment was subsequent to the record of the mortgage under which the former sale was had, and it appears the proceeds were insufficient to pay the indebtedness secured by it; and, as it is not shown that the claim on which the judgment was rendered was such as to entitle it to priority over the mortgage, the latter must be treated as the superior lien, and entitled to receive the unpaid balance out of the proceeds of any sale of the property that may be had at the instance of Fox, before any part can

be properly applied on his judgment. The holder of the mortgage, or of the indebtedness secured by it, is therefore a necessary party; but, as he can only be interested in the distribution of the proceeds of the sale, it will be sufficient if the party is brought in before that takes place. The presence of the party is not necessary before the decree of sale. It may turn out that the resale will produce no more, nor even enough to pay the balance of the mortgage debt; but whether a suitor's remedy promises to be productive of beneficial results, or not, is for his consideration. The court is concerned only with his rights. The judgment rendered by the circuit court against Fox is reversed, and the cause will be remanded for a decree in his favor, in accordance with this opinion. In other respects the judgment is affirmed.

(53 Ohio St. 342)

HAVENS et al. v. HORTON.

(Supreme Court of Ohio. June 27, 1895.)

DEED OF ASSIGNMENT—POWER OF PROBATE COURT TO ORDER SALE OF MORTGAGED LAND—JURISDICTION NOT OUSTED BY MORTGAGEE'S ACTION TO FORECLOSE.

1. Where a deed of assignment has been filed in the probate court in accordance with section 6335 Rev. St., and the assignee has qualified, that court is clothed with jurisdiction to fully execute the trust. And, where such deed conveys land incumbered by mortgage, the court has power, as an incident of jurisdiction, to order the land sold and the mortgage satisfied.

2. Jurisdiction thus acquired is not ousted by the subsequent commencement of an action by the mortgagee, in the court of common pleas of the county, to foreclose the mortgage.

(Syllabus by the Court.)

Error to circuit court, Perry county.

On May 11, 1893, Thomas Horton, Jr., commenced an action in the court of common pleas of Licking county, to recover upon six promissory notes, and, for a seventh cause of action, to foreclose a mortgage on land in that county, given to secure payment of the notes against Robert Meridith, maker and mortgagor, and George W. Havens, assignee.

From a judgment of the circuit court affirming a judgment of the common pleas, defendants bring error. Reversed.

Havens answered, alleging, in substance, "that, on the 1st day of April, A. D. 1893, the said Robert Meridith made and executed, and delivered to him, his certain deed of assignment, granting and conveying to him all his property, real and personal, including the real estate described in plaintiff's petition, in trust, under the insolvent laws of the state of Ohio, for the benefit of all the creditors of the said Robert Meridith; that said deed of assignment was filed in the probate court of Licking county, on the 1st day of April, A. D. 1893, at 1:20 o'clock p. m., and that this defendant, on said date, accepted the trust created in him by said deed of assignment, gave bond, and was duly qualified by said probate court, and entered upon the discharge of his duties as such assignee; that, on the 25th

day of April, A. D. 1893, an order of appraisal issued out of the probate court of said county, to three judicious, disinterested, and qualified appraisers, directing and authorizing them to appraise, according to law, all property, real and personal, and assets of the said Robert Meridith, assigned as aforesaid to this defendant; and that said appraisers, acting under the authority of said order of appraisal, made an inventory and appraisal of all the assets of said estate, including the real estate described in plaintiff's petition, and delivered said order of appraisal, with their proceedings thereon, to this defendant, and that this defendant filed the same in the probate court of said county, verified by his oath as required by law, on the 25th day of May, 1893; and this defendant says that, on the 21st day of June, 1893, he filed a petition, as assignee of the said Robert Meridith, in the probate court of said county, to sell all the real estate belonging to said assignment, including the real estate described in plaintiff's petition; and that, on July 1st, 1893, the probate court, finding that Thomas Horton, Jr., plaintiff in this action, and one of the defendants in the petition to sell said real estate, filed, as aforesaid, in the probate court, by this defendant, as assignee, was a nonresident of Licking county, ordered that summons be served on said Horton by publication; and that such proceedings were had under said order that, on August 18th, 1893, proof of publication of notice and service of summons thereby on said Thomas Horton, Jr., was filed in said probate court; and that, on the — day of September, 1893, the said Thomas Horton, Jr., by his attorney, filed his motion in said probate court to said petition of this defendant, and afterwards, to wit, on the — day of September, 1893, on the application of said Thomas Horton, Jr., leave was given him to file his answer in said case in said probate court; and that, by reason of the premises and of the facts above stated, said probate court had jurisdiction of the subject-matter of plaintiff's seventh cause of action before the commencement of plaintiff's action in the court; and that said suit is now pending in said probate court."

To this answer the plaintiff demurred. The demurrer was sustained, and decree of foreclosure entered. From this judgment the assignee appealed to the circuit court, where a like holding was had, and judgment rendered. To reverse this judgment the present proceeding in error is prosecuted.

J. A. Flory and G. E. Daugherty, for plaintiff in error. J. R. Davies, for defendant in error.

PER CURIAM. By the filing of the deed of assignment in the probate court, and the qualification of the assignee, in conformity with section 6335, Rev. St., that court acquired jurisdiction of the real as well as personal property conveyed by the deed of assignment, and power to order sale of the land and payment

of the incumbrance thereon; and that jurisdiction was not ousted by the commencement of an action by the mortgagee in the court of common pleas to foreclose his mortgage. *Dwyer v. Garlough*, 31 Ohio St. 153; *Linderman v. Ingham*, 36 Ohio St. 1; *Blandy v. Benedict*, 42 Ohio St. 299; *Sayler v. Simpson*, 45 Ohio St. 141, 12 N. E. 181; *Betz v. Snyder*, 48 Ohio St. 498, 28 N. E. 234; *Clapp v. Banking Co.*, 50 Ohio St. 536, 35 N. E. 308; *McNeil v. Hagerty*, 51 Ohio St. 263, 37 N. E. 526. Judgment reversed, and cause remanded to the circuit court, with directions to overrule the demurrer and dismiss the petition.

(53 Ohio St. 312)

OHIO & P. COAL CO. v. SMITH.

(Supreme Court of Ohio. June 27, 1895.)

ACTION FOR DAMAGES—ABATEMENT—DEATH OF PLAINTIFF.

A pending action to recover damages for injuries caused by the negligence of the defendant does not abate by the death of the plaintiff.

(Syllabus by the Court.)

Error to circuit court, Columbiana county.

Action by Alexander G. Smith, as administrator of the estate of Henry Davidson, deceased, against the Ohio & Pennsylvania Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

For injuries claimed to have been caused by the negligence of the Ohio & Pennsylvania Coal Company and its agents, Henry Davidson, then in life, commenced an action against the company to recover damages. On a trial had a judgment was rendered in his favor, which was afterwards set aside on error by the circuit court, and a new trial awarded. Afterwards, and before the new trial was had, Davidson died, and the action was revived in the name of his administrator, Alexander G. Smith. A trial was then had, which resulted in a verdict and judgment against the company. It was claimed that, on the death of the plaintiff, the action abated, under section 5144, Rev. St., and that the court erred in permitting it to be reversed. On error the judgment was affirmed by the circuit court. Error is prosecuted to this court to reverse the judgment on the ground, among other assignments, that there was error in the revivor of the action.

Blandin & Rice, John W. Morrison, and H. M. Daugherty, for plaintiff in error. Alex. G. & P. M. Smith and P. M. Ashford, for defendant in error.

PER CURIAM. We see no error in the ruling of the court. The action was a pending one at the death of the plaintiff. It is not within any of the enumerated exceptions of section 5144, and was therefore properly revived and prosecuted to judgment in the name of the administrator of the deceased plaintiff. Judgment affirmed.

(53 Ohio St. 251)

PENDERY v. ALLEN et al.

(Supreme Court of Ohio. June 18, 1895.)

FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—JUDGMENT AGAINST DEFENDANT—PARTICIPATION AS CREDITOR—NOTICE OF SUIT.

1. Where notice is given of the pendency and object of a suit to set aside a conveyance, claimed to have been made to defraud creditors, or to declare an assignment, giving preferences, a trust for the benefit of all the creditors of the assignor, and judgment is rendered against the defendant, he is not precluded by such notice from participating as a creditor (if one) in the distribution of the fund, though other creditors came in and complied with the provisions of the statute (section 6344, Rev. St.) giving to such creditors, with the plaintiff, a priority in its distribution.

2. The provisions of section 6344, Rev. St., as to giving notice of the pendency and object of a suit to set aside a conveyance, applies to a suit under the previous section to declare an assignment giving preferences a trust for the benefit of all creditors of the assignor.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by Israel H. Pendery against A. C. Allen and others to set aside certain conveyances as fraudulent. Judgment for plaintiff. From the order of distribution, he brings error. Modified.

Oliver B. Jones and James W. O'Hara, for plaintiffs in error. March & Ritchie, R. Tyler, P. Roettinger, J. R. Von Seggern, D. Thew Wright, J. T. Harrison, and Harrison & Aston, for defendants in error.

MINSHALL, C. J. This case was recently in this court on error. It was there determined that the mortgage to Lowe Emerson, made and delivered by E. P. Allen, was in the nature of an assignment in contemplation of insolvency, made to secure certain creditors of the mortgagor, and therefore inured to the equal benefit of all his creditors, within the meaning of section 6343, Rev. St.; and the cause was remanded to the court of common pleas, to be administered in accordance with the statute regulating such assignments. *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716. On distribution, after the payment of costs, expenses, and attorney's fee, the court ordered the fund in the hands of the trustee (Lowe Emerson) and of the sheriff of the county to be paid to all the creditors of Edward P. Allen, including Lowe Emerson, in proportion to the amount of their respective claims. This the plaintiff claims is error, on the ground that, at the commencement of the suit, he caused notice to be given of the object and pendency of it, as provided in section 6344, Rev. St., and that thereupon a priority should have been given to him and those who came in under the notice and complied with the provisions of that section, not only over the remaining creditors, but also over the defendant Lowe Emerson, as a creditor of Allen. In other words, it is claimed that, on the commencement of such a suit, and the giving of the notice, the defendant is

required to elect whether he will contest its prosecution, or abandon the defense and take with the other creditors in proportion to his claim as creditor; and that, if he elects to defend, and the assignment is declared a trust within the meaning of section 6343, he is postponed as a creditor until the plaintiff, and the other creditors who came in with him under the notice are satisfied. We do not accept this as the proper construction of the statute. The provision of section 6343, that the creditors who come in under the notice and comply with its provisions "shall be first entitled with the plaintiff to the benefits of such transfer or assignment, in proportion to the amounts of their respective claims," relates to the creditors other than the defendant. The latter, being in by summons, is not within the purview of the notice, and his rights are not affected thereby. He may defend against the suit, and, if he fail, what he loses is the preference claimed under the transfer or assignment. The thing recovered in such action is, in contemplation of law, the excess of the property transferred or assigned, over and above the claim of the defendant as a general creditor of the assignor. Thus, in an action to set aside a conveyance claimed to have been made to defraud creditors, the court found that the consideration was inadequate (being the liability of the grantees for the grantor, as surety on the claims of certain creditors, the liability being some \$1,000 less than the value of the land as found by the court). The grantees were required to account only for the excess. In other words, they were treated as creditors to the extent of their liability as sureties. *Jamison v. McNally*, 21 Ohio St. 295, 296. The court, then, did not err in its order directing that Emerson should be included as a creditor in the distribution of the fund. But a notice was given, at the commencement of the suit, of its pendency and object. The notice was of the pendency of a suit to set aside the mortgage as made to hinder and delay creditors. Subsequently, by an amendment, the object was changed so as to ask that it be declared an assignment to prefer creditors, under section 6343, Rev. St. It is quite certain, as we think, that the provisions of section 6344 as to giving notice apply as well to a proceeding under section 6343 as under the subsequent section. Such is the express language of the statute. But we are also of the opinion that a notice to set aside a conveyance on the ground that it was made to hinder and delay creditors is not rendered ineffective by a subsequent amendment asking to have a trust for creditors declared. The relief sought in either case is substantially the same. Therefore, as certain creditors of Allen did come in under the notice and give security as required by the statute, they, with the plaintiff, are entitled to priority in the distribution of the fund (after the payment of costs, expenses, and attor-

ney fees) over such other creditors as did not come in. The decree will be modified, in accordance with this opinion.

(53 Ohio St. 307)

STATE v. JOHNSON, City Clerk.

(Supreme Court of Ohio. June 25, 1895.)

DIVERSION OF MUNICIPAL FUNDS—PUNISHMENT—
CONVERSION OF MONEY BY OFFICER TO
OWN USE—EMBEZZLEMENT.

The object of section 6846, Rev. St. is to punish as an offense the diversion, appropriation, or application of the funds of a municipal corporation, or of a board of education, by an officer or agent there named, to a use other than that for which the funds were raised. A conversion of the money to his own use by such officer or agent is an offense, under section 6841, punishing the embezzlement of public money, and is not within the language or spirit of the above section.

(Syllabus by the Court.)

Exceptions from court of common pleas, Jefferson county.

William R. Johnson, city clerk of Steubenville, was convicted of appropriating certain moneys belonging to the public light fund of the city. A motion in arrest of judgment, on the ground that the indictment charged no offense under the statutes, was sustained, and the prosecuting attorney excepts. Exceptions overruled.

Dlo Rogers and E. E. Erskine, for the State. J. M. Jordan and J. F. Daton, for defendant.

MINSHALL, C. J. The defendant was tried and convicted upon an indictment presented by the grand jury of the county. The indictment contained four counts. The conviction was had upon the first. The others, so far as the question here is concerned, are immaterial. The first count charged that the defendant, being the clerk of the city of Steubenville, on September 5, 1893, "did then and there, unlawfully and knowingly, divert, appropriate, and apply certain funds of said city of Steubenville, to wit, moneys, in the sum of \$93.75, belonging to the 'public light fund' of said city, to other use and purpose than that for which the same was raised, by then and there converting the same to the use of him, the said William R. Johnson, the same having been raised under the laws of the state of Ohio for the use of said public light fund," and that it came into his hands in pursuance of the ordinances of the city. The jury found the defendant guilty as charged in the first count, and not guilty as charged in the other counts; the other counts differing from the first only in the averment as to the official character in which the defendant acted,—the second count charging him as "agent," the third as "officer," and the fourth as "servant." The jury also found that the defendant "diverted and appropriated \$93.75 to a use and purpose other than that for which it was raised." A motion was made in arrest of judgment, on the ground that the

facts stated in neither count of the indictment constitute an offense under the laws of Ohio. The motion was sustained, and the prosecuting attorney excepted to the ruling, and brings the question here for review upon a bill of exceptions.

It is claimed, and seems to be conceded by the prosecuting attorney, that the indictment was drawn to support a conviction under section 6846, Rev. St.; and the question is whether its averments are sufficient for that purpose. We are of the opinion that they are not. That section reads as follows: "A member of the council or board of aldermen of any municipal corporation, or an officer, agent, clerk, or servant of such corporation or of any board or department thereof or any officer, agent, clerk or servant of any board of education who knowingly diverts, appropriates or applies any funds or part of any fund raised under any law by taxation or otherwise to any other use or purpose than that for which it was raised or appropriated, or who knowingly diverts, appropriates, or applies any money borrowed, or any bond of the corporation, or any part of the proceeds of such bond, to any other use or purpose than that for which such loan was made, or bond issued, shall be deemed guilty of embezzling the amount so diverted, appropriated, or applied, and punished accordingly." The purpose of this section seems very clear from the language employed. It is not to punish any act of an officer or agent of a corporation, done with the view of personal gain, such as converting money under his control to his own use, but his act as such officer or agent, knowingly done for the purpose of diverting or misapplying the money belonging to a particular fund or raised for a particular purpose to some other fund or municipal purpose than that for which it was raised. The offense of converting money or property intrusted to the care of a person to his own use,—that is, embezzlement, in its proper sense,—is punished by the previous sections of the statutes. This offense is not of that character. This more fully appears from the history of the section. On May 7, 1869, what is known as the "Municipal Code" was adopted. 66 Ohio Laws, 149. It provided, in chapter 53 thereof, for the creation of a "sinking fund," for the gradual extinguishment of the bonds and funded debt of municipal corporations; and, to secure the preservation of this fund, it was enacted, in section 675, that "if any member of the council, or officer of the corporation, shall knowingly divert or appropriate the tax or sinking fund raised under this act, to any other purpose than that to which it is by this act appropriated, he shall, on conviction," be punished as therein provided. 66 Ohio Laws, 263. By an amendment, passed April 7, 1876 (73 Ohio Laws, 116), this section was so extended as to make it an offense for any member of the council, officer, or agent of the corporation, to knowingly divert or apply any fund to a use or purpose for which it was not

raised. This section, as amended, was further extended, and made to include the misapplication of loans and bonds, and of the funds of a board of education, and is now the section of the Revised Statutes in question. A disregard of the inviolability, intended by the legislature, of sinking funds, and finally of all funds, raised for a particular purpose, without doubt, induced the enactment of section 6846, and of the sections of which it is a revision, and its object is to punish the agent concerned in the diversion. It is, therefore, clear that the averments of the indictment are not sufficient to constitute an offense under this section. It is true the indictment avers that the defendant knowingly diverted and appropriated the moneys of the public light fund of the city to uses other than those for which the fund was raised; but this was done, as the indictment proceeds to aver, by converting the same to the use of the defendant. Such conversion constitutes an offense under section 6841, punishing the embezzlement of public money.

If the evidence had been sufficient to support a conviction under this section, it is possible that, by a liberal construction, the indictment might have been construed to charge such an offense. It does not follow the usual form of such an indictment (Wilson's Ohio Cr. Code, p. 69), and the prosecuting attorney does not claim that it was drawn under section 6841. His claim is that it is under the following section, 6846. To regard it as drawn under the prior section, the averment that the defendant did unlawfully and knowingly divert, appropriate, and apply certain funds, the public light fund of the city, to other use than that for which they were raised, would have to be regarded as surplusage. But we need not decide the question here. A good prosecutor, intending to charge an offense under section 6841, would most likely follow forms based on the language of the section, and omit all immaterial averments. The jury in their verdict found that the defendant "diverted and appropriated \$93.75 to a use and purpose other than that for which it was raised." The evidence is not contained in the bill of exceptions, so that this court cannot know that the jury meant by this something not expressed in the language. It is certainly not equivalent to a finding that he converted the money to his own use, and is consistent with the fact that he did not; so that we cannot say that the court erred in arresting the judgment. Exceptions overruled.

(53 Ohio St. 303)

JACKSON et al. v. AKRON BRICK ASS'N.

(Supreme Court of Ohio. June 25, 1895.)

ASSOCIATION FOR ILLEGAL PURPOSE—SUIT IN ADOPTED NAME.

In contemplation of law an association of persons formed for an illegal purpose, or one against public policy, is not a partnership. Hence an association formed for such purpose

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cannot, under section 5011, Rev. St., sue in the name adopted for the transaction of its business.

(Syllabus by the Court.)

Error to circuit court, Summit county.

Action on contract by the Akron Brick Association, a partnership, against Andrew Jackson and another. Judgment for plaintiff, and defendants appeal. Reversed.

Kohler & Musser, for plaintiffs in error.
Oviatt, Allen & Cobb, for defendant in error.

MINSHALL, C. J. The action below was brought by the Akron Brick Association, claiming to be a partnership doing business under that name in the city of Akron, against Jackson and Lyman as defendants. The object of the suit was to recover on a contract, by which, as averred, Jackson & Lyman agreed to pay the association for brick it was then furnishing to Barnett & O'Near, subcontractors of the defendants. The defendants denied any liability upon the contract, and also denied that the plaintiff was a partnership doing business under the name of the Akron Brick Association. They also, as a separate and specific defense, averred "that said Akron Brick Association, so-called, is not in fact a lawful partnership, but that said alleged partnership is a combination of all or nearly all of the several brick manufacturers and dealers in and about the city of Akron, in which place, and in order to accomplish its purposes, said association has established and now maintains a central office or agency through which all purchases of brick must be made, and through which all sales of brick are made; that the object and purpose of forming and maintaining said association, and of said agency, was and is to control and enhance the price of brick, and in order to prevent and do away with a fair, open competition among the several companies, firms, and individuals entering into and comprising said association; that the said union or association is in restraint of trade and contrary to sound public policy." By a reply the averments of the answer were denied, and, in compliance with interrogations annexed to the answer, the plaintiff added a copy of the articles under which the association was formed and does business. From the view we take of the case, it is unnecessary to consider any of the errors assigned, other than the one that relates to the right of the plaintiff to sue by the assumed name of the Akron Brick Association. The articles of association, in connection with the evidence, support the averments of the defense. On the trial of the case the court, in its charge to the jury, dispensed with any consideration of the question by the jury, saying: "In our jurisprudence it is no defense to say that the contract was made with a bad man, or with persons engaged in prosecuting acts contrary to law or the policy of the state, unless the contrary grows immediately out of and in connection with an illegal

or immoral act. A clear distinction exists, in law as well as ethics, between a contract entered into to do an unlawful or immoral act, or to promote a course of conduct contrary to the policy of the state, and a contract entered into for a legitimate purpose, though made with persons who commit unlawful and immoral acts, or promote schemes contrary to good policy." We see no error in the court deciding the matter, nor in the law as stated by the learned judge. The error consists, as we think, in the application of it. The objection relates to the right of the persons composing the Akron Brick Association to sue by that name, instead of the names of those composing the association. If they have that right, it is derived from the provision of section 5011, Rev. St., which reads as follows: "A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." A partnership is an association, with certain incidents recognized by law, for the convenient transaction of legitimate trade and business. It cannot therefore be formed for an illegal purpose or one contrary to public policy. *Metc. Cont. 116; 1 Lindl. Partn. 91; Sampson v. Shaw, 101 Mass. 145.* It therefore follows that, if the Akron Brick Association was organized for a purpose contrary to public policy, it has no right under the statute to sue by the name assumed in its business. It is not a partnership within the meaning of the statute. This does not deny to the persons comprising the association the right, in their individual names, to maintain an action for the price of brick sold and delivered to a third person, or the enforcement of any contract that in no way depends upon the illegal arrangement as between themselves. The law stated by the court in its charge properly applies to such a case, but does not to the question made here, which goes simply to the right of the persons comprising the association to sue, in the name assumed by them, under the provisions of the section above quoted. It is a right derived from the making of a lawful contract of partnership, and can only be exercised where a lawful contract of partnership has been made and entered into. The evidence in the case tended to, if it did not conclusively, show that the association was formed for the simple purpose of controlling the price of brick in the interest of the members. Such combinations are against public policy, as has been frequently held in this state. *Salt Co. v. Guthrie, 35 Ohio St. 666; Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. 660; State v. Standard Oil Co., 49 Ohio St. 137, 185, 30 N. E. 279.* The court refused to say to the jury that if they found such to have been the object of the association a recovery could not be had

in favor of the association by its assumed partnership name, and charged the jury as before stated. This, we think, is error, for which the judgment should be reversed. Our Code does not provide for a plea in abatement. An association of persons suing under section 5011, Rev. St., must bring themselves within its provisions by averment. If they do not, the omission is a proper ground of demurrer. *Haskins v. Alcott, 13 Ohio St. 210.* So that, where the objection does not appear on the face of the petition, it must be made by answer if the defendant would rely on it. That was done in this case. The plaintiff then had an opportunity to dismiss its suit, and bring it in the names of the proper parties, if it desired to do so. Instead of doing so it took issue upon the answer, so that it became a question of fact to be determined by the jury under proper directions from the court. Judgment reversed, and cause remanded for further proceedings.

(53 Ohio St. 118)

KERNOHAN v. MANSS.

(Supreme Court of Ohio. June 11, 1895.)

MORTGAGE TO SECURE NOTES—ASSIGNMENT OF MORTGAGE TO SECURE FORGED NOTES—SALE BY MORTGAGEE OF GENUINE NOTE BEFORE MATURITY—FORECLOSURE—LIEN OF HOLDER OF GENUINE NOTE.

M. executed to eight persons a mortgage to secure eight promissory notes, made to them respectively. The notes were delivered to the several mortgagees, and the mortgage to McG., one of the mortgagees. It was then duly recorded. After record, without objection by the others, McG. took possession of the mortgage and of three of the notes belonging to other mortgagees, for safe-keeping. Afterwards, and before maturity of any of the notes, McG., claiming to be the owner of the mortgage and of all the notes, for a valuable consideration received of K., assigned and delivered to him the mortgage and forged copies of all of the notes, with forged indorsements on each, except that on the note purporting to be made to him the indorsement was genuine. The assignment purported, also, to transfer the notes secured by the mortgage. McG. retained in his own possession the genuine notes. Afterwards, but before the maturity of the note made to McG., he, for a valuable consideration, indorsed and delivered the genuine note to M. & M., informing them that the note, with others, was secured by mortgage on certain real estate. Before taking the note, M. & M. had the records examined, and found that the statements of McG. respecting the mortgage security were correct. He also stated that he, with the consent of the other mortgagees, was holding the original mortgage for himself, and as custodian for the others. They did not ask to see the original mortgage, and did not see it. K. and M. & M. acted in entire good faith, neither having a suspicion that a fraud was contemplated by McG. *Held*, on foreclosure of the mortgage, the debt to M. & M. is entitled to preference over that of K.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

The action below was a proceeding in the probate court of Hamilton county for the sale of lands of Gano Martin, deceased, to pay debts, in which the plaintiff in error and the defendants in error were cross petition-

ers, each claiming to hold a lien prior to that of the other upon the lands in question. That court found in favor of John and Louis Manss, from which Kernohan appealed. On error, the circuit court affirmed the judgment of the court of common pleas, and Kernohan brings error. Affirmed.

On the trial in the common pleas, the following undisputed facts appeared, viz.:

On January 1, 1879, Gano Martin, the then owner of the real estate sold in this action, being in feeble health, and desiring to make some sort of settlement of his estate, before he died, providing as well for his children and widow as for certain creditors (amongst whom was one William R. McGill, to whom he was then indebted in the amount of \$7,602.72), executed a mortgage deed covering his said real estate. The consideration named was \$16,113.69. The grantees were said McGill and seven others. The mortgage was conditioned to secure the payment of eight promissory notes, each dated January 1, 1879, payable five years after date, with 8 per cent. interest, payable annually, except one on which no interest was payable until after Gano Martin's death. The mortgage deed was then delivered to McGill, with the consent of the other mortgagees, he (McGill) stating he would put it in his safe for safe-keeping. It was left for record, January 20, 1879, with the recorder of Hamilton county, and duly recorded, and thereafter without objection by the other mortgagees, remained in the possession of said McGill until delivered to said Kernohan, as hereinafter stated. The note for \$7,602.72 was also delivered to McGill at the same time, and the notes to order of three other mortgagees were also delivered, unindorsed, to McGill, at the same time, for safe-keeping. Some time afterwards one of the mortgagees (George Martin) sold his note to William R. McGill, and, so far as appears, McGill never owned, or had any interest in, any of the other notes. The note for \$7,602.72 remained in the possession of McGill until delivered to John and Louis Manss, as hereinafter stated.

On the 8th day of February, 1879, being prior to the maturity of the notes secured by said mortgage, Robert Kernohan made a loan of \$11,000 to McGill, who, among other collateral, transferred and assigned to Kernohan the said mortgage, and what purported to be all the notes secured thereby. At the time of the transfer, McGill was the owner and holder of the genuine note for \$7,602.72, secured by said mortgage. This transfer was made in the following manner: Before the payment of the \$11,000, McGill produced to Kernohan and his attorney the original mortgage deed from Gano Martin, and the following assignment was indorsed thereon:

"For value received, I hereby assign and transfer to Robert Kernohan, his representatives and assigns, the within mortgage, and the notes secured thereby. William R. McGill. February 8, 1879."

The assignment was then and there signed by William R. McGill. At the same time, eight certain papers, answering in form to the eight notes described in the mortgage, including one for \$7,602.72, were produced by said McGill as the original genuine notes secured by said mortgage. The said papers were, at the time they were produced, indorsed in blank with the name of the payees thereof, except that for \$7,602.72, which was indorsed as hereafter stated. At the same time he signed the said assignment on the back of the mortgage, McGill indorsed each of said papers (including that for \$7,602.72 drawn to his own order, which hitherto had been unindorsed) with his own signature, and the words "protest waived," as appears thereon; and thereupon the said papers and mortgage were delivered to Kernohan, with the other collateral, and said sum of \$11,000 paid. The mortgage, so assigned and delivered, was the genuine mortgage deed executed by Gano Martin and wife; but the papers purporting to be the notes secured thereby, and so delivered and indorsed by said McGill, are each and every one of them forgeries (except the indorsements of McGill thereon), though they were delivered to Kernohan by McGill as genuine. Kernohan received the mortgage and what purported to be the real notes, as above, duly indorsed and delivered to him, in good faith and for value, supposing said notes to be genuine, and they remained in his possession until after the death of McGill, which took place July 2, 1884, and until this action was begun. Kernohan did not know, or have any cause to know, of such forgery, and that said notes were not genuine, until after the death of McGill. Interest on said loan of \$11,000 was paid by McGill up to his death. The amounts realized from the other collateral, together with any amount that has been or may be ordered paid to him in this case, will not discharge said debt of \$11,000. The estate of said Gano Martin is insolvent. The assignment on the mortgage was not left for record or entered, until April 25, 1884.

On or about April 1, 1879, being after the transaction with Kernohan, but prior to the maturity of said note for \$7,602.72, the defendants John and Louis Manss loaned William R. McGill the sum of \$4,000, taking his note, dated May 8, 1879, for same, McGill at that time transferring to them, by indorsement and delivery, as collateral for said loan, the original genuine note for \$7,602.72 made by Gano Martin, which, notwithstanding his transaction with Kernohan, he had retained possession of. John and Louis Manss did not learn, until a week or 10 days after McGill's death, of any other note purporting to be of the amount of the note so indorsed and delivered as collateral. At the time of the transaction between McGill and the Manss brothers, McGill stated that the note was secured by a mortgage; that it was given to secure oth-

er notes, to other payees, and that he, by and with the consent of all the other mortgagees, was holding the mortgage, for himself and as custodian for the other holders of notes secured by the mortgage; and also told them that he thought the mortgage notes safe. Before loaning the money, they had an examination made of the records, which showed that the mortgage was as represented, and that there was no other mortgage against the property. They did not ask McGill to let them see the mortgage deed, nor did they at any time see it, but relied upon McGill's statement that he had it. They, before and after the maturity of the note, made other advances to McGill, to the extent of \$11,300, additional to said sum of \$4,000, and also received other collateral; it being agreed with McGill, at the time said other advances were made, that the note for \$7,602.72, together with the other collateral, should stand as security for all the advances. Some of the other collateral were known by Maness Bros. to be mortgage notes; but in no instance did they require the production of the mortgage deed securing the same, again relying upon McGill's statements to them. They have not been able to realize upon any of the said other collateral, as in each case the mortgage notes and other instruments are claimed to be forgeries. There is no question as to the good faith of either Kernohan or the brothers Maness.

Upon these facts, the court held that John and Louis Maness were the owners and holders of the genuine note for \$7,602.72, given by Martin to McGill; that it was secured by the mortgage; and was the first lien; and decreed accordingly. On error the circuit court affirmed this judgment, and Kernohan now asks that those judgments be reversed.

Drausin Wulsin and Frank O. Suire, for plaintiff in error. Wm. E. Jones and J. J. Glidden, for defendants in error.

SPEAR, J. The question presented by the record is whether, both parties acting in good faith, one who obtains title to a mortgage given to secure several notes to several persons, by assignment for value by one of the mortgagees, with delivery of the same and a forged copy of one of several notes secured thereby, indorsed by the payee who was then the owner of the genuine note, obtains a lien for money thus advanced on the faith of the security, in preference to the bona fide indorsee for value of the genuine note obtained afterwards, both transactions occurring before the maturity of the note. It seems to us that the question will be solved by the application of simple and well-established principles. The concession that each party acted in entire good faith removes any necessity for considering equities, and leaves the case to be determined on purely legal grounds.

The following propositions we consider are settled in Ohio:

1. Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage is, therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt. On the other hand, a transfer of the note by the owner, so as to vest legal title in the indorsee, will carry with it equitable ownership of the mortgage. And so, if the debt be evidenced by several promissory notes, the legal transfer of a portion of the notes carries with it such proportional interest in the security as the notes transferred bear to the whole. *Harkrader v. Leiby*, 4 Ohio St. 602; *Swartz v. Liest*, 13 Ohio St. 419; *Fithian v. Corwin*, 17 Ohio St. 119; *Allen v. Bank*, 23 Ohio St. 97; *Holmes v. Gardner*, 50 Ohio St. 167, 33 N. E. 644.

2. Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action. Where given to secure notes, it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment. And, where the notes are legally transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holder of the notes. *Jordon v. Cheney*, 74 Me. 359; *Jones, Mortg.* 818; *Pom. Eq. Jur.* § 1210.

3. All notes payable to any person or order are negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee or holder successively. Such indorsee or holder may, in his own name, institute and maintain an action thereon against the maker. *Rev. St.* §§ 3171, 3172.

4. A holder of negotiable paper who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity, holds it by a good title. To defeat a recovery, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. Nor does the note lose its commercial character when secured by mortgage. *Johnson v. Way*, 27 Ohio St. 374; *Kitchen v. Loudonback*, 48 Ohio St. 177, 26 N. E. 979.

Applying these rules to the facts, the following conclusions seem to result, viz.: Kernohan, by the assignment of the mortgage, took the legal title to it, so far as the same was owned by McGill, and an equitable right in the \$7,602.72 note. He did not take, nor did McGill intend to transfer to him, any legal title to the note, for McGill kept, and intended to keep, that in his own possession, unindorsed, and subject to his continued control. Such rights as Kerno-

han took he might assert as against McGill, but John and Louis Manss alone can recover on the note. They, by their purchase and the indorsement to them by McGill, took a full title to it, as against the world, together with the equitable title to the mortgage in whosoever hands it might be. The one has the legal title to the incident, with an equitable right in the debt; the other, the legal title to the debt, together with an equitable title to the incident. As both cannot have precedence, the weaker must give way to the stronger. The legal title to the incident must be subordinated to that which is superior, viz.: the legal title to the debt, although the holder of the incident acquired his right first. John and Louis Manss were, therefore, entitled to the proceeds of the mortgaged lands. The case of *Kernohan v. Durham*, 48 Ohio St. 1, 28 N. E. 982, is relied upon by plaintiff in error. We think it does not support his contention. In that case, Coddington took, by indorsement, the genuine note, after due. Kernohan took an assignment of the mortgage, which assignment also purported to transfer the note. This was not only before the transfer of the note to Coddington, but before the note was due. The holding is that, as between Kernohan and McGill (the payee), the former took an equitable title to the genuine note, and hence, as Coddington's title was acquired after the note had been dishonored, he could take no better right than his indorser had. The note being past due, he was put upon inquiry, and was chargeable with whatever knowledge due inquiry would have elicited. The vital difference between the position of the holder of the note in that case and in this is, that, while Coddington took his title after due, and hence was charged with all infirmities, John and Louis Manss, being indorsees and purchasers for value in the ordinary course of trade, before due, took good title as against the world. Judgments affirmed.

(53 Ohio St. 268)

COLUMBUS & E. RY. CO. et al. v. WILLIAMS.

(Supreme Court of Ohio. June 25, 1895.)

**SALE OF RIGHT OF WAY—INDEFINITE DESCRIPTION
—GRANTOR ESTOPPED TO DENY LOCATION.**

An owner of land who sells to a railroad company a right of way for its road by a written contract in which the description of the land is indefinite, and after the road is constructed, accepts, with full knowledge of the facts and without objection, the compensation agreed to be paid, and acquiesces for a period of six years in the occupancy by the company of the right of way on which the road is so constructed, is estopped to deny that such location is the location originally agreed upon, and to demand additional compensation.

(Syllabus by the Court.)

Error to circuit court, Perry county.

On July 10, 1889, Thomas J. Williams filed a petition against the Columbus & Eastern

Railway Company in the probate court of Perry county, under section 6448, Rev. St., to compel the appropriation of a strip of land described as being 70 feet in width and about one-half mile in length, extending through the farm of the petitioner, and such proceedings were had thereafter that a verdict and judgment thereon were rendered in favor of the petitioner. On error the judgment was affirmed by the common pleas and circuit courts, and to reverse those judgments defendants bring error. Reversed.

W. E. Guerin and Ferguson & Johnston, for plaintiffs in error. Butler & Butler, for defendant in error.

SPEAR, J. A number of errors are alleged, but the view taken by this court of the principal one makes it unnecessary to consider the others. By its answer the railway company took issue with the averment of the petition that it was in occupancy of land without right, and alleged in substance that it acquired its rights in the year 1887 by purchase at judicial sale from a corporation known as the Columbus & Eastern Railroad Company, which corporation, in the year 1883, constructed a railroad; that in the month of July, 1883, the said railroad company located and constructed its line of railroad upon the lands of plaintiff described in the petition; that the same was done under and in pursuance of a written contract with plaintiff, by the terms of which the plaintiff, for the consideration of \$375, granted to said company said strip of land for said railroad; that after said railroad had been located and constructed on said strip as aforesaid, the company paid plaintiff for the said right of way the said sum of \$375, and thereby acquired title to said right of way. A copy of the contract is set out in the answer. By its reply the petitioner denied that he ever sold the railroad company the right of way sought to be appropriated herein, and averred that said land was never purchased or paid for by the said company. At the preliminary hearing the probate court found that in the year 1883 the plaintiff sold to the railroad company a right of way for its railroad across his premises described in the petition by a written contract, and that on August 18, 1883, the company paid him the sum of \$375 therefor, and that the defendant company purchased of the railroad company as alleged. The court further found that in the construction of its road the company deviated a part of the way a short distance from the line described in the written contract, and that a part of the road is on the right of way described in the contract and part of the same, but the court is unable to find how much of the road is on the location described in the contract and how much is off, and as to the portion not on the location described in the contract the company does not hold the same by said written contract. A jury was thereupon ordered.

It will be noted that the reply does not take issue upon the allegation of the answer that the contract price, \$375, was received by the plaintiff, as and for right of way, after the construction of the road; nor is there anything in the evidence, all of which is set out in the bill of exceptions, to negative this averment. Indeed the plaintiff, in his testimony, says that he received that money, and has kept it, and does not attempt to deny that it was so received by him after the road was constructed. It is further to be noted that the company had no occasion to desire ownership of or interest in any land other than that upon which its roadbed was constructed, and that this fact was known to the plaintiff. The inference follows, therefore, that, when the consideration was paid by the company and received by the plaintiff, the land concerning which the parties were dealing was perfectly understood by both of them as being the strip of land on which the road had been constructed, and that the plaintiff took the money with the full knowledge that the purchaser was paying it upon the understanding that it was compensation for that precise land and none other. The question, therefore, is whether, in view of the circumstances, the plaintiff can now be heard to claim that the payment, which he accepted and has kept, was in part for some other land, and to insist upon opening up the subject for the purpose of demanding further compensation. We think the question will be answered by the application of well-understood equitable principles. The description given in the contract was indefinite. One of the recitals was that "Whereas the Columbus & Eastern Railroad Company may desire to locate its railroad through my lands and premises," and the agreement following was to release to the company "a strip of land sixty feet wide through my entire property on such route as said company has located its road." There was no attempt to describe the exact land. This indefiniteness of description, doubtless, was the principal difficulty which confronted the trial court in its efforts to ascertain what deviation had been made from the original line, and prevented that court from finding how much of the road is on the location described in the contract and how much is off. The land actually occupied by the company in the construction of its road, and the action of the parties in regard thereto, therefore, became of prime importance in determining what land the owner intended to part with and the company intended to buy. If, at the time of constructing the road, there was a deviation, in some particulars, from the lines originally made by the company's engineer, it was optional with the plaintiff to affirm or disaffirm that change. He might object to it, and refuse to take the money, or he might assent to it and accept the compensation. But could he adopt the part which was for his own benefit and reject the rest? It is

said in *Hermann on Estoppel* (page 1166 et seq.): "One entitled to a benefit under an instrument must, if he claims the benefit of the instrument, abandon every right the assertion whereof would defeat, even partially, any of the provisions of that instrument." "If a voidable contract or other transaction is voluntarily acted on with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he cannot avoid it when, after abiding that event, it has turned out to his disadvantage." And upon page 1167: "Where a party whose land is taken by a railroad company under the right of eminent domain, and in whose favor damages are assessed and deposited to his credit, who knows of irregularities in the proceeding, and receives the money without objection, and sees the company construct its road over his land, cannot thereafter maintain any proceedings on account of such irregularities, as by accepting the damages he waives all right to object to the proceedings. He cannot have the money and litigate with the company as to their right to occupy the land." The author cites, to the last proposition, *Burns v. Railroad Co.*, 9 Wis. 450; *Town v. Town of Blackberry*, 29 Ill. 137, and *Kille v. Town of Yellowhead*, 80 Ill. 208, which appear to sustain the text. In *Bannon v. Angier*, 2 Allen, 123, which was an action in tort for obstructing a right of way over land of the defendant, the court, by Bigelow, C. J., declares that: "Where a right of way or other easement is granted by deed, without fixed and definite limits, the practical location and use of such way or easement by the grantee under his deed, acquiesced in by the grantor at the time of the grant and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same, in legal effect, as if it had been fully described by the terms of the grant." And the same learned judge, speaking for the court in *Jennison v. Walker*, 11 Gray, 423, says: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and definite course, with the full acquiescence of both parties, it cannot be changed at the pleasure of the grantee." See, also, *Onthank v. Railroad Co.*, 71 N. Y. 194. Coming to our own state, we find the following in *Railroad Co. v. Prentice*, 13 Ohio St. 373 (opinion by Sutliff, J.): "It certainly is not an unreasonable presumption, after proof of the fact that a road or canal had been surveyed and staked out, that when worked and in operation as a public thoroughfare,

without any objection to the locus in quo, it should, if afterwards questioned, be presumed to have been opened where surveyed and located." And in *Warner v. Railroad Co.*, 39 Ohio St. 70, the holding is: "Where the terms of a grant of a right of way are general and indefinite, its location and use by the grantee, acquiesced in by the grantor, will have the same legal effect as if it had been fully described in the terms of the grant." The principles stated in the above citations we believe to be applicable to the case at bar, and as conclusion we are of opinion that, by accepting the consideration money after the construction of the road, and acquiescence for six years in the occupancy and use by the company of the land on which its road was thus practically located, the plaintiff is estopped to now deny that such location is the true location, and demand additional compensation.

Upon the whole case, as shown by the record, the plaintiff was not entitled to recover. The judgments below will therefore be reversed, and the action dismissed.

(53 Ohio St. 12)

HOCKING VAL. COAL CO. v. ROSSER.

(Supreme Court of Ohio.)

ATTORNEY'S FEE—ACTION FOR WAGES—APPEAL BY DEFENDANT AND RECOVERY BY PLAINTIFF—CONSTITUTIONAL LAW.

Section 6563a, Rev. St., providing: "If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of five dollars, for his attorney. But no such attorney fee shall be taxed in the costs unless said wages have been demanded in writing, and not paid within three days after such demand. If the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest, from the rendition of the judgment before the justice, there shall be included in his costs, such additional fee not in excess of fifteen dollars, for his attorney, as the court may allow,"—is unconstitutional and void.

(Syllabus by the Court.)

Error to circuit court, Athens county.

On August 22, 1893, Hiram Rosser commenced an action before a justice of the peace of Athens county to recover against the Hocking Valley Coal Company \$6.82, upon a claim for work and labor, and also an attorney fee of \$5, demanded by virtue of section 6563a, Rev. St., because the plaintiff in error failed to pay the sum claimed as wages within three days after payment thereof had been demanded in writing. The defendant in error recovered judgment before the justice of the peace for the amount of his claim for wages, and also an attorney fee of \$5, as he had demanded. The plaintiff in error appealed the cause to the court of common pleas, where the defendant in error again prevailed, and was allowed by that court an additional attorney fee of \$5. This judgment was affirmed by the circuit court, whereupon the plaintiff in error in-

stituted proceedings in this court to reverse the same. Reversed.

Arnold, Morton & Guerin and L. D. Vickers, for plaintiff in error. L. M. Jewett and Buckley & Pettit, for defendant in error.

BRADBURY, J. The defendant in error on August 22, 1893, filed before R. B. Patterson, a justice of the peace in and for Athens county, Ohio, the following bill of particulars: "Hiram Rosser, Plaintiff, v. The Hocking Valley Coal Company, Defendant. The defendant is a corporation, duly organized under the laws of Ohio, and doing business in Nelsonville, Ohio. Defendant is indebted to plaintiff in the sum of \$6.82 for work and labor done and performed in and about the coal mines of said defendant during the months of July and August, 1893, and at the request of said defendant. Said sum is due and unpaid. Frequent requests have been made for payment of the same. On the 18th day of August, 1893, plaintiff served upon defendant a notice in writing, demanding payment of said sum within three days thereafter. Said defendant has neglected and refused to pay said sum within three days thereafter, in compliance with said demand. Therefore plaintiff prays judgment against said defendant for said sum of \$6.82, and for his costs in this action, and for his attorney's fee of \$5.00, and interest from August 10, 1893. Buckley & Pettit, Attorneys for Plaintiff." The defendant below, plaintiff in error in this court, was duly served with summons, but did not appear before the justice at the time of trial, nor make any defense against the claim of the plaintiff below. Whereupon the justice of the peace, upon the testimony presented by the plaintiff below, rendered judgment for him and against the defendant below for \$6.82, the exact amount claimed, together with costs of suit and an attorney fee of \$5. Plaintiff in error appealed the cause to the court of common pleas, where a petition was filed similar in all respects to the bill of particulars before quoted, except that an attorney fee of \$15 was demanded, instead of one of \$5, as in the bill of particulars. The plaintiff in error made no defense in the court of common pleas, and that court gave judgment against it for \$7 and costs, including an attorney fee of \$10, \$5 of which was for services of an attorney in the court of common pleas, and \$5 for such services rendered in the proceedings before the justice of the peace. The plaintiff in error, objecting to that part of the judgment of the court of common pleas which required it to pay attorney fees for the benefit of its adversary, moved the court to retax costs by striking out the items relating to such fees. The court of common pleas overruled the motion, and exceptions were duly noted. This ruling of the court of common pleas having been sustained by

the circuit court, the cause was brought to this court to reverse the action of those courts upon the ground that the statute upon the provisions of which the rulings rest is unconstitutional, and therefore void.

This statute (89 Ohio Laws, 59, § 8563a) provides: "If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of five dollars for his attorney. But no such attorney fee shall be taxed unless said wages have been demanded in writing and not paid within three days after such demand. If the defendant appeal from any such judgment and the plaintiff on appeal recover a like sum exclusive of the interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of fifteen dollars for his attorney as the court may allow." By virtue of the provisions of this statute, any claimant of wages may, in the first instance, determine the amount due him for wages from his employer, and make written demand for its payment, which, if not complied with within three days, subjects the employer to the penalty of an attorney fee, if an action is afterwards brought to enforce the demand, and the amount claimed is recovered therein. The amount due may, and often does, depend upon a numerous train of facts and circumstances, many of which may be in dispute between the parties, the most obvious of which is the number of days, weeks, or months during which the service had been continued; the rate of wages agreed upon, or, if no rate had been fixed, the reasonable value of the services rendered; whether payments had been made from time to time on account, or whether a set-off or counterclaim existed between the parties by which the amount otherwise due would be reduced or entirely extinguished. Mutual accounts may have run between the employé and employer for years, become complicated, and of doubtful and difficult solution. Whether this condition of things exists, or whether the claim is simply for the wages of a single day or week at a fixed price, is immaterial in the purview of this statute. In either case, by its terms, the employé may in the first instance fix the amount of his demand, and if he does this, and serves the written notice prescribed, the employer contests the claim at his peril. The language of the statute is imperative: "If the plaintiff * * * recover the sum claimed by him in his bill of particulars there shall be included in his costs such fee as the court may allow," not to exceed \$5, in the court of the justice of the peace, or, should the defendant appeal the case, a total of \$15 by the court of common pleas. The language requiring that the fee be allowed is mandatory. The court or justice has no discretion in this respect. It must allow an

attorney fee. The amount only is discretionary, within the limit prescribed; and that means that, within such limits, the tribunal by which the judgment is rendered is bound to allow the value of the services rendered. Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds which he willfully or arbitrarily or even carelessly refused to apply to pay his debt, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him. Whether the debtor interposes or shows a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are equally immaterial. In either case, the statute denounces against him a penalty, called an "attorney fee," if an action is brought on the claim, and judgment recovered for the sum demanded. The debtor may even acknowledge the debt, and be solicitous for its payment, but, owing to straightened circumstances, fail to pay within the prescribed time. Nevertheless, the penalty is incurred.

In the case under consideration, it appears by the bill of particulars that the written demand prescribed by the statute was made, and that it was not complied with within the three days. No other ground was alleged as the basis of the penalty. The record does not show any denial of the debt, by the debtor, at the time the demand was made, or afterwards, or that it had funds with which it could have paid the sum demanded. Afterwards, when an action was brought in the justice's court on the claim, no defense was made or obstacle whatever interposed to delay or embarrass the proceedings. Under these circumstances, no intent to vex or harass the claimant or delay the action can be imputed to the plaintiff in error. The question submitted by it to the circuit court, and to this court, shows that its object in taking an appeal from the judgment of the justice of the peace may be fairly attributed to its desire to be relieved from paying an attorney fee for the benefit of its antagonist, and thereby assert and vindicate an equal right to the protection of the courts of the state. Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law. It is true that no provision of the constitution of 1851 declares in

direct and express terms that this may not be done; but, nevertheless, it violates the fundamental principles upon which our government rests, as they are enunciated and declared by that instrument in the bill of rights. The first section of the constitution declares that the right to acquire, possess, and protect property is inalienable, and the next section declares, among other things, that "government is instituted for their equal protection and benefit" of every person, while section 16 of article 1 provides that "all courts shall be open, and every person, for an injury done him in his lands, goods, persons or reputation shall have remedy by due course of law, and justice shall be administered without denial or delay." The right to protect property is declared, as well as that justice shall not be denied, and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property. If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, grocers, or any other class of citizens might make out their accounts, demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim, if he recovered the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective right. The legislative power to compel an unsuccessful party to an action—generally the defendant—to pay an attorney fee to his opponent has received the attention of a number of courts of last resort, as well as laws which impose as a penalty double damages or some similar penalty for some wrongful or negligent act injurious to another. Where the penalty has been imposed for some tortious or negligent act, the statute has generally, though not always, been sustained; but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Millett v. People*, 117 Ill. 294, 7 N. E. 631; *State v. Fire Creek Coke & Coal Co.*, 33 W. Va. 188, 10 S. E. 288; *Durkee v. City of Janesville*, 28 Wis. 464; *Railroad Co. v. Morris*, 65 Ala. 193; *Wilder v. Railway Co.*, 70 Mich. 882, 33 N. W. 289; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62; *Wally's Heirs v. Kennedy*, 2 Yerg. 554; *Vanzant v. Wad-del*, Id. 260; *Railroad Co. v. Baty*, 6 Neb. 87; *State v. Loomis*, 115 Mo. 307, 22 S. W.

350; *Railway Co. v. Willson* (Tex. App.) 19 S. W. 910; *Railway Co. v. Duggan*, 109 Ill. 537. Various phases of this subject have received attention in the foregoing cases, as well as in some others to which we do not deem it necessary to refer. The general tendency of these authorities is towards the result which we have reached; but, whether they do or do not support our conclusions, we are satisfied that the fundamental principles of government declared by our bill of rights clearly and unequivocally prohibit legislation of the character of that involved in this case. Judgment allowing an attorney fee reversed.

(164 Mass. 214)

BJBJIAN v. WOONSOCKET RUBBER CO.

(Supreme Judicial Court of Massachusetts.

Suffolk. Sept. 5, 1895.)

**INJURY TO EMPLOYE—DANGEROUS MACHINERY—
WARNING OF DANGER—FELLOW SERVANT—
CONTRIBUTORY NEGLIGENCE.**

1. Negligence of a competent servant, who, in the course of his daily duty of oiling machines, fails to readjust the cylinders of one of them, whereby the operator thereof is injured, cannot be imputed to the master.

2. An employer, who knows that a need of warning an inexperienced servant, working on a dangerous machine, has arisen, is bound to give it, though the danger arose from the negligence of a fellow servant.

3. One just commencing to operate a machine for compounding rubber, under the charge of an experienced man, cannot be held, as a matter of law, negligent, for continuing to feed the rubber to it, in the usual manner, with his hands, notwithstanding the sudden falling through the cylinders of the machine of pieces of rubber, where this would indicate to an experienced man, but not to him, that the cylinders were too far apart, and that there was increased danger therefrom; and the evidence authorized a finding that on the falling through of the rubber he, by a look, appealed to the one in charge of him for advice, and the latter, by merely laughing, in effect instructed him to go on as before.

Appeal from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Peter Bjbjian against the Woonsocket Rubber Company for personal injuries received by plaintiff in defendant's employ while operating a machine for compounding rubber. There was a verdict for plaintiff, and the case is reserved, by consent of the parties, for consideration of the supreme judicial court. Judgment for plaintiff on verdict.

S. L. Whipple and W. R. Sears, for plaintiff. C. K. Cobb, for defendant.

BARKER, J. Upon the report, the question is whether the jury could find that some breach of the defendant's duty to the plaintiff caused his hurt, and that he was himself using due care.

1. The fault of the workman who, after oiling the machine, neglected to readjust its cylinders, cannot be imputed to the defendant. The oiling of the machine was one of the daily matters, regularly incident to its

ordinary use, which must be intrusted to servants; and in such cases, if a competent servant is selected, his negligence on a single occasion cannot be imputed to the master. *Johnson v. Boat Co.*, 135 Mass. 209; *McGee v. Cordage Co.*, 139 Mass. 445, 1 N. E. 745; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574; *Ryalls v. Mills*, 150 Mass. 180, 185, 22 N. E. 766.

2. A majority of the court are of opinion that there was evidence of a breach of the defendant's duty to give instruction and warning. The jury may have found that the plaintiff's state of pupillage, as to his work, had not ended, and that Healy was yet charged with the duty of instructing him how to use the machine safely and properly; that the plaintiff's experience with the machine had been so very brief that he was chargeable with no more knowledge of it than he actually had; that he did not know that the cylinders were, or could be, out of adjustment; that he knew of no way of feeding the material but by the use of his hands; that the sudden falling through of the two pieces of rubber gave him no actual knowledge that the machine was not in a condition for use; that when the pieces so fell he turned for advice to Healy, and that Healy's laugh was, in effect, a direction to go on as before. If, as the jury might find, the quick falling through of the rubber would at once show an experienced workman that the cylinders were too far apart, it was the duty of Healy, if he still had the plaintiff in charge, and if he understood when the pieces first fell through that he was applied to by the plaintiff for instructions, to warn him against attempting to feed the pieces again until the cylinders had been readjusted; and an omission so to do would be imputable to the defendant, on whom rested whatever duty there was to give the plaintiff warning. For this purpose, Healy represented the defendant; and if the defendant was found to have, through Healy, known that a need of warning had arisen, there was a duty to give it, although the danger came from the fault of a fellow servant, and although, as held in *Siddall v. Mills*, 162 Mass. 378, 382, 38 N. E. 969, the employer is not ordinarily called upon to warn against dangers which can only result from the fault of fellow servants. The plaintiff was an adult, and, as stated in *Stuart v. Railway Co.*, 163 Mass. 391, 40 N. E. 180, the doctrine that it is the duty of an employer to give instructions to one about to work on dangerous machinery, when there are dangers which the employer knows, or ought to know, and which he has reason to believe his employé does not know, and will not discover in time to protect himself from injury, is to be applied in favor of adults with great caution; and the employer is not required to give warning where the elements of the danger are so obvious to a careful person of average intelligence that ordinary

prudence should make him avoid them without warning. While, in the present instance, many of the elements of the danger were obvious, the circumstance that the cylinders were much too far apart was not, owing to their position, obvious; and it was this circumstance which very much increased the danger to the plaintiff in feeding his machine in the usual manner. If the plaintiff, by looking at Healy when the pieces of rubber fell through, asked for instruction he should have been warned not to repeat the operation of feeding them with his hands until the cylinders had been readjusted.

3. A majority of the court are also of opinion that the question whether the plaintiff was guilty of negligence in attempting to again feed with his hands the pieces which had just fallen through was for the jury. Of course, no man of ordinary intelligence, with a day's experience in operating the machine, could contend that he did not know that, if his hands were so placed between the upper portions of the revolving cylinders as to come in contact with their surfaces, there was obvious danger that his arms would be drawn in. The plaintiff admitted that he knew that if he put his fingers between the cylinders they would be cut or broken, and there was uncontradicted evidence that he had been told that the machine was dangerous, and that he must be very careful. And, besides this, the sudden falling through of the pieces of rubber, when first fed, was enough to make it his duty to inquire of himself, or of his instructor, whether he ought to feed them in the same way again. But the machine, as then out of adjustment, was very much more dangerous than usual. The jury may have found that the plaintiff was then, for the first time, confronted with this increased danger, and that he did not know to what the unusual course of things was due, nor what he ought, under such circumstances, to do. If, without asking for advice, he had again placed the pieces of rubber in the machine with his hands, he might have been said to have been at fault, although that was the usual way of feeding, and the only way in which he had been instructed. If he was yet a pupil, ordinary care required that he should not repeat such an operation without asking for instructions. The plaintiff's testimony, however, justified a finding that upon the first indication of the increased danger he did in fact, by a look, appeal to Healy for advice, and saw merely a laugh in reply; and the jury may have found that in this way the plaintiff did, in effect, inquire of Healy what he ought to do, and was, in effect, instructed to go on as before. If so, we think it cannot be said, as matter of law, that he was negligent in again attempting to feed the machine in the usual manner. His want of personal experience tended to justify him in following the directions of the man who had him in charge, and his im-

perfect knowledge of English must be taken into account, in determining whether he was at fault in asking advice by a look, and interpreting the answering laugh as a direction to do as before. Judgment for plaintiff on the verdict.

(164 Mass. 237)

PARKER v. CHINA MUT. INS. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1895.)

**MARINE INSURANCE—CONSTRUCTION OF POLICY—
PROHIBITED WATERS.**

A policy of marine insurance, containing a printed clause which prohibited the vessel from certain waters including the Gulf of Campeachy, had written into it the amount of insurance, the name of the vessel, and the terms of the policy, after which was written the words, "Excluding the Gulf of Campeachy." *Held*, that the written words were not for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of Campeachy, near which the vessel was when insured.

Appeal from superior court, Suffolk county.

Action by J. R. Parker against the China Mutual Insurance Company on a marine policy issued on the schooner H. A. De Witt when she was at La Guayro, in Venezuela. Judgment for defendant. Plaintiff appeals. Affirmed.

The policy had written into it the following: "One thousand dollars on schooner H. A. De Witt, valued at six thousand dollars. At and from the 24th of June, 1890, at noon, until the 24th day of June, 1891, at noon. Excluding Gulf of Campeachy."

Eugene P. Carver and Edward E. Blodgett, for appellant. J. D. Bryant, for appellee.

FIELD, C. J. In the present case we think that the words, "excluding Gulf of Campeachy," were written in the policy not for the purpose of qualifying the printed clause in which the vessel was prohibited from certain rivers, gulfs, straits, and seas, including the Gulf of Campeachy, but for the purpose of calling particular attention to the Gulf of Campeachy, which was near the port where the vessel was when the insurance was effected. If the intention had been materially to modify the effect of the printed clause, we think it would have been shown by the use of words more distinctly expressing that intention. So far as we are aware, there is no technical meaning given to the word "excluding" in marine insurance, and the customary meaning of the word does not differ greatly from that of the words "prohibiting" or "prohibited from." The plaintiff relies upon the decision in *Palmer v. Insurance Co.*, 1 Story, 360, Fed. Cas. No. 10,698, but Mr. Justice Story reached his conclusion in that case with some hesitation, relying upon the particular words of the policy, and not upon any technical signification of the word "excluding," which had become established in marine insurance. We are unable to see

any such contradiction between the written and the printed words concerning the Gulf of Campeachy, in the present policy, as to make it necessary to reject the printed words. It is, in effect, conceded by the plaintiff that the printed clause, if in force as to the Gulf of Campeachy, is equivalent to a warranty that the vessel should not go there during the time covered by the insurance. *Odlorne v. Insurance Co.*, 101 Mass. 551; *Whiton v. Insurance Co.*, 109 Mass. 24; *Burgess v. Insurance Co.*, 126 Mass. 70; *Oobb v. Insurance Co.*, 58 Me. 326; *Birrell v. Dryer*, 9 App. Cas. 345. Judgment for the defendant affirmed.

(164 Mass. 239)

EVANS et al. v. HAMLIN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 5, 1895.)

WRIT OF ERROR—EQUITY.

A writ of error does not lie in proceedings in equity, unless authorized by statute.

Error from supreme judicial court; Lathrop, Judge.

Suit by Hamlin and others against Evans and others. Decree for complainants. Defendants bring error. Writ dismissed.

Robinson & Balney, for plaintiffs in error. Robert M. Morse and P. Wardher, for defendants in error.

FIELD, C. J. This is a writ of error from this court, sued out for the purpose of reversing a decree rendered in a suit in equity by the court when held by a single justice within and for the county of Suffolk. A writ of error lies where the proceedings are according to the course of the common law, but it does not lie in proceedings in equity, unless it is authorized by statute. The customary remedy in equity to reverse a final decree for errors of law apparent on the record is by a bill of review. *Elliott v. Balcom*, 11 Gray, 286. There is no statute of this commonwealth which authorizes a writ of error in proceedings in equity.

After the decree in the equity suit which is complained of was entered by a single justice in the court sitting for the county, an appeal was taken to the full court, and exceptions were allowed by the single justice, and the appeal and exceptions were entered in the full court. While the exceptions and appeal were pending before the full court, the following agreement was filed in that court, viz.: "Supreme Judicial Court for the Commonwealth. In Equity. George P. Deshon et al., Assignees, vs. Arthur M. Evans and Augustin Thompson. It is agreed in the above-entitled action that the appeal taken by the defendants be waived, that the bill of exceptions taken by said defendants be overruled, and that the decree of Mr. Justice Charles Allen be affirmed. R. M. Morse, Jr., for Compl'ts. W. B. Rich, for Def't Evans. J. A. Brackett, for Def't

Thompson." A rescript of the full court affirming the decree of the single justice was sent down in pursuance of this agreement. It deserves to be considered by the plaintiffs in error whether any proceedings in the nature of a bill of review will lie in this court to reverse a final decree in equity which has been affirmed by the full court, although an application for a rehearing sometimes may be made, which is addressed exclusively to the discretion of the full court. It should also be considered whether, in any event, a bill of review will lie to reverse a final decree which has been affirmed by the full court by consent of all of the parties. See *Winchester v. Winchester*, 121 Mass. 127. The present writ of error must be dismissed. So ordered.

(164 Mass. 222)

NASHUA & L. R. CORP. v. BOSTON & L. R. CORP.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 4, 1895.)

CONTRACTS OF CORPORATIONS—RES JUDICATA.

1. Where two railroads under a traffic contract are operated together, and their joint manager, without authority, pays out of the joint fund money for the improvement of one of the roads, an action will lie against such road by the other for its proportion of the money so used, though the contract under which they were operated was ultra vires.

2. Record of a judgment in a suit on several distinct claims is not a bar to a subsequent suit by the same plaintiff on one of the same claims, where the record does not show that the claim was adjudicated in such suit, but merely that the other demands were determined in favor of plaintiff. *Holmes, J.*, dissenting.

Report from superior court, Suffolk county; Justin Dewey, Judge.

Action by the Nashua & Lowell Railroad Corporation against the Boston & Lowell Railroad Corporation for money paid out of the joint fund for the improvement of the defendant's road. Reported to supreme judicial court. Judgment for plaintiff.

For statement of facts, see 157 Mass. 268, 31 N. E. 1060.

A. S. Hall and F. A. Brooks, for plaintiff.
J. H. Benton, Jr., for defendant.

ALLEN, J. 1. The iron of the Boston & Lowell Railroad being at the outset in worse relative condition than that of the Nashua & Lowell Railroad and branches, it was agreed that in the final settlement of the contract the iron of the Boston & Lowell road should be left in the same relative worse condition, or otherwise its improved relative condition should be paid for by the Boston & Lowell Railroad Corporation on its separate account. The existing difference at the outset was appraised as equivalent to the cost of replacing 300 tons of old rails with new. The report finds that at the termination of the contract the rails of the Boston & Lowell road were not in a relatively worse

condition than those of the Nashua & Lowell road, and that the cost of replacing 300 tons of old rails with new was agreed by the parties to be \$9,711.88. The report further finds that whatever was expended upon the road-bed of the Boston & Lowell road during the existence of the contract was from the joint fund. It thus appears that, instead of the Boston & Lowell Railroad Company's paying for the improvement on its separate account, the improvement was paid for out of the joint fund, in which the plaintiff was interested to the extent of 31 per cent. The amount, therefore, which the plaintiff could recover for this item is 31 per cent. or \$9,711.88, or \$3,010.68. *Nashua & L. R. Co. v. Boston & L. R. Co.*, 157 Mass. 268, 31 N. E. 1060.

2. The defendant, however, contends that the traffic contract was ultra vires, and that neither corporation had power, under its charter, to agree with the other to operate their railroads as one road. No authority has been cited in favor of this view, but it would seem to be supported by decisions in New Hampshire. *Burke v. Railroad Co.*, 61 N. H. 160. See, also, *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393, 23 Atl. 529. We do not, however, need to enter upon this question, because the plaintiff's suit, to the extent above mentioned, may be maintained on an independent ground. The joint manager, without authority either under the contract or otherwise, used the joint fund belonging to the two railroad companies for the improvement of the relative condition of the defendant's road. In this way the defendant has without right received the benefit of funds belonging to the plaintiff, and an action may be maintained to recover for the same, even though the traffic contract was ultra vires. *Woollen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776; *L'Herbette v. Bank*, 162 Mass. 137, 38 N. E. 368; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478; *Bank v. Townsend*, 139 U. S. 67, 74-76, 11 Sup. Ct. 496; *Manchester & L. R. Co. v. Concord R. R.* (N. H.; 1890) 20 Atl. 383; *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. 306.

3. The defendant further contends that the plaintiff is estopped to maintain this suit by the judgment or decree entered in favor of the plaintiff against the defendant in the circuit court of the United States. No authority is cited in support of this view. It appears that the plaintiff brought a bill in equity in that court against the defendant upon the claim now in suit here, and upon other distinct claims; that, after issue was joined therein, the plaintiff moved for leave to amend its bill by striking out the present claim; that, after a hearing, this motion was denied by the court; that thereupon the plaintiff filed in the circuit court a paper disclaiming and discontinuing its bill as to said

claim; that this paper was filed without leave of court, and there was never any order of court upon it; that, after various intermediate proceedings, a final decree was entered in the circuit court for the plaintiff for one of the claims set forth in its bill, no mention being made therein of the claim now in suit; and that afterwards said decree was performed and satisfied of record. The defendant has not, in its answer, averred, nor by its evidence proved, that the present claim was in fact argued, considered, or determined in the circuit court. The report is silent upon this point. If this had been done in point of fact, of course the present suit could not be maintained. What we have to consider is whether, upon the case as it is presented to us, we should assume that it was so determined; and whether, looking merely at the record, the legal effect of the former decree is to estop the plaintiff now. In the first place, it is clear that the plaintiff's attempt to withdraw the present claim from that suit in spite of the refusal of the court to permit such withdrawal, was nugatory. The case stood thereafter just as if no such attempt had been made. No doubt, as a general, though not universal, proposition, at any time before a hearing, the court, on application made, will allow a plaintiff in equity to dismiss his whole bill as of course upon payment of costs. *Kempton v. Burgess*, 136 Mass. 192. Such dismissal, however, is not made without an order of court; and there may be facts which would lead the court to refuse to allow it. *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 713, 8 Sup. Ct. 594; *Stevens v. Railroads*, 4 Fed. 97; *Badger v. Badger*, 1 Cliff. 237, Fed. Cas. No. 717; *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, Fed. Cas. No. 4,899; *Wilkinson v. Wilkinson*, 2 R. I. 414; *Cozzens v. Sisson*, 5 R. I. 489; *Electric Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602; *Manufacturing Co. v. Waring*, 46 Fed. 87, 106; *Hershberger v. Blewett*, 55 Fed. 170; *City of Detroit v. Detroit City Ry. Co.*, Id. 569. Where a plaintiff wishes to dismiss his bill as to a part of the relief prayed for, the proper way is to apply for leave to amend by striking out. *Railroad Co. v. Stewart*, 19 N. J. Eq. 69. This the plaintiff did, and his motion was denied. The defendant was therefore entitled to treat the claim now in suit as still a part of the matter to be heard and determined in that suit. It does not necessarily follow, however, that the judgment in that case is a bar to the present suit. It has been held elsewhere that, if a plaintiff sues in one action for several distinct demands, and obtains a general verdict and judgment, the record of such judgment is not conclusive evidence that all of the demands were included therein, and will not bar a subsequent action for such as, in fact, were not adjudicated upon. *Seddon v. Tutop*, 6 Term R. 607; *Paine v. Insurance Co.*, 12 R. I. 440; *Hungerford's Appeal*, 41 Conn. 322;

Supple v. Cannon, 44 Conn. 424; *Allebaugh v. Coakley*, 75 Va. 628; *Wheeler v. Van Houten*, 12 Johns. 311, dictum. See, also, *Freem. Judgm.* § 272 ad finem. This question was discussed, but not decided, in *Goodrich v. Yale*, 8 Allen, 454, where it was said that the doctrine of *Seddon v. Tutop* "is not entirely free from objection, inasmuch as it allows a party unnecessarily to subject the other party to a second suit, after the plaintiff has elected to unite two causes of action in one suit, and when he has had full opportunity to obtain judgment for his entire damages." The court, however, was not ready to deny the doctrine of that decision, and upon consideration we think it better not to extend the estoppel of a former judgment so far as to assume conclusively that such a distinct demand was determined in favor of the defendant when the record does not so state, but merely shows that the other demands were determined in favor of the plaintiff. Such estoppel includes whatever was actually determined, and whatever was necessarily involved in the actual determination; but where the former action included several distinct claims or demands, which were distinct causes of action, a demand or cause of action which in point of fact was not passed upon may be the subject of a subsequent suit. The defendant might have brought such demand to the attention of the court, and might have asked for and obtained an adjudication upon it. But if this was not done, and if there was no such adjudication, then there is no estoppel in respect to it. This limitation of the doctrine of estoppel by former judgment is in accordance with the general tendency of the decisions. *Foye v. Patch*, 132 Mass. 105; *Hooker v. Hubbard*, 102 Mass. 239, 245; *Burlen v. Shannon*, 99 Mass. 200; *Russell v. Place*, 94 U. S. 606; *De Sollar v. Hanscome*, 158 U. S. 216, 221, 15 Sup. Ct. 816; *Dunlap v. Glidden*, 34 Me. 517; *Pray v. Hegeman*, 98 N. Y. 351; 2 Smith, Lead. Cas. *699, and cases cited. The demand now in suit, therefore, is not barred by the former judgment, unless it was in fact adjudicated upon therein; and the record laid before us is not conclusive evidence that it was so adjudicated upon. If there is any question as to the fact, it will be determined in the superior court. Unless in point of fact it was so adjudicated, the plaintiff should have a decree for \$3,010.18 and interest. Ordered accordingly.

HOLMES, J. (dissenting). In my opinion, when the pleadings present three issues, and the final decree is for the plaintiff upon two of them, and is silent as to the third, it has the same effect, with regard to that issue, as if it had been expressly for the defendant. *Thompson v. McKay*, 41 Cal. 221, 227. In either form it is a bar to a subsequent suit for the same cause of action. *Schmidt v. Zahensdorf*, 30 Iowa, 498. Decisions as to the effect of the decree as an estoppel in col-

lateral proceedings have no application. See *Foye v. Patch*, 132 Mass. 105, 110; *Bassett v. Railroad Co.*, 150 Mass. 178, 22 N. E. 890; *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482; *Watts v. Watts*, 160 Mass. 464, 465, 36 N. E. 479; *Cromwell v. County of Sac*, 94 U. S. 351, 352; *Pray v. Hegeman*, 98 N. Y. 351.

KNOWLTON and LATHROP, JJ., concur in this view.

(141 Ind. 640)

BORING, Auditor, v. STATE ex rel. JACKSON.

(Supreme Court of Indiana. Aug. 30, 1895.)

AMENDATORY STATUTE—TITLE.

Under Const. art. 4, § 21, providing that "no act shall be amended by mere reference to its title," which necessitates reference to the title of the act to be amended, Act March 9, 1895, entitled "An act to amend section 33 of an act entitled 'An act to amend section 33 of an act approved March 6, 1865, and added supplemental sections thereto approved March 8, 1873, being section 4424 of the Revised Statutes of 1881,'" is not sufficient to amend Act March 8, 1873, § 2, which amended and took the place of Act March 6, 1865, § 33, and became Rev. St. § 4424. *Jordan, J.*, dissenting.

Appeal from circuit court, Hancock county.

Application for mandamus on the relation of Quitman Jackson to Lawrence Boring, auditor. Writ issued, and defendant appeals. Affirmed.

Felt & Jackson, W. A. Ketcham, Atty. Gen., Stimson, Stimson & Higgins, and H. Allen Condit, for appellant. Kerns & Bailey, B. F. Stuart, and Marsh & Cook, for appellee.

HOWARD, C. J. On the 3d day of June, 1895, the township trustees of Hancock county, under provisions of section 2 of an act entitled "An act to amend an act entitled 'An act to provide for a general system of common schools,' etc., approved March 6, 1865, and adding supplemental sections thereto," approved March 8, 1873 (Acts 1873, p. 75; Rev. St. 1881, § 4424; Rev. St. 1894, § 5000), met at the office of the county auditor and elected the relator superintendent of schools for the ensuing term of two years. The auditor refusing to make a record of such election, or to accept and approve the oath of office and bond tendered by the relator, and to report his name and address to the superintendent of public instruction, as required by said section of the statute, this suit was brought for mandate to compel the performance of such duties. On the issue of the alternative writ, the auditor made return thereto, admitting the truth of the matters therein charged, but said, by way of avoidance, that the said section of the statute of March 8, 1873, under which the relator claimed his election, had been repealed by an act of the general assembly, in force March 9, 1895 (Acts 1895, p. 203); and that, according to the provisions of said last mentioned act, the

election of a county superintendent was postponed until the first Monday of September, 1895. To this return a demurrer was sustained, after which judgment was rendered against appellant, and a peremptory writ issued. The question to be decided is whether the act of March 9, 1895, is a valid law.

It is admitted by both parties to this appeal that the title and the enacting clause of the statute in question are defective. The appellee insists that these defects, under repeated decisions of this court, are fatal to the validity of the law; while counsel for appellant argue that, notwithstanding the defects complained of, the intent of the legislature in the enactment of the statute is manifest, and that this intent has been expressed in substantial compliance with the requirements of the constitution. The title, together with the enacting clause of the act of March 9, 1895, reads as follows: "An act to amend section 33 of an act entitled 'An act to provide for a general system of common schools, the officers thereof, and their respective powers and duties and matters properly connected therewith, and prescribing the fees for certain officers therein named, and for the establishment and regulation of township libraries, and to repeal all laws inconsistent therewith, providing penalties therein prescribed, approved March 6, 1865,' and added supplemental sections thereto, approved March 8, 1873, being section 4424 of the Revised Statutes of 1881, and declaring an emergency. Section 1. Be it enacted by the general assembly of the state of Indiana, that section 33 of the above entitled act, being section 4424 of the Revised Statutes of 1881, be and the same is amended to read as follows: Sec. 33. The township trustees of the several townships of each county shall meet at the office of the county auditor of such county on the first Monday of September, eighteen hundred and ninety-five, and biennially thereafter, and appoint a county superintendent, who shall be a citizen," etc. Both in the title and in the body of the act it would thus appear that the legislature expressed its intention to amend section 33 of the act of March 6, 1865. But it is agreed that said section 33 of the act of 1865 was amended by the act of March 8, 1873, and has therefore not been in existence since the latter date.

"We think the question well settled by the decisions of this court," say counsel for appellant, "that a section of an act or statute, as amended, supersedes and takes the place of the section or statute amended; and the section, as it stood before such amendment, ceases to exist, and is effectually repealed and obliterated from the statute, and therefore not subject to an amendment." Citing *Longlois v. Longlois*, 48 Ind. 60; *Blakemore v. Dolan*, 50 Ind. 194; *Feibleman v. State*, 98 Ind. 516. Counsel, therefore, admit that, so far as the act in question professes to be an amendment of the act of 1865, it is invalid, as being intended as an amend-

ment of section 2 of the act of 1873, by which latter act the act of 1865 had been amended and superseded. "But," say counsel, "both the title and body of the act of 1895 contain the descriptive phrase, 'being section 4424 of the Revised Statutes of 1881,'" and it is hence argued that this reference to section 4424 of the Revised Statutes is sufficient to identify and make definitely known the section intended to be amended. In other words, while it is admitted that the act of 1895 does not refer to the title of the act to be amended, as required by article 4, § 21, of the constitution, yet it is contended that a reference to the corresponding section of the Revised Statutes will supply the deficiency. Counsel have not satisfied us by argument or citation of authority that the position thus taken is tenable. In *Felbleman v. State*, supra, where a like reference to a section of the Revised Statutes was relied upon to supply the place of a reference to the section of the statute to be amended, the direct contrary was held. In that case, Hammond, J., speaking for the court, said: "But if it should be conceded that it was intended by the act of 1883, in its reference to section 1418 of the Revised Statutes, to amend the first section of the act of 1867, it is proper to inquire whether such mode of statutory amendment has the sanction of the constitution. If the intention of the act of 1883 was not the amendment of the first section of the act of 1862, but the amendment of the first section of the act of 1867 (by which the act of 1852 had been amended), then all references in the title of said act of 1883 to said act of 1852 should be regarded as surplusage, and, when eliminated, the title of said act of 1883 would read, 'An act to amend section 1418 of the Revised Statutes, and declaring an emergency.' Would this be sufficient? In other words, may a section of the Revised Statutes of 1881, or a section of any other statute, be amended by merely naming the section sought to be amended, without referring to the title of the act of which it forms a part?" After an examination of the force and application of the constitutional provision in question (article 4, § 21), to show that in all cases it is necessary to refer to the title of the act to be amended as well as to set out the act as revised or the section as amended, the learned judge continues: "This construction gives meaning and force to each clause of section 21, supra, of the constitution, and its observance enables the legislature to act understandingly in the amendment of statutes. If a section in the Revision of 1881 may be amended by simply referring to it by number, so may a law of any session of the legislature be amended in the same way by a title like this: 'An act to amend section 3, on page 46 of the Acts of 1883.' This would lead to looseness and uncertainty in statutory amendments, which it was the main object of the constitutional pro-

vision under consideration to prevent. Section 19 of article 4 of the constitution provides that 'every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title.' And this 'title,' we think, under section 21, supra, must be referred to when any subsequent amendment of the act is made."

Counsel criticize the *Felbleman* Case as having "put rather a strained construction on the constitutional provision above set out" (article 4, § 21); but we are impressed with the soundness of the reasoning of the court, and see no sufficient cause to reject its authority. Indeed, the attorney general, who has filed a very candid brief in support of the act under consideration, admits that it is insufficient as an amendment of the act of 1873, in so far as it merely refers to the act of 1865, or to section 4424 of the Revised Statutes of 1881. "It must, therefore, be taken as settled," says he, "that so far as the act of 1895 attempts to amend the act of March 6, 1865, or section 4424 of the Revision of 1881, it is inoperative and void, as attempting to amend (a) something that was not in existence; (b) to amend a section without naming any title of the section sought to be amended." The attorney general himself, however, advances a theory, based upon the words, "and added supplemental sections thereto, approved March 8, 1873," in the title of the act of 1895, from which he argues the validity of the act. We confess that we have found it difficult to follow the reasoning of the able representative of the state in this subtle argument. After expressly excluding, as we have seen, the reference to the act of 1865, and to section 4424 of the Revised Statutes of 1881, as insufficient to validate the act of 1895, he nevertheless says: "The act of 1895 refers to section 33 of the act of March 6, 1865, with supplementary sections added, approved March 8, 1873, being section 4424 of the Revised Statutes of 1881. A comparison of section 4424 with section 2 of the amendatory act of March 8, 1873, will disclose that they are one and the same thing, to wit, section 33 of the act of March 6, 1865 (not, it is true, as originally enacted, but as amended March 8, 1873), and that the title is as entirely within the reason of the constitutional rule as was the title in the *Bush* Case." *Bush v. City of Indianapolis*, 120 Ind. 476, 22 N. E. 422. This seems to us—we say it in all candor—a violent and far-fetched effort to attain what, we think, was intended by the constitution to be a plain and evident identification of a statute to be amended. We have not found, on examination, that any of our decisions go so far as counsel would thus have us go in upholding so strained a construction of a plain constitutional provision.

In the case of *Bush v. City of Indianapolis*, supra, upon which counsel rely, the title of the amending statute (Acts 1889, p. 395) was absolutely correct, according to the severest

rules of construction. "It will be observed," said the court in that case, "that the title of the act sets out at full length the title of the act sought to be amended, recites that it is the intention to amend section 6 of said act, and that section 6 of said act is section 5317 of the Revised Statutes of 1881," and section 7282 of the Revised Statutes of 1894. While in the enacting clause the usual and proper method would have been to enact "that section 6 of the above-entitled act be amended so as to read as follows," yet, as the title expressly stated that section 6 of said act was section 5317 of the Revised Statutes, the court, recognizing "that under our constitution it takes both the title and the body of an act to constitute a valid law," and that both must therefore be construed together, rightly concluded that it was a substantial compliance with the constitution for the enacting clause to name "section 5317 of the Revised Statutes of 1881," instead of its equivalent,—"section 6 of the above-entitled act." In the act of 1895, however, there is not, either in the title or in the body of the act, any such identification of section 2 of the act of 1873 (the section to be amended) with section 4424 of the Revised Statutes of 1881 (section 5900 of the Revised Statutes of 1894); the said section 2 of the act of 1873 not being even mentioned in the act of 1895. We may observe, in addition, that this court has already, in two decisions, refused to consider the clause here referred to by the attorney general as sufficient to sustain a like defective title and enacting clause, in a former attempt to amend this same section 2 of the act of 1873. By the act of March 9, 1875 (Acts Reg. Sess. 1875, p. 131), it was attempted to amend the very section 2 of the act of March 8, 1873, which the act before us—that of March 9, 1895—also attempted to amend. The title and enacting clause of the act of 1875 read as follows: "An act to amend section thirty-three," etc., "of an act entitled 'An act to provide for a general system of common schools,' etc., approved March 6, 1865, and adding supplemental sections thereto, approved March 8, 1873. Section 1. Be it enacted," etc., "that section thirty-three of said act be and the same is hereby amended so as to read as follows." It will be seen that the title and enacting clause of the amendatory act of 1875 are substantially identical with those of the act of 1895. In both are found the clauses, "and adding [added] supplemental sections thereto, approved March 8, 1873," to which the attorney general alludes as sufficient to save the act of 1895. But in *Board v. Smith*, 52 Ind. 420, and again in *State v. Harrison*, 67 Ind. 71, this court expressly held the act of 1875 void, as an attempt to amend the act of 1873, for the reason that the act of 1865, and not that of 1873, was referred to in the title.

In a supplemental brief, additional counsel appearing for the appellant advance still another theory, to the effect that, under the de-

cisions of this court, it would have been sufficient if in the act before us, the title had merely referred to section 33 of the act of 1865, omitting all reference to the amendatory act of 1873, or to section 4424 of the Revised Statutes of 1881. In support of this contention, *Bell v. Malsh*, 137 Ind. 229, 36 N. E. 358, 1118, is cited to show that "a title stating that an act is an act to amend a given section of another act sufficiently advertises the purposes of the amendatory act." We are at a loss to understand how this can help the act of 1895, the title of which does not state that the act is an act to amend any section in force at the time of the proposed amendment, but a section long before repealed. Equally inapplicable is the quotation from *Fuller v. Cox*, 135 Ind. 46, 34 N. E. 822, where the title was not that of an amendatory, but of a supplemental, act; supplemental also "to all acts amendatory" of the original act. So in *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644, there was no question as to the correctness of an amendment, but only as to which of two laws governed in a given case; and it was held that, as the amendments had become a part of the original act, the act as so amended was the law of the case.

Counsel go even further, and, in opposition to the concession of the attorney general, and also to what we think evident to be the law, say that, "if the title of the act in controversy had simply stated that it was an act to amend section 4424 of the Revised Statutes of 1881, the purpose of the act would have been sufficiently advertised in the title." This would certainly be a very loose method of revising and amending statutes, as is clearly shown in the *Feibleman Case*, *supra*. Nor do we think, as counsel claim, that such a method is sanctioned in the case of *Bush v. City of Indianapolis*, *supra*. There, as we have already said, the reference to the title of the old act was complete in the title of the new act. In addition, the number of the corresponding section of the Revised Statutes was given. Afterwards, in the body of the amendatory statute, the section of the Revised Statutes so identified in the title was used instead of the section of the act to be amended. Construing the title and the body of the amendatory act together, it was held that the section to be amended was thus identified substantially as required by the constitution. Here it is not section 2, or any other section of the act of 1873, but section 33 of the act of 1865, a repealed section, that is identified with a section of the Revised Statutes. Unless the current of our decisions as to the amendment of statutes is to be turned aside, and many well-considered cases overruled, we must hold that an amendatory act, as that of March 9, 1895, which wholly fails to refer to the act to be revised or the section to be amended, is, under the constitution, void. Nor is it enough that the statute to be amended be identified; it must be identified

substantially in the manner provided for in the constitution, as the same has been interpreted by an unbroken line of the decisions of this court. The judgment is affirmed.

HACKNEY, J. (concurring). The question presented by the record is as to the constitutional validity of the act of the general assembly passed March 9, 1895 (Acts 1895, p. 208). The general school law of March 3, 1865, in section 33 thereof, provided for the selection of a school examiner (Acts 1865, p. 3). In 1873 that section of the act of 1865 was amended, and supplemental sections were added to said act (Acts 1873, p. 75, § 2). By that amendment the office of county superintendent was substituted for that of school examiner, and appointments to that office were provided for. By the act of 1895 it was attempted to change the time for the appointment to said office, and the act was entitled as follows: "An act to amend section 33 of an act entitled '*An act to provide for a general system of common schools, the officers thereof and their respective powers and duties, and matters properly connected therewith, and prescribing the fees for certain officers therein named and for the establishment and regulation of township libraries, and the repeal of all laws inconsistent therewith, providing penalties therein prescribed,*' approved March 6, 1865, and added supplemental sections thereto, approved March 8, 1873, being section 4424 of the Revised Statutes of 1881, and declaring an emergency." The words italicized constitute the title to the act of 1895. If we consider, in connection with the preceding language of the title, the words "and added supplemental sections thereto, approved March 8, 1873," as a part of the title to the act which it was intended to amend, we are met with the fact that no act of 1873 bears a title in the words so connected. There are two acts of March 8, 1873, which amend the act of 1865 and add supplemental sections thereto. See Acts 1873, p. 68; Acts 1873, p. 75. The titles of the two acts of 1873 are identical, and, aside from the references to section 33, and to Rev. St. 1881, § 4424, the title of the act of 1895 would refer with like certainty to either. But, besides the uncertainty arising from the likeness of the titles of the two acts of 1873, the title of the act of 1895 becomes more ambiguous when we recall the fact that its language omits from that of the title of either of the acts of 1873 the words "An act to amend an act entitled," and it substitutes the word "added" for the word "adding," as employed in each of the titles of 1873. As applied to either of the acts of 1873, the title of that of 1895, purporting to amend section 33, and the enacting clause, directing the amendment to "section 33 of the above-entitled act," we are confronted with an impassable barrier in the fact that the first of the acts of 1873 contains but 15 sections, while the second contains but 11.

If we accept the language of the title and that of the enacting clause as expressing an intention to amend section 33 of an act, the title of which is given, there is no escape from the conclusion that such act is that of 1865, since the title to no other act is given, and since it is found that no other act to which reference could have been possible contained a "section 33." But, as if to add confusion to the already existing ambiguities, the title includes the additional words "being section 4424 of the Revised Statutes of 1881." Can these words be employed to give direction to the act which it was desired to amend, and by them to determine that an intention which we do find expressed in the title and in the enacting clause shall not prevail? This question has been answered in the negative by the case of *Feibleman v. State*, 98 Ind. 516, where the amendatory act was, by its title, directed to a section of an act which had been previously amended, but it contained a further direction, to wit, "being section 1418 of the Revised Statutes," which section of the statutes was from the act so previously amending the original act. It was held that the constitutional method of designating the act to be amended was by reference to its title, and not by reference to a section of the Revised Statutes; that sections 19, 21, art. 4, of the constitution (Rev. St. 1894, §§ 115, 117), require amendatory acts, like original acts, to express their subject in a title by uniform method, and with freedom from looseness and uncertainty, and that this is accomplished by reference to the title of the act to be amended, and never by reference to a section in the Revised Statutes. Besides the departure from the constitutional method of amending, it is a well-known fact that revisions of the statute law are not always by legislative authority or recognition, and many times laws are incorrectly copied into the revised edition. In this instance it will be seen that there are no less than four changes in the phraseology in the act of March 8, 1873, by the revisors, in carrying section 2 into Rev. St. 1881, § 4424.

Returning, therefore, to the other portions of the act, we find authority for the construction that the amendment was legally directed to section 33 of the act of 1865. *Blakemore v. Dolan*, 50 Ind. 194; *Board v. Smith*, 52 Ind. 420; *State v. Harrison*, 67 Ind. 71. In *Board v. Smith*, and in *State v. Harrison*, construction was given to an act of March 9, 1875 (Acts 1875, p. 131), the title of which was as follows: "An act to amend sections thirty-three, thirty-seven and forty-three, and supplemental section six, of an act entitled '*An act to provide,*'" etc., continuing with the title of the act of March 6, 1865, to which we have referred, and concluding with the words "and adding supplemental sections thereto, approved March 8, 1873." It was expressly held that the amendment was directed to the act of 1865, and not to the amenda-

tory act of 1873. When the act then in question is compared with that now in question it will be seen that, aside from the ambiguities of the act of 1895, to which we have referred, the questions presented in those cases and in this are identical. In *Blakemore v. Dolan*, the decision involved attempted amendments to this act of 1865, and, in one view of the present case, is decisive of the question. Then the fifth section of the act of 1865 had been amended in 1873 (Acts 1873, p. 68), and in 1875 (Acts Reg. Sess. 1875, p. 135) an act was passed, the title of which designated for amendment section 1 of said act of 1873, which had so amended section 5 of the original act, but it was enacted "that section 5 of the above-recited act be amended," etc. In section 1 of the act of 1873 the amended section stood by the original section number, 5, as in the present case the amendatory section, 2, attempts to amend the original section to stand as 33. In that case the second amendatory act was held to apply to the first act, and not to the act of 1873. So we must hold in this case. The amendment, having been directed to a law which had been superseded by an amendment, was void, the first amendment having taken the place of the original law. *Hall v. Craig*, 125 Ind. 523, 25 N. E. 538; *Feibleman v. State*, supra; *McIntyre v. Marine*, 93 Ind. 193; *Brokaw v. Board*, 73 Ind. 543; *State v. Harrison*, supra; *Ford v. Booker*, 53 Ind. 395; *Board v. Smith*, supra; *Blakemore v. Dolan*, supra; *Longlois v. Longlois*, 48 Ind. 60; *Board v. Markle*, 46 Ind. 96; *Draper v. Falley*, 33 Ind. 465. If we should deny the correctness of the construction made in *State v. Harrison* and *Board v. Smith*, thereby overruling those cases, and should accept the contention that the amendment was directed to the first amendatory act, and not to the original act, we would but the more certainly condemn the act of 1895, by holding the act of 1873 to have been superseded by that of 1875, which attempted to amend said section 33 of the act of 1865. Whether treated as an attempted amendment of the act of 1865, or by the constitutional rule for the amendment of laws as clearly pointed out in *Feibleman v. State*, supra, or from a duty to identify with reasonable certainty the act to be amended, the act of 1895, in my opinion, is invalid.

JORDAN, J. (dissenting). I cannot concur in the result reached in the opinion of the majority of this court, and adjudge that the statute in controversy is invalid. The law is assailed upon the alleged grounds that the legislative body neglected to duly observe the forms required by the constitution of this state, which are necessary to give validity to amendatory acts. Section 19 of article 4 of the constitution provides: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Section 21 of the same article provides: "No act shall

ever be revised or amended by mere reference to its title; but the act revised, or the section amended shall be set forth and published at full length." It is evident that, in the passage of the statute involved in the case at bar, the latter section of the constitution above cited was not violated, as no attempt was made to revise an act, or amend a section by mere reference to its title. The section amended was set forth and published at length.

But it is contended by the learned counsel for appellee that the statute in question was an attempt upon the part of the legislature to amend the original section 33 of the act of March 6, 1865, and that consequently the act resulted in amending this section, which had been amended by an act approved March 8, 1873, and was therefore not in existence. In my judgment, this contention cannot be sustained. Of course it is conceded as a settled principle of law that where a section of a statute has been amended it no longer exists in its original form, but is superseded by the section as amended. The title of the act of 1895 reads as follows: "An act to amend section 33 of an act entitled 'An act to provide for a general system of common schools, the officers thereof, and their respective powers and duties, and matters properly connected therewith, and prescribing the fees for certain officers herein named, and for the establishment and regulation of township libraries, and to repeal all laws inconsistent therewith, providing penalties therein prescribed, approved March 6, 1865,' and added supplemental sections thereto, approved March 8, 1873, being section 4424 of the Revised Statutes of 1881, and declaring an emergency." If it was not intended to amend section 33 as it existed by virtue of the amendment of 1873, and as it had been incorporated into section 4424, Rev. St. 1881, why did not the draughtsman of the bill of 1895 end its title, after reciting that of the act of 1865? Why continue with the words "and added supplementary sections thereto approved March 8, 1873, being section 4424 of the Revised Statutes of 1881"? These words are in the title, and are there to serve a purpose, namely, to advertise that it was the intention to amend section 33 as amended by the act of March 8, 1873, and as it had been set forth and published in section 4424 of the Revision of 1881. Force and effect must be given to these words by courts. They cannot be waived aside or discarded.

In *Cooley*, Const. Lim. pp. 57, 58, it is said: "It is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause." By giving the proper force and effect to these words and to those employed in the enacting part of the act, to wit, "that section 33 of the above-entitled act, being

section 4424 of the Revised Statutes of 1881, be and the same is amended to read as follows," etc., it is apparent, I think, that the legislature intended to, and did, amend section 33, as amended by the amendatory act of March 8, 1873, and that there was no intention or attempt to amend the original section 33 of the act of 1865; and that this legislative purpose was sufficiently advertised in the title of the act in question.

In the case of *Bell v. Maish*, 137 Ind. 229, 36 N. E. 358, 1118, the court said: "We think that a title stating that an act is an act to amend a given section of another act sufficiently advertises the purpose of the amendatory act, which is the chief object of the constitutional provision." If the object of the title is to advertise the purpose of the bill, it must be evident that every member of the last general assembly, of ordinary understanding, was by the title to the act in question notified that its purpose was to amend section 33 as amended, and not the section as it originally existed. If any doubts had arisen in the minds of the assemblymen they would have been removed by the words "being section 4424 of the Revised Statutes of 1881," as used in the title, and also in the enacting clause of the statute; for, upon an examination, it would have been found that section 4424, Rev. St. 1881, was section 33 of the act of 1865, as amended. Much stress is placed by counsel for appellee upon the decision of *Feibleman v. State*, 98 Ind. 516. But that case is easily distinguished from the one now before the court. In the title of the act considered in the *Feibleman* Case, it was declared to be an "act to amend section 1," etc., "of an act approved June 9, 1852, being section 1418 of the Revised Statutes." There was in no manner any reference to the amendatory act of 1867; and the enacting clause read, "Be it enacted," etc., "that section 1 of the above-entitled act be amended to read as follows," etc., section 1418 of the Revision being entirely omitted. Hammond, J., in the opinion, on page 519, said: "Our conclusion, after careful consideration, is that the object of the act of 1883 was to amend the first section of the act of 1852. The reasons for this are apparent both in the title and body of the act of 1883. The title of the act of 1883 sets out verbatim the title of the act of 1852, giving the date of its approval, specifies that it is an act to amend the first section of said act of 1852, and makes no reference by quotation, date, or otherwise, to the amendatory act of 1867. And then, after the enacting clause, the first section of the act of 1883 provides "that section 1 of the above-entitled act [the act of 1852] be amended to read as follows," etc. The reasons for the conclusion reached in the above case—that the object of the act of 1883 was to amend the first section of the act of 1852—are stated by the court to be based upon the fact that the former act set out verbatim the title of the latter, and made

"no reference by quotation, date, or otherwise, to the amendatory act of 1867." But this objection cannot be successfully urged against the title of the statute now in question, for the reason that it does refer to the amendatory act of 1873, by the words "and added supplementary sections thereto, approved March 8, 1873, being section 4424," etc. It is seen that the title of the act, after quoting a part of the amendatory act of 1873, which it proposed to amend, also referred to, and gave the date of, its approval; and then, in order that all members of the legislature and others concerned might be fully apprised of the purpose or object of the bill, the section of the Revised Statutes was given. This undoubtedly made the title certain to a common intent. It is well settled that in the construction of statutes, as well as of contracts, "that which can be made certain is certain." By an act of the general assembly approved April 18, 1881 (Acts 1881, p. 605), provisions for the revision and publication of the statutes of this state were made. Section 3 of this act provided that the commissioners should annotate the contents of the volumes so as to show, by proper reference, the acts or sections, the time when they went into force, etc. Section 4 provided that the volume should be known as the "Revised Statutes of 1881." It therefore appears that both the title and the enacting clause of the act in controversy employed the legally authorized name by referring to the "Revised Statutes of 1881." By an examination of section 4424, Rev. St. 1881, the authorized annotation will be found. At the head of this section are the words "1875, p. 75; in force March 8, 1873." Following the number of the revised section are the words "county superintendent," and the numerals "33." By these annotations it clearly appears that this section, 4424, will be found on page 75 of the Acts of 1875, and that it went into force March 8, 1873, and that it is numbered "section 33" in the statute with which it is connected. By turning to the Acts of 1875 (page 75) we find that section 33 of the act of 1865 was amended by section 2 of an act approved March 8, 1873, and that this section, as amended by section 2 of this amendatory act, is section 4424, Rev. St. 1881. Here we find a fair illustration of the maxim above mentioned,—"That which can be made certain is certain." The conclusion to my mind is irresistible that, by considering the words used in the title in question, to wit, "added supplementary sections thereto, approved March 8, 1873, being section 4424 of the Revised Statutes of 1881," together with the body of the act, that the purpose of the act, namely, to amend section 33 as amended by the act of 1873, is apparent, and that this object was sufficiently advertised and made evident within the aim and spirit of the constitutional provision. The title and body of the act supplied the means, and all that was necessary was to make an

examination, in order to render the purpose of the act certain.

In the case of *Shoemaker v. Smith*, 37 Ind. 131, the court says: "There was no need of stating the date of the approval of the amended law. This is usually, but not necessarily, done, and the omission can be of no consequence if the law intended to be amended is pointed out with such reasonable certainty as to identify it."

In the case of *Clare v. State*, 68 Ind. 17, the amendatory statute considered by this court recited or declared in its title, and also in its enacting clause, that it was intended to amend section 74, while in fact it was intended to, and did, amend section 36. This act was upheld. *Howk, C. J.*, speaking for the court, on page 25 of the opinion, said: "But we do not understand that this court is bound, in the interpretation and construction of a statute, to take the words used therein in their plain, exact, and literal sense. On the contrary, the true rule is, and always has been, as recognized in many decisions of this court, to make the legislative intention in the enactment of the particular statute the chief guide of the court in its interpretation and construction. If the object, purpose, and intention of the legislature, in the enactment of the particular statute, can be fairly ascertained and arrived at, then it is the duty of the court to overlook and disregard all apparent inaccuracies and mistakes in the mere verbiage or phraseology of the statute, and, if possible, to give force and effect to the evident reason, spirit, and intention of the law. This, we think, is the true and only safe rule for the guidance of the courts in all statutory exposition and construction; and, as such, it has been recognized and acted upon by this court in a large number of its reported decisions."

As said in *Bush v. City of Indianapolis*, 120 Ind. 476, 22 N. E. 422 (which decision supports our views): "The power of the courts to declare a statute unconstitutional is a high one, and is never exercised in doubtful cases. To doubt is to resolve in favor of the constitutionality of the law." An act of the legislature is not to be declared unconstitutional unless it is clearly, palpably, and plainly in conflict with the constitution. *Henderson v. State*, 137 Ind. 556, 36 N. E. 257. It must be presumed that the general assembly of 1895 constructively knew that section 33, as it originally stood, had been amended, and thereby had been superseded by section 33 as amended. By the means of the descriptive words employed in the title and act itself, actual knowledge was brought to that body of that fact. It cannot be presumed that the legislature intended to enact an invalid statute. It is well settled that a section of a law amended is incorporated into and becomes a part of the original act, and stands as and for the original section on and after the date of the taking effect of the amendatory law. The

section, as amended, does not appear in section 4424, Rev. St. 1881, as section 2 of the amendatory act, but as section 33 of the act as amended. While it may be admitted that the title of the act is not skillfully drafted, nevertheless this will not authorize a court to strike down a statute. If it did, many acts of the lawmaking power would meet with judicial condemnation. With all due deference to the judgment of my associates, I am of the opinion that the validity of the statute ought to be sustained, and the judgment below reversed.

(164 Mass. 286)

RICE et al. v. NATIONAL CREDIT INS. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sep. 9, 1895.)

BOND OF INDEMNITY—CONSTRUCTION.

Defendant gave plaintiffs a bond to indemnify them against losses by sales in their business in excess of one-fourth of 1 per cent. of their annual sales, to an amount not exceeding \$10,000 "save such sum or sums as shall be deducted therefrom as hereinafter provided." It was provided that, in computing "losses," claims of loss should not exceed \$7,500 in any one firm, and that, in computing "indemnity," for which defendant was liable, 12 per cent. should be deducted from the total gross losses, as calculated under the provisions of the bond, and the said one-fourth of 1 per cent. loss of plaintiffs should also be deducted from said total losses, and the remainder should be the amount of indemnity to be paid by defendant, not to exceed said \$10,000. *Held*, that where plaintiffs had a loss with a single firm of over \$20,000, the "total gross loss," from which the 12 per cent. and the one-fourth of 1 per cent. was to be deducted, was \$7,500, and the balance was the indemnity to be paid.

Appeal from superior court, Suffolk county.

Action by Henry A. Rice and others against the National Credit Insurance Company on an indemnity bond. The court found for defendant. Plaintiffs appeal. Judgment on the finding. The parties agreed to the following statement of facts:

The policy of insurance, or bond, was duly executed and delivered to the plaintiffs by the defendant company on or about the day of its date, in consideration of the premium therein recited, which was duly paid by the plaintiffs. The plaintiffs at the date of the policy, and ever since, were engaged in the wool business, and during the year commencing on the 1st day of June, 1892, and ending on the 1st day of June, 1893, made sales and deliveries to an amount of more than \$1,500,000 and less than \$2,000,000. During this year the plaintiffs sold and delivered to the Highland Worsted Mills, a corporation organized under the laws of New Jersey, and doing business in Camden in that state, wool to the value of \$23,097.64, at an agreed price of that sum, and during the same year the Highland Worsted Mills became unable to pay their debts, and were declared insolvent by due process of law. No part of the debt from said corporation to

plaintiffs has ever been paid. So much of said loss of said Highland Worsted Mills as is covered by said policy, or bond, comprises plaintiffs' gross losses as calculated under the provision of said bond. The initial loss of one-fourth of 1 per cent. of the plaintiffs' annual sale, as computed under said bond, is \$4,928.47. Within 10 days after receiving notice of such insolvency, and before June 1, 1893, the plaintiffs notified the home office of the defendant company in writing, on one of the blank forms provided by the defendant, of the loss and insolvency, which notice was sent by registered mail, properly addressed, and was duly received. Within 30 days after the expiration of the insurance policy, or bond, final proof of the loss caused by said insolvency was made by the plaintiffs at the home office of the defendant company upon the blank forms for final proof of loss furnished by the defendant. All blanks on said forms were properly filled with the information called for therein, and said final proof of loss was duly verified. The capital and credit ratings of the Highland Worsted Mills at the time of the sale of said wool in the latest reference book of the mercantile agency named in said bond were such as to cover losses on sales to said worsted mills to the limit allowed by said bond. The plaintiffs at the time of said sale had received no information detrimentally affecting the ratings of said Highland Worsted Mills. Adjustment under said policy, or bond, was demanded within 60 days after final proof of loss. The defendant adjusted losses admitted by it under said bond on August 30, 1893, and within 60 days after said final proof of loss was made, and within 60 days thereafter made due tender to plaintiffs of the sum of \$1,671.53, which sum said defendant claimed to be due plaintiffs under the terms of said bond, but which plaintiffs, claiming more than that amount, then and there refused to accept.

M. F. Dickinson, Jr., and Samuel Williston, for appellants. Solomon Lincoln, for appellee.

MORTON, J. The instrument declared on is in the form of a bond of indemnity from the defendant to the plaintiffs, in which the defendant agrees to indemnify the plaintiffs against losses by sales and deliveries in their business in excess of one-fourth of 1 per cent. of their annual sales and deliveries, to an amount not exceeding \$10,000, "save such sum or sums as shall be deducted therefrom as hereinafter provided." By the sixth condition it is provided that, "in the computation of losses, when final adjustment hereinafter is made, no loss on any one claim shall be included to an extent of more than 33½ per cent. of the lowest capital rating in the latest reference book of the mercantile agency named above. * * * and in no event shall claims of loss exceed \$7,500 in any one individual or firm." And by the eighth con-

dition it is further provided that, "In the computation of indemnity under this bond, for which this company is liable: 1st, twelve (12) per cent. shall be deducted from the total gross losses as calculated under the provisions of this bond; * * * 2d, the said ¼ per cent. loss of said second party shall also be deducted from said total losses, and the remainder shall be and constitute the amount of indemnity to be paid by said first party, not to exceed said ten thousand dollars (\$10,000)." The plaintiffs suffered a loss to the amount of \$23,097.64, and the question is whether, in computing the indemnity to which they are entitled, the 12 per cent. and the one-fourth of 1 per cent. shall be deducted from that amount, leaving a sum larger than the major limit of recovery, and entitling them, therefore, to the \$7,500 which is fixed as the limit of recovery, or whether the 12 per cent. or the one-fourth of 1 per cent. are to be deducted from the \$7,500, and the balance is to be regarded as the indemnity to which they are entitled. We think that the latter is the construction that must be adopted. The word "loss" (or "losses") occurs frequently in the bond, and it is evident that it is used as meaning the loss which the plaintiffs have sustained in their dealings with their customers, and not the amount for which the defendant may be liable under the bond. The term by which the latter is spoken of is "Indemnity." The sixth condition is directed to ascertaining the amount of the loss, and the eighth to the computation of the indemnity after the loss has been fixed. There are two methods provided for ascertaining the loss: First, it shall not be more than 33½ per cent. of a certain rating; and, secondly, it shall in no event exceed the sum of \$7,500. When the loss is ascertained in either one of these modes, it constitutes the gross loss referred to in condition 8, and from it are to be deducted the 12 per cent. and the one-fourth of 1 per cent., and the balance constitutes the indemnity which the company is to pay. The agreement to indemnify does not apply to the whole of the excess loss, with a limit of liability on the part of the defendant, in which case the method proposed by the plaintiffs would be correct, but only to a certain amount of the excess; and it is from that that the deductions are to be made. Judgment on the finding.

(164 Mass. 291)

KING BRICK-MANUF'G CO. v. PHOENIX INS. CO. et al. SAME v. PENNSYLVANIA INS. CO. SAME v. GRANITE STATE INS. CO. SAME v. INSURANCE CO. OF NORTH AMERICA. SAME v. ROYAL INS. CO. SAME v. ORIENT INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1895.)

INSURANCE—REPRESENTATIONS—BREACH OF WARRANTIES.

1. Under Rev. St. Me. c. 49, § 20, providing that statements of description in a policy of in-

insurance are representations, and that a change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, does not affect the policy unless they materially increase the risk, the words "constant watch," occurring in a rider, attached to a policy issued in that state on the plant of a brick-manufacturing company, in the following words: "Steam pump, with sufficient hose to cover buildings. Constant watch,"—constitutes a representation, and not a warranty.

2. Where a policy contains a representation that a "constant watch" is kept on the insured property, the temporary absence of a watchman, without knowledge of the insured, is not a change in the property, or in its use or occupation, within a statute or provision of the policy making a change in the property insured, or in its use or occupation, a breach of the policy only if it materially increases the risk.

3. Under a provision in a policy of insurance making an application, survey, plan, or description referred to in the policy a part of the contract, and a warranty by the insured, a rider attached thereto describing the property cannot be construed a warranty.

Exceptions from superior court, Suffolk county; John W. Hammond, Judge.

Several actions by the King Brick-Manufacturing Company against the Phoenix Insurance Company, the Pennsylvania Insurance Company, the Granite State Insurance Company, the Insurance Company of North America, the Royal Insurance Company, and the Orient Insurance Company, respectively, on policies of insurance, were consolidated. From findings for the plaintiff in each of the cases, defendants bring exceptions. Exceptions overruled.

F. T. Beuner, for plaintiff. O. D. Baker, for defendants.

LATHROP, J. To each of the policies of insurance in this case was attached a rider, which first expressed the amount of the insurance, the division of this amount on the several subjects of risk, followed by these words: "Situated on east side of Pleasant river, in Columbia Falls, Maine. Steam pump, with sufficient hose to cover buildings. Constant watch." The property insured was the plant of a brick-manufacturing company, where a fire was liable to break out at any time, and which needed the constant care and supervision of a watchman. It was destroyed by a fire breaking out at night, which we assume might have been put out if the watchman employed by the plaintiff for the purpose had been present; but he was absent at the time, through negligence or a misunderstanding, without the knowledge of the plaintiff, or of any one of its officers. The principal question in the case turns on the meaning of the words "constant watch." The presiding justice of the superior court found for the plaintiff in each case, and made the following rulings of law: "(1) The phrase 'constant watch' was not a warranty, but a representation; and it had reference, not only to the time the policy was issued, but also to the future. (2) It must have been true and correct as to things

done or existing at the time the policy was issued; and, so far as it related to the future, it was a stipulation to be fairly and substantially complied with. (3) If the plaintiff established a rule that there should be a constant watch, and employed proper servants to execute such rule, and otherwise exercised reasonable supervision to see that the rule was executed, and such rule had been executed up to the night of the fire, a temporary omission to keep such watch on the night of the fire, owing to accident or the negligence of subordinate persons, servants, or workmen, not known to or sanctioned or permitted by the insured, or its superintendent or managing officer or agent, and without negligence on the part of the insured or such officer or agent, would not prevent recovery by the plaintiff in this action, even if the fire would not have occurred but for such omission." We are of opinion that these rulings were right.

The property insured was situated in the state of Maine, and the policies were issued there. The contracts are, therefore, to be construed with reference to the laws of that state. *Daniels v. Insurance Co.*, 12 Cush. 416, 422. Chapter 49 of the Revised Statutes of Maine contains the following section, which is made part of the case: "Section 20. All statements of description or value in an application or policy of insurance are representations and not warranties; erroneous descriptions, or statements of value or title by the insured, do not prevent his recovering on his policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss or materially increased the risk; a change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." We are somewhat embarrassed in construing this statute by the fact that the decisions of the supreme court of Maine afford us but little assistance. The precise question here involved does not appear to have been decided. There are, however, expressions of opinion in several cases which show that the statute is to be liberally construed in favor of the insured. In *Campbell v. Insurance Co.*, 59 Me. 430, 434, the court, speaking of the statute in question, say that it "was not designed to lay any additional stumbling block in the way of the policy holder before his case could be heard upon its merits, and it should not be so construed as to give it that effect." In *Emery v. Insurance Co.*, 52 Me. 322, 325, it is said by the court: "Warranties on these points [the valuation and interest of the insured] are to be treated as representations, and nothing more." And in *Day v. Insurance Co.*, 81 Me. 244, 18 Atl. 894, it is said: "Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limitations, and con-

ditions that in many cases they secured to the insured nothing better than an unsuccessful lawsuit, in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil." The words "constant watch," in the connection in which they occur, may, perhaps, amount to a description of the risk, and, if so, by the terms of the statute they constitute a representation, and not a warranty; but the description cannot be said to be erroneous in this case, for the words in the statute, which follow the clause above cited, show that the words "erroneous descriptions" refer to descriptions of the property as it really existed, and not to a promise as to the future. The words upon which the defendants principally rely are these: "A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." But in this case there was no change in the property, or in its use or occupation. The word "change" in the law of insurance means a permanent or habitual change, and does not include the temporary absence of a watchman of which the insured has no knowledge. *Shaw v. Robberds*, 6 Adol. & E. 75; *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 115; *Loud v. Insurance Co.*, 2 Gray, 221, and cases cited. Was there a breach of any of the terms of the policy by the insured? This depends upon whether the assured absolutely promised that there should be a "constant watch,"—in other words, whether he warranted this,—or whether the words constitute a representation merely, and are governed by the familiar rules applicable to representations. Unless they amount to a warranty, there is no breach of the agreement. In this part of the case we assume, of course, that the first clause of the section is not broad enough to include a statement as to the future. It is a familiar rule of construction that a promise in regard to the future, which is not clearly made a warranty, is a representation only, and not a warranty. *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114; *Daniels v. Insurance Co.*, 12 Cush. 416; *National Bank v. Hartford Ins. Co.*, 95 U. S. 673; *Garcelon v. Insurance Co.*, 50 Me. 530. On the principles laid down in these cases, we cannot regard the words "constant watch" as constituting a condition precedent to the right to recover, and consider them as a representation that a constant watch would be kept. The duty was thus imposed upon the insured to use all reasonable care and to take all reasonable means to see that a constant watch was kept. This was done by making a rule to that effect and providing a watch. No negligence or fraud is imputed to the assured. The loss was caused by the negligence of a servant, and this is a risk covered by the insurance. There was, therefore, no breach of the terms of the policy

by the insured. *Shaw v. Robberds*, 6 Adol. & E. 75; *Dobson v. Sotheby*, 1 Moody & M. 90; *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 115; *Daniels v. Insurance Co.*, 12 Cush. 416; *Loud v. Insurance Co.*, 2 Gray, 221; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 131; *Aurora Insurance Co. v. Eddy*, 55 Ill. 213, 219; *Mickey v. Insurance Co.*, 35 Iowa, 174. The defendants further rely upon certain provisions in the policies as showing that the words "constant watch" constitute a warranty. In four of the policies the language is: "If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured." This clearly refers to some paper outside of the policy, and not to words in the policy itself. Moreover, if the clause were broader, and constituted a description of the property a warranty, it would be in conflict with the provisions of section 20, and void by section 21, which provides: "All provisions contained in any policy of insurance in conflict with any of the provisions hereof are null and void." The other two policies contain this clause: "Any change increasing the hazard, either within the premises, or adjacent thereto, and not reported to this company, and agreed to by entry in due form in the body hereof, will render this policy void." But, as we have already stated, the word "change" means a permanent or habitual change, and not the temporary absence of a watchman. Exceptions overruled.

(164 Mass. 276)

H. A. PRENTICE CO. v. PAGE et al.

DAVIS et al. v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1895.)

SALE—BONA FIDE PLEDGEE—INSTRUCTIONS.

1. Pub. St. c. 71, § 1, providing that an agent to whom goods are intrusted for sale is the true owner thereof, so far as to render valid a sale of them by him to a bona fide purchaser, does not protect a pledgee of goods where the pledgor obtained them from the owner by fraudulent representations, and on forged conditional contracts of sale.

2. On suit for conversion by the owner of goods against a pledgee to whom the goods were pledged by an agent, an instruction that if the goods were intrusted to the agent to sell for cash the defendant is protected by Pub. St. c. 71, is properly refused, where there is no evidence that the goods were to be sold for cash.

Report from superior court, Suffolk county; Justin Dewey, Judge.

Actions by the H. A. Prentice Company against Moses S. Page and others, and by James M. Davis and others against Moses S. Page and another, heard together. There were verdicts for plaintiffs in each case, and the cases were, on request of defendants, reported to this court; if the instructions given were correct, judgment to be

entered on the verdicts, otherwise a new trial to be granted. Judgment on verdicts.

Raymond R. Gilman, for plaintiffs. L. M. Child, for defendants.

MORTON, J. The goods which are the subject of these suits were obtained from the plaintiffs by one Gregg by means of false and fraudulent misrepresentations and forged conditional contracts of sale. After he had thus obtained the goods, Gregg pledged them to the defendants. Although there is nothing in the report of the presiding justice, or in the auditor's report, positively showing that the defendants took them in good faith, it is assumed in the instructions to the jury, and we take it for granted that they did. The H. A. Prentice Company also "trusted Gregg personally with some two thousand dollars' worth of merchandise, and charged the same to him in the regular course of business"; but it is expressly stated in the report of the presiding justice that none of the goods which are the subject of these suits were "ever charged to him or purchased by him in any way, but were all delivered to said Gregg, upon his representation that he had a reliable customer for them," and we assume were all accounted for by him by forged conditional contracts of sale. The facts show that there was a larcenous taking of the goods by Gregg, for which he was afterwards convicted and sentenced. The defendants, in substance, requested the court to instruct the jury that if the goods were intrusted to Gregg to sell for cash, or on conditional contracts of sale, the defendants were protected by chapter 71, Pub. St., although the goods were obtained from the plaintiffs by Gregg by forgery and fraud. The court refused to give this instruction, and instructed the jury, in effect, that in order to protect a bona fide pledgee under chapter 71 "the goods or merchandise must have been intrusted to" the agent "to sell and dispose of in the ordinary course of business, as a common-law sale." Without undertaking to say that intrusting goods or merchandise to an agent or factor to sell means, under all circumstances, such a sale as defined by the court, we think, upon the undisputed facts, the plaintiffs were clearly entitled to recover, and that, therefore, the instructions could have done no harm in the present case.

There was no evidence to show that the goods were intrusted to Gregg to sell for cash, and therefore so much of the request as related to that was inapplicable to the case before the court and jury. The object of chapter 71, Pub. St., is to protect parties dealing in good faith with factors or agents who have been intrusted with goods or merchandise for sale or consignment. It might be said that goods given, as these were, to one to be delivered by him

to parties who he represented had purchased them, were not intrusted to him for sale, but as an agent for delivery merely. But, however that may be, we do not think that the statute applies when goods or merchandise have been procured, as here, by the agent or factor, to be intrusted to him for delivery, under what purport to be conditional contracts of sale, and in consequence of what, in law, constitutes a larceny of them on his part. In such a case the goods cannot be said to have been intrusted to him for sale in any manner, within any fair meaning of those words. It would be a contradiction in terms to say that goods are intrusted for sale to one who steals them. *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805; *Thacher v. Moors*, 134 Mass. 156; *Stollenwerck v. Thacher*, 115 Mass. 224; *Dows v. Bank*, 91 U. S. 618; *Soltan v. Gerdau*, 119 N. Y. 380, 23 N. E. 864. If the goods have been properly intrusted to an agent for sale, a party afterwards dealing in good faith with the agent will be protected, though the latter may violate his instructions, or conduct himself fraudulently towards his principal in disposing of or dealing with the goods. *Bank v. Gardner*, 15 Gray, 362, 374. But that was not the case here. In regard to the case of *Baines v. Swainson*, 4 Best & S. 270, which may seem opposed to the conclusion which we have reached, it should be observed that the English factors' acts simply provide that the goods shall be "intrusted," and not as ours "intrusted for sale," and the fact that they do not provide that they shall be intrusted for sale is adverted to in the argument of counsel and in the opinion given by *Crompton, J.* Id. 275, 281. See, also, *Cole v. Bank*, L. R. 10 Q. P. 354, 373, 374, where *Blackburn, J.*, says that *Willes, J.*, in delivering judgment in *Fuentes v. Montis*, L. R. 3 Q. P. 268, "speaks of *Baines v. Swainson* as going to the extreme of the law." Judgment on the verdicts.

(164 Mass. 227,

PROPRIETORS OF MILLS ON MONATIQUE RIVER v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 6, 1895.)

EMINENT DOMAIN—RIGHT TO COMPENSATION.

The petitioners were incorporated by St. 1818, c. 35, and were authorized to erect dams and make reserves of water in Houghton's pond, and several other ponds, for the purpose of supplying power to operate their mills. The corporation had not exercised its power to make a reserve in Houghton's pond, but was about to do so when the board of park commissioners, under St. 1893, c. 407, appropriated certain lands, including said pond and the outlet thereof, thereby preventing the corporation from making said reserve, but the waters were not diverted. The act of incorporation did not grant the right of eminent domain, nor had the corporation otherwise acquired title to any of the land taken. *Held* that, though the commonwealth owned the waters of the pond at the time of the incorporation, the franchise conferred no right of property therein, but rather a license and permission,

and the charter was therefore not impaired by the action of the park commissioners so as to entitle the corporation to compensation for the taking.

Exceptions from supreme judicial court, Norfolk county.

Action by the Proprietors of Mills on Monatiquot River against the commonwealth of Massachusetts to recover damages for taking certain lands. A demurrer to the petition was sustained, and plaintiff excepts. Affirmed.

E. C. Bumpus and R. F. Simes, for plaintiff. F. V. Balch, F. Rockeman, and J. D. Colt, for the Commonwealth.

FIELD, C. J. By St. 1893, c. 407, § 4, the board of metropolitan park commissioners is authorized "to take, in fee or otherwise, in the name and for the benefit of the commonwealth, by purchase, gift, devise or eminent domain, lands and rights in land for public open spaces within said district, or to take bonds for the conveyance thereof; and to preserve and care for such public reservations," etc. By Id. § 7, "said board shall estimate and determine as near as may be all damages sustained by any person or corporation by the taking of land, or any right therein, under this act; but any one aggrieved by such determination of the board may have such damages assessed by a jury of the superior court, in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways." See St. 1894, c. 288. The petition in the present case alleges that on January 5, 1895, the board, acting under the statute, duly took certain parcels of land and rights in land which are situated in the town of Milton and in the city of Quincy, and are definitely described in the taking, and which included Houghton's pond and the brook which is the outlet of the pond, and which empties into Blue Hill river,—one of the tributaries of Monatiquot river. Houghton's pond is a great pond of the area of about 25 acres, and Blue Hill river empties into Monatiquot river above the mill sites of those of the petitioners, who own or occupy mill sites on Monatiquot river. The petitioners are the corporation of the Proprietors of Mills on Monatiquot River, which does not maintain mills on the river, and certain persons and corporations which own or occupy mills on the river; and it is alleged that these last, and their predecessors in title, "for more than twenty years prior to December 29, 1893, have had the use and enjoyment of Houghton's pond at said privileges, as it has flowed from said pond down into the said river, and to and past their respective privileges." All of these owners or occupants of mills, but one, are members of the corporation of the Proprietors of Mills on Monatiquot River. The lands taken by the board at the time of the taking were not owned, and never had been owned, by any of the peti-

tioners; and there has been no actual diversion of the waters of Houghton's pond, or of its outlet from Monatiquot river. The commonwealth, waiving "all objection on the ground of the joinder of several petitioners in the single petition," demurred on the ground that the petition does not state a case which entitles the petitioners, or any of them, to damages.

The claims of the owners or occupants of mill privileges are made, we think, upon a mistaken view of the effect of the taking by the board. Land and rights in land have been taken, and this includes ponds and streams of water within the limits of the land taken, but no right is given to divert running water from the channels in which it naturally flows. The commonwealth, as owner in fee after the taking, has, we think, the rights which belong to a private owner of land and of ponds and streams on the land. The commonwealth was the owner of the great pond before the taking, and its rights to control the waters of this pond are either the same as they were before the taking, or have been made somewhat less by the taking. The land has been taken for, and the pond has been taken for, or dedicated to, the purposes of the statute, which are "to acquire, maintain and make available to the inhabitants of said district open spaces for exercise and recreation." These are called in the act "public open spaces" and "public reservations." There is nothing in the act which indicates that the board may take or impair the water rights of those persons who own land not taken, but to or through which streams of water flow from the land taken. The commonwealth, succeeding to the title of private owners, acting through the board of commissioners, may make such reasonable use of the waters on the land taken as the private owners before the taking lawfully could have made, without liability to the owners of land not taken, but to or through which these waters flow. Whether the commonwealth, as owner, has greater rights in the waters of the great pond before they issue from the pond, need not now be considered. Whatever rights the owners of mill sites had before the taking to have the waters of Houghton's pond and of its outlet flow into Blue Hill river, and thence into Monatiquot river, past their mills, they have now. The board have not attempted to take any of these rights.

The claim of the Proprietors of Mills on Monatiquot River is a peculiar one. They were incorporated by an act approved June 12, 1818, being St. 1818, c. 35. This act was considered in *Proprietors of Mills on Monatiquot River v. Inhabitants of Randolph, Holbrook, and Braintree*, 157 Mass. 345, 32 N. E. 153. That case was a petition for the assessment of damages for the taking of all the waters of "Great Pond," so called, under St. 1885, c. 217, for the purpose of supplying the inhabitants of Braintree, Randolph, and

Holbrook with water. There it appeared that the corporation of the Proprietors of Mills on Monatiquot River "owned a dam which held up and regulated the waters of Great pond, and certain land and flowage rights in connection therewith, at or near the border of said pond, which dam and land and flowage rights acquired by and belonging to the said corporation were taken by the respondents under said act of 1885," etc.; and it was held that under St. 1885, c. 217, the corporation "was entitled to recover the market value of its dam, land, and flowage rights which were taken, as property distinct from the right to use the water of the river, which belonged to the mill owners on the stream, and that the mill owners could also recover for the injury to their estates, in being deprived of the use of a part of the water of the stream by the taking of the respondents." By the act of incorporation the Proprietors of Mills on Monatiquot River were given authority to make reserves of water in Houghton's pond, Cranberry pond, Little pond, and Great pond, and to erect suitable dams at proper places for the purpose of raising the water in said ponds "as high as its original bounds," and "to lower the outlet of said ponds, in such quantities, and at such times," as the proprietors or a major part of them should judge best. It appears by the petition that the corporation, before the year 1890, had exercised its powers, so far as concerned Great and Little ponds, so called (being both great ponds), and had used the waters of these ponds as reserved waters, but that about the year 1890 all of the waters of these ponds were taken, under the right of eminent domain, for the purpose of supplying the inhabitants of certain towns with water. The corporation had not exercised its rights under its charter, with reference to Houghton's pond, because, as is alleged, until the waters of Great and Little ponds had been taken it did not need to make a reserve of the waters of Houghton's pond. These waters flowed, as they had always flowed, through the natural outlet of the pond, and formed a part of the waters which flowed through the channel of Monatiquot river, past the mills of the other petitioners. After the diversion of the waters of Great and Little ponds from the Monatiquot river, there was need of new reserves of water, and the petition alleges as follows: "The outlet of Houghton's pond could be deepened at small expense, and a dam put there which would reserve a certain amount of water in this pond, that could be used during the dry season at the said mills, and which would be of value to take the place, to some extent, of the reserved waters diverted from Great and Little ponds. After said diversion of Great and Little ponds the proprietors' corporation had considered the question of such storing and using of the waters in Houghton's pond, and intended to take definite proceedings relative

thereto, although at the date of the action of the respondent, hereinafter set forth, no such definite proceedings had actually been taken." The claim of this petitioner, then, is that it has been prevented, by the taking of land and of rights in land by the board of metropolitan park commissioners, from erecting a dam and making a reserve of the waters of Houghton's pond, and that, therefore, the right which the corporation had to do this has been taken from the corporation. It is, as we understand, conceded by the counsel of the commonwealth that since the taking the corporation of the Proprietors of Mills on Monatiquot River cannot, without the consent of the commonwealth, lawfully erect dams, and change the outlet of Houghton's pond, upon the land taken by the commissioners. The act of incorporation (St. 1818, c. 35) was passed before the passage of St. 1831, c. 81, which provided that acts of incorporation thereafter passed should be liable to be amended, altered, or repealed at the pleasure of the legislature; and there is no power expressly reserved to the legislature in St. 1818, c. 35, to alter, amend, or repeal the statute. Whether it is subject to the provisions of St. 1808, c. 85, § 7, we have not found it necessary to consider.

It is contended in behalf of the commonwealth that the act of incorporation did not confer upon the corporation the right of eminent domain, and we think that this contention is true. There are no words that purport to grant the right to take private property, and no provision for compensation. The ponds described in the act are all great ponds. If it were necessary to take private property to exercise any of the rights and powers to make reserves of water, we think that the property must be acquired by purchase from the owners. The act, in this respect, is like that construed in *Thatcher v. Bridge Co.*, 18 Pick. 501.

It is suggested that the taking by the park commissioners impairs the franchise powers of the corporation. It does this, if it does it at all, by taking property upon which those powers might be exercised. If the corporation have no rights of property in the waters of Houghton's pond, the taking of these waters has not taken anything from the corporation, although there may be less property left, upon which, without the further consent of the commonwealth, the powers of the corporation may be exercised. If a corporation were empowered to erect and maintain dwelling houses anywhere within the city of Boston, a taking of land in Boston, which was not the property of the corporation, for the purpose of making a public park, upon which dwelling houses could not be built, would not be a taking of any franchises or property of the corporation, although the quantity of land on which the corporation might erect dwelling houses would be less after the taking than before. See *Boston Water-Power Co. v. Boston &*

W. R. Corp., 23 Pick. 360, 395. The question then is whether the commonwealth, by the act of incorporation, granted to the corporation any rights of property with reference to the waters of Houghton's pond which have been taken by the park commissioners. In *Proprietors of Mills on Monatiquot River v. Braintree Water Supply Co.*, 149 Mass. 478, 21 N. E. 761, the plaintiff had built and maintained a dam at the outlet of "Little Pond," so called, and had raised the water of the pond to high-water mark; making a valuable reserve of water in the pond, of about 110,000,000 gallons. It was contended by the defendant that the plaintiff had, at most, only a revocable license to use and enjoy the waters of the pond, which the commonwealth might terminate at its pleasure. The court in that case found it unnecessary to decide the question. In the present case there never has been any exercise by the corporation of its powers with reference to the waters of Houghton's pond, and the corporation never has had any possession or control of them before they became a part of the waters of Monatiquot river. The argument is that the commonwealth owned the waters of Houghton's pond, and, by the act of incorporation, granted to the corporation rights of property in them, which became vested, and which have not been lost by non-user, and which could not be taken away by the commonwealth, except for a public purpose, and then only by paying reasonable compensation. The act gives to the corporation "full power, liberty and authority, to make the reserves of water wished by them," etc., and this relates to the powers of the corporation; and the proprietors are "authorized and empowered" to erect suitable dams, lower the outlets of said ponds, and draw off the waters, etc., and this at least implies a permission to do these things, so far as the commonwealth could give permission. This charter seems to a majority of the court to resemble, with respect to the grant of powers, that of the Watuppa Reservoir Company, which was considered in *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 559 18 N. E. 465. A majority of the court there said: "By its charter this company was granted the power to make reserves of water in the 'Watuppa Ponds,' so called, by erecting a dam across the outlet of said ponds, in the town of Troy, in the county of Bristol, so as to raise the water in said ponds two feet higher than the dam already erected by the Troy Cotton & Woollen Manufactory in said town of Troy, and to draw off said reserved water in such quantities, at such times, and in such manner as they shall judge to be most for the interest of all concerned." St. 1826, c. 31. We do not think that this can be construed as granting any part of the pond, or any absolute and exclusive right to use and control the waters of the pond. It does not do this in terms, or by necessary implication. It is a familiar

rule that grants made by the government are to be construed in favor of the grantor, and this is especially true when they affect the interests of the people, which are held in trust by the government. The state is not presumed to grant away such rights or franchises, unless it is done in clear terms, or by an implication which is strictly necessary. *Com. v. Roxbury*, 9 Gray, 451; *Martin v. Waddell*, 16 Pet. 367, 411; *Canal Co. v. Wright*, 9 Watts & S. 9." This was a question distinct from the principal one in that case, and upon this the justices who dissented from the opinion of the majority upon the principal question said: "There is great force in the argument that by the acts of the corporation under its charter the contract of the commonwealth has become executed, and that the rights of the corporation have become vested so that they cannot be taken away without compensation,—at least, so long as the charter remains unrepealed." But no opinion was expressed by them upon the effect of that charter if the powers given to the corporation had not been exercised. That charter was expressly made subject to St. 1808, c. 65. In the present case it must be taken that no one of the plaintiffs ever owned the land at the outlet of Houghton's pond, or ever had acquired any right to enter upon this land for the purpose of damming up the water or deepening the channel, or for any other purpose. St. 1818, c. 35, conferred no such right. All that the corporation created by that statute acquired by it was the right to do certain things as a corporation, provided it should acquire from the owners the right to use the land on the borders of the pond. This, at most, was a possibility. Everything depended upon the corporation's acquiring, by purchase or otherwise, the right to enter upon the land at the outlet. The only right, in actual possession, which any of the plaintiffs ever had, was to have the water flow ut currere solebat. The owners of the land at the outlet and around the pond might sell it or give it away to whomsoever they pleased. They might have sold or given it to the park commissioners, and in that case the park commissioners would have succeeded to the rights of the former owners. But the park commissioners, instead of purchasing, have taken this land at the outlet, and all around the pond. If this taking had been made expressly subject to all the rights which the Proprietors of Mills on Monatiquot River had under St. 1818, c. 35, still that corporation could do nothing until it should obtain leave from the commonwealth, as owner of the land at the outlet, to build a dam there. As against the commonwealth, in its capacity of owner of this land, the corporation of the Proprietors of Mills on Monatiquot River has no right whatever; and the taking of the land at the outlet did no legal harm to the plaintiff, any more than if the commonwealth had bought it.

We have no occasion in the present case to express any opinion upon the rights in the waters of Houghton's pond which might have been acquired by the Proprietors of Mills on Monatiquot River if the powers given by the charter had been exercised by the purchase of land, and by building a dam and actually making reserves of waters in Houghton's pond. The powers of the corporation not having been exercised with reference to Houghton's pond, the corporation must stand, if at all, upon the effect of the charter in granting rights of property in the waters of Houghton's pond. The language of the charter seems to a majority of the court that of license and permission, rather than that of a gift, grant, or conveyance of property, and they are of opinion that by the charter it was not intended to grant to the corporation irrevocable rights of property in the waters of Houghton's pond. Demurrer sustained and petition dismissed.

(164 Mass. 257)

ROSS v. PEARSON CORDAGE CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1895.)

INJURY TO EMPLOYEE—NEGLIGENCE OF EMPLOYER.

Where one oiling a machine is injured by its starting up by a belt working from the loose pulley to the tight pulley, the employer is not liable, though the accident could not have happened had there been something with which to lock the lever used in shifting the belt from the tight pulley to the loose pulley and back again, there being no evidence that the machinery was defective or different from that in use elsewhere.

Appeal from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Bella Ross, by next friend, against the Pearson Cordage Company, for injuries received while in defendant's employ. There was verdict for defendant, at the direction of the court; and the case, at the request of plaintiff, is reported for the determination of the supreme judicial court. Judgment directed for defendant.

Hiram P. Harriman and Frederick J. Daggett, for plaintiff. Conrad Reno, for defendant.

LATHROP, J. The plaintiff, a girl 19 years of age, was injured by having her hand caught in the cogs of a machine called a "drawing frame," which she was cleaning. We assume, in her favor, that there was evidence for the jury that the machine started without its having been set in motion by a fellow servant. The remaining question is therefore whether there was any evidence which would warrant the jury in finding any breach of duty on the part of the defendant. The evidence as to the machine comes from an expert who was a witness for the plaintiff. He testified that the machine was started and stopped by what is called a "belt shipper," such as is used to

throw a belt from a tight to a loose pulley; that the machine was stopped by simply moving the lever by which the belt was thrown from the tight to the loose pulley, and the reverse movement to start the machine; that the shipper was two feet long, with nothing to hold it in its place, except that it was pivoted in the center; that, in the proper construction of such a machine, such levers are not ordinarily locked or clamped, unless the machine has some special danger; that a machine which required two persons to operate it—one at the end where the shipper is, and one at the other end—would make it necessary that there should be something to secure it; that a simple latch would secure it from allowing the belt to run on; that machines sometimes started by means of the belt getting a little twisted, and spreading on one side, which is liable to run on the fixed pulley from the loose pulley; that this will be done if a shaft tips or the belts are improperly adjusted for height; that this would be prevented by having the shifting bar latched or locked; and that it would also prevent the machine being started by any one striking against it. He further testified that the shipper was like the ordinary shipper, such as is used on an ordinary machine; that there was nothing unusual about it; that it was made in the ordinary way; and that he did not see any defect in it. There is certainly nothing in this evidence, with the exception, perhaps, of a single sentence, which tends to show any breach of duty on the part of the defendant. There is nothing in the case to show that there was any special danger in the machine, or that the shaft tipped, or that the belt was improperly adjusted, or that the belt had got twisted and spread on one side. It is true that the expert testified "that a machine which required two persons to operate it—one at the end where the shipper is, and one at the other end—would make it necessary that there should be something to secure it." He, however, gave no reason for this opinion, and we can conceive of none, except that the one near the shipper might accidentally strike against it. But we assume that there was no one in the room with her at the time. The machine had been stopped before the accident by a fellow servant; and it is obvious that, if the belt had not been entirely removed from the tight pulley to the loose one, there would be danger of the belt working onto the tight pulley, and starting the machine. See *Dingley v. Knitting Co.*, 134 N. Y. 555, 32 N. E. 35. The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to

warrant the jury in finding that there was any breach of duty on the part of the defendant.

In *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 875, there was evidence that the machine was not put up properly; that the driving pulley upon the main shaft had a convex surface, instead of a flat surface, such as it should have had, and was so fixed with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion onto the fixed pulley, and thus to start the machine. There was also evidence that other similar machines in the defendant's factory had previously started without being intentionally set in motion, so that the defendant might, by the exercise of reasonable care, have known the fact of the machines starting, and have remedied the defects. The case in these respects differs widely from the one at bar. In *Mooney v. Lumber Co.*, 154 Mass. 407, 28 N. E. 352, the plaintiff was injured by the automatic starting of a carriage connected with a sawing machine. It was undisputed that a machine which would so start was improperly constructed or adjusted. The machine had three days before the accident started automatically, and this was known to the defendant's foreman, who told the plaintiff, before the accident, that it had been repaired. Under these circumstances it was held that the jury were warranted in finding that the defendant was negligent. In *Connors v. Manufacturing Co.*, 156 Mass. 163, 30 N. E. 559, the plaintiff was injured by the starting of a stationary engine caused by a leak in the throttle valve. The engine was an old one when bought by the defendant, and he had caused it to be repaired, but nothing was done to the throttle valve. There was also evidence that the wear and tear which would produce the condition of things which caused the defendant to have the engine repaired would tend to cause a leaky throttle valve. It was held that the question of the defendant's negligence was for the jury. The two cases last cited differ widely from the one at bar. Judgment for the defendant.

(164 Mass. 247)

DWIGHT PRINTING CO. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 6, 1895.)

EMINENT DOMAIN—CONDEMNATION OF WATER RIGHTS—COMPENSATION.

Under the statute of 1872 (chapter 177), the city of Boston was authorized to take all the water of Sudbury river, said water to be taken at a point which was below petitioner's land. By application of the statute of 1846 (chapter 167) to that of 1872, the petition for damages for taking of water rights could not be filed until the water was actually withdrawn or diverted. Pursuant to the statute of 1872 the city took said water at the point aforesaid. Afterwards the city took and controlled the flow of certain

other waters which empty into Sudbury river, and purchased certain mills situated on said river above the premises of petitioner, but by the purchase of the mills no greater interference with the waters was created than had previously existed. *Held*, that inasmuch as the waters were not actually withdrawn from the channel of Sudbury river above the premises of petitioner, but were diverted from a point below, it could not, under the statute, claim damages for loss of water rights, though it might be entitled to compensation for loss of rights in the other waters which flowed into said river and were appropriated by said city.

Exceptions from supreme judicial court, Middlesex county.

Action by Dwight Printing Company against city of Boston to recover damages for appropriating certain water rights. Plaintiff had judgment, and defendant excepts. Exception sustained.

Frank P. Goulding and E. C. Bumpus, for petitioner. Andrew J. Bailey, for defendant.

FIELD, C. J. By St. 1846, c. 167, the city of Boston was authorized to take the water of Long pond, etc., and the water which may flow into and from it, and any other ponds or streams within the distance of four miles from said Long pond, and any water rights connected therewith; and also to take land around the margin of Long pond, and all land necessary for constructing reservoirs and laying aqueducts for the purpose of supplying the city of Boston with pure water. In the sixth section of this statute it was provided that the city should be liable to pay all damages that should be sustained by any persons in their property by the "taking of any land, water, or water rights," or by the constructing of any aqueducts, reservoirs, or other works, and that if the owner of any "land, water, or water rights" shall not agree with the city upon the damages, he may apply by petition for the assessment of his damages at any time within three years from the "taking of said land, water, or water rights." By the eighth section of the statute it was provided as follows: "No application shall be made to the court, for the assessment of damages for the taking of any water rights, until the water shall be actually withdrawn or diverted by the said city under the authority of this act; and any person or corporation, whose water rights may be thus taken and affected, may make his application aforesaid, at any time within three years from the time when the waters shall be first actually withdrawn or diverted as aforesaid."

It is not entirely clear what is meant by the distinction between the taking of water and the taking of water rights, but it may be suggested that, in general, the taking of a pond or a stream, with the water in it, is a taking of the land and of the water of the proprietors of the pond or stream where the taking is made; and is also a taking of the water rights of such other persons as

have the right to use the water elsewhere, such as lower proprietors on a stream. It is plain, however, whatever the distinction may be, that, under the statute, when what is called "land" or "water" is taken, the petition must be filed within three years from the taking; and that when what are called "water rights" are taken the petition must be filed within three years from the time the water is actually withdrawn or diverted. This implies that what is called the "taking of water rights" is a taking for the purpose of ultimately withdrawing or diverting the water for the use of the city of Boston.

By St. 1872, c. 177, the city was authorized to take all "the water of Sudbury river, so called, said water to be taken at any point or points within the town of Framingham or higher up on said river, and the water of Farm pond, so called, in said town of Framingham, and the waters which may flow into and from said river and pond, and to take any water rights in or upon said river or pond, in or above the town of Framingham or connected therewith." The city was also authorized by this section to take and hold, by purchase or otherwise, in connection with the said sources of supply, any lands and real estate necessary for increasing or preserving the purity of the water, or for laying, building, and maintaining aqueducts, water courses, reservoirs, dams, buildings, etc., for the purpose of conducting, elevating, purifying, storing, discharging, disposing of and distributing water, etc. By the fifth section of this statute the city is made liable "to pay all damages that shall be sustained by any persons in their property, by the taking of or injury to any land, real estate, water or water rights, or by the flowage of the lands of any persons, or by the interference with or injury to any use or enjoyment of the water of said river to which any person, at the time of such taking, is legally entitled, or by any other doings under this act; and in regard to such taking, injury, interference and flowage, and the ascertainment and payment of all such damages, the said city of Boston, and all persons claiming damages, shall have all the rights, immunities and remedies, and be subject to all the duties, liabilities and regulations" provided in St. 1846, c. 167, and St. 1850, c. 316. In the application of the statute of 1872 to that of 1846, so far as remedies are concerned, it seems that for every taking of land or of water, or of injury to or interference with land or water or water rights not amounting to a taking of water rights, or for injury to or interference with the use and enjoyment of the water of Sudbury river, the petition for damages by any person injured in his property must be filed within three years from the taking, or from the act which causes the injury or interference; but when water rights are taken the petition for damages cannot be filed until the water is actually withdrawn or diverted by the city.

On January 21, 1875, the city took all the water of Sudbury river at and above the dam built by the city of Boston in 1872 in Framingham, and all the water in the said dam to the source or sources of said river, all the water in Farm pond, all the water in the brook connecting Farm pond with the water of Sudbury river, and all the water in all streams, brooks, rivulets, or water courses of any kind, whether natural or artificial, that may flow into or from said Farm pond or into or from said Sudbury river at any point above said dam, subject to the restriction set forth in St. 1872, c. 177, § 4. The dam referred to was built below the premises of the petitioner, and it is at this dam that the city of Boston has connected its aqueducts with Sudbury river, and has withdrawn and diverted water from the channel of the river to be conducted to the city of Boston. The effect of this taking upon the right of the petitioner to damages was considered in a case between the same parties as the present, which is reported in 122 Mass. 533. On July 29, 1890, the city, in form, took substantially the same waters over again, and also took for "building and maintaining thereon a dam and reservoir for storing water for the sole use and benefit of said city," certain parcels of land, including Whitehall pond, so called, and the lands about it and under it, and the water rights in the pond and in the waters thereof, and the streams and ponds forming a part thereof and tributary thereto. On August 14, 1890, the city also took certain parcels of land near Indian brook, so called, including the brook, the water and the water rights in it and in all the streams and brooks tributary thereto, for the purpose of "building and maintaining thereon a dam and reservoir for storing water for the sole use and benefit of said city." Indian brook and Whitehall brook, which is the outlet of Whitehall pond, empty into the Sudbury river above the premises of the petitioner. All the damages for the taking of Whitehall pond and of Indian brook and of the waters thereof and of the water rights therein and of the lands under and about the same, we understand, have been agreed upon by the parties and paid by the city. The city, on January 27, 1891, bought and took conveyances of the Chattanooga Mills and mill privileges, including the mill dam and mill pond which are on Sudbury river above the premises of the petitioner, having, on January 2, 1891, taken said mills and mill privileges, mill dam and mill pond, under the statutes hereinbefore recited, "for the purpose of preserving and protecting the purity of the water for said city for the sole use and benefit of said city," and the city maintains the dam and pond and permits the water of Sudbury river to run over the dam, without any other interference with the stream. The city, also, on October 29, 1891, bought and took a conveyance of the Rocklawn Mills and mill priv-

illeges, including the mill dam and mill pond on Sudbury river several miles above the Chattanooga Mills; and, on the same 29th day of October, took, under the statutes hereinbefore recited, the said mills, dam, pond, and privileges "for the purpose of preserving and protecting the purity of the water for said city, for the sole use and benefit of said city," and the city has taken possession of the mills and has let them to a tenant, who has continued to operate said mills by means of the said dam and pond, and has controlled the water of the river for that purpose. It does not appear that the tenant has controlled the water in any other manner than a proprietor of an upper mill privilege at common law has a right to do. No water whatever, from any source, has been actually withdrawn or diverted from the channel of Sudbury river, or its tributaries, above the premises of the petitioner.

The only difference between the situation now and that at the time of the decision reported in 122 Mass. 583, is that Whitehall pond and Indian brook and the lands under and about them and the water in them have, since that decision, been taken by the city, and reservoirs have been constructed there, and are used for the purpose of storing water for the benefit of the city; and the water from these reservoirs is controlled in its flow into that river above the premises of the petitioner more or less by the city of Boston, for its benefit; and that since that decision the Chattanooga mill privileges and the Rocklawn mill privileges have been purchased by the city, and also taken by the city, with the mill ponds and mill dams connected therewith, for the purpose of preserving and protecting the purity of the water of the river for the benefit of the city. The flow of the water in Sudbury river has not been interfered with otherwise than by maintaining the storage reservoirs as aforesaid, and the dam at the Chattanooga Mills, and by operating the Rocklawn Mills in the same manner as they were operated before the city purchased and took them.

It is not contended by the petitioner that all the powers granted to the city by St. 1872, c. 177, were exhausted by the taking of the water of Sudbury river and of its tributaries on January 21, 1875. The petitioner, in effect, admits that under said statute there may be successive takings at different times by the city; and it files its petition under the special takings of Indian brook, Whitehall pond, Chattanooga Mills, and Rocklawn Mills, all of which were made long after the taking of January 21, 1875. The contention of the petitioner, as we understand it, is that by the taking of January 21, 1875, and by the taking of July 29, 1890, of substantially the same effect, the city took all of the water rights of the petitioner at and above the dam of the petitioner, in all of the water of Sudbury river and of

its tributaries above the dam, subject, of course, to the restrictions imposed by the statute of 1872; and that, by the other subsequent acts of the city of Boston hereinbefore recited, some of the water of the river or of its tributaries has been actually withdrawn or diverted from the river above the dam of the petitioner, within the meaning of St. 1846; and that therefore the petitioner is entitled to maintain its petition for damages sustained in the taking of all its water rights in said river and its tributaries. This contention is made on the theory that all of its water rights in the river have been taken subject to the restrictions of the Statute of 1872, and that the time of the filing of the petition for damages sustained by such taking was only postponed until there has been some withdrawal or diversion of the water, and that when this occurred, even though only a small part of the water was withdrawn or diverted, the right to file a petition for all the damages sustained by the taking accrues, and that the damages are the same as if all the water of the river subject to the restriction of the statute of 1872 had been actually withdrawn or diverted.

In the first place, there has been no actual withdrawal or diversion of any water from the channel of Sudbury river, in the ordinary sense of those words. We understand that the damages for the takings of Whitehall pond and Indian brook and their tributaries have been paid, although this is not entirely clear from the exceptions. The interference with the flow of the water in the river at Chattanooga Mills and Rocklawn Mills is no greater than existed before these mills were purchased and taken by the city, and it may deserve to be considered whether it is anything more than what the proprietor of lands on a running stream can rightfully cause in the exercise of his common-law right to make a reasonable use of the water as it flows through his land. There is nothing in the takings of Chattanooga Mills and Rocklawn Mills and their tributaries which purports to be a taking for the purpose of diverting the water or withdrawing it from the channel in which, before the taking, it was accustomed to run. As the statute of 1872 provides that damages may be recovered for an injury to or interference with water rights, or with the use and enjoyment of water, as well as for a taking of water rights and an actual withdrawal or diversion of the water, it is entirely unnecessary to interpret the words "withdrawal or diversion" in an unusual or an unnatural sense. We see no evidence of any actual withdrawal or diversion of the water of Sudbury river above the premises of the petitioner. The fundamental proposition of the petitioner is that the water in the Sudbury river and its tributaries were taken by the city by its taking of January 21, 1875. Why the city adopted the form of taking which it

used we do not know. The water of Sudbury river was actually withdrawn and diverted from the river for the use of the city of Boston at or just above the dam which the city erected in Framingham, and the water was actually taken and withdrawn at that point by the city. Having taken the water at that point, under the authority of the law, the city had a right to have the sources of the water naturally flowing in the river at that point kept in their natural condition, subject to such reasonable uses as upper proprietors on the river and its tributaries might make of the water. The right to have the water of all the tributaries of the river and of the river itself flow to the dam erected by the city as it had been accustomed to flow, subject to such reasonable uses, is secured to the city by the common law, and it was not necessary that there should be a special taking of the water rights throughout the whole extent of the river and its tributaries above its dam in order to secure to the city the natural flow of water to the dam. It is evident, we think, that the city never understood that by this taking of January 21, 1875, it acquired any property in the river above its dam and pond in addition to what the common law gave it; for, so far as appears, the city never exercised any rights over the river above its dam and pond, except under a purchase or a new taking, such as is shown in the present case. The theory of the petitioner is, in effect, that the city, having acquired all the water rights above its dam by the taking of 1875, could at any time, if it should purchase or take land necessary for the purpose, enter its aqueducts into the river at any point above the dam of the petitioner and withdraw the water without any new taking of the water or water rights. We are of opinion that this is not the legal effect of the taking of 1875 or of the similar taking of 1890, but that, notwithstanding the form of the takings, the legal effect was to take the water of Sudbury river at and just above the dam which the city constructed in Framingham, where its aqueduct was connected with the river, and where the water was withdrawn.

On this construction of the effect of the takings there has been no general taking of all the water rights of the petitioner in Sudbury river above its dam, subject to the restrictions of the statute of 1872. If any of its water rights in the river above its dam have been taken, it is by the takings of Indian brook, Whitehall pond, Chattanooga Mills or Rocklawn Mills, and we do not construe these takings as authorizing a withdrawal or diversion of the water from the channel of the river above the premises of the petitioner. On the construction that we have given to the statutes, and the effect of the takings by the city, if the city is liable for any damages to the petitioner it is for interference with the use and enjoyment of the water by the petitioner, so far as there has been any interfer-

ence with this use, or so far as the takings authorize any interference with this use, beyond the right of interference which at common law the city is entitled to exercise by virtue of its ownership of property. We infer that full damages have been paid to the petitioner for all injuries sustained by the takings of Indian brook and Whitehall pond and their tributaries, but if we are mistaken in this, then it may be that the petitioner is entitled to damages for such interference with the flow of the water in Sudbury river as the city may exercise under these takings. If by the taking of Chattanooga Mills or of the Rocklawn Mills, for the purposes indicated by the taking, the city can lawfully exercise rights of control over the water of the river beyond what belongs to it as proprietor of those mills, it may be that the petitioner is entitled to damages therefor, as for an injury to or interference with its water rights. We see no reason to doubt that the city could, under the statute of 1872, lawfully purchase those mill privileges and hold them, under the statute, for the purpose of preserving the purity of the water, and it may deserve to be considered whether the city, as such purchaser, has not the rights which belong to the proprietors of land under and on a natural stream. If the operation of the Rocklawn Mills through a tenant is ultra vires of the city this does not concern the petitioner if there is no invasion of its rights. There is nothing in the case indicating that the owner of the Chattanooga Mills or of the Rocklawn Mills was under any obligation to the petitioner to use his mill pond as a storage pond for the benefit of the petitioner.

On the view we have taken of the case, the exceptions must be sustained. Whether the petition should be dismissed or should be retained for the assessment of damages for some interference if there be any, with the use of the water, or for some right of interference with this use which the city has acquired by its takings, if it has acquired any, which does not amount to a withdrawal of the water, or a right to withdraw it, from the river, but which has caused or may cause injury to any rights which the petitioner has to have the water of Sudbury river flow past its premises as it was accustomed to flow, we need not now determine. Exceptions sustained.

(164 Mass. 232)

AUSTIN v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1895.)

INJURY TO BRAKEMAN—ASSUMPTION OF RISK— POSTS NEAR TRACK.

A brakeman injured, while climbing the side ladder of a car, by a post near the track, which was one of many similar structures equally near the track, and which he had passed every day in the course of his two years' employment, will be held to have assumed the risk, whether or not he actually knew of the danger.

Appeal from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Charles H. Austin against the Boston & Maine Railroad for personal injuries received by being struck by some part of a target gate structure, while about to climb the side ladder of a caboose. Verdict was directed for defendant, and at the request of plaintiff the case is reported for the determination of the supreme judicial court. Judgment for defendant.

Samuel C. Darling, for plaintiff. Solomon Lincoln, for defendant.

MORTON, J. We do not see how this case can be distinguished from *Lovejoy v. Railroad Co.*, 125 Mass. 79, *Thain v. Railroad Co.*, 161 Mass. 353, 37 N. E. 309, and *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500. The plaintiff had been employed as a freight brakeman on the Rockport freight for two years or more, and had had occasion to go by this post nearly or quite every day. The post was only one of many structures as near to the track as it was, and the plaintiff must be held to have taken the risk of injury from its proximity to the track, whether he actually knew of the danger or not. The slight sagging of the post towards the track, of which there was evidence, is not shown to have had anything to do with the injury to the plaintiff. Judgment for defendant.

(164 Mass. 296)

PERRY v. OLD COLONY R. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 14, 1895.)

INJURY TO RAILROAD EMPLOYE — NEGLIGENCE OF FOREMAN — PERSON IN CHARGE OF TRAIN "ON RAILROAD."

1. Plaintiff was sent by a foreman in charge of a roundhouse and of such repairs as are made there to repair an engine therein, by grinding in a check. While doing so, he was injured by the blowing down of the engine by the engineer. *Held*, that the foreman was not negligent in failing to give notice to the engineer, who knew that some one would be sent, that plaintiff had been sent, or to plaintiff of the dangers incident to the work, he being acquainted with them.

2. An engine in a roundhouse for repairs is not on a railroad track, within St. 1887, c. 270, making the employer liable for injury to an employé from negligence of an employé in charge or control of an engine or train "upon a railroad."

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by William A. Perry against the Old Colony Railroad Company. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

H. L. Boutwell and J. E. Kelley, for plaintiff. Benton & Choate, for defendant.

MORTON, J. This is an action for personal injuries, brought under St. 1887, c. 270. There are three counts in the declaration. The first and third counts allege negligence on the part of a person intrusted with and

exercising superintendence, and who was one Noyes, the foreman in charge of the roundhouse and of such repairs as were there made. The second count alleges negligence on the part of a person who had charge or control of a locomotive engine upon a railroad, and who was one Straw, the engineer of the engine on which the plaintiff was at work at the time of the injury. The evidence all comes from the plaintiff and his witnesses. It is nowhere expressly stated what was the nature of the repair which the plaintiff was sent to do upon the engine, but, from the fact that the repair principally referred to in the testimony was the grinding in of a check, we infer that that was in part, at least, what the plaintiff had to do; and we assume that Noyes knew it, either in the customary way, by a slip from the engineer, or in some other manner. It is said that when he sent the plaintiff to do the job he should have given notice to the engineer or fireman that he had been sent. But both the engineer and fireman knew that some one would be sent by the foreman to do the repair. And it hardly would seem necessary for the foreman to notify them that he had done what, in the ordinary course of things, they had every reason to expect he would do. There was nothing to show that there was anything unusual about the job, or in the manner or place of doing it. The place was dangerous, but the plaintiff knew that. He also knew that the engine would have to be blown down, if a check was ground in, and that that was done over the ashpit as commonly as anywhere. There was no negligence on the part of the foreman in failing to notify the plaintiff of what he well understood himself. There was nothing to show that it was customary, when men were sent to grind in checks, to notify the engineer or fireman, or anybody else, of the fact, and that they must be careful about blowing down, or that it had ever been done before, or that anything was omitted, in this case, on which the men habitually relied, or had a right to rely. There was testimony that the workmen looked out for themselves, as they needs must, in many things. Some details a foreman may safely ignore, or leave to the men over whom he has charge. We discover no evidence of negligence on the part of Noyes.

In the next place, even if Straw was negligent in blowing down,—which we do not decide,—we do not think that he had charge or control of a locomotive upon a railroad track, within the meaning of the act (St. 1887, c. 270). The statute, as it is said in *Thyng v. Fitchburg R. Co.*, 156 Mass. 18, 13 N. E. 169, "seems chiefly to contemplate the dangers from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements." This engine was stalled in the roundhouse

for repairs, and was not "upon a railroad track," as those words are ordinarily used. The case would be different, perhaps, if it had been standing on a track, waiting to be coupled to a train, or for some temporary purpose. If the engine had been in the repair shop, no one, we think, would contend that it was upon a railroad track, within the fair meaning of the act. The fact that it was in the roundhouse, instead, where such repairs were made as could be made comfortably, does not, it seems to us, make any difference. It is also a matter of great doubt whether the engine was in the charge or control of Straw. The testimony tended to show that when an engine came into the roundhouse it was generally assigned to a pit, the tender brake set up, and the wheels blocked, and then the engineer went off, and the engine was in charge of the train dispatcher; or, as the plaintiff put it, "the engineer had no duties in the roundhouse, any more than, if he has a little job on his engine to do, he does it," which is far from saying that in the roundhouse he has charge or control of the engine. The blowing down of the engine was in response to an outside suggestion, and might as well have been done by any one else, for aught that appears. But, even if the engine was in charge or control of Straw, that is not sufficient. In order to make the defendant liable, it must also have been upon a railroad track, which we do not think it was.

The views expressed above make it unnecessary to consider the question of the plaintiff's due care. The result is that a majority of the court think the exceptions should be sustained, and it is so ordered.

(164 Mass. 235)

CROWELL et al. v. CAPE COD SHIP-CANAL CO. et al.

(Supreme Judicial Court of Massachusetts. Barnstable. Sept. 6, 1895.)

PARTIES—DISTRIBUTION OF FUND.

Where a corporation was required by law to deposit certain moneys with the treasurer of the commonwealth to indemnify those who should sustain damage by the construction of a canal, and the fund was insufficient to pay all claims, a bill to have certain damages paid out of the fund should make all interested therein parties to the suit.

Report from supreme judicial court, Barnstable county; James M. Morton, Judge.

Bill by Crowell and others against Cape Cod Ship-Canal Company and another to have their judgment paid out of certain funds deposited with the treasurer of the commonwealth. A demurrer to the bill was sustained. Remanded for further proceedings.

H. P. Harriman and F. J. Daggett, for plaintiffs. George Putnam, for defendants.

LATHROP, J. St. 1833, c. 259, incorporating the Cape Cod Ship-Canal Company, by section 19 provides for a deposit by the defendant of the sum of \$200,000 with the treasurer

of the commonwealth, and that "the supreme judicial court shall have jurisdiction in equity to apply said deposit to the payment of any damages caused by the laying out, construction and maintenance of said canal, and for all claims against said company for labor performed and furnished, and for land or materials taken or used in the construction of said canal." The plaintiffs have recovered a judgment against the Cape Cod Ship-Canal Company, amounting to \$2,260.53, for damages occasioned by the taking of their land for the construction of a canal, and seek by this bill in equity, which is brought against the canal corporation and the treasurer of the commonwealth, to have their judgment, with interest, paid out of the sum of \$200,000, which was deposited as required by the statute. It appears from the answers of the defendants, which it is agreed are to be taken as true, that there are other claims pending against the defendant corporation by persons who contend that they are entitled to share in the fund, which, if allowed, will more than exhaust the fund; and the defendant corporation contends that before the claims of the plaintiffs are ordered to be paid an inquiry should be had, to give all persons interested or claiming to be interested in the fund an opportunity to appear and present their claims, in order that the fund, if not sufficient to pay all claims that may be allowed, may be equitably distributed. On the facts stated we have no doubt that the contention of the defendants should prevail. The fund in question is for the benefit of all persons having claims within the terms of the statute. If it is insufficient to pay all in full, it should be divided ratably among them. A bill in equity in such a case as this, as in the case of a creditors' bill, or a suit for the administration of a trust fund, should make all persons interested in the fund parties. *Smith v. Williams*, 116 Mass. 510; *Libby v. Norris*, 142 Mass. 246, 7 N. E. 919. See, also, *Richmond v. Irons*, 121 U. S. 27, 44, 7 Sup. Ct. 788. If this is not done, the bill may be treated as brought in behalf of all parties in interest, and an opportunity given them to come in and present their claims. *Hallett v. Hallett*, 2 Paige, 15, 19. The case must therefore be remanded to the county court, that an order of notice may issue to all persons interested to present their claims by a certain time. So ordered.

(164 Mass. 209)

LEWIS v. NORTON.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 5, 1895.)

EXECUTION — SALE OF LAND — AUTHORITY OF CONSTABLE.

Pub. St. c. 27, § 114, authorizes a constable, within his own town only, to serve any writ or other process. Pub. St. c. 172, § 29, requires an officer selling land on execution to post a notice of such sale in the city or town in which the land is, and in two adjoining cities or towns in the same county, if there are so many. *Held*,

that an execution sale of land by a constable of the city in which the land lies is void when it appears that there are other towns in the same county, since he has no jurisdiction to post in such towns the notices required by statute.

Appeal from superior court, Suffolk county; Frank T. Ware, Judge.

Writ of entry by Frank Lewis against Mary E. Norton. From a judgment for tenant, demandant appeals. Affirmed.

W. B. Stevens, for appellant. Chas. H. Sprague, for appellee.

KNOWLTON, J. The principal question argued before us was considered and decided in *Lewis v. Norton*, 159 Mass. 432, 34 N. E. 544, and a majority of the court are of opinion that there is no good reason for changing the decision then announced. For more than 200 years constables have been elected by the towns of this commonwealth, and have been regarded as town or city officers. 1 Prov. Laws (State Ed.) 65; *Leavitt v. Leavitt*, 135 Mass. 191. Except in a few cases, for which special provisions are made by the statutes, they can do nothing officially outside of the cities or towns in which they are elected. Pub. St. c. 27, §§ 113, 114, 122; *Leavitt v. Leavitt*, *ubi supra*. The special provisions of the statutes do not include authority to act in making a sale of land upon an execution. Pub. St. c. 27, §§ 121, 122; Id. c. 154, § 31; Id. c. 155, § 44; Id. c. 161, § 41; Id. c. 170, §§ 12, 22; St. 1885, c. 289. An attempt of a constable to do anything without express authority from a statute in the service of a writ or execution outside of the city or town for which he is elected is like a similar attempt of a deputy sheriff to serve a writ outside of the county for which he has a commission; it is wholly void. See *Lee v. Wells*, 15 Gray, 459. The constable who made the levy in the present case had no jurisdiction in any city or town adjoining Boston to post or cause to be posted notifications of the sale under his levy as required by the statute, and his levy and sale were ineffectual to pass a title to the real estate. A constable can serve civil process under Pub. St. c. 27, § 114, in personal actions, where the damages are laid at a sum not exceeding \$300, provided that the particular service which he attempts can be completed "within his town"; but if an indivisible official act of service requires action outside of the city or town for which he is elected, it must be done by an officer of more extensive jurisdiction. Judgment for the tenant.

(164 Mass. 210.)

FOWLE v. CHILD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 5, 1895.)

ASSUMPSIT—EVIDENCE—OTHER FRAUDS.

1. On a suit for money had and received, which defendant claimed was deposited as collateral for a note, the note is admissible in evi-

dence, though it has been pleaded as a set-off by defendant in a suit pending against him by plaintiff on another claim.

2. On a suit for money deposited as security for a note in a safety vault, which neither party could open except in the other's presence, or with his written consent, it appeared that defendant, with plaintiff's written consent, went to the vault, and found only worthless paper. *Held*, that evidence of other acts of fraud by plaintiff in course of his transactions with defendant during the same period of time were admissible to prove that he removed the money himself by fraud while at the vault with plaintiff.

3. Evidence that, on a criminal prosecution of the plaintiff for one of the frauds testified to, he was acquitted, was properly excluded.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Action by Joseph Fowle against Linus M. Child and another for money had and received. From a verdict for defendants, plaintiff brings exceptions. Exceptions overruled.

W. H. Baker and C. H. Welch, for plaintiff. R. M. Morse, for defendants.

BARKER, J. 1. The first and second exceptions may be disposed of together. The notes given by the plaintiff to the defendants upon the adjustment of the accounts between them in May, 1886, were secured by pledge of the money which the plaintiff sought to recover in this action, and were admissible in evidence for the defense, upon the issue whether, if they took that money, they were entitled to retain it as collateral security for the notes. The record of the former suit, in which the notes were pleaded in set-off against the plaintiff, showed that the suit was still pending. As it had not gone to judgment, the notes were not extinguished, and the record offered by the plaintiff was immaterial, and was rightly excluded. Until the notes were extinguished, the right to retain the collateral pledged as security for their payment remained in the defendants.

2. The next class of exceptions is to the admission of evidence that, during the period covered by the transactions upon which the plaintiff's suit is founded, he committed other frauds upon the defendants in other transactions in which they lent him money. This evidence was introduced in support of the defendants' contentions that they took no money from the safety vaults, and that they found in the vaults nothing but worthless bundles, secretly substituted by the plaintiff for the money which he had himself fraudulently removed. Acts which are part of one general scheme or plan of fraud, designed and put in execution by the same person, are admissible to prove that an act which has been done by some one was in fact done by the person who designed and pursued the plan, if the act in question is a necessary part of the plan. *Com. v. Robinson*, 146 Mass. 571, 577, 16 N. E. 452. See, also, *Wiggin v. Day*, 9 Gray, 97; *Lynde v. McGregor*, 13 Allen, 172; *Jordan v. Osgood*, 109 Mass. 457; *Haskins v. Warren*, 115 Mass.

514; *Horton v. Weiner*, 124 Mass. 92; *Com. v. White*, 145 Mass. 392, 14 N. E. 811. And the plan itself and the acts done in pursuance of it may all be proved by circumstantial evidence. *Com. v. Robinson*, *ubi supra*. The transactions shown in the evidence in the present case were very strange and peculiar. One reasonable explanation of them is that they disclose a plan by which the plaintiff designed to cheat the defendants after first obtaining their confidence by showing them that he had money in large amounts, by intrusting his money to their keeping, borrowing from them upon their belief that they had it in their keeping, and, when his borrowing had reached a sufficient extent, cheating them by secretly removing his money from their possession by sleight of hand, and substituting in its stead something of no value. All the transactions put in evidence were between the same parties, during the same period of time, and were of the general character of confidence games, carried through by deception and jugglery. They may well have been parts of a single plan, the chief end of which was the abstraction by the plaintiff of the money from the safety boxes; and, if so, any acts done by him in pursuance of that plan were competent to show that it was he who did the act which was its necessary culmination if successfully carried through.

3. The remaining exception is to the exclusion of evidence that the plaintiff had been acquitted in a criminal prosecution for one of the frauds, evidence of which was admitted against him. But that acquittal was res inter alios, like the withdrawal of suits by other parties in *Haskins v. Warren*, 115 Mass. 514, 538. Because the defendants were strangers to the judgment offered, it could not affect them. *Com. v. Waters*, 11 Gray, 81; *Cluff v. Insurance Co.*, 99 Mass. 317, 325; *Parker v. Kenyon*, 112 Mass. 264. Exceptions overruled.

(164 Mass. 241)

DAVIS v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1895.)

CONTRACT BY STATE—CONTINGENT COMPENSATION
—VALIDITY—ESTOPPEL.

1. A contract by a state authorizing a person to prosecute a claim, and providing that his compensation should be a certain per cent. of the amount collected by him, to be paid out of the proceeds thereof, is not void, as against public policy, because making the payment of compensation contingent on success; the contract being authorized by the legislature, which empowers the governor and council, on behalf of the state, to appoint an agent to prosecute the claim, and to fix his compensation, to be paid out of any amount received therefrom.

2. After the state had employed petitioner to prosecute its claim against the United States for a refund of the direct tax paid under Act Cong. Aug. 5, 1861, his compensation to be a per cent. of any amount he might collect, to be paid out of the proceeds received therefrom, he helped to procure the passage of Act Cong. March 2,

1891, appropriating money to reimburse to the states the amount of such taxes collected from them; providing that no money should be paid thereunder to any state till it had accepted the trusts imposed by the act; imposing as trusts the condition that, where the sum credited to any state had been collected by the United States from inhabitants of the state, it should be held in trust by the state for the persons from whom it was collected; and providing that no part of the money appropriated by the act should be paid out by any state to an agent under any existing contract for services. Thereafter the state accepted the appropriation and the trusts, by a resolve drawn, at request of the state auditor, by petitioner. *Held*, that even if the provision against payment by the state to an agent out of the money appropriated be considered as part of the trust created by the act of congress, and as applying where the direct tax had not been collected from inhabitants of the state, but had been paid by the state itself, the state would not be relieved from paying petitioner; his conduct not having amounted to a waiver of compensation, but merely of the condition that it should be paid out of the money received from the United States.

Appeal from superior court, Suffolk county.

Petition of Theodore E. Davis against the commonwealth of Massachusetts for compensation for services. A demurrer to the petition was overruled, and defendant appeals. Affirmed.

The resolve of the legislature of March 20, 1888, referred to in the opinion, was as follows: "Resolved, that the governor and council are hereby authorized to employ the agent of the commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the commonwealth for a refund of the direct tax paid under act of congress approved August fifth in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, also to fix his compensation, which shall be paid out of any amount received therefrom."

The order of February 5, 1890, of the governor and council was as follows: "Ordered, that Theodore E. Davis, of Washington, D. C., agent of the commonwealth for the prosecution of war claims against the United States, be, and he is hereby, authorized to prosecute also the claim of the commonwealth for a refund of the direct tax paid under act of congress approved August fifth in the year eighteen hundred and sixty-one, and that his compensation be two per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom, and paid into the treasury of the commonwealth; the same to be in full for compensation and expenses on account of said claim."

Hosea M. Knowlton, Atty. Gen., J. Mott Hallowell, 2d Asst. Atty. Gen., for the Commonwealth. John D. Long and William Schfield, for appellee.

FIELD, O. J. This is a petition against the commonwealth, under Pub. St. c. 195, as amended by St. 1887, c. 246. The common-

wealth demurred to the petition. The superior court overruled the demurrer, and ordered judgment for the petitioner; and the commonwealth appealed to this court. The order of the governor and council passed February 5, 1890, seems to us within the authority granted by the resolve of March 20, 1888, and we have no doubt that the legislature had the constitutional power to pass the resolve. We cannot declare the contract made with the petitioner by the governor and council void as against public policy, because the legislature has sanctioned it. Whether a similar contract between private individuals, in which the compensation to be paid is made contingent upon success, would be deemed at common law void, as against good morals and public policy, we need not consider. The legislature can determine for itself what public policy requires or permits to be done in the prosecution in any form of claims of the commonwealth against the United States. It is not bound, in fixing the compensation of its agents, to conform to the rules of the common law as interpreted by the courts, or to pass a general law whereby individuals shall be put upon the same footing as the commonwealth in the prosecution of similar claims.

The more difficult question in the case is whether the obligation of the commonwealth to the petitioner is affected by the act of congress of March 2, 1891, and by the acceptance of the money by the commonwealth from the United States under the resolve of April 8, 1891. By that resolve the commonwealth accepted in full satisfaction of all claims against the United States on account of the collection of the direct tax under the statute of the United States approved August 5, 1861, the money which had been credited to it by the secretary of the treasury of the United States, under the provisions of the statute of the United States approved March 2, 1891; and the commonwealth further accepted all trusts imposed upon it by the provisions of the last-named statute. The statute of the United States approved March 2, 1891, appropriated the money necessary to reimburse to each state and territory the amount of the direct tax collected under the statute of the United States approved August 5, 1861; and it provided that "no money shall be paid to any state or territory until the legislature thereof shall have accepted by resolution the sum herein appropriated and the trusts imposed in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the governor to receive said money for the uses and purposes aforesaid." The trusts imposed by this statute are "that where the sums or any part thereof credited to any state, territory, or the District of Columbia have been collected by the United States from the citizens or inhabitants thereof, or any other person either directly or by sale of property, such sums shall be held in trust by such state, territory, or District of Columbia, for

the benefit of these persons or inhabitants from whom they were collected or their legal representatives." In this commonwealth the tax was not collected by a levy upon the inhabitants, but was paid by the commonwealth out of its treasury, and therefore this commonwealth did not receive the money upon the trust above mentioned. This statute of the United States also provided as follows: "That no part of the money hereby appropriated shall be paid out by the governor of any state or territory or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any state or territory and any attorney or agent. All claims under the trust hereby created shall be filed with the governor of such state or territory and the commissioners of the District of Columbia, respectively, within six years next after the passage of this act; and all claims not so filed shall be forever barred, and the money attributable thereto shall belong to such state, territory, or the District of Columbia, respectively, as the case may be." We consider the statute to mean that no part of the money received shall be paid out to any agent or attorney under any contract for services made before or existing at the time of the passage of the statute, but we doubt whether this provision can be regarded as a part of the trust created by the statute. We are inclined to think that the commonwealth, after it received the money, held it as its own absolute property. It may be doubtful whether this provision of the statute last cited was intended to apply to states which had paid the tax out of their treasuries; but, if it be considered as including all the states, then the reception of the money by the commonwealth under the statute may be held to imply a promise on the part of the commonwealth to the United States that it will not pay out of any of the money so received any compensation to any agent or attorney under any contract for services made before the passage of the statute. Assuming this to be so, what is the legal effect of such a promise upon the claim of the petitioner against the commonwealth? If the petitioner has performed his contract with the commonwealth, and, according to the terms of the contract, has become entitled to his compensation, we think that it would be no defense for the commonwealth that it had promised the United States that it would not pay to him his compensation. It may be conceded that congress, in appropriating money to be paid out of the treasury of the United States to the states, can impose upon it any trust which it sees fit, and that the states, if they accept the money, are bound to carry these trusts into effect.

The most formidable argument is that as the original resolve provided that the compensation of the agent to be employed "shall be paid out of any amount received" from the United States, and as the order under which the petitioner was employed provided

that "his compensation be two per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom, and paid into the treasury of the commonwealth, the same to be in full for compensation and expenses on account of said claim," the petitioner, by assenting to the commonwealth's receiving the money under the act of congress which in effect provided that no part of the money, when received, shall be paid to him, has waived his claim for compensation or is estopped from asserting it. The petitioner not only alleges that he helped to procure the passage of the act of congress, but, in the eighth paragraph of his petition, alleges also the following: "Eight. Your petitioner says that very soon after the passage of the said act of congress of March 2, 1891, to refund the direct tax, the chief clerk of the state auditor's office under the direction of the then state auditor, Mr. W. D. T. Trefry, wrote to him at Washington, and requested him to prepare the form of a resolve for the legislature to pass, in accordance with the requirement of said act of congress, accepting the sum therein appropriated, and also the proper form of a claim to be made upon the treasury department of the United States for obtaining the money, and that both of said forms were prepared by your petitioner and forwarded, and were used by the commonwealth in obtaining said money," etc. It is plain from these allegations that it must be considered that the petitioner assented to the commonwealth's receiving the money on the terms provided in the statute of the United States of March 2, 1891. The promise implied on the part of the commonwealth, if one is to be implied from its acceptance of the money under such a statute, may certainly be regarded as importing at least a moral obligation, which it may be the duty of the commonwealth to keep. Is it to be inferred that the petitioner, in procuring the passage of the statute, and in assenting to the commonwealth's receiving the money under it, intended to waive altogether his claim for compensation? We think not. Congress, in the statute, did not undertake to declare void any contracts theretofore made between the representative of any state and an agent or attorney. Congress only provided that the money appropriated should not be used to pay for the services of any such agent or attorney. If the money was to be held in trust by the state for the persons from whom the tax was collected, this was a necessary provision if these persons were to be paid in full out of it; but if the money was not held in trust by the state, but belonged to the state absolutely, it is largely a matter of form whether the obligations of the state shall be discharged out of the money received from the United States or out of other funds of the state. We think that due effect can be given to the conduct of the petitioner if we hold that, at most, it amounted to an assent on his part

that he need not be paid out of the money received from the United States, and that the commonwealth, so far as he is concerned, may keep its promise to the United States. But the petitioner has in substance performed his part of the contract, and the commonwealth has fully received the benefit contemplated by such performance; and, whether the contract was a provident one or not, the commonwealth ought, in substance, to perform its part of the contract, and we see no legal difficulty in its doing so. The principal thing promised is a certain amount of compensation, to be determined in a certain manner. It is a subordinate and separable part of the contract that the compensation shall be paid out of the proceeds, and this last may be waived or modified by the parties without a cancellation or avoidance of the whole contract. We are of opinion that the commonwealth is bound to pay the amount of the compensation agreed upon from any appropriation that may be made for the purpose. See Pub. St. c. 195, § 4. It was agreed by the attorney general at the argument that, if the demurrer should be overruled, judgment should be entered against the commonwealth. Judgment accordingly.

(184 Mass. 370)

PENDERGAST v. TIBBETTS et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1895.)
WILL—EFFECT OF CODICIL.

A will gave certain legacies to certain of testator's relatives,—among others, \$10,000 to each of three nieces,—and then divided the residue among all such legatees in proportion to the amounts thus given. A codicil revoked their legacies, and, in place thereof, gave to each of said nieces \$5,000, and gave to each of three other nieces, not named in the will, \$5,000. The codicil then ratified and confirmed the will in all other respects than those named in the codicil. *Held*, that the provision for the three nieces mentioned in the codicil for the first time did not entitle them to come in under the residuary clause, and that the three nieces mentioned in the will took under the residuary clause, on the basis of a legacy of \$10,000 to each of them.

Case reserved from supreme judicial court, Suffolk county; John Lathrop, Judge.

Suit by George H. Pendergast against Sarah Matilda Tibbetts and others to determine how property should be distributed among defendants under the will and codicil of John Tibbetts, deceased. At the request of the parties the case is reserved, on the bill and answers, for the determination of the full court.

Samuel S. Harris, for plaintiff. Worcester, Gafney & Snow, for defendants Abby Nutter, Susan Whitehouse, and Lydia Varney. John F. Tyler, for defendants Sarah Matilda Tibbetts, Mary Ann Silsbury, and Frank W. Tibbetts.

MORTON, J. By his will the testator gives various pecuniary legacies to and for certain

person named therein, who are all relatives, and then divides the rest and residue among them in proportion to the respective amounts thus given. Among the legatees named in the will are Abby Nutter, Susan Whitehouse, and Lydia Varney, all nieces of the testator, who are given in the second clause the sum of \$10,000 each. By the codicil (clause 2) the testator revokes their legacies, and, "in place thereof," gives and bequeaths to each of his said nieces the sum of \$5,000, and, by clause 3, gives to three other nieces, who are not named in the will, \$5,000 each. The first clause in the codicil appoints an executor and trustee in the place of one deceased, and the fourth and last clause ratifies and confirms the will in all other respects than those named in the codicil. The questions are—First, whether the change made by the codicil in the legacies of Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney affect their shares under the residuary clause in the will; and, secondly, whether the legacies given in clause 3 of the codicil to the three other nieces entitle them to come in under the residuary clause in the will.

Dealing with the last question first, it is to be observed that there is nothing in the codicil which provides in terms that the three nieces who are named for the first time in it shall share in the residue, whose distribution is provided for in the will. Neither is there in the will. The language there is, "all the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath to the same persons and in the same proportions as I have given the money legacies hereinbefore named," which manifestly does not include them. The general rule is that "the codicil shall change the will so far only as the intent is manifest, especially when, in all other respects, the will is, in terms, ratified and confirmed," which is the case here. *Quincy v. Rogers*, 9 Cush. 291, 295; *Chapin v. Parker*, 157 Mass. 63, 81 N. E. 713. It is argued that the general plan of the will is to give certain legacies to relatives of the testator, and then to divide the residue among them in like proportions; that the will and the codicil are to be read together, as one instrument (*Gray v. Sherman*, 5 Allen, 198); and that, naturally, the testator would intend to include the nieces mentioned in the codicil in the distribution of the residue. The difficulty with this is that the codicil expressly provides that the will is to remain as it is, save as altered by the codicil, and that that does not manifest any intention on the part of the testator that they shall share in the residue. We think that they take simply the legacies that are given them by the codicil, and no more.

The application of the rule above stated disposes, it seems to us, of the first question, also. The rule is again stated in *Tilden v. Tilden*, 18 Gray, 108, in these words: "A codicil duly executed is an addition or sup-

plement to a will, and is no revocation thereof, except in the precise degree in which it is inconsistent therewith, unless there be words of revocation,"—and then, it might be added, only to the precise extent of the revocation. See, also, *Holden v. Blaney*, 119 Mass. 421. The reducing of the legacies given to Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney, in the second clause of the will, from \$10,000 each to \$5,000, and giving the amounts thus taken from them to the other three nieces named in the codicil, is consistent with an intention on the part of the testator to have Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney to share in the rest and residue, as the will provides that they should. Though the will and codicil are to be taken together, in ascertaining what disposition is made by the testator of his estate, the will remains, save as altered by the codicil. The latter does not, in terms or otherwise, purport to deal with the rest and residue; and we think that it would be going too far to infer that the testator intended to change the distribution of the rest and residue because certain legacies named in the will are reduced by the codicil, and, as thus reduced, are given in place of those named in the will. The testator well may have been content that the sums named in the will should stand, notwithstanding the reduction by the codicil, as the basis for the distribution of the rest and residue. At any rate, that is the way the will reads, and, in the absence of anything in the codicil plainly indicating a contrary intention, we must take the will as it stands. We think that this construction is in accordance with the cases, except, perhaps, *In re Courtauld's Estate*, *Courtauld v. Cawston*, Wkly. Notes (London, 1882) 185, which stands on its own facts, and does not appear to have been followed. *Quincy v. Rogers*, supra; *Chapin v. Parker*, supra; *Wetmore v. Parker*, 52 N. Y. 450; *Colt v. Colt*, 32 Conn. 422; *In re Gibson's Trusts*, 2 Johns. & H. 656; *Lushington v. Boldero*, Coop. 216; *Hilliersdon v. Grove*, 21 Beav. 518. Decree accordingly.

(164 Mass. 274)

EASTERN ELECTRIC CABLE CO. v.
GREAT WESTERN MANUF'G
CO. et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1895.)

CREDITORS' BILL—ASSETS OF DEBTOR—EQUITABLE
RELIEF.

1. A corporation executed a mortgage to a trustee to secure its bonds, and delivered its bonds to the trustee to sell, subject to its order; the proceeds, on sale, to be turned over to it. *Held*, that the bonds in the hands of the trustee were not property or assets of the corporation which a creditor could reach, but merely its unsatisfied obligation.

2. Neither can the corporation be compelled to issue the bonds for the purpose of borrowing money to pay a creditor.

3. Nor are the rights of the corporation against the trustee to any surplus after the

mortgage is paid, or to a release in case the bonds are paid in full, or to require the return of the bonds in the trustee's hands,—there having been no default or foreclosure, or payment of the bonds issued, or demand for a release or for a return of the misused bonds,—property that can be reached and applied in payment of debts due a creditor of the corporation.

Appeal from supreme judicial court, Suffolk county; James M. Morton, Judge.

Suit by the Eastern Electric Cable Company against the Great Western Manufacturing Company and the American Loan & Trust Company. The bill was dismissed, and plaintiff appeals. Affirmed.

The bill was as follows: "(1) The defendant Great Western Manufacturing Company is indebted to the plaintiff in the sum of eight thousand nine hundred and sixty-one dollars and ninety cents (\$8,961.90), with interest, according to certain promissory notes and a certain draft, copies of which are hereto annexed, marked, respectively, A, B, C, D, E, F, and G. (2) The plaintiff is informed and believes, and, upon information and belief, alleges, that on or before the 27th day of November, A. D. 1894, the defendant Great Western Manufacturing Company executed and delivered to the defendant American Loan & Trust Company, as trustee, a certain mortgage of its plant located in the city of Duluth, Minn., to secure the payment of a series of bonds amounting to one hundred thousand dollars (\$100,000), and that said mortgagor has delivered to said defendant American Loan & Trust Company the aforesaid bonds. (3) The plaintiff is further informed and believes, and, upon information and belief, alleges, that said bonds were issued and delivered as aforesaid for the purpose of being sold by said American Loan & Trust Company, the proceeds thereof to be turned over to the defendant Great Western Manufacturing Company; that since said 27th day of November said American Loan & Trust Company has delivered to sundry parties, as requested by the defendant Great Western Manufacturing Company, said bonds, to the extent of eighty thousand dollars (\$80,000); and that said American Loan & Trust Company now has in its possession the remaining bonds of said issue, amounting to twenty thousand dollars, to be held and disposed of by it subject to the order of said Great Western Manufacturing Company,—the proceeds, upon sale, to be turned over to said Great Western Manufacturing Company. (4) The defendant Great Western Manufacturing Company, so far as the plaintiff is informed and believes, has no other property within the commonwealth which the plaintiff is able, by any process, to reach and apply to the liquidation of its debt, and if the defendant Great Western Manufacturing Company is allowed to withdraw said twenty thousand dollars (\$20,000) of bonds, or the proceeds thereof, from said American Loan & Trust Company, the plaintiff will have no security for the payment of its said debt. The plaintiff is unable to effectually reach said twenty thousand

dollars (\$20,000) of bonds by means of attachment at law, or trustee process, by reason of the fact that only a part of its debt, as represented by said promissory notes, copies of which are hereto annexed, is yet due. (5) The defendant Great Western Manufacturing Company has heretofore agreed with the plaintiff that it would pay to the plaintiff a part of its said debt out of the proceeds of said issue of bonds, but has failed so to do. Wherefore, the plaintiff prays (1) that the defendant American Loan & Trust Company may be temporarily restrained, by order of this honorable court, from delivering to the defendant Great Western Manufacturing Company, or its representatives, the balance of the bonds in its hands, or the proceeds thereof; (2) that said injunction may be made perpetual; (3) that an account may be taken and judgment entered in behalf of the plaintiff against the Great Western Manufacturing Company for the debt actually found due from said defendant to the plaintiff; (4) that the plaintiff have a decree that said bonds be sold, and the proceeds thereof reached and applied to the payment of the plaintiff's said debt."

Sherman L. Whipple and Hollis R. Bailey, for plaintiff. Johnson, Clapp & Underwood, for defendants.

MORTON, J. The bonds in the possession of the trust company were the unissued obligations of the manufacturing company. The trust company had made no advance upon them, and could not issue them, except, as the bill stated, by the order of the manufacturing company. The unissued notes or bonds of a party, in his possession and control, do not constitute a part of his property or assets. *Richardson's Ex'r v. Green*, 133 U. S. 30, 47, 10 Sup. Ct. 280; *Coddington v. Gilbert*, 17 N. Y. 489. See, also, *Barnes v. Railroad Co.*, 12 Hun, 126; *Sickles v. Richardson*, 23 Hun, 539; *Cook, Stock & Stockh.* § 762; *Jones, Corp. Bonds* (2d Ed.) § 182. And a party cannot be directly compelled to issue his notes or bonds for the purpose of borrowing money to pay his debts.

The plaintiff further contends that there are valuable rights which the manufacturing company has against the trust company which can be reached and applied, and which are—First, the right to any surplus that may remain after the mortgage is paid; secondly, the right to a release in case the bonds are paid in full by the manufacturing company; and, thirdly, a possible right to require the return of the bonds which are in the hands of the trustee. There has been no foreclosure or default of the mortgage; there is no present surplus in the hands of the mortgagee to which the manufacturing company is entitled; the bonds have not been paid in full by it, and non constat that they will be; and no demand has been made for a release or for a return of the bonds in the possession of the

trust company. We have been referred to no case in which it has been held that rights or demands so contingent and conjectural were property that could be reached and applied in payment of debts due to a creditor. See *Pettibone v. Railroad Co.*, 148 Mass. 411, 19 N. E. 337; *Amy v. Manning*, 149 Mass. 427, 21 N. E. 943.

Consideration of other questions raised and discussed in the brief is rendered unnecessary by the result reached on the question whether the manufacturing company had any property in the possession of the trust company, and whether the alleged rights could be reached and applied in payment of the plaintiff's demand. Decree affirmed.

(164 Mass. 287)

CUSHING et al. v. SPALDING et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1895.)

WILL—CONSTRUCTION—NATURE OF ESTATE.

A widow devised land to C. in trust for an insane daughter for her life, and on her death one-fifth part to C., and four undivided fifth parts to said C. to hold in trust for W., B., M., and S.; such real estate "to be holden upon the condition that the fee simple in the same shall never be sold, but the same be built upon or continued to be used as a farm." She also devised to her and her husband's nieces all the residue of her estate after the death of such daughter. The daughter survived testatrix, but died before any of the other beneficiaries. C. afterwards died without qualifying as such trustee. M.'s husband also died. *Held*, that the quoted condition in the will was void, and that, on the death of the daughter W., M. and S. became vested with a good title in fee to their undivided interests, which they could convey without a trustee being appointed.

Case reserved from supreme judicial court, Suffolk county; John Lathrop, Judge.

Bill by Mary J. Cushing, Sarah C. Cushing (widows), and Frances R. Cushing, against Henry E. Spalding and others, for specific performance of contract for the sale of land by plaintiffs to defendants. The case was reserved on bill, answer, and replication for consideration of the full court. Decree for plaintiffs.

The bill is as follows: "The plaintiffs respectfully represent that they and the defendants made an agreement in writing, a copy whereof is hereto annexed, for the sale and purchase of three undivided fourths of certain real estate therein described, situated in said Hull; that on the 18th day, and again the 21st day, of December, 1894, the plaintiffs offered to convey the same to the defendants by a good and sufficient quitclaim deed conveying a good and clear title thereto; that the defendants refused to accept any deed, and expressly waived any further or formal tender of a deed, and have ever since so refused; that for more than twenty years last past, viz. for forty years, the plaintiffs have had a good and clear title to said premises, both by record and by actual, open, exclusive, adverse, and undisturbed possession thereof under

claim of right. Wherefore the plaintiffs pray that said defendants be compelled, by the decree of this court, specifically to perform their said agreement with the plaintiffs, the plaintiffs being willing, and hereby offering, specifically to perform the said agreement on their part. Francis L. Hayes, Solicitor for the Plaintiffs. Filed January 30, 1895."

"Agreement made this third day of December, A. D. 1894, between Mary J. Cushing, Sarah C. Cushing, and Frances R. Cushing of the first part, and Henry E. Spalding, David O. Wade, Z. Taylor Harrington, and Mary A. Eaton, wife of John J. Eaton, of the second part: The parties of the first part hereby agree to sell, and the parties of the second part to purchase, three undivided fourths of a certain estate situated in Hull, in the commonwealth of Massachusetts, and bounded and described as follows: Southeasterly by land late of Sally Jones, land of Abby C. Cushing, and land of one Harrington; southerly by the 'Creek'; westerly and northerly by the sea,—containing about thirteen and one-quarter acres, or however otherwise the same may be bounded and described, except as hereinafter excepted. Also three undivided fourths of about three acres of marsh lying southwesterly of the above parcel; reserving and excepting from each of said parcels all of the lands taken by the Nantasket Beach Railroad or other railroad. Said premises are to be conveyed subject to the taxes assessed in May, 1893, and in May, 1894, which taxes are to be assumed and paid by the parties of the second part within ten days after delivery of the deed of said land. Said premises are to be conveyed on or before December 19, 1894, by a good and sufficient quitclaim deed of the party of the first part, conveying a good and clear title to the same free from all incumbrances, except said taxes, but should a longer time be necessary for the proper examination of the title to said land, or for the perfecting of the title thereto, a reasonable extension of time beyond December 19, 1894, shall be given for such purpose, and for such deed and conveyance the parties of the second part are to pay the sum of twenty-one thousand four hundred and fifty dollars (and the taxes above provided), of which sum eight hundred dollars have been paid this day, forty-two hundred dollars are to be paid in cash upon the delivery of said deed, and the remainder is to be paid by the joint and several note of the parties of the second part, dated the same as the deed, bearing interest at five per cent. per annum, payable semiannually, and secured by a power of sale mortgage in the usual form upon the said premises, such note to be payable in one year from its date. Said note and mortgage to be also signed by said John J. Eaton; and said mortgage to be also signed by the wives of the mortgagors. The deed is to be delivered and the consideration paid, at the registry of deeds in which the deed should by law be recorded. If the party of the first part shall be unable to give title or to make

conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease, but the acceptance of a deed and possession by the party of the second part shall be deemed to be a full performance and discharge hereof. In consideration of the above, William L. Cushing, husband of the said Frances R. Cushing, hereby agrees to join in the deed to be made as aforesaid, and to release to the party of the second part all right of curtesy in the said premises. It is understood that a broker's commission of 2½ per cent. on the said sale is to be paid to Francis Sprague by the said party of the first part. In witness whereof the said parties hereto, and to another instrument of like tenor, set their hands and their common seal on the day and year first above written."

Answer: "The defendants admit that they executed the agreement, a copy of which is annexed to the plaintiffs' bill. The defendants admit that they waived a formal tender of the deed as alleged in the plaintiffs' bill. The plaintiffs' interest in the real estate which forms the subject-matter of said agreement is three-fourths of the same interest which Samuel T. Cushing, William L. Cushing, Benjamin Cushing, Mary Jane Cushing, and Sarah Abby Cushing acquired in said real estate as devisees under the will of one Mary Cushing, which will was proved and allowed by the judge of probate court in the county of Plymouth, and of which a copy is hereto annexed. By the terms of said will (paragraph "Thirdly"), after payment of debts and sundry legacies all the residue of the property of said testatrix, both real and personal, was devised to said Samuel T. Cushing, but in trust, nevertheless, to devote the income thereof to the support of Sarah Cushing, daughter of the testatrix, an insane person, for her life, and on the death of said Sarah, after a specific bequest to said Samuel T. Cushing, all the rest and residue of the real estate, excepting a certain specified piece, was devised as follows (paragraph "Fifth," clause "Second"): One undivided fifth part thereof to said Samuel T. Cushing and his heirs forever, and four undivided fifth parts to said Samuel T. Cushing, to hold in trust for said William L. Cushing, Benjamin Cushing, Mary Jane Cushing, and Sarah Abby Cushing; said real estate to be holden upon the condition that the fee simple in the same should never be sold, but the same should be built upon or continue to be used as a farm. By a later clause in said will, all the rest and residue of the testatrix's real and personal estate of every description which should remain after the decease of the said daughter Sarah was devised to certain nephews and nieces of the testatrix and of the testatrix's deceased husband. Said testatrix died during the life of her said daughter. Said daughter Sarah Cushing died during the life of the other beneficiaries above mentioned. Said

Samuel T. Cushing died before the filing of the plaintiffs' bill, never having qualified as trustee under said will. The defendants say that the plaintiffs cannot convey a good and clear title to said real estate, for the following reasons: (1) That there should be a trustee appointed as successor to said Samuel T. Cushing to make a valid conveyance. (2) That said real estate was held by said Samuel T. Cushing, and by said Samuel T. Cushing as trustee, upon a condition inconsistent with a good and clear title. (3) That under said will it is uncertain whether, upon the death of said daughter Sarah Cushing, said Samuel T. Cushing for himself, and as trustee for said William L. Cushing, Benjamin Cushing, Mary Jane Cushing, and Sarah Abby Cushing, took the title to said real estate, or whether said nephews and nieces of said testatrix and of her deceased husband took the title thereto. The defendants since the execution of said agreement, have always been [and] are now ready to accept a deed of said real estate conveying to them a good and clear title thereto. Wherefore, for said reasons, the defendants say that no decree for specific performance should be made, but the defendants should be hence dismissed with their costs. By Their Solicitor, Walter S. Pinkham. Filed February 15, 1895."

Will of Mary Cushing: "I, Mary Cushing, of Hull, in the county of Plymouth, widow of the late Robert Vinal Cushing, deceased, being in ill health, but of sound and disposing mind and memory, do make this instrument, and declare it to be my last will and testament. First, I appoint my nephew George Loring of Boston, and my friend Dr. Robert T. P. Fiske of Hingham, executors of this my last will and testament, directing them to pay all my just debts and funeral expenses, and all charges and expenses of the settlement of my estate, and also, in certain events hereinafter named, the legacies hereinafter given. Second, I appoint my nephew Samuel T. Cushing, of Boston, guardian of my daughter Sarah. Thirdly, After the payment of my just debts and funeral expenses, and all charges and expenses of the settlement of my estate, I give all of my real and personal estate, of every description, in my possession, or to which I have the right and title, including the personal property of my deceased daughters, Mary, Jane L., and Judith S., belonging to me, but whose estates have not yet been administered upon, to my nephew, Samuel T. Cushing; to hold the same in trust, however, for the following uses and purposes, namely: That he devote and apply the net income, interest, and rents of the same, after the payment of all necessary expenses, taxes, etc., to the use, maintenance, liberal and comfortable support of my daughter Sarah, so long as she remains an insane person, incapable of taking care of property and of disposing of the same by last will and testament; and if said net income, interest, and

rents should be insufficient for said purposes, then the said trustee may from time to time, as becomes necessary, sell and convey any real and personal property held by him under this will in trust, and appropriate the proceeds of such sales to the purposes above named. And it is my will that my daughter Sarah should occupy my dwelling house as long as she shall live; and I direct that all my furniture, silver plate, and household movables in my dwelling house shall remain there for my daughter's use. And the said trustee may, at any time that he thinks expedient and for the benefit of the estate, sell, transfer, assign, and convey any of the personal estate, except the furniture, etc., in my dwelling house, and reinvest the same in good securities, to be holden upon the same trusts and for the same uses and purposes as are herein expressed with regard to the property I have herein given to him in trust. If at any time the said Samuel T. Cushing shall decease, resign, or become incapacitated for the execution of the trusts aforesaid, or of any trusts committed to him in this will, then I request the honorable judge of probate for this county to appoint a suitable person in his stead to carry out and fulfill the said trusts. Fourth. But if at any time my said daughter Sarah should become of sound and disposing mind, sufficiently to take the charge and care of the property, then the said trustee, upon the request of the said Sarah, shall convey and assign to her all the real and personal estate so held by him in trust, the same to be holden and used by her as her own property, and upon her decease to pass and be distributed as she may, by her last will and testament, direct; but if she should die intestate, leaving no legal or valid last will and testament, then to pass and be distributed according to the terms and provisions of this my last will and testament as hereinafter expressed. Fifth. Upon the decease of my daughter Sarah intestate, and without leaving a legal and valid will, I devise, bequeath, and dispose of the said real and personal estate and property, whether the same be still holden in trust by the said Samuel T. Cushing or his successor, or whether it shall have been assigned and conveyed to my daughter as above provided, in manner following, to wit: First. I give and devise to my nephew Samuel T. Cushing my dwelling house in Hull, with about an acre and a half of land, more or less, under and around the same; meaning to include the garden and lot behind the same in the rear of the house, the yards and outbuildings, and the orchard lot and the lot in the rear thereof; also the garden in front of the above, on the opposite side of the highway; the land on the north side of the highway being bounded southerly by the same, easterly and northerly by land lately of Thomas Jones, deceased, and westerly by what was the Almshouse lot and by my other land, as the fences now stand. To have

and to hold the same to him, his heirs forever. I also give the said Samuel all the furniture, silver plate, and household movables of every kind in my dwelling house. And it is my particular direction and wish that neither said real or personal estate shall ever be sold, but shall always remain in the family. Second. I also give to my said nephew Samuel T. Cushing, and his heirs forever, one undivided fifth part of all the rest and residue of my real estate (except my land at Whitehead, in said Hull). I also give the said Samuel four undivided fifth parts of the same rest and residue of my real estate (except my land at Whitehead aforesaid); to be held by him in trust for the use and benefit of his brothers and sisters and their respective heirs, namely, William L. Cushing, Benjamin Cushing, Mary Jane Cushing, wife of Isaac Cushing, and Sarah Abby Cushing; but said rest and residue of my real estate is to be holden upon the condition that the fee simple in the same shall never be sold, but the same be built upon or continue to be used as a farm. Third. I give to the Wilbraham Academy, five hundred dollars, the same to be holden by the trustees or other proper officers of said institution for the purpose for which it was established. Fourth. I give to the Methodist Episcopal Church and Society in Hull five hundred dollars, the interest of the same to be expended in support of the preaching of the Gospel; and the officers of said church and society standing in the relation of deacons or wardens thereof shall forever hold said sum in trust for the use and benefit of said church and society. Fifth. I give the First Baptist Church and Society in Hingham five hundred dollars, to be appropriated by the deacons of said church to the preaching of the Gospel. Sixth. I give to my nephew Charles Newcomb, son of my sister Margaret, deceased, six hundred dollars. Seventh. I give to my nephew Samuel T. Cushing, five hundred dollars; to my nephew Benjamin Cushing, five hundred dollars; to my nephew William L. Cushing, five hundred dollars; to my niece Mary Jane Cushing, wife of Isaac Cushing, three hundred dollars; and to my niece Sarah Abby Cushing, three hundred dollars,—all children of my deceased brother, William L. Cushing. Eighth. I give to Mrs. Sarah Cushing, widow of my brother, William, three hundred dollars. Ninth. I give to Hannah Turner, wife of Benjamin Turner, two hundred dollars; to Eliza Turner two hundred dollars; to Perez Turner five hundred dollars; to William Cushing Turner, two hundred dollars,—all children of Hannah Turner, wife of Perez Turner, and sister of my late husband, deceased. Tenth. I give to Nancy Cushing, Charlotte Waterman, George K. Cushing, Andrew Cushing, Isaac Cushing, and Christopher Cushing each one hundred dollars; and to Maria Louisa Reynolds two hundred dollars,—all children of George

Cushing, a deceased brother of my husband. Eleventh. I give to Mrs. Rachel Cushing, widow of Pickels Cushing, and sister of my late husband, three hundred dollars; and to her daughter, Mary Cushing, three hundred dollars; and to her other daughters, namely, Julia Messinger, Lydia Holmes, and Eliza Barker, each two hundred dollars. Twelfth. To the daughters of Mary Loring, deceased, sister of my late husband, Julia A. Loring, Elizabeth P. Loring, Mary N. Loring, and Matilda W. Swan, I give each two hundred and fifty dollars, amounting to one thousand dollars. To the sons of said Mary Loring, namely, James S. Loring, George Loring, Joseph C. Loring, and Francis W. Loring, I give each one hundred dollars, making four hundred dollars. Thirteenth. To the two children of my nephew Samuel T. Cushing, namely, Samuel and Jane, I give one thousand dollars each, making two thousand dollars. Fourteenth. I give to my executors, Dr. R. T. P. Fiske and George Loring, each five hundred dollars, making one thousand dollars. In the event of the decease of any of said legatees before they shall become entitled to receive said legacies of money, the same shall not lapse, but shall pass and be paid to the respective legal representatives of such deceased legatees. Fifteenth. I also give, to Mrs. Pope, wife of Joseph Pope of Hull, one hundred dollars; to Mrs. Oliver Tower, wife of Moses B. Tower, one hundred dollars; to Lydia Cushing Tower, daughter of said Moses, two hundred dollars; to Mrs. Sybil Dill, wife of Daniel Dill, of Hull, one hundred dollars; to Mrs. Angelo, wife of John Angelo, two hundred dollars; to have and to hold the same to her, the said Mrs. Angelo, to her own use free from the control and interference of her husband; to Mrs. Esther McKann, of Hull, one hundred dollars; to Miss Lucy Loring, daughter of Samuel Loring, Esq., of Hull, one hundred dollars; to Miss Mary A. Fiske and Sarah D. Fiske, daughters of Dr. Fiske, of Hingham, one hundred dollars each; to Miss Sarah Gould and Rebecca Gould, daughters of Robert Gould, of Hingham, one hundred dollars each; to Mrs. Nancy Gould, wife of Robert Gould, Jr., of Hull, one hundred dollars; to Mrs. Sarah Jane, wife of Davis Dill, of Hull, one hundred dollars; to Mrs. Emma Read, widow, of Hull, one hundred dollars; to Mrs. Jane Tower, wife of John Tower, of Hull, one hundred dollars; to Miss Mary Read, of Hull, one hundred and fifty dollars; to Mrs. Knight, wife of Martin Knight, of Hull, one hundred dollars; to Mrs. Elizabeth, wife of Charles Hayes, of Hull, one hundred dollars; to Miss Matilda Angelo, of Hull, one hundred dollars; to Mrs. Augustus, wife of John Augustus, of Hull, one hundred dollars; to Mrs. Eliza, wife of Joseph Cobb, of Hull, one hundred dollars; to Mrs. Sally Eldredge, wife of Reuben Eldredge, of Hingham, one hundred dollars; to Miss Mary Cushing Eldredge, daughter of said

Reuben, one hundred dollars. Sixteenth. To Mrs. Eliza Angelo, wife of said John Angelo, I give the building standing on my land and formerly known as the 'Almhouse,' on condition that she remove the same within three months after my decease, at her own expense, as I do not give her the land on which said building stands. Seventeenth. I give to Mary Cushing, daughter of my late husband's sister, Rachel Cushing, one black dress, partly made, and a cotton rug made by her grandmother. The legacies in the sixteenth and seventeenth clauses above are to be delivered by my executors as soon as may be after my decease, while those that precede them under the 'Fifth' clause of this my will are to take effect only in the event of the decease of my daughter Sarah, intestate, and without leaving a legal and valid last will and testament. I also direct my executors to sell my land at Whitehead, being about eleven and a half acres, as soon as may be after my decease, and to pay the proceeds thereof to the said Samuel T. Cushing, trustee, to hold the same for the uses and purposes mentioned in the clause numbered 'Thirdly' in this my will, and the deeds or deeds of my executors shall be sufficient to pass and convey the title to said real estate at Whitehead to any person or persons who shall purchase the same at public or private sale. All the rest and residue of my real and personal estate of every description which shall remain after the decease of my daughter, if the same shall not have been disposed of by my daughter by a last will and testament, I give to my nephews and nieces and to the nephews and nieces of my late husband whose names have been herein mentioned, and who shall be living at the decease of my said daughter, share and share alike, to have and to hold the same to them, their heirs and assigns forever. In testimony whereof I, the said Mary Cushing, have hereunto set my hand and seal this eighteenth day of March, in the year of our Lord, eighteen hundred and fifty-seven. Mary Cushing. [Seal.] Witnesses: Eben Gay, John Reed, Joshua Crosley, Jr."

Codicil: "I, Mary Cushing, of Hull, widow, being weak in body, but of sound disposing mind and memory, did make, ordain, publish, and declare an instrument written, signed, and witnessed on the eighteenth day of the present month as my last will and testament, and I do now hereby declare and confirm the same, and in addition thereto I now make this codicil, to wit: I give and bequeath to Mary E. Pallerson, of Hingham, single woman, the sum of one hundred dollars; to Jane Gouch, wife of Samuel D. Gouch, of Hingham, tailor, one hundred dollars; and to Albert C. Litchfield, of Boston, mason, son of my niece Harriet Litchfield, one hundred dollars; the above legacies not to be paid until after the decease of my daughter Sarah Cushing. In witness whereof I have hereunto set my hand and seal this twenty-ninth day of March in

the year of our Lord one thousand eight hundred and fifty seven. Mary X Cushing,
her
mark
[Seal.] Witnesses: Samuel Loring, John Reed,
Joshua Crosby, Jr."

Replication (Special): "Now come the plaintiffs, and, in reply to the defendants' answer, admit that they derive their title to the premises in question under the will of Mary Cushing, a copy of which is annexed to said answer; that Sarah Cushing and Samuel T. Cushing died, and that said Samuel did not qualify as trustee,—all as alleged in said answer. They deny that under said will, or by its terms, their title to said premises is defective, but claim that the same is good and clear. They further say that, before filing the bill, they offered to secure the appointment of a trustee to convey the title, as claimed by the defendants to be necessary, and are willing and offer now so to do, but not admitting its necessity; and in all respects they reaffirm the allegations of said bill."

Francis L. Hayes, for plaintiffs. Walter S. Pinkham, for defendants.

MORTON, J. The condition against alienation was clearly void. Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; Todd v. Sawyer, 147 Mass. 571, 17 N. E. 527; Gleason v. Fayerweather, 4 Gray, 348, 353; Hawley v. Northampton, 8 Mass. 3, 37. The provision in regard to building upon the real estate, or continuing to use it as a farm, forms part of the condition. By it the testatrix says, in effect, by way of attempted mitigation, that, though the estate is not to be sold, it may be used by the devisees for building and farming. The restraint upon alienation being void, the trustee took the estate simply for the use and benefit of the devisees, and the statute of uses immediately executed the use in them, except as to Mary Jane Cushing, who, being a married woman, took an equitable estate in fee simple during coverture. Upon the death of her husband the trust terminated, and the statute executed the use in her so as to give her the legal estate. Richardson v. Stodder, 100 Mass. 528; Moore v. Stinson, 144 Mass. 595, 596, 12 N. E. 410. The appointment of a trustee does not appear to be necessary. It is clear that the rest and residue referred to in the concluding paragraph of the will means so much of the estate as would remain undisposed of under the previous conditions of the will if her daughter should recover and the estate should be conveyed to her and she should die intestate, or so much as would remain undisposed of if the daughter should continue of unsound mind till her death. In either of these contingencies the real estate in controversy is disposed of by the will, and the latter contingency is the one that has happened. It is only where there is a fairly reasonable doubt as to the construction of the instrument on which the title of the plaintiff

depends that a court will be justified in refusing specific performance on account of the absence of parties who would have a right to dispute the defendant's title. Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Butts v. Andrews, 136 Mass. 221; Cunningham v. Blake, 121 Mass. 333. Otherwise the mere fact of possible litigation would be sufficient to bar a right to specific performance. We see no valid ground for questioning the plaintiffs' title in this case. Decree for plaintiffs.

(164 Mass. 263)

McMANUS v. INHABITANTS OF TOWN OF WESTON (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 9, 1895.)

ROAD COMMISSIONERS—NEGLIGENCE—LIABILITY OF TOWN.

Road commissioners (as established by Acts 1871, c. 158; Pub. St. c. 27, § 75), while engaged in making improvements and alterations on an existing way for the purpose of rendering it safer for travelers, are public officers, and not servants of the town, although the work was ordered by the county commissioners, upon petition by the town.

Exceptions from superior court, Middlesex county; Caleb Blodgett, Judge.

Separate actions by Ellen McManus and Patrick McManus against the inhabitants of Weston to recover for personal injuries. A verdict was ordered for defendant, and plaintiffs except. Exceptions overruled.

These were actions of tort to recover damages for injuries sustained by plaintiffs while driving along a county road in Weston called "Central Avenue." At the trial it appeared that the accident was caused by the failure of persons in charge of work on the avenue to give warning that a steam drill was in operation on the avenue, and also by the acts of the persons in charge of the drill allowing steam to escape from the boiler while plaintiffs were passing. The work on the avenue was done under the charge of the road commissioners of the defendant, who acted under a vote of the town in carrying out the work, which was done under an order of the county commissioners.

Elder, Wait & Whitman, for plaintiffs. Allyn & Mayberry, for defendant.

MORTON, J. These two cases were tried together, and both depend on the same facts; and the principal question in each is whether the road commissioners acted as public officers, or as servants of the town. We think that they acted in the former capacity, and not in the latter. The office of road commissioner is of recent origin. It was first established by chapter 158, Acts 1871. By the second section of that act it was provided that "said road commissioners shall have and perform exclusively all the powers and duties now vested by law in selectmen and surveyors of highways, concerning the laying out, altering, making, repairing or discontinuing

streets, ways, sidewalks, sewers and drains." This was amended by chapter 51, Acts 1873, by substituting therefor a new section, as follows: "Said road commissioners, in matters concerning streets, ways, bridges, monuments at the termin and angles of roads, guideposts, sidewalks, shade-trees, sewers and drains, shall exclusively have the powers and be subject to the duties, liabilities and penalties of selectmen and surveyors of highways." This section, with an added provision about the moving of buildings in public streets, forms section 75, c. 27, Pub. St., and that, in turn, forms section 23 of chapter 423, Acts 1893, in regard to the powers and duties of town officers. It is evident that the object of the amendment was, not to restrict the powers and duties of the road commissioners; but rather to enlarge them, or, perhaps, to make it clearer what they were originally intended to include. The purpose of the statute was to enable towns to unite in one board for the sake of greater efficiency, powers and duties which, speaking generally, were exercised by the selectmen and surveyors of highways, in regard to streets and ways, and to give them the exclusive control over such matters. And it is apparent that a board, so constituted, and acting within the scope of its powers and duties, would act as a board of public officers, and not as servants of the town. *Walton v. Swampscott*, 1 Allen, 101; *Tindley v. Salem*, 137 Mass. 173 et seq., and cases cited; *Blanchard v. Inhabitants of Ayer*, 148 Mass. 174, 19 N. E. 200. The plaintiffs contend, however, that the work in which the road commissioners were engaged upon Central avenue did not come within their powers and duties as public officers. But we think that what they were doing fairly may be called a "making and repairing," within the meaning of section 3, c. 52, Pub. St. Although ordered by the county commissioners, the work did not relate to the construction of a new way, or the building of one that had been materially widened or lengthened or changed from its original lay out, but was in the nature of repairs to and improvement of an existing way, and for the purpose of rendering it safer and more convenient to travelers. The petition under which the county commissioners acted was for the relocation of an existing way. What was to be done was spoken of in the first appropriation by the town as "repairs on Central avenue," and the exceptions expressly state that the ledge where the work was being done at the time of the injury complained of was wholly within the old lines, and that the location by the county commissioners did not differ much from the old line of fences; meaning, as we infer, that the old road and the road as located by the county commissioners were substantially the same. There is nothing to show that the removal of the ledge would not have been within the ordinary scope of the powers and duties of surveyors of highways. From the

absence of any testimony as to the previous condition of the road, it is not easy to say that the repairs, though extensive, were not such as would not have come within the province of the road commissioners after the town had appropriated the money for them. *Proctor v. Stone*, 158 Mass. 564, 33 N. E. 704. The mere fact that they were unusual, or permanent, or expensive, or authorized by a special vote and appropriation, would not prevent them from being of such a character. *Hennessey v. City of New Bedford*, 153 Mass. 260, 26 N. E. 999; *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538; *Denniston v. Clark*, 125 Mass. 216; *Mitchell v. Bridgewater*, 10 Cush. 411. In *Craigie v. Mellen*, 6 Mass. 7, it was assumed without question that it was the duty of the highway surveyors to make safe and passable a town way which had been laid out for the inhabitants of Cambridge, and approved by them. See, also, *Cyr v. Dufour*, 68 Me. 492. In *Callender v. Marsh*, 1 Pick. 417, 426, which has never been questioned as an authority (*Burr v. Leicester*, 121 Mass. 242), it is said that the authority of highway surveyors "would seem to include everything which may be needed towards making the ways perfect and complete, either by leveling them where they are uneven and difficult of ascent and descent, or raising them where they should be sunken and miry." In consequence of this decision, and of the suggestions contained in it, a statute was passed giving a remedy to landowners who sustained damages by any act done in raising, lowering, or otherwise for the purpose of repairing a highway or town way. Rev. St. c. 25, § 6; Pub. St. c. 52, § 15. But as was said in *Denniston v. Clark*, 125 Mass. 225, "this statute does not affect the extent of the authority of the public and its officers, or the principle upon which that authority rests." It is true that it has been held that the powers and duties of highway surveyors were confined to repairs, and that neither they nor selectmen had authority, by virtue of their offices, to build or contract for the building of new ways, or of ways that were so widened or altered that what was to be done would amount to the substitution of a new way for an old one, either within the same or other lines. *Todd v. Rowley*, 8 Allen, 51; *Denniston v. Clark*, 125 Mass. 220; *Bean v. Hyde Park*, 143 Mass. 245, 9 N. E. 638; *Blanchard v. Inhabitants of Ayer*, 148 Mass. 174, 19 N. E. 200; *Bemis v. Springfield*, 122 Mass. 110. There is no general rule defining what are repairs, and what are changes or alterations so radical that they fairly cannot be called such. *Proctor v. Stone*, 158 Mass. 564, 33 N. E. 704. The original statute creating the office of highway surveyors gave them power to amend as well as to repair (St. 1786, c. 81, § 1); and the law seems to have been liberally applied in favor of repairs. Though the word "amend" was omitted in the Revised Statutes and the later Revisions, there

is nothing to show that there was any intention of restricting the powers of the surveyors within narrower limits than those established by the original act. By St. 1877, c. 58, amending section 2, c. 298, Acts 1871, which abolished the payment of highway and town-way taxes in labor and materials, and provided that towns should raise by assessment on the polls and estates of residents and nonresidents such sums of money as were necessary for making and repairing highways and town ways, it was provided that the sums so voted should be expended by the road commissioners; the difference between the highway surveyors and road commissioners being that, in the case of the former, the expenditures were to be under the direction of the selectmen, but, in the latter, not. Section 2 of chapter 298, Acts 1871, with the amendment of chapter 58, Acts 1877, were incorporated into and form section 81, c. 52, Pub. St., on which the defendant relies. The meaning of the word "making" in this connection does not appear to have been considered, or to have received any construction. In the act establishing the road commissioners it evidently meant something more than "repairing." St. 1871, c. 158, § 2. In the present and earlier statutes it seems to have been used, in some instances, in a sense which would include building or constructing. Pub. St. c. 52, § 13; Id. c. 49, §§ 9, 75; Rev. St. c. 24, §§ 10, 44, 47, 64; Id. c. 25, §§ 9, 15; St. 1796, c. 58, § 1; St. 1818, c. 121, § 1. It is so used in the sewer acts. Pub. St. c. 50, §§ 1, 3, 4. But we do not think that it can be construed, in the section on which the defendant relies, as authorizing the road commissioners, whenever a new way is laid out in a town, to go on and build it. *Craigie v. Mellen*, supra; *Cyr v. Dufour*, supra. The road commissioners are not given power generally over the laying out, making, discontinuing, and repairing of ways, but only such powers as the selectmen and highway surveyors have, and such as are bestowed by the section under consideration. It is clear that neither the selectmen nor highway commissioners have authority to build new ways. We think that the jurisdiction of road commissioners is confined to existing ways, with the possible exception before noted, and within lines corresponding substantially to existing lines; and that, as applied to them, the word "making" means more than repairing, and may properly include work of the general character of that which they were doing in this case upon Central avenue, and that, after the town had made the appropriation, it was for the commissioners to do the work with such instrumentalities and in such manner as seemed to them best. *Pratt v. Weymouth*, supra; *Hennessey v. City of New Bedford*, supra. Although the duty of completing the road according to the lay out and order of the county commissioners is imposed by statute

upon the town, there can, we think, be no question that the town fulfills the duty thus imposed upon it if the money necessary to carry out the order of the county commissioners is appropriated by it, and the work is done by public officers duly chosen by it, and within whose jurisdiction it comes. Whether the work is done by public officers, or by persons specially appointed by the town, it is equally within the power of the county commissioners to see that their order is complied with. The fact that the town voluntarily adopted the statute providing for the election of road commissioners can make no difference as to whether the commissioners were or were not acting as public officers. *Tindley v. Salem*, supra. A majority of the court think that the exceptions should be overruled, and it is so ordered. Exceptions overruled.

(164 Mass. 303)

WRIGHT v. VERMONT LIFE INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 16, 1895.)

ACTION ON LIFE INSURANCE POLICY—DEMAND BEFORE SUIT—PROOFS OF DEATH.

1. The rule of law requiring an administrator of one who has insured his life for the benefit of another to sue on the policy was not changed by St. 1887, c. 214, § 73, providing that in such a case the beneficiary shall be entitled to the proceeds, as against the creditors and representatives of the person taking out the policy.

2. St. 1894, c. 225, giving the beneficiary of a life policy a right of action thereon in his own name, is applicable only to policies issued after the statute went into effect.

3. A demand for the payment of a life policy is not a condition precedent to the right of suing thereon.

4. In an action on a life policy providing for payment of the policy at a particular office of the company after satisfactory proof of the death of the insured is furnished, evidence that proofs of death were left with an agent of the company at its office in another city, who promised to forward them to the city designated in the policy, and production of these proofs by the defendant at the trial, warrant a finding by the jury that proofs of death had been furnished as required by the policy.

5. An applicant for life insurance, who, by the application, is required to make a full and true answer to the questions asked, in answer to the question of his occupation, stated that he was a waiter. In an action on the policy there was evidence that he had been a calker, but at the time the application was made was a waiter in a restaurant. In the proofs of death the beneficiary stated that he was a calker and waiter, but did not do any calking after the policy was taken out. *Held*, that the question of the employment of the insured at the time the answer was made was for the jury.

6. A complaint on a life policy may be amended by substituting for the name of the beneficiary, as plaintiff, the name of the administrator of the insured, as plaintiff for her benefit.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Action by Alexander H. Wright against the Vermont Life Insurance Company on a policy of insurance. There was a verdict

for plaintiff, and defendant brings exceptions. Exceptions sustained.

This was an action on a life policy issued by the defendant company on the life of Alexander H. Wright by his widow in her own name. The defendant requested the court to rule that this action could not be maintained by the plaintiff, but only by the administrator of the insured's estate. The court refused said request, and ruled that the plaintiff could maintain the action, as brought, if she was in other respects entitled to maintain it. The defendant excepted to said refusal to rule, and to said ruling. There was no evidence that the plaintiff personally had ever demanded payment of the policy at the office of the company in Burlington, but she testified that she had demanded payment from the agent of the company at 40 Water street, Boston; and the defendant asked the court to rule that in the absence of such evidence this action could not be maintained, but the court refused said request, and the defendant excepted thereto. The plaintiff testified that, not more than two months after her husband's death, she took the proofs of death, on forms furnished by the company, to an office at 40 Water street, Boston, which had on the door a sign, "Vermont Life Insurance Company," and gave them to a Mr. Lyons, and that he informed her the papers would be forwarded to Burlington. She also testified that she had been there before, and had seen Mr. Lyons before in the office. It was admitted that proofs of death were regularly and properly filled out, and the same were produced at the trial of the case by defendant's counsel. The defendant asked the court to rule that this evidence was insufficient to establish that proofs of death had been furnished to the company within one year after the death of the insured, but the court refused said request, and left the question to the jury, to which defendant excepted. The application for this policy provides that all the statements and answers to the printed questions on the application are offered to the said company as a consideration of the contract applied for, each of which the applicant warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries. The third question on page 1 of this application is as follows: "(3) Occupation or employment." "In giving the occupation of the person, it is not sufficient to state, for example, that he is a merchant or mechanic; but the particular branch of business, or the trade, must be specified." And the insured's answer is, "Walter." On the evidence, the defendant requested the court to rule that the plaintiff could not recover in this action, inasmuch as the insured's answer to said third question in his application was not full, complete, and true; but the judge refused said request, and left the question to the jury, and the defendant excepted.

W. A. Morse and P. H. Cooney, for plaintiff. John Woodbury, for defendant.

LATHROP, J. 1. We are of opinion that the first request for instructions should have been granted. The promise to pay to the plaintiff was, by intendment of law, made with Alexander H. Wright, and his administrator was the proper party to sue. St. 1887, c. 214, § 73,¹ did not change this rule of law. *Nims v. Ford*, 159 Mass. 575, 34 N. E. 543; *McCarthy v. Insurance Co.*, 162 Mass. 254, 38 N. E. 968. St. 1894, c. 225, which gives the person to whom a policy of life insurance is made payable the right to maintain an action thereon in his own name, by its terms, applies only to policies thereafter issued, and has no application to the policy in this case, which was issued in January, 1890.

2. The second request for instructions was properly refused. The bill of exceptions on this point is as follows: "There was no evidence that the plaintiff, personally, had ever demanded payment of the policy at the office of the company in Burlington, but she testified that she had demanded payment from the agent of the company at 40 Water street, Boston; and the defendant asked the court to rule that in the absence of such evidence this action could not be maintained, but the court refused said request, and the defendant excepted thereto." Treating the request literally, it would be enough to say that, if a demand was necessary at Burlington, the plaintiff was not required to make it personally, but could make it by an agent, and that, as the request was based entirely on the want of evidence of a personal demand by the plaintiff at Burlington, the judge was not bound to give it. But we may go further, and say that there is nothing in the policy which requires any demand at Burlington or elsewhere. The promise is to pay at the office in Burlington within 90 days after satisfactory proof of death of the insured. At the expiration of 90 days after satisfactory proofs were furnished, a right of action accrued, without any formal demand. It is no bar to an action on a promise to pay money that the promisee was not present at the time and place appointed for payment. *Ruggles v. Patten*, 8 Mass. 480; *Carley v. Vance*, 17 Mass. 389; *Payson v. Whitcomb*, 15 Pick. 212. In *Carter v. Smith*, 9 Cush. 321, in an action on a promissory note payable, at a time fixed, at either of the banks in Portland, the defendant objected that the plaintiff must prove a demand. This objection was overruled, and this court (Chief Justice Shaw giving the opinion) overruled the defendant's exceptions, with double costs. It is for the promisor to show in defense that he was ready to pay,

¹ St. 1887, c. 214, § 73, provides that in such a case the beneficiary shall be entitled to the proceeds, as against the creditors and representatives of the person taking the policy.

and he must make a tender accompanied by a proferat in curia. *Carley v. Vance*, ubi supra; *Carter v. Smith*, ubi supra.

3. The third request for instructions, that the evidence was insufficient to establish that the proof of death had been furnished in accordance with the requirements of the policy, was properly refused. It is true that the promise to pay in the policy is "at its [the defendant's] office in the city of Burlington," "ninety days after satisfactory proof, at its said office, of the death of the said insured." The proof of death was made out on blanks furnished by the company, was taken to the office of the defendant in Boston, and there received by a person apparently in charge of the office, who promised to forward it to Burlington; and it was produced at the trial by the defendant's counsel. It was admitted that the proof was regularly and properly made out. No evidence was produced by the defendant to show that it was not received at Burlington. We are of opinion that the jury were well warranted in finding against the defendant on this issue.

4. The next objection is that the insured did not make a "full, complete, and true" answer to the third question in the application for insurance, which required him to state his "occupation or employment." The answer was, "Waiter." The evidence was that the insured had been a calker, but at the time the application was made he was a waiter in a restaurant. It is true that, in the "proof of death" signed by the plaintiff, she stated that he was employed as a waiter, and was also doing jobbing in calking for different persons, and that he was a calker and waiter; but she explained in her testimony that, although his trade was that of a calker, he did not do any calking at the time of the policy, or afterwards, although he tried to get some jobs at calking. The question did not call for the past occupation of the insured, as in *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654, but for his then occupation. The question of his occupation at the time of the application was submitted to the jury under instructions not now objected to by the defendant. The defendant, on this point, has relied solely upon the refusal of the judge to rule that the plaintiff could not recover because the answer of the insured was not full, complete, and true. On the evidence, such a ruling was rightly refused. It was for the jury, upon the evidence, to say what the applicant's occupation was at the time the answer was made. The statement made by the plaintiff was evidence against her, but was not conclusive.

5. It is within the power of the superior court to allow an amendment of the writ, substituting for her name, as plaintiff, the name of the administrator of her husband's estate, as nominal plaintiff, for her benefit. *Winch v. Hosmer*, 122 Mass. 438; *Costello v. Crowell*, 134 Mass. 280; *Lewis v. Austin*,

144 Mass. 383, 11 N. E. 538. As the defendant's exceptions on the merits have been overruled, there seems to be no reason why the case should be tried again, or why, if the amendment above suggested be allowed, judgment should not be entered on the verdict. *Pierce v. Insurance Co.*, 138 Mass. 151, 164. As the judge erred in refusing to give the first instruction requested, the entry must be: Exceptions sustained.

(164 Mass. 313)

BURNHAM v. WINDRAM (two cases).
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 21, 1895.)

PLEDGE—ENFORCEMENT OF COLLATERAL—JUDGMENT ON ORIGINAL DEBT.

The fact that defendant executed a third note, and delivered the same, together with certain stock, as collateral security for two other notes, under an agreement that the third note and stock were to be returned upon payment of the other two notes, will not prevent plaintiff from having judgment on the third note (though there can be but one satisfaction), where judgment was rendered on the first notes, but not satisfied.

Exceptions from superior court, Suffolk county; Henry N. Sheldon, Judge.

Two actions by D. S. Burnham against H. W. Windram on certain promissory notes. Plaintiff had judgment, and defendant excepts. Exceptions overruled.

These were actions of contract between the same parties, and were tried together. The first action was on two promissory notes, copies of which hereinafter appear, marked "A" and "B," respectively, and the second action was on the note, a copy of which is marked "C." All the said notes were introduced in evidence, and also the paper, a copy of which is marked "D." The plaintiff testified that, on the day of the date of said notes, the same were delivered to him, with certificate for 500 shares of stock of Boston Woven Cordage Company, referred to in note C, and in return therefor, at the same time, he gave to defendant \$350 in money, surrendered a note for \$550, then overdue (which note was made by the defendant, and indorsed by one Nutter), and signed and delivered the paper, a copy of which is marked "D." The plaintiff also testified that nothing had been paid on said note; that he had not been able to sell said stock, or any part thereof, although he had offered the same for sale at public auction under terms of note C, and that he still held the original certificate delivered to him as aforesaid; and that said stock was now worthless. There was no other evidence, material to the issues of these cases, introduced at the trial. The defendant requested the court to rule: First. That the notes and the paper marked "D" should be construed together, and, being so construed, showed that the defendant owed the plaintiff only the amount of notes A and B, with interest from the date of maturity thereof; on payment of which the plaintiff was bound to return note C and said shares of stock of the

Boston Woven Cordage Company. Second. To instruct the jury that, upon the foregoing evidence, the defendant owed the plaintiff only \$900,—the amount of notes A and B,—with interest from the date of maturity thereof. Third. That, upon the evidence, the jury should find for the plaintiff in the first action for the amount of notes A and B, and interest as aforesaid, and should find a verdict for the defendant in the second action. But the court declined so to rule and instruct the jury, and ruled that the plaintiff, on the evidence, was entitled to a verdict in both actions, and instructed the jury to find a verdict in each action for the amount of the notes declared on therein, and interest, not to exceed the ad damnum of the writ in either case. And the jury returned a verdict for the plaintiff in the first action for \$1,000 (the amount of the ad damnum of the writ therein), and returned a verdict in the second action for \$1,000 (the amount of the ad damnum of the writ therein), both of which verdicts were duly recorded. From said rulings and refusals to rule defendant excepts.

A: "\$550.00. Boston, Oct. 24, 1892. Thirty days after date, I promise to pay to the order of D. S. Burnham five hundred and fifty dollars, at any bank in Boston. Value received. H. W. Windram."

B: "\$350.00. Boston, Oct. 24, 1892. Thirty days after date, I promise to pay to the order of D. S. Burnham three hundred and fifty dollars, at any bank in Boston. Value received. H. W. Windram."

C: "\$900.00. Boston, Oct. 24, 1892. Thirty days after date, for value received, I promise to pay to D. S. Burnham, or order, nine hundred dollars, and interest at the rate of six per centum per annum for such further time as said principal sum, or any part, shall remain unpaid; I having deposited with this obligation, as collateral security, five hundred shares of the capital stock of the Boston Woven Cordage Company, with authority to sell the same, without notice, either at public or private sale, or otherwise, at the option of the holder or holders hereof, on the nonperformance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders, or to his or their orders. And it is further agreed that the holder or holders hereof may purchase at said sale. H. W. Windram."

D: "Boston, Oct. 24, 1892. Received of Harold W. Windram his two notes, this day, payable in thirty days, one for \$350.00 and one for \$550.00, and, as collateral security, for payment of same, his note for \$900.00, on thirty days, with five hundred shares of the capital stock of the Boston Woven Cordage Company; and I agree, upon payment of the first two mentioned notes, to deliver to him the last-described note and the shares of the Boston Woven Cordage Company. D. S. Burnham."

C. R. Elder, for plaintiff. W. O. Kyle, for defendant.

MORTON, J. Upon their face, the three notes constitute separate and distinct causes of action. The plaintiff is the bona fide holder, for value, of all of them. There can be no question of his right to recover upon the two notes in the first suit. Neither could there be as to the one in the second suit, if it were not for agreement D. The condition in the agreement which would have entitled the defendant to a return of the notes and of the stock has not been performed; and the agreement does not, therefore, constitute a defense. The fact that the note in the last suit is described in the agreement as collateral to the other two notes is immaterial. *Vanuxem v. Burr*, 151 Mass. 386, 389, 24 N. E. 778, and cases cited; *Costello v. Crowell*, 134 Mass. 230; *Bank v. Jefferson*, 138 Mass. 111; *Royal Bank of Liverpool v. Grand Junction R. Co.*, 100 Mass. 444. Of course, the plaintiff can have but one satisfaction of the debt due him, but we see no valid objection to his taking judgment in both actions. *Savage v. Stevens*, 128 Mass. 254. We discover no error in the rulings or refusals to rule. Exceptions overruled.

(164 Mass. 306)

MASONIC BLDG. ASS'N et al. v. BROWN-ELL et al.

GREENE v. SAME.

(Supreme Judicial Court of Massachusetts.
Bristol. Sept. 21, 1895.)

PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS
—VALIDITY OF ASSESSMENTS.

1. Pub. St. c. 49, § 93, provides that every way shall be deemed to be laid out under the provisions of that chapter, "unless the order laying out the same" declares the same to be laid out under the law authorizing the assessment of betterments. *Hdd* that, where the board made two orders,—the first reciting that, in the opinion of the board, convenience and necessity required that a certain street should be widened, and directing that notice be given to the abutters, naming them, of the intention of the board to assess a portion of the expense on the estates benefited; and the second order reciting that certain land was thereby taken and laid out as part of said way, without referring to the law authorizing the assessment of betterments,—both of said orders, taken together, should be considered as the "order laying out the way," within the statute, so as to authorize an assessment of betterments.

2. A petition to quash certain betterment assessments alleged that the improvement was not completed at the time of the assessment, and it was stipulated that the facts alleged should be taken as true. *Hdd*, that such fact cannot be taken as true when it appeared from a copy of the assessment order, which was made a part of the petition, that the work was completed.

3. The levy of a betterment assessment by a board appointed by the mayor and confirmed by the aldermen, pursuant to an act of the legislature, is not an unconstitutional exercise of the taxing power, as the taxpayers were represented in the legislature which passed the act, and accepted it by a formal vote.

4. An assessment for betterments, describing the land assessed as belonging to certain persons, and situated on the east side of the street on which the improvements were made, is not void for indefiniteness.

5. The fact that an assessment for betterments on a certain street was levied on the land of a person described by omitting or inserting an erroneous middle initial does not invalidate it unless it is shown that there was more than one person of that name owning land on the street.

6. The fact that the land benefited by improvements was assessed in the name of the former owners will not defeat the assessment where it is not made to appear that any one was prejudiced by the error, if it is one.

Case reserved from supreme judicial court, Bristol county; James M. Morton, Judge.

Petitions for writs of certiorari by Francis B. Greene and by the Masonic Building Association and others against Stephen A. Brownell and others, constituting the board of public works of New Bedford, to quash certain assessments. Both petitions were considered and determined together. Petitions dismissed.

The orders of the board of public works referred to in the opinion are as follows:

"City of New Bedford. In Board of Public Works, September 28, 1892. Whereas, in the opinion of this board, the public necessity and convenience of the inhabitants require that Pleasant street should be widened from William to Union street, it is therefore hereby ordered that due notice be given to trustees of Elizabeth T. Wood, Samuel P. Richmond, Mary C. S. Millard, Est. of Stephen Taber, N. B. Five Cents Savings Bank, Bates and Kirby, Charles S. Cummings, David B. Greene Est., Cummings Est., William M. Bates, Clarence Cook and others, James D. Thompson, city of New Bedford, F. B. Greene, and all other persons interested, that this board intends to lay out the street before mentioned, by taking a portion of their land, and laying out the same as a public street; and, also, that due notice be given, to all persons and parties owning or having any rights in estates that will be benefited by the said proposed lay out of said street, that this board intend to assess a portion of the expense thereof upon the estates so benefited, according to law, and that on Monday, the 17th day of October, at 3 o'clock p. m., they will be on the line of said proposed lay out of said street, for the purpose of viewing the same and hearing any objections which may be made to said taking and laying out, or to said assessment."

"City of New Bedford. In Board of Public Works, October 17, 1892. Resolved, that the public necessity and convenience of the inhabitants of the city require that Pleasant street be widened ten feet on the east side, between Union and William streets, and, for that purpose, it is necessary to take for said widening and lay out, as a part of said public street or way of the said city, parcels of land belonging to the Cummings estate, viz. the heirs of Benjamin and William Cummings, Wm. M. Bates, Bates & Kirby (Orin G. Bates and Frank Kirby), N. B. Five Cents Savings Bank, estate of Stephen Taber, Mary C. S. Millard, S. P. Richmond,

Clarence A. Cook, Edward D. Mandell, and Gilbert Allen, trustees, and trustees of Elizabeth T. Wood. Said lay out of said widening of said street is bounded as follows, viz.: Beginning at a point in the north line of Union street, ten (10) feet east of the east line of Pleasant street, as heretofore accepted, thence northerly, in a straight line, three hundred sixty-nine and twelve hundredths (369.12) feet, to a point in the south line of William street, ten (10) feet east of the present east line of Pleasant street. The west line of the widening is the present east line, as heretofore accepted, and ten (10) feet west of, and parallel to, the east line. And whereas, due notice has been given of the intention of this board to take the said parcels of land for the purpose aforesaid, as appears by the return on the order of notice issued therefor, it is therefore ordered that the parcels of land before described be, and the same hereby are, taken and laid out and accepted as a part of said Pleasant street, as a public street or way of the said city, to be known as 'Pleasant Street,' and the grade thereof is established according to a plan of the said widening of said street, and profile of the grade thereof, dated October 17, 1892, and deposited in the office of this board; that this board doth adjudge that the expense of the laying out and construction of said street will amount to \$35,135.00; that the damages to the estates, parts of which are taken as above, are the sums set against them respectively on the schedule hereunto annexed, and that all persons or parties, owners of land in the line of said lay out, remove and take away any and all buildings, fences, and trees from the land so taken, within 180 days from and after the adoption of this order.

Awards of Damages.

Cummings Estate	\$ 9,510
Bates & Kirby.....	4,445
Five Cents Savings Bank.....	1,840
Stephen Taber Estate.....	1,925
Mary C. S. Millard.....	1,850
S. P. Richmond.....	3,165
Est. Elizabeth Wood, or Clarence A. Cook et ali., Trustees.....	10,400

\$33,135"

"In Board of Public Works, New Bedford, September 25, 1894. In the matter of the assessment of betterments upon account of the widening of Pleasant street. Whereas, the board of public works, on the 26th day of September, 1892, voted to widen Pleasant street from its former width of forty feet to a width of fifty feet, by taking ten feet of land belonging to the abutters upon the easterly side of said Pleasant street, from the southerly side of William street to the northerly side of Union street; and whereas, the whole amount of the expense of widening said Pleasant street is \$34,682.16; and whereas, said Pleasant street was duly accepted, October 17, 1892, and the work of widening said street, in pursuance of said

lay out and acceptance, has been completed, and the whole amount of the expense of laying out, widening, and construction thereof, including damages to abutters for land and buildings taken, was \$34,682.16: It is hereby ordered, adjudged, and determined that the whole amount of benefit and advantage received by any real estate from said widening and grading of said Pleasant street, beyond the general advantage to all real estate in said New Bedford, is \$34,682.16; and it is further ordered, adjudged, and determined that one-half of said benefit and advantage, to wit, \$17,341.08, be, and the same hereby is, assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each, as follows, viz.:

Elizabeth J. Wood, land on the east side of the street, between Union and William streets.....	\$ 2,332 55
Samuel P. Richmond, land on the east side of the street, between Union and William streets.....	1,194 73
Estate of Stephen Taber, land on east side of street.....	379 25
N. B. Five Cents Savings Bank, land on east side of Pleasant street, between Union and William streets.....	1,016 43
Bates & Kirby, land on the east side of Pleasant street.....	807 10
Mary C. S. Millard, land on the east side of Pleasant street.....	1,128 13
Cummings estate, land on the east side of Pleasant street.....	1,471 63
City of New Bedford, land on the west side of Pleasant street.....	3,996 00
Louisa R. Thompson, land on the west side of Pleasant street....	1,699 93
F. B. Greene et al., land on the west side of Pleasant street.....	2,089 43
F. B. Greene et al., land on the west side of Pleasant street.....	1,225 90
	\$17,341 08

—And the tax collector is hereby directed to collect said assessments, and that said assessments shall be paid in the same manner, and upon the same conditions, as in other cases of the laying out, alteration, widening, grading, or discontinuance of streets and ways."

Crapo, Clifford & Clifford, for petitioners
Masonic Bldg. Ass'n et al. Lem. Le B.
Holmes, for petitioner Greene. H. M. Knowlton and T. F. Desmond, for respondents.

MORTON, J. These are petitions for writs of certiorari to quash certain betterment assessments made upon the estates of the petitioners by the board of public works of the city of New Bedford in consequence of the benefit adjudged by it to have been received by the estates in the widening of a public street, called "Pleasant Street." The character of the objections to the assessments is the same in both cases, except that in the case of Francis B. Greene, petitioner, it is alleged in the petition, in addition to the causes stated in the petition of the Masonic Building Association, that the action of the board on September 26 and October 17, 1892,

was not lawful, by reason of the absence from the meetings of the board of the city clerk, who is made, by the act creating the board, its recording officer. The two cases were argued together, and are to be considered together.

The first and principal objection is that "the order laying out" the widening did not expressly declare that the widening was under the provisions of the law authorizing the assessment of betterments, as it is required by Pub. St. c. 49, § 93, that it should, in order to justify such assessment. *Fuller v. Springfield*, 123 Mass. 289. The petitioners contend that the order of October 17th constituted "the order laying out" the widening. The respondents contend that the statute means "the order for laying out," and that that was the order of September 26th. This contention derives some support from the language of the original act limiting the time within which betterment assessments should be laid, which was: "Such assessment shall be laid within two years after the passage of the order for the laying out," etc. St. 1869, c. 367, § 1. The question would still remain, however, whether there was any substantial difference between the two readings. The petitioners also contend that section 1, c. 51, Pub. St., is to be construed as if it read: "Laid out in pursuance of an order," etc. We do not think that either the petitioners or the respondents are quite correct. The board of public works of New Bedford was established by St. 1889, c. 167. By section 3, all the duties and powers in relation to laying out and altering streets or ways, vested in the city council or either branch thereof, or the mayor and aldermen, as supervisors of highways or otherwise, are vested in and are to be exclusively exercised by the board. The city charter of New Bedford provides that: "The city council shall have the same power in relation to laying out, acceptance, altering or discontinuing of streets and ways and the assessment of damages which selectmen and inhabitants of towns now by law have. But all petitions and questions relating to laying out, widening, altering or discontinuing any street or way shall be first acted on by the mayor and aldermen." St. 1847, c. 60, § 12. It is evident, therefore, that all the powers which selectmen and the inhabitants of towns have, in regard to the laying out or altering of streets or ways, are vested in the board, and that they form the basis of its authority in such matters, and that the powers which previously had been divided between the mayor and aldermen and the city council are now consolidated in its hands, and that it has sole jurisdiction in matters committed to its charge. The order of September 26th, which the board adopted, recited that, in the opinion of the board, common convenience and necessity required that Pleasant street should be widened from William to Union street, and directed that notice be given to the abut-

ters, naming them, of the intention of the board to lay out the street by taking a portion of their land and laying it out as a public street, and that the board intended to assess a portion of the expense on the estates benefited, and would be on the line of the proposed way or lay out at a certain time to view it, and to hear any objections to the lay out or assessment. It is manifest that this order did not constitute a laying out. It contained no description of the way, nor of the lands taken, nor of the owners thereof, nor of the sums awarded as damages, and no statement that the way was in fact laid out, or that land was taken for the purpose of laying out a way. It was not a laying out within the purview of the statute which allows a party aggrieved by an assessment of his damages to have the matter of his complaint determined by a jury "within one year after such laying out." Pub. St. c. 49, § 79; *Brookline v. Commissioners*, 114 Mass. 548; *Peterson v. City of Waltham*, 150 Mass. 564, 23 N. E. 236; *Loring v. Boston*, 12 Gray, 209; *Russell v. New Bedford*, 5 Gray, 31; *Eaton v. Framingham*, 6 Cush. 245; *Commonwealth v. City of Boston*, 16 Pick. 442, 446. But, in view of the fact that the powers and duties of the board were those of the selectmen and of the inhabitants of towns, the recitals and the direction as to notice contained in the order of September 26th constituted important steps in the laying out of the way. That order contained the adjudication of the board that common convenience and necessity required the laying out of the way. It stated the intention of the board to lay it out, and it directed notice to be given to the abutters of the time and place when and where the board would proceed to lay out the way, and hear the parties in the matter of damages and betterment assessments. All of these things were absolute prerequisites to the final laying out on October 17th. *Fitchburg R. R. v. Fitchburg*, 121 Mass. 132. The repetition of the adjudication of common convenience and necessity in the order of October 17th gave no added force to the previous adjudication. There is nothing in the statutes defining what is meant by "the order laying out,"—whether it refers to some particular step or stage in the proceedings, or whether it means the whole proceedings by which the way is laid out. In the present case, the notice which was served on the abutters is made by reference a part of the order of October 17th, and refers in terms to the order of September 26th. We think, on the whole, that the two orders, being thus connected by reference, and having been adopted for the purpose of laying out the way in question, by a board having sole jurisdiction of the laying out of streets, and the essential facts contained in both being equally necessary to the final laying out, should be taken together, although passed at different times, and regarded as constituting one order, which would be cor-

rectly described as "the order laying out the way." Construing the words "the order laying out" thus, it clearly enough appears that the order expressly declares that the way was laid out under the provision of law authorizing the assessment of betterments.

It is also objected that the widening was not completed at the time when the betterment assessments were made. This objection is based on an allegation in one of the reasons for the issuing of the writ, coupled with the stipulation, in the reservation in each case, that the facts alleged in the petition and answer are to be taken as true. It is, perhaps, sufficient to say, in regard to this objection, that it appears from a copy of the assessment order passed by the board on September 25, 1894, which is annexed in each case to the petition, and forms part of it, that the work of widening had been completed. *Dickinson v. Worcester*, 138 Mass. 555, 560. In view of the doubt thus thrown upon the existence of the fact, it could hardly be said that, on this ground, substantial justice had not been done, even if, as matter of pleading, the statements contained in the assessment order annexed to the answer were not to be taken as true. Besides, the averment seems to be argumentative rather than a statement of a substantive fact.

It is further objected that it is not within the constitutional power of officers appointed by the mayor and confirmed by the aldermen, as the act establishing this board provides that its members shall be, to make a betterment assessment. We have been referred to no authority supporting this proposition. It is attempted to deduce it from some general principles in regard to the right of representation in matters relating to taxation. But the citizens of New Bedford were represented in the legislature which passed the act, and they accepted it by a formal vote. The authority of the legislature to delegate to boards and commissions appointed by the governor and council, or by courts, or, as this was, the power to assess and apportion certain expenses, reserving to parties aggrieved the right to a jury trial, has been exercised too long to admit of question now. *Kingman, Petitioner*, 153 Mass. 566, 576, 27 N. E. 778; *Brayton v. Fall River*, 124 Mass. 95; *Agawam v. Hampden Co.*, 130 Mass. 528; *Boston & A. R. Co. v. City of Newton*, 148 Mass. 474, 20 N. E. 106; Pub. St. c. 112, § 131 et seq.; St. 1895, c. 450; St. 1894, cc. 288, 497; St. 1893, c. 407; St. 1892, c. 404; St. 1891, c. 380; St. 1890, c. 205; St. 1889, c. 439; St. 1888, c. 384. It is for the legislature to say who shall have supervision and control in matters relating to streets and ways in any given locality, and how he or they shall be selected, elected, or appointed.

The objection that the orders of September 26th and October 17th were not duly adopted, because the city clerk was not present, and a clerk pro tem. was chosen, who made the record after being duly sworn, has not

been pressed, and we consider it as waived. There is certainly nothing in it.

The remaining objection is that the property of the petitioners, on which betterments have been assessed, is incorrectly, imperfectly, insufficiently, and indefinitely described. It is not alleged that the petitioners all have not property situated on Pleasant street which is subject to assessment. Although more than two years have elapsed since the laying out, it is possible that the tax could be reassessed under section 2, c. 51, Pub. St., in which case it would seem that substantial justice would not require that these assessments should be quashed. But, aside from that consideration, we do not think that the assessments are invalid for the reason assigned. In the order of October 17, 1892, assessing the damages, the land belonging to the Cummings estate, to which damages were awarded, is described as that "belonging to the heirs of Benjamin and William Cummings," and, inferentially, as on the east side of Pleasant street. And it is only fair to suppose that where, in the order of September 25, 1894, the Cummings estate is assessed for betterments, the same estate is intended that was included in the assessment of damages. The statutes contain no provision respecting the description of estates benefited. But a deed describing the property conveyed as on the east side of Pleasant street, in New Bedford, belonging to the heirs of Benjamin and William Cummings, would operate as a good conveyance; and we do not see why a similar description is not sufficient to base a betterment assessment upon. How the amount of this tax shall be divided among the different owners is a matter with which the board can have no concern.

We fear that we do not appreciate the force of the objection in regard to the indefiniteness of the description (if that is relied on) in regard to the Masonic Building Association. The petition alleges that Charles W. Clifford and others, trustees and executors under the will of Charles L. Wood, conveyed certain premises, bounding on Pleasant street, to Edward D. Mandell and others, trustees; that Samuel P. Richmond conveyed to the same persons, also as trustees, another tract bounding on Pleasant street; and that said grantees conveyed said tracts to the Masonic Building Association. In the assessment of damages an award is made to "Est. Elizabeth Wood, or Clarence A. Cook et al., trustees, \$10,400," and award of damages was also made to S. P. Richmond; and it is alleged that the damages awarded to him and to Clarence A. Cook and others, trustees, were paid to the Masonic Building Association, which had acquired the right thereto by the aforesaid conveyance. In the order of September 25, 1894, assessing betterment assessments, is the following: "Elizabeth J. Wood, land on east side of the street, between Union and William streets, \$2,-832.55. Samuel P. Richmond, land on the

east side of the street, between Union and William streets, \$1,194.73." And the petition alleges that demand for the payment of these sums has been made on the Masonic Building Association, and that they constitute a lien on a part or all of its real estate. If the objection is that the middle initial is "J," and should be "T," or vice versa, or that there should be no middle initial, that is not such an error as will defeat the assessment, it not being alleged that there is more than one Elizabeth Wood who owns land on Pleasant street, between William and Union streets. If the objection is that the land of Elizabeth Wood and of S. P. Richmond is not sufficiently identified, that is answered by what has been already said in regard to the Cummings estate. If the objection is that the tax should have been assessed to the Masonic Building Association, and not to Elizabeth Wood and Samuel P. Richmond, the answer is that it is the estate benefited which is to be assessed, and, so long as that is correctly designated, justice does not require that the assessment should be quashed because the names of former owners have been used in describing it, instead of the name of the petitioner, when it does not appear that any one has been or will be misled or prejudiced by the error, if it is one. *Inhabitants of Monterey v. Berkshire Co. Com'rs, 7 Cush. 394.*

In regard to the objection that it is uncertain to which of the tracts for which "F. B. Greene et al." are assessed the respective assessments apply, we think that will plainly appear when the order of the assessments is applied to that in which the estates follow each other on the street.

On the whole case, we discover no error which requires that the assessments, or either of them, should be quashed. Petitions dismissed.

(143 Ind. 30.)

LEWIS et al. v. STATE.

(Supreme Court of Indiana. Sept. 17, 1895.)

CRIMINAL LAW—REVIEW.

Errors which are merely cause for new trial cannot be assigned as independent errors in an appellate court, but they should be presented to the trial court by motion for new trial, and, if overruled, its action in so doing assigned as error.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

James Lewis and others were convicted of robbery, and appeal. Affirmed.

Bernard Dolan, for appellants. W. A. Ketcham, Atty. Gen., and F. E. Matson, for the State.

JORDAN, J. The appellants were charged with, and convicted of, the crime of robbery, and sentenced to be imprisoned in the state's prison for a term of three years. In this court they have assigned errors substan-

tially as follows: "(1) Error of law occurring at the trial, in this: that the court erred in allowing witness Constantine Engler to give evidence against Edward Wolf, charging him with the commission of a felony other than the one with which he was charged," etc. "(2) That the court erred in allowing counsel for the state to make statements, in the presence of the jury, charging Edward Wolf with the commission of a similar crime," etc. "(3) Newly-discovered evidence." "(4) The verdict of the jury is contrary to the evidence."

These are the only errors that counsel for appellants have attempted to assign. It is well settled, by numerous decisions of this court, that alleged errors which are merely causes for a new trial in the lower court cannot be assigned in the supreme court as independent errors. In order to have presented the errors assigned to this court for review, appellants should have first properly presented them to the trial court by a motion for a new trial, and the action of that court in overruling the motion should have been assigned as error. *Wagner v. State*, 63 Ind. 250; *Allen v. State*, 74 Ind. 216. No question being presented for our consideration upon the merits of this appeal, the judgment is affirmed.

(142 Ind. 24)

ROOK et al. v. WILSON.

(Supreme Court of Indiana. Sept. 17, 1895.)

WILLS—DESCRIPTION OF LAND—EXECUTION BY MARK.

1. A will devising "my real estate, to wit, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of a certain section, will pass title to the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of such section, it appearing that the latter land was the only land owned by testator at the time of his death, and being admitted that it was the land referred to by testator as "my real estate."

2. Any mark used by testator to stand for his name, and show his assent to the will, is sufficient.

Appeal from circuit court, Jay county; L. Hubbard, Judge.

Action by Albert N. Wilson against Jacob Rook and others. Judgment for plaintiff. Certain defendants appeal. Affirmed.

David T. Taylor, for appellants. La Follette & Adair and R. H. Hartford, for appellee.

HOWARD, C. J. This was an action brought by appellee against appellants and other defendants to quiet title to certain real estate. A demurrer having been overruled to the complaint, the appellants filed an answer and a cross complaint. Afterwards, by leave of court, the answer and cross complaint were withdrawn, and the appellants stood upon their demurrer. Thereupon, the court, having heard the evidence, found for the appellee, and entered a decree quieting his title to the land in controversy. Appellee traces title, through mesne conveyances, to a warranty deed made by Mary Rook

and David Rook, widow and son of Samuel Rook; and the only question to be considered is whether the last will of Samuel Rook authorized David Rook to execute said deed.

It is not questioned that by said will certain land was devised to David Rook, on conditions which were fulfilled by him; that on the death of the testator, in August, 1854, the will was duly proved, and David Rook at once went into possession of the land in controversy, claiming ownership under the will; and that he so continued in possession under claim of ownership until the making of the deed under which appellee claims title. It seems, also, that the title and possession thus acquired remained unassailed for nearly 40 years. It is said, however, that the land described in the will is not the same as that in dispute. The description in the will is: "My real estate, to wit, the southeast quarter of the southeast quarter of section eight (8), in township No. eight (8) in 22 north, of range twelve (12) east." Appellee alleged in his complaint that, in this reference to the lands devised, the testator used an erroneous specific description of land which he did not then, and at no time thereafter, own; but that he did, at the time, own the land here in dispute, to wit, "the northeast quarter of the southeast quarter of section eight (8), township twenty-two (22) north, range twelve (12) east"; that the last-named land was "the only real estate owned by said Samuel Rook at his death"; and that "the said land [describing it] is and was the land referred to in the said will of Samuel Rook, deceased, by the words, 'My real estate.'" These allegations, being taken as true, were sufficient, as we think, to make the complaint good as against the objection here urged against it. The intention to devise the land in controversy, "my real estate," is evident from the whole tenor of the will, and the erroneous description cannot obscure this intention. A similar misdescription in *Cleveland v. Spilman*, 25 Ind. 95, was held insufficient to invalidate a devise. Counsel say that case was not well considered, and ought not to be followed. The opinion in *Cleveland v. Spilman* was written by one of the ablest judges that ever sat upon this bench, and the case has since been often cited by this court on the point in question, including the recent case of *Priest v. Lackey*, 140 Ind. —, 89 N. E. 54; and we are still of opinion that it should be followed in such a case as that before us. The language of the will shows that the devise was intended to operate upon the land then owned by the testator, which was the N. E., and not the S. E., $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the section.

Attention is also called to the circumstance that the will is signed: "James ^{his} X Rook, ^{mark} Testator," and not "Samuel Rook," as it should have been. The defect, if it be such, is not discussed by counsel. A similar defect was noticed in the signature to the will

in *Cleveland v. Spilman*, supra. The will in this case was duly probated as the will of Samuel Rook. Any mark used by the testator to stand for his name, and show his assent to the will, would be sufficient. See 1 Jarm. Wills (6th Am., from 5th Eng., Ed.) pp. 79, 80.

We have carefully considered every question raised in the several able briefs of counsel on both sides, and find no error in the record for which the judgment should be reversed. Judgment affirmed.

(142 Ind. 27)

FREEL v. SCHOOL CITY OF CRAWFORDSVILLE.

(Supreme Court of Indiana. Sept. 17, 1895.)

SCHOOL CORPORATION—LIABILITY FOR NEGLIGENCE.

A school corporation, which is an involuntary corporation, established as part of the school system of the state, in compliance with Const. art. 8, §§ 182, 187, and organized solely for the public benefit, is not liable for an injury received by a person through the negligence of its officers or agents, it not being made liable by statute, and not being authorized to raise money to pay damages.

Appeal from circuit court, Montgomery county; J. M. Rabb, Special Judge.

Action by Cornelius J. Freel against the school city of Crawfordsville, Ind. Judgment for defendant. Plaintiff appeals. Affirmed.

M. E. Clodfelter, Geo. D. Hurley, and C. L. Thompson, for appellant. Paul & Bruner, for appellee.

MONKS, J. Appellant brought this action to recover for personal injuries sustained by him while in the employment of appellee as a laborer, making repairs on a schoolhouse. A demurrer was sustained to the complaint, and judgment rendered for appellee. The only error assigned calls in question the ruling of the court in sustaining the demurrer to the complaint. If appellee is liable to respond in damages for the negligence of its officers or agents, the court erred in sustaining the demurrer to the complaint, as the same is otherwise sufficient.

School corporations in this state are a part of the educational system of the state, established in compliance with article 8 of the constitution (sections 182, 187, Rev. St. 1881; sections 182, 187, Rev. St. 1894), which makes it the duty of the legislature "to provide by law for a general and uniform system of common schools, where tuition shall be without charge and equally open to all." They are involuntary corporations, organized, not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the state for the sole purpose of administering the state system of public education. It is the duty of the school trustees of a township, town, or city to take charge of the educational affairs of their respective lo-

calities, and, among other things, to build and keep in repair public-school buildings. In performing the duties required of them, they exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. School corporations, therefore, are governed by the same law, in respect to their liability to individuals for the negligence of their officers or agents, as are counties and townships. It is well established that where subdivisions of the state are organized solely for a public purpose, by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions, then, as counties, townships, and school corporations, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. *Cones v. Board*, 137 Ind. 404, 37 N. E. 272, and authorities cited; *Board v. Daily*, 132 Ind. 73, 31 N. E. 531, and cases cited; *Morris v. Board*, 131 Ind. 285, 31 N. E. 77, and cases cited. In *Smith v. Board*, 131 Ind. 116, 30 N. E. 949, this court held that a county was not liable for an injury to a servant, sustained without his fault, while engaged in tearing down one of its bridges, although he works under the immediate charge of its agent, who is known to the board of commissioners to be incompetent, which incompetency is the proximate cause of the injury. The case of *Smith v. Board*, supra, is decisive of the questions in this case. Besides, school corporations in this state have no fund out of which such damages can be paid, nor have they any power, express or implied, to raise a fund for such purpose, by taxation or otherwise. The law specifically states what taxes shall be levied for their benefit, and how and for what the same shall be disbursed, and no provision is made for the payment of damages for personal injuries. This fact alone would be decisive of the question against appellant. *Cones v. Board*, supra, on pages 408, 409; *O'Leary v. Board*, 79 Mich. 281, 44 N. W. 608. Certainly, a public corporation is not liable to respond in damages, in any instance, for the negligence of its officers or agents, unless it has the authority to raise the money from the taxpayers to pay the same. The officer, agent, or other person whose negligence was the proximate cause of the injury may be liable, but the appellee is not. The decisions in other states fully sustain the views here expressed. *Edgerly v. Concord*, 62 N. H. 8; *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373, and note on pages 398-402; *Howard v. City of Worcester*, 153 Mass. 426, 27 N. E. 11; 2 Thomp. Neg. 698; *Hill v. Boston*, 122 Mass. 344; *Wixon v. City of Newport*, 13 R. I. 454; *Finch v. Board*, 30 Ohio St. 37; *Lane v. Township*, 58 Iowa, 462, 12 N. W. 478; *Flori v. City of St. Louis*, 69 Mo. 341; *Hollenbeck*

v. Winnebago Co., 95 Ill. 148; Bigelow v. Inhabitants of Randolph, 14 Gray, 541; Kincaid v. Hardin, 53 Iowa, 480, 5 N. W. 589; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812; Bailey v. Lawrence Co. (S. D.) 59 N. W. 219; 1 Beach, Pub. Corp. § 739, note 1; 15 Am. & Eng. Enc. Law, p. 1143, and authorities cited in note 1; 1 Shear. & R. Neg. § 267. There is no error in the record. Judgment affirmed.

(142 Ind. 490)

STOTSENBURG v. FORDICE et al.¹

(Supreme Court of Indiana. Sept. 17, 1895.)

ANSWER—SET-OFF—MONEY PAID BY MISTAKE—DEMAND FOR RETURN.

1. Where a plea is not, strictly speaking, a defense to the cause of action, but sets up a cross demand, such as set-off or counterclaim, it is not bad in failing to respond to so much of the claim sued on as may exceed the set-off or counterclaim, though it be directed to the entire cause of action.

2. Money paid by mistake of the payor, as interest in excess of the rate provided by the note, may be recovered, though there be no deceit or concealment, mutuality of mistake, imposition, or compulsory payment.

3. In an action on a note, defendant can set off excessive interest paid thereon by mistake without having made demand for repayment.

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by Evan B. Stotsenburg, administrator de bonis non, against Nelson Fordice and others. From a judgment for plaintiff for part only of his demand, he appeals. Affirmed.

Voight & Stotsenburg, for appellant. A. Dowling, for appellees.

HACKNEY, J. In November, 1866, one Maginnis executed to the appellant's predecessor three promissory notes, each for \$1,627.27, "with interest at the rate of six per cent., payable semiannually, and specifically in gold coin." To secure said notes, he executed his mortgage of certain real estate. In November, 1871, Maginnis conveyed the real estate to the appellee Fordice and one Devol, who assumed the payment of said mortgage. In November, 1877, what was supposed to be one-half of said debt was paid. In May, 1892, by order of the Floyd circuit court in partition, said real estate, as the property of said Fordice and Devol, was sold to the appellee John B. Lloyd, who assumed said mortgage. This suit was by the appellant for a personal judgment against said Fordice and Lloyd, and the foreclosure of said mortgage against them and the appellee Etta B. Lloyd. The fourth paragraph of the separate answers each of Fordice and of Lloyd and wife was as follows: "And the defendant, * * * by way of amended fourth paragraph of answer herein, says that, by mistake of the agents of said Fordice as to the rate of interest upon said notes, the said defendant Fordice, by his agents, paid, to the predeces-

sors of the plaintiff in his said trust, interest, on the notes mentioned in the complaint, at the rate of eight per cent., instead of six per cent.; that such mistake was made in each payment of interest on said notes from the 13th day of November, 1867, until the 11th day of February, 1892, said payments being made annually from said first-named date until the date last mentioned; that, by reason of the excess of interest so paid by mistake, the defendant is entitled to an annual credit upon the principal of the notes sued on of thirty-two dollars and fifty-five cents (\$32.55), and to a total credit upon the principal of the notes sued on of eight hundred and seventeen dollars and fifty cents (\$817.50). Wherefore he prays judgment," etc. Upon the overruling of the appellant's demurrers to said answers for the want of sufficient facts, the appellant filed replies, and the court, upon final hearing, rendered a special finding, and gave the appellant judgment and decree for the principal and interest sued for, less the amount found to have been overpaid on account of interest and by reason of said alleged mistake. The appellant's complaint in this court is of the overruling of said demurrers, and in denying him a new trial.

The first proposition advanced is that the answer in question was but a partial answer while pleaded in bar of the entire cause of action. A well-known rule of practice is that which holds that a partial defense pleaded in bar of an entire cause of action is unavailing. However, it is now well settled that where the plea is not, strictly speaking, a defense to the cause of action, but sets up a cross demand, such as set-off or counterclaim, it is not bad in failing to respond to so much of the claim sued upon as may be in excess of the set-off or counterclaim, though it be directed to the entire cause of action. Curran v. Curran, 40 Ind. 473; Dodge v. Dunham, 41 Ind. 186; Mullendore v. Scott, 45 Ind. 113; Law v. Vierling, Id. 26.

The appellant assails this answer, further, because (1) no deceit or concealment was practiced on Fordice; (2) mistake to operate as a defense must be mutual, or it must be shown that surprise or imposition existed; (3) the payments were not shown to have been compulsory or involuntary; (4) Fordice and Lloyd were strangers to the original transaction, and could not take advantage of the payment of usurious interest; (5) that demand for repayment should have been alleged. In Brown v. Road Co., 56 Ind. 110, a complaint to recover money paid by mistake of the payor was held sufficient without allegations of fraud, concealment, mutuality of mistake, or compulsory payment. An objection there expressly made was that no fraud or concealment was alleged, and that, if the payor did not know the facts and the state of the accounts with the payee, it was his neglect, and therefore no remedy existed. It was said in that case: "It is well settled that money paid under a mistake, on

¹ Rehearing denied. See 41 N. E. 810.

the part of the payor, of a material fact, can be recovered back. 2 Chit. Cont. (11th Am. Ed.) 923, and authorities there cited. On the subject of laches on the part of the party paying the money and seeking to recover it back, we quote the following passages from the volume above cited, at page 939: "And, in the above case, Baily, J., said: 'If a party pay money under a mistake of the real facts, and no laches is imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money.' But the rule on this subject has ceased to be thus limited; it being now held that the possession of the means of knowledge by the party who paid the money can be regarded only as affording a strong observation to the jury to induce them to believe that he had actual knowledge of the circumstances, but that there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself." A similar case is that of *Lewellen v. Garrett*, 58 Ind. 442. There the rule of recovery was quoted from *Guild v. Baldridge*, 2 Swan, 295, as follows: "The right of recovery proceeds upon the ground that the plaintiff has paid money which he was under no obligation to pay (and which the party to whom it was paid had no right either to receive or to retain), and which, had the true state of facts been present in his mind at the time, he would not have paid." In *Worley v. Moore*, 97 Ind. 15, the rule recognized was that, where the facts showed that the payee could not in good conscience retain the money, it could be recovered. It is true that the opinion stated that in that instance the mistake was mutual, but it was not held that recovery depended upon the mutuality of the mistake, nor was fraud or concealment held to be essential. In *City of Indianapolis v. McAvoy*, 86 Ind. 587, it was held that the failure to employ the means of knowledge which would disclose the mistake does not preclude recovery. In *Ingalls v. Miller*, 121 Ind. 189, 190, 22 N. E. 995, is the following statement of the rule: "Where money is paid upon the supposition that a specific fact, which it was supposed would entitle the other to maintain an action, is true, which fact is not true, an action will lie to recover the money back, 'upon the ground that the plaintiff has paid money which he was under no obligation to pay (and which the party to whom it was paid had no right either to receive or to retain), and which, had the true state of facts been present in his mind at the time, he would not have paid.' *Guild v. Baldridge*, 2 Swan, 293; *Lewellen v. Garrett*, 58 Ind. 442; *Brown v. Road Co.*, 56 Ind. 110; *Cross v. Herr*, 96 Ind. 96." See, also, *Grimes v. Blake*, 16 Ind. 160; 15 Am. & Eng. Enc. Law, p. 677; *Railroad Co. v. Faunce*, 46 Am. Dec. 655. In the last case it was held that money paid in consequence of a mistaken view of the facts cannot be a voluntary payment.

To the same effect is the rule as stated in *Bish. Cont.* §§ 632, 633.

It is clear that, in the reformation of contracts which are alleged to misstate the intention, it must appear that the mistake is that of all of the parties. Otherwise, a new contract would be made, and the terms of the first would be varied to meet the mind of but one of the parties, and not to conform to the conditions upon which the minds of both parties met in the original transaction. But we do not see any good reason for applying the rule of mutuality where recovery is sought for moneys paid, under a mistake of fact, to one not entitled to receive it. Suppose the mistake is as to the identity of the creditor, and money owing to A. is paid to and received by B. The fact that B. does not participate in the mistake, but submits his willing hands to the receipt of the money, should not, in good conscience, permit B. to retain the money when the debtor discovers his mistake. Nor do we observe a better reason for enforcing the rule of mutuality where the mistake consists in paying to the proper creditor, by mistake, more than he was entitled to receive. But even where written agreements are sought to be reformed, the rule as to mutuality of mistake is not unbending. In *Roszell v. Roszell*, 109 Ind. 354, 356, 10 N. E. 114, it is said: "If it appears that the mistake was known to one of the parties, who, with knowledge of the ignorance of the other, nevertheless kept silent, where he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement." This proposition, it seems to us, should receive added force when applied to the case of one who has received, by the mistake of another, that to which he was not entitled, but which he may have accepted with knowledge of the mistake. In *Kerr, Fraud & M.* p. 415, the rule is stated more strongly than is necessary to support the one conclusion: "Money paid voluntarily, under mistake of fact, is recoverable, both at law and in equity, unless it be clear that the party making the payment intended to waive all inquiry into the facts. It is not enough that he may have had the means of learning the truth if he had chosen to make inquiry. The only limitation is that he must not waive all inquiry." The issue tendered by the answer requires no inquiry as to the collection or recoupment of usurious interest paid, nor as to the privilege of *Fordice* and *Lloyd* to take advantage of any such payments. The contract rate was not usurious, and the excess was alleged to have been paid by mistake as to the contract rate, and not pursuant to contract. It was not essential to the maintenance of the appellees' claim, as pleaded in the answer in review, that a demand should have been made, before answering, for the repayment of the sums paid by mistake, or for credit therefor upon the notes. The suit of the appellant excused the demand, if one was necessary. *Harshman v. Mitchell*,

117 Ind. 312, 20 N. E. 228; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905; *McClanahan v. Williams*, 138 Ind. 30, 35 N. E. 897. We are of opinion that the fourth answer of Fordice was not bad for any of the reasons urged against it.

The fourth answer of Lloyd is attacked for all of the reasons pressed against the answer of Fordice, and upon the additional objection that Lloyd was not a party to the mistake of Fordice, and would not be injured thereby, but that he had notice, by the proceedings in partition, that he was assuming the principal of the debt. The partition proceedings were not before the lower court by the allegations of the answer, and could form no basis for an objection to the answer. The answer responded to the complaint, which, in theory, charged both Lloyd and Fordice as privies to the transaction with the original debtor; and the answer was not objectionable in pleading facts which showed that the assumption was of a debt diminished by payments, and by the existence of claims which should be deemed a compensation, in part, of the claim sued upon.

The question is suggested that the judgment was not sustained by the evidence. The well-known rule that this court will not weigh the evidence, and pass upon the question of its weight and preponderance, renders it necessary only that we should ascertain that there was evidence supporting the judgment. The evidence, without conflict, shows that the notes provided but 6 per centum as interest, and that the payments made were at the rate of 8 per centum. It also appears that, for one or two years of the payments of Fordice, he paid 8 per centum in currency, as the equivalent of 6 per centum in gold,—gold then bearing a premium,—and that subsequently his payments were gauged by the amount he had first paid, though gold did not then bear a premium, and were made by his agents, who were governed by the former payments, and did not know the contract rate. This it seems is sufficient to bring the case within the rules suggested with reference to the sufficiency of the answer of Fordice. Finding no error in the record, the judgment is affirmed.

(142 Ind. 31)

CITY OF SOUTH BEND v. MARTIN.

(Supreme Court of Indiana. Sept. 17, 1895.)

PEDDLERS—LICENSES—INTERSTATE COMMERCE.

1. One who goes from house to house with articles of commerce, there offering them for sale, and delivering them as sold, is engaged in peddling, within Rev. St. 1894, § 3541 (Rev. St. 1881, § 3106), authorizing cities to restrain hawking and peddling.

2. An ordinance prohibiting peddling without a license is not an interference with interstate commerce, in the case of a person who takes about with him articles sent to him, as agent, to sell, by one manufacturing in another state, and delivers them as sales are made; and it is immaterial that the sales are on the installment plan, and that the title remains in the manufacturer till payment of the price.

Appeal from circuit court, St. Joseph county; L. Hubbard, Judge.

Action by the city of South Bend against William C. Martin. From a judgment of the circuit court reversing a judgment in the mayor's court for plaintiff, plaintiff appeals. Reversed.

Wilbert Ward, for appellant. Joseph G. Orr, for appellee.

MCCABE, J. The appellant prosecuted the appellee before the mayor of said city to recover the penalty, of not less than \$1, nor more than \$20, provided in an ordinance with a violation of which the appellee was charged in the verified complaint filed. Said complaint charged "that the defendant, on the 12th day of September, 1894, at the city * * * aforesaid, violated sections Nos. 24 and 25 of Ordinance No. 938 of said city, passed by the common council thereof on the 11th day of December, 1893, and amended August, 1894, by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend by carrying, exposing, offering, and crying for sale, articles of merchandise, to wit, rattan rocking chairs, in the public streets and avenues of said city, without having a license for that purpose; that while so engaged the defendant sold and delivered to one Emma Wright one rattan rocking chair, for the sum of six dollars; that said articles of merchandise so sold were not newspapers nor produce nor provisions, and that said sales were not for future delivery of said chairs; that defendant is not a wholesale traveling merchant." The city recovered judgment in the mayor's court for one dollar, and the defendant appealed to the circuit court, where a trial resulted in a judgment for the defendant. The plaintiff appeals therefrom to this court. One of the questions presented by the record and briefs is whether the ordinance referred to is valid. That alone rescues the appeal from the exclusive jurisdiction of the appellate court. Acts 1891, p. 39; Rev. St. 1894, § 1336. The only error assigned is that the circuit court overruled appellant's motion for a new trial. The ground for the motion for a new trial is that the decision of the court was contrary to law and the evidence.

The only evidence in the cause was the following agreed statement of facts:

"A. H. Ordway & Co. are manufacturers of rattan chairs, residing in South Framingham, Mass., of which state they are citizens, and in which city they have their manufactory and place of business. In the prosecution of the said business they sell directly to the people of the different states, and do not sell to retail dealers in the trade. They ship their chairs from the factory to A. H. Ordway & Co., in care of their agents at different points throughout the United States. In the prosecution of their said business they employ men, who go about from town to town in

Indiana and other states of the Union with the chairs, going personally from house to house, and selling the chairs on the installment plan, retaining the title in the chairs until they are fully paid for, and deliver the goods at the time the sales are made. The defendant William C. Martin was an employé of the said A. H. Ordway & Co., employed by them to travel and sell their chairs in the manner stated, upon a commission on the amount of his sales, at the time of his arrest September 13, 1894. The particular chairs which defendant was engaged in selling in South Bend, Indiana, at the time of his arrest, were shipped by the owners and manufacturers, A. H. Ordway & Co., from South Framingham, Mass., to A. H. Ordway & Co., in care of their agent at Chicago, state of Illinois, where they have a branch and repository, and there reshipped from Chicago to South Bend, Indiana. The defendant, William C. Martin, at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale, and was acting solely for A. H. Ordway & Co.; and the said sales were made on the installment plan, and the title retained in A. H. Ordway & Co. until same are fully paid for. The common council of the city of South Bend had enacted an ordinance, in force at the time of the arrest of the said William C. Martin, entitled 'An ordinance concerning the licensing of certain extraordinary trades and establishments.' Passed December 11, 1893; amended August 28, 1894. Section 24 of said ordinance provides as follows:

"It shall be unlawful for any person to carry on the business of hawking and peddling within the corporate limits of South Bend, at wholesale or retail, by carrying, exposing or crying for sale within any street, avenue, alley or public square of said city, or otherwise, any article of commerce without a license from said city for that purpose: provided this section shall not apply to the sale of newspapers nor to produce and provisions nor fruit of peddlers' own raising, nor to taking orders for future delivery of any kind of goods, wares or merchandise, nor to wholesale travelling merchants and farmers who sell only retail dealers in like commodities. Any person violating any section of this ordinance shall be fined for each offense not less than one dollar nor more than twenty dollars."

"Sec. 25. License to hawkers and peddlers shall be signed by the mayor and countersigned by the clerk on payment of a license fee as follows: For carrying goods by hand, one dollar per day, five dollars per week, ten dollars per month and twenty dollars per year. For selling from any kind of vehicle two dollars per day, eight dollars per week, fifteen dollars per month, twenty-five dollars

per year. The clerk for such services shall receive fifty cents for each license issued to be paid by the applicant.

"Sec. 26. No license issued under any section of this ordinance shall be transferable; nor shall any person other than the person named in the license, be permitted to use the same, nor shall any license protect any person from incurring the penalties prescribed by this ordinance except the license named in the license."

"The defendant, William C. Martin, at the time of his arrest, was not engaged in the sale of newspapers, produce, provisions, or fruit, and was not taking orders for future delivery, and was not a wholesale traveling merchant, but was selling at retail to consumers. The defendant, * * * at the time of his arrest, had not obtained a license as required by said ordinance. The defendant was arrested, tried, convicted, and sentenced to pay a fine of * * * \$1 and costs, under said ordinance, before D. B. J. Schafer, mayor of said city of South Bend, September 13, 1894. If the court should be of the opinion, upon the facts stated, that the defendant * * * was liable to pay the license fee provided by said ordinance, then judgment to be rendered for the plaintiff for one dollar (\$1) and costs of suit. If the court should be of opinion that the said Martin was not liable to pay, then judgment to be entered for the defendant for costs of suit."

Subdivision 23, § 3106, Rev. St. 1881 (section 3541, Burns' Rev. St. 1894), empowers cities "to regulate the ringing of bells and crying of goods and to restrain hawking and peddling." It has been held by this court that this statutory provision empowers a city to pass an ordinance requiring a license to hawk and peddle in a city. *City of Huntington v. Cheesbro*, 57 Ind. 74. The ordinance involved in *Graffy v. City of Rushville*, 107 Ind. 502, 8 N. E. 609, imposing a penalty on "every person who peddles, hawks, sells, or exhibits for sale, any goods, wares or merchandise not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares or merchandise for immediate or future delivery about the streets, alleys, hotels, business houses, or at any public or private place in said city," without a license, was held void both because it violated section 23 of article 1 of the state constitution, which provides that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," and because of its plain repugnance to the federal constitution, which commits to congress the exclusive power to regulate commerce among the several states. The provision in that ordinance that brought it in conflict with both constitutions, in the opinion of the court, was its discrimination against "any goods, wares or merchandise not the growth or manufacture of

Rush county, Indiana." Graffy had been taking orders from citizens of said city for shirts, socks, and men's furnishing goods, about the streets, etc., of said city, which were not of the growth or manufacture of said Rush county. That he resided in Indianapolis, and was in the employ of Paul H. Krauss, a manufacturer and dealer in such goods, residing, and having his business house in the city of Indianapolis. That Graffy's manner of business was to carry samples of the different articles manufactured or sold by his employer, and exhibit them, from house to house, to individuals, not dealers, soliciting orders from each individual for such articles, and in such quantities as the individual might require or purchase. The goods thus ordered were to be delivered at a future day, by express or otherwise. He delivered no goods, nor did he carry any goods with him, except the samples. It is easy to see that, as against Graffy, this ordinance, under the facts, was an infringement of the provision quoted from the state constitution; but it is difficult to see how, under those facts, it violated any provision of the federal constitution. It is also easy to see that a case might arise, on a different state of facts, that would make the ordinance void, as to that case, because of its infringement of the federal constitution. For instance, had the manufacturer and dealer in these goods been a resident of another state, and had his business house there, his goods then would have been the legitimate subjects of interstate commerce, and Graffy would have been engaged in interstate commerce, the exclusive power to regulate which is vested by the federal constitution in the congress of the United States. But the facts in that case show that Graffy was not engaged in interstate commerce, but that he was engaged in intrastate commerce; that his commerce and trade, and by which it was charged he violated the ordinance, were entirely confined within the boundaries of the state of Indiana, the power to regulate which has never been delegated by the federal constitution to congress, but has been retained by, and belongs to, the several states. The case, however, rightly decided that the ordinance was void because of its infringement of the state constitution, but not as an infringement of the federal constitution, under the facts of that case. It will be observed that the ordinance now before us makes no discrimination, but applies to all, without regard to residence, or the place from whence the goods come.

Two questions arise under the assignment of errors, and the contention of counsel: (1) Was the business of the appellee, conducted in the manner described in the complaint and agreed facts, within the prohibition of the ordinance against hawking and peddling? (2) Was the ordinance in question a valid exercise of the power vested in the city by the statute referred to? The answer to both questions depends, to some extent, upon the an-

swer to the question, what is hawking and peddling? Because it is that that the city is authorized to restrain, and requiring a license was held to be a restraint on such business in *City of Huntington v. Cheesbro*, supra. In *Graffy v. City of Rushville*, supra, it was said: "The extent of the power conferred upon cities by the statute, in this connection, is to restrain hawking and peddling, and any mode of selling which does not legitimately fall within these terms cannot be made unlawful by being specially described and restrained in the ordinance. Such sales and exhibitions of wares, and such orders for the future delivery of goods, and such only, as are embraced by the terms 'hawking and peddling,' may be restrained by ordinances duly passed under the power conferred by the statute above set out." We must therefore inquire and ascertain what constitutes a hawker and a peddler. This court, in the case last referred to, adopted the definition of Chief Justice Shaw in *Com. v. Ober*, 12 Cush. 493, which definition has been adopted by many courts,—among them, the supreme court of the United States, in *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367. It was said by Chief Justice Shaw that: "The leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader, who has goods for sale, and sells them, in a fixed place of business. Superadded to this (though, perhaps, not essential), by a 'hawker' is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish." Webster defines "peddling" as traveling about and selling small wares, and "hawking" as offering for sale in the streets by outcry. Another definition also adopted by this court in the case referred to, and by the supreme court of the United States in the case referred to, runs thus: "A peddler, petty chapman, or other trading person, going from town to town, or to other men's houses, and traveling, either on foot, or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." *Rap. & L. Law Dict.* tit. "Hawker." This court and the supreme court of the United States, in the cases mentioned, quote with approval another definition found in the various law dictionaries, showing the disfavor in which the common law held the vocation, as follows: "Hawkers. Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise which ought to be uttered in open market, were of old so called; and the appellation seems to grow

from their uncertain wandering, like persons that, with hawks, seize their game where they can find it. * * * Hawkers and peddlers, &c., going from town to town or house to house, are now to pay a fine and duty to the king." The purpose and policy of the statute in empowering cities to pass ordinances in restraint of hawking and peddling was probably twofold. One and the principal object to be attained was the protection and encouragement of local dealers and merchants, who are largely dependent for their patronage on their reputation for integrity and fair dealing, and their social and moral standing in the community, and who, by investing their means, providing fixed places of trade, and paying taxes on their merchandise, help to build up and maintain the city in which they reside, and contribute to the support of its schools, and other local interests and enterprises. The other was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders, of unknown repute, who may be frequently patronized by persons in order to be rid of their importunities and presence. Under these definitions of "hawking and peddling," the city was amply empowered to enact the ordinance in question. The police power vested by the statute in the city may be properly exerted to restrain all such as, by their methods of doing business, are liable to invade social order, or injuriously affect the prosperity of the city, by seeking purchasers for their wares in the homes of citizens, or in the streets or public places of a city, to the discouragement of the more legitimate methods of others, on whom the municipality is dependent for its support. In *Graffy v. City of Rushville*, supra, it was said: "Any method of selling goods, wares, or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities, * * * constitutes the person so selling a hawker or peddler, within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking and peddling without being duly licensed." The same is true in the case now before us.

The next question is, was the ordinance in question a valid exercise of the power vested in the city by the statute? The answer to that question depends upon whether the ordinance violates or infringes any of the limitations of the constitution, state or federal. It is not claimed that it violates any provision of the state constitution, or infringes any of its provisions. This is practically conceded by the appellee. But he contends earnestly that it infringes that provision of the federal

constitution which vests in congress the power to regulate commerce with foreign nations, and among the several states. It is contended that the business of the appellee, and the manner in which it was conducted, as shown by the agreed statement of the facts, made it interstate commerce, and therefore beyond the control of the state authorities. In support of this contention, appellee's counsel cite and rely on *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829. It was said in that case, quoting from Chief Justice Fuller in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, that: "The power vested in congress 'to regulate commerce with foreign nations, and among the several states and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of the state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419. And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the state, unless placed there by congressional action." But the facts in that case (*Brennan v. Titusville*) were entirely different from those in the case at bar, though, at first blush, they may seem to be very similar. In that case, J. A. Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, Ill., of which state he was a citizen, and in which city he had his factory and place of business. He employed agents, who, under his direction, solicited orders for pictures and picture frames in the state of Pennsylvania, and other states of the Union, by going personally to residents and citizens of said states, and exhibiting samples,—going, when necessary, from house to house. Brennan was an agent of Shephard, employed by him to travel and solicit orders for said articles, in the manner stated, upon a salary, and also upon commission upon amount of his sales. Upon receiving orders for pictures and picture frames, the agents of said Shephard forwarded the same to him, at Chicago, Ill., where the goods were made, and from there said Shephard shipped the goods to the purchasers in Titusville, Pa., by railroad, freight and express; and the price of said goods was collected and forwarded by the express companies, and sometimes by the agents, to Shephard, at Chicago, Ill. The

agent, Brennan, employed by said Shephard, was engaged in conducting the business in the manner stated at the time of his arrest in said city of Titusville, Pa. There was at the time in force in said city an ordinance enacted by said city of Titusville, providing "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business and shall pay to said treasurer therefor the following sums, according to the time said license shall be granted"; and then follows the price of the license for the different lengths of time for which they may be granted. The penalty provided for a violation of the ordinance was a fine not exceeding \$100, nor less than the amount required for a license to such person, together with 20 per cent. added, with costs of suit. The agent had not procured a license when he did the business with which he was charged. It was further said in that case, quoting from the opinion of Mr. Justice Bradley in *Leloup v. Port of Mobile*, 127 U. S. 640, 645, 8 Sup. Ct. 1380, that, "Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business." And further quoting in that case from the opinion of Mr. Justice Field, in *Welton v. Missouri*, 91 U. S. 275, 278, it was said, "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves." It was further said in the case of *Brennan v. Titusville*, supra, that: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and, if a state may lawfully exact it, it may increase the amount of the exaction, until all interstate commerce in this mode ceases to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and, to that extent, to regulate it." And, after reviewing a long line of decisions of the supreme court of the United States, it was said by Mr. Justice Brewer, who delivered the opinion of the court, that, "Within the reasoning of these cases, it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was therefore beyond the power of the state." For that reason the judgment of the supreme court of Pennsylvania, which had held the ordinance valid, was reversed. It follows, therefore, from these principles, well established by the decisions of the supreme court of the United

States,—the court of last resort upon such questions, and whose decisions thereon are binding upon and authoritative with us,—that if the goods involved in the case now before us were the subjects of interstate commerce at the time the appellee was dealing with them, and if the appellee, in selling them as he did, was engaged in interstate commerce, then the ordinance he was charged with violating was void, at least as to him and that transaction. But it will have been observed that the facts in *Brennan v. Titusville*, supra, as before remarked, are very different from those in the case now before us. The goods in *Brennan's Case*, when his employment was at an end in each sale, were still in the manufacturer's possession, in another state than that in which he made the sales. His employment as a "person canvassing or soliciting within said city orders for goods," etc., was at an end, so far as the restriction in the ordinance went, when he transmitted the order for which he had canvassed, or which he had solicited, to his employer, in the other state. Therefore, in taxing his occupation, the goods were taxed, by the ordinance, before they had come into the state of Pennsylvania, and become incorporated into the mass of property in that state, and while they were in the state of Illinois. Not so under the facts in the case now before us. Before appellee's employment can begin in any sale of chairs, as shown by the agreed state of facts, such chairs must be first shipped by their owners and manufacturers, A. H. Ordway & Co., in Massachusetts, into the state of Indiana, for sale by the appellee as their agent. The chairs, in the regular course of business, as shown to have been conducted by the appellee, must reach their final destination and resting place in Indiana before appellee can have anything to do with them. After they reach such final destination, and not before, appellee's employment, which is taxed by the ordinance, begins.

Whether such chairs, after their final destination is reached, are the subjects of interstate commerce, is the turning point in this case, and is a very different question than that presented in *Brennan v. Titusville*, supra. There the employment of the agent ceased before the goods were shipped, even, and much longer before they reached their final destination and resting place, as to each particular sale. But the supreme court of the United States, more than one year later,—on March 4, 1895,—decided a case that is exactly in point, namely, *Emert v. Missouri*, supra. At page 309, 153 U. S., and page 387, 15 Sup. Ct., Mr. Justice Gray, speaking for the court, said: "The facts were agreed, that the Singer Manufacturing Company for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddlers' license, was

engaged in going from place to place in Montgomery county, in the state of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to persons at different places, and found a purchaser, and sold and delivered it to him. The supreme court of the state, in its opinion, understood and assumed the effect of those facts to be as follows: The defendant was engaged in going from place to place, selling and trying to sell sewing machines, in Montgomery county, in this state, and had been so engaged for some years. He carried the machines with him, in a wagon, and, on making a sale, delivered those sold to the purchaser. He was not only soliciting orders, but was making sales, and delivering the property sold. These acts bring him clearly within the statutory definition of a 'peddler,' and, having no license from the state, he became liable to the penalties imposed by the statute, unless for any reason, he was exempt from the operations of the law. * * * Upon any construction, it is clear that the defendant was engaged in going from place to place within the state, without a license, soliciting orders for the sale of sewing machines, having with him, in the wagon, at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. * * * The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer from one state to another, and were neither interstate commerce, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and, so far as appears, the only goods in which he was dealing had become a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state. The statute in question is no part of the revenue law. It makes no discrimination between residents or products of Missouri and those of other states, and manifests no intention to interfere in any way with interstate commerce. Its object in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the state

against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door." A large number of the decisions of that court upon that question are reviewed in the case last quoted from above, and quotations made therefrom. Quoting from *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, it is there said: "Coal brought in flat boats from Pittsburgh to New Orleans was still afloat in the Mississippi river after its arrival, in the same boats and in the same condition in which it had been brought, and was held in order to be sold, on account of the original owners, by the boat load; yet this court unanimously decided that a tax imposed by General Statutes of the state of Louisiana upon this coal was valid, and, speaking by Mr. Justice Bradley, said: 'It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.' The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival within the state,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax, laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to." And it was further there said: "In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, indeed, the majority of the court held that a statute of Tennessee requiring 'all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample,' to pay a certain sum, weekly or monthly, for a license, was, as applied to persons soliciting orders for goods on behalf of houses doing business in other states, unconstitutional, as inconsistent with the power of congress to regulate commerce among the several states. * * * The distinction on which the judgment proceeded is clearly brought out in the following passages of the opinion: 'As soon as the goods are in the state, and become a part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v. Hous-*

von, 114 U. S. 622, 5 Sup. Ct. 1091. When goods are sent from one state to another for sale, or in consequence of a sale, they become a part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they are not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are. *Id.*; *Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself. "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state, is interstate commerce." And quoting from the opinion of Mr. Justice Field in *Welton v. Missouri*, 91 U. S. 275, involving a state statute, discriminating against goods from other states, it was further said, in *Emert v. Missouri*, *supra*, that: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin."

In the case now before us, the goods, as shown by the agreed state of facts, had been sent by the owners and manufacturers from one state into another—from Massachusetts to Indiana—for sale; reaching their final destination and resting place before they were sold, or offered to be sold, and before appellee's employment in connection with them commenced. His employment was taxed by the ordinance, and that was, under the authorities cited, a tax upon the goods themselves, it is true; but before such employment began the goods had reached their final destination, and place of rest, and ceased to be subjects of interstate commerce, and had become incorporated in the general mass of property in this state, and liable to be taxed as other property, there being no discrimination made in the ordinance against them as goods from another state,—they not being taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. There was no attempt, in the ordinance in question, to tax the sale of goods, or the offer to sell them, before they are brought into the state. There was no negotiation of sales of goods which were in another state, for the purpose of introducing them into this state. It will have been observed that in the case we have been quoting from (*Emert v. Missouri*, *supra*) the supreme court of the United States is careful to note that, while the defendant Emert's occupation was offering for sale and selling sewing machines manufactured and owned in New Jersey, yet that there was nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time, and that his dealings were neither accompanied nor followed by any transfer of

goods, or of any order for their transfer, from one state to another. Had it been otherwise, the case would have been ruled by *Brennan v. Titusville*, *supra*. There is no conflict between the two cases, as appellee's counsel seems to suppose. On the contrary, the opinion in the latter case expressly mentions the former as following the rule laid down in *Robbins v. Taxing Dist.*, *supra*, and is in harmony with the rule laid down in the case then before the court; the conclusion there reached being that the Missouri statute then involved was in no wise repugnant to the power of congress to regulate commerce among the several states, but was a valid exercise of the power of the state over persons and business within its borders. That conclusion is decisive of the question here involved, and discussed by counsel on both sides. But appellee's counsel seeks to avoid the force of that conclusion by contending that the facts agreed upon do not bring the present case within that rule, because, as he contends: "The defendant was engaged in the sale of chairs on the installment plan. When a purchaser was found, only a conditional sale was made, the title being retained in the foreign owner until some indefinite time in the future. It might never vest in the purchaser, for the reason that he might never comply with the conditions of the sale." And the further contention is that an actual sale is necessary, to bring the defendant within the rule laid down in *Emert v. Missouri*, *supra*, by the supreme court of the United States. It is a sufficient answer to that contention to say that, while that case was one where an actual sale had been made, yet no rule was there laid down that an actual sale was necessary in that or any other case, though the prosecution was for a violation of a statute providing that "no person shall deal as a peddler without a license." Whether that statute was actually violated, or not, by Emert, was not discussed or decided by the supreme court of the United States, because that was not a federal question, and that court has no jurisdiction on a writ of error to the supreme court of a state, as was the case there, to decide anything but federal questions. The ordinance here involved, however, was very different from the Missouri statute. The ordinance prohibited hawking and peddling without a license, and, under the authorities already cited, that forbade selling and offering to sell. The Missouri statute would probably have been held by the supreme court of that state, had the question been presented, to require actual dealing by a peddler, to constitute a violation thereof. But the learned counsel for the appellee himself speaks of the transactions of his client, as shown in the agreed facts, as a "sale," and the persons to whom such sales were made as "a purchaser." This is significant. It indicates that the learned counsel, though deeply interested in showing that such transactions were not sales, and that the persons with whom his client had them were not purchasers, yet, with all his learning, could find no

word in the English language that would so aptly and tersely express what the acts of his client meant or amounted to, or would so correctly characterize them, as the word "sale," and no word that would so correctly characterize the persons with whom his client had the transactions as the word "purchaser." The circumstance that the sales were on the installment plan, the title being retained in the foreign owner until the terms and conditions of the sale were complied with, did not wholly eliminate from the transaction all characteristics of a contract of sale. In an executed contract of sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas, in an executory contract of sale, the goods remain the property of the seller till the contract is executed. 21 Am. & Eng. Enc. Law, 476, and numerous authorities there cited in note 1, among which are *Straus v. Ross*, 25 Ind. 300, and *Lester v. East*, 49 Ind. 588. Most of the sales made by commercial travelers or drummers are mere conditional sales, yet no one thinks of denying that they are sales, the title to the property remaining in the seller until the conditions of the sale are fully complied with. And yet those transactions are correctly denominated "sales." Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. *Lanman v. McGregor*, 94 Ind. 301; *Railroad Co. v. Erwin*, 84 Ind. 457. And yet no one would, in his senses, think of denying that such a transaction was a sale. If such contention were to prevail, all sales by hawkers and peddlers might escape all restraint by cities, by inserting such a provision in the contract.

It is lastly contended that the agreed facts do not show that appellee was guilty of a violation of the ordinance, because there is no statement therein "that, while so engaged, the defendant sold and delivered to one Emma Wright one rattan rocking chair, for the sum of six dollars," as was charged in the complaint. It is true that statement was in the complaint, and is not found in the agreed facts, and if that were the only charge in the complaint the trial court would have been justified in finding for the defendant. In addition to the above charge, the complaint charges "that the defendant, on the 12th day of September, 1894, at the city and county aforesaid, violated sections 24 and 25 of the ordinance [describing it], by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend, by carrying, exposing, offering, and crying for sale articles of merchandise, to wit, rattan rocking chairs, in the public streets of said city, without having a license for that purpose." Among other things, the agreed facts are that "the defendant, * * * at the

time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale," etc. He could not be selling chairs without making actual sales, and if he did it by going personally from house to house in said city, selling the chairs and delivering the same, as he has agreed that he did, then he violated the ordinance, in both hawking and peddling.

The necessary conclusion, upon authority as well as upon principle, is that the ordinance in question is in no wise repugnant to the power of congress to regulate commerce among the several states, but is a valid exercise of the police power of the state, vested by the state statute in the city, over persons and business within its borders. It follows that the finding and decision of the circuit court were contrary to law and the evidence, and that it erred in overruling the motion for a new trial. The judgment is reversed and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

HOWARD, C. J., took no part in this decision.

(142 Ind. 92)

BUNDY v. SUMMERLAND, County Treasurer.

(Supreme Court of Indiana. Sept. 20, 1895.)

ACTION TO ENJOIN COLLECTION OF TAXES—SUFFICIENCY OF COMPLAINT.

In an action to enjoin the collection of certain taxes, part of which are admitted to be legally collectible, the complaint must allege a tender of such part, and a keeping of the tender good by a payment into court.

Appeal from circuit court, Wabash county; H. B. Shively, Judge.

Action by Camillus Bundy to enjoin John C. Summerland, as county treasurer, from collecting certain taxes. Judgment for defendant. Plaintiff appeals. Affirmed.

Carroll & Dean, for appellant. Alvah Taylor, for appellee.

MONKS, J. This action was brought by appellant to enjoin the appellee, as county treasurer, from collecting certain taxes. It appears from the complaint that appellant was charged on the tax duplicate in the hands of appellee with \$120, of which \$15 is legally due, and the remainder is claimed to be illegal for the reason that the real estate on which it was assessed was exempt from taxation. There was a demurrer to the complaint, which was sustained, and judgment rendered for appellee. The sufficiency of the complaint is the only question presented. It clearly appears from the complaint that a part, at least, of the taxes which appellee was

attempting to collect was legally collectible. It is settled in this state that if a part of the tax charged on the duplicate against the party be legal, and a part illegal, that which is legal must be first paid or tendered to the treasurer, before an action to enjoin the collection of the residue can be maintained. *Board of Com'rs v. Dalley*, 115 Ind. 360, 17 N. E. 619; *City of South Bend v. University of Notre Dame du Lac*, 69 Ind. 344; *Smith v. Manufacturing Co.*, 131 Ind. 150, 30 N. E. 947. It is averred in the complaint "that, before the commencement of the action, plaintiff offered to pay the defendant the sum of \$15, assessed upon and against his personal estate, but the defendant refused to accept the same, except as a credit upon the aggregate amount of said taxes so attempted to be collected; * * * that he is ready and willing to pay the taxes so assessed against his personal property, when the same can be ascertained separate from said real estate." These are the only allegations in regard to payment or tender. It is urged that the tender, as averred, was conditional, and therefore not sufficient. *Storey v. Krewson*, 55 Ind. 397; *Bowen v. Julius* (Ind. Sup.) 40 N. E. 700. It is also urged by appellee that, if it were admitted that the tender as alleged was sufficient, there are no averments in the complaint showing that the tender was kept good by paying the money into court. There was no dispute about the amount of the tax on the personal property. It was already ascertained and determined before the alleged tender was made. The rule requiring the taxpayer to pay or tender all taxes due upon property owned by him which is subject to taxation, before he can enjoin the taxes claimed to be illegal, is a just and salutary one, and should be strictly enforced. When a tender is made to a county treasurer, and is refused, the same must be kept good by paying into court, when the complaint is filed, the amount legally due for taxes. This must be alleged in the complaint, or the same will not be sufficient to withstand a demurrer for want of facts. *Lancaster v. Du Hadaway*, 97 Ind. 566, and cases cited; *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704; *Railroad Co. v. Marsh*, 57 Ind. 505; *Clark v. Mullenix*, 11 Ind. 532.

It is not necessary to consider the other objections urged to the complaint, as the same is not sufficient for the reason stated. The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(112 Ind. 99)

BECKER v. HUTHSTEINER et al.

(Supreme Court of Indiana. Sept. 20, 1895.)

DEFAULT JUDGMENT—SETTING ASIDE—LACHES.

1. A complaint to set aside a judgment by default, on the ground of excusable neglect, must show that the plaintiff had a good defense to the action.

2. Where, through excusable neglect, judgment by default is rendered against a junior incumbrancer, barring his equity of redemption,

and he learns of the judgment while the period of redemption is running, a failure on his part to redeem will defeat his right to have the judgment set aside, on the ground of excusable neglect, under Rev. St. 1894, § 399 (Rev. St. 1881, § 396).

Appeal from circuit court, Perry county: Edward Goregh, Judge.

Action by Caroline Becker against Gustave Huthstainer and others to set aside a judgment by default. From a judgment for defendants, plaintiff appeals. Affirmed.

Sol. H. Esarey and C. L. & H. E. Jewett, for appellant. H. B. Hatfield, F. H. Hatfield, and Hemenway & Henning, for appellees.

JORDAN, J. Appellant filed her complaint in the lower court, under section 396, Rev. St. 1881 (section 399, Rev. St. 1894),¹ to be relieved from a judgment taken against her through alleged excusable neglect. The material facts, as they substantially appear from the complaint, are as follows: At and prior to the 31st day of October, 1892, the appellee the Tell City Bank was the owner and holder of a mortgage upon certain described real estate situated in Tell City, Perry county, Ind. This mortgage was executed by one Alois Becker and wife, to secure notes held by the bank. At the same date appellant was the holder and owner of a duly-recorded mortgage and judgment, both of which were liens upon said realty, but junior to that of the bank's mortgage. On said 31st day of October, appellee commenced an action in the Perry circuit court to foreclose its mortgage, to which action appellant was made a party defendant, by reason of her being a holder of the aforesaid liens. She, failing to appear to said action, was defaulted. A judgment or decree was entered foreclosing appellee's mortgage, whereby appellant's equity of redemption in and to the mortgaged premises under her said liens was decreed as barred. The record in said foreclosure proceeding recites that the appellant was duly served with a summons, etc. It is alleged that, at the time of the commencement of that action, appellant was a German woman, unable to speak, read, or understand the English language; that she was 55 years of age, in poor health, and had no experience or knowledge of the proceedings of courts in relation to the foreclosure of mortgages; that, if she was served by a copy of the summons to appear in said cause, she has no knowledge thereof; that, if the summons was read to her, it was read in the English language, and she did not understand it. It is further shown that the mortgaged realty was on the 17th day of December, 1892, sold, under the bank's foreclosure judgment, at sheriff's sale, and the same was purchased by the appellee Huth-

¹ Rev. St. 1894, § 399 (Rev. St. 1881, § 396), provides that the court shall relieve a party from a judgment rendered against him through his excusable neglect.

stelner, as the cashier of the bank. Appellant avers that she had no knowledge of the pendency of said action until after the sale of the land, which fact she ascertained some time in the following February. A demurrer was sustained to the complaint for insufficiency of facts, and this action of the court is assigned as error.

Conceding, without deciding, that the allegations in the complaint sufficiently sustain appellant in this action in her failure to appear to the action in question, upon the grounds of excusable neglect, this alone, however, is not sufficient to entitle her to the relief sought by her complaint. She was also required, under the rule firmly settled by repeated decisions of this court, to further show by her pleading that she had a specific, pertinent, and good defense thereto. *Slagle v. Bodmer*, 77 Ind. 330; *Lee v. Basey*, 85 Ind. 543; *Nichols v. Nichols*, 96 Ind. 433. There is an entire absence in the complaint of any facts tending to show that appellant had any defenses to the action, if she had appeared in court in response to the summons served upon her, whereby the senior lien of the bank could have been defeated, in whole or in part. The only effect of the judgment rendered against the appellant upon her default (as there is nothing appearing to the contrary) was to bar her equity of redemption, as a junior incumbrancer, after the expiration of the statutory period. *Holmes v. Bybee*, 34 Ind. 262; *Coleman v. Witherspoon*, 76 Ind. 285. After appellant ascertained the fact that she had been made a party to the bank's action, and judgment rendered against her upon default, and that the mortgaged premises had been sold by the sheriff in pursuance of the decree therein, over nine months still remained of the year allowed by the statute for her to exercise the right of redemption. This right she neglected to avail herself of, but stood by until after the expiration of the time allowed for redemption of the land from the sale on the bank's decree, and thereby permitted its title under said sale to become absolute by the sheriff's conveyance, and her junior liens upon the mortgaged realty were lost. The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(141 Ind. 697)

MCCUTCHEN v. MCCUTCHEN.

(Supreme Court of Indiana. Sept. 18, 1895.)

REFERENCE—SPECIAL FINDINGS BY REFEREE—COSTS—TAXATION—WAIVER OF ASSIGNMENTS.

1. Objections to a referee's conclusions of law cannot be made by motion to modify, but errors therein must be taken advantage of by exception before the referee or in the trial court.

2. Where appellant's brief submits an assignment of error "to the court without argument, and asks the court to pass upon the same," the error will be deemed to have been waived.

3. There being nothing in the transcript to show the ground on which the court acted, it will be presumed that a motion to tax all the costs to defendant was properly overruled.

Appeal from circuit court, Wabash county; H. B. Shively, Judge.

Action by Samuel M. McCutchen against John P. McCutchen. From orders overruling plaintiff's motion to modify the conclusions of law of the referee to whom the cause was referred by agreement, and to tax all costs to defendant, plaintiff appeals. Affirmed.

James D. Conner, Jr., for appellant. Slick & Hunter, for appellee.

MCCABE, J. By agreement of parties, this cause in the circuit court was referred to Alvah Taylor, Esq., an attorney of the Wabash bar, with directions to him, as referee, to take and report the evidence verbatim, with his conclusions of law thereon stated separately in writing. After qualifying, he heard the case, filed his report, in which it is shown that he made a special finding of the facts, and stated conclusions of law thereon. He also recites in his report that "all the oral evidence was written by me, in the presence of the respective parties, and * * * is hereto subjoined." But no such, nor any, evidence, is contained in the transcript. His conclusions of law on the facts specially found are stated in writing. The defendant, the appellee, had judgment pursuant to the conclusions of law. It is assigned for error here that the circuit court erred—First, in overruling plaintiff's motion to modify the conclusions of law, as set forth on page 12 of the transcript; second, in overruling plaintiff's motion to modify the conclusions of law, as set out on page 13 of the transcript; third, in overruling plaintiff's motion for a judgment in his favor, as set forth on page 14; fourth, in overruling plaintiff's motion to modify the conclusions of law, as set forth on page 16; fifth, in overruling plaintiff's motion to tax all the costs in the case to the defendant, for the reason that there was a finding in favor of the plaintiff on all the issues in the case.

The appellant waives the third and fourth errors assigned by the following language in his brief: "The third and fourth errors we respectfully submit to the court without argument, and ask the court to pass upon the same."

Trials by referees are conducted in the same manner as a trial by the court. *Burns' Rev. St. 1894*, § 566 (*Rev. St. 1881*, § 557); *Railway Co. v. Bradley*, 7 Ind. 49; *Gilmore v. Board*, 35 Ind. 344; *Pitts v. Langsdale*, 32 Ind. 218; *Way v. Fravel*, 61 Ind. 162; *Lee v. State*, 88 Ind. 256. Both by the statute referred to and the decisions of this court, erroneous conclusions of law must be taken advantage of by exceptions thereto, taken either before the referee or in the trial court. *Roush v. Emerick*, 80 Ind. 551; *Bremmerman v. Jennings*, 101 Ind. 253. When the report of a referee is general, it stands as a general finding or verdict; and when it is special, with conclusions of law, it stands as

a special verdict or special finding in the trial court. *Railway Co. v. Bradley*, supra; *Gilmore v. Board*, supra; *Pitts v. Langsdale*, supra; *Way v. Fravel*, supra; *Lee v. State*, supra. Therefore, if such conclusions of law are erroneous, they must be objected to in the same way that such conclusions of law are objected to in a special finding of the facts, with conclusions of law thereon, by the circuit court. That cannot be done by a motion to modify such conclusions. *Rada-baugh v. Silvers*, 135 Ind. 605, 35 N. E. 694, and authorities there cited; *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695. Therefore, the first and second assignments of errors do not present the questions sought to be raised by them.

The fifth assignment cannot avail the appellant, because there is nothing in the transcript to show the grounds on which the court acted in overruling the motion. The motion was, as we have seen, to tax all the costs in the case to the defendant, for the reason that there was a finding in favor of the plaintiff on all the issues in the case. That may all be true, and yet not right to tax all the costs against the defendant. There was no judgment rendered for costs for or against anybody. If, for any reason, as on account of a continuance, or failure to perfect a change of venue, or the like, any part of the costs were properly chargeable against the appellant, it was not error to overrule his motion to tax all of them against the appellee. It is our duty to presume that there were good and sufficient reasons for the ruling of the court on that motion until the contrary is made affirmatively to appear by the record. *Hunter v. Thomas*, 37 Ind. 145; *Harter v. Elzroth*, 111 Ind. 159, 12 N. E. 129, and cases there cited; *Elliott*, App. Proc. § 592, and authorities there cited.

The errors assigned being unavailable, the judgment is affirmed.

(142 Ind. 94)

STATE ex rel. CULBERT v. LINKHAUER.

(Supreme Court of Indiana. Sept. 20, 1895.)

SHERIFF—VACANCY IN OFFICE—HOLDING OVER BY APPOINTEE.

1. Const. art. 6, § 2, provides that no person shall hold the office of sheriff more than four years in succession. Id. art. 2, § 11, provides that, where the law prohibits a person from holding the same office for more than a certain number of years continuously, the time such office is held under appointment shall not be counted a part of the time. *Held*, that one who was appointed to and completed the term of office (of sheriff) of one who, after being elected to succeed himself for a term of two years, died before qualifying, is eligible to hold the office for the regular term of two years succeeding that for which he was appointed on the death, before qualifying, of the person elected to such term.

2. Const. art. 15, § 3, provides that a person holding office by law for a given term shall hold until his successor is elected and qualified. Rev. St. 1894, § 7579 (Rev. St. 1881, § 5563), authorizes the county board to fill vacancies in the office of sheriff by appointments which shall ex-

pire when "a successor is elected and qualified." *Held*, that where the person elected sheriff died before qualifying, and defendant was appointed to and completed his term, and the person elected at the next general election also died before qualifying, there was no vacancy, and defendant continued to hold the office.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Information in the nature of quo warranto, on relation of James S. Culbert, against Jacob O. Linkhauer, to oust defendant from the office of sheriff. From a judgment for defendant, relator appeals. Affirmed.

Headington & La Follette, for appellant. O. H. Adair and John M. Smith, for appellee.

HACKNEY, J. The appellant filed in the lower court an information in the nature of a quo warranto, to oust the appellee from the office of sheriff of Jay county. A demurrer for the want of sufficient facts was sustained to the information, and that ruling is the only assigned error. The material facts presented by the information were that one Gillum was elected in 1892 to succeed himself in said office, and after qualifying he departed this life on December 22, 1892. On the 23d day of December, 1892, the board of commissioners of Jay county appointed the appellee to the vacancy occasioned by the death of Gillum, and he gave bond, took the oath of office, entered upon the duties, and continued in the possession, of said office, and occupied the same at the filing of the information. At the November election in 1894, John English was elected to said office, but before he had filed his bond, or taken the oath of office, he departed this life, on, to wit, November 7, 1894. Upon the theory of the existence of a vacancy by reason of the foregoing facts, the board of commissioners of Jay county, in regular form, appointed the relator to fill such supposed vacancy, and he took the oath of office, tendered his bond, and demanded possession of the office, which demand was refused by the appellee. There is no contention that the election of English, without his having qualified, had the effect to create a vacancy in the office, but it is insisted by the appellant that a vacancy occurred by reason of the expiration of the period for which the appellee was appointed, and that the appellee holding in the second term, and to the end of the fourth year, for which Gillum was elected, he was, under the constitution, ineligible to hold longer.

The office is an elective, constitutional office, and the term of eligibility is limited to the following words: "No person shall be eligible to the office of * * * sheriff more than four years in any period of six years." Const. art. 6, § 2 (Rev. St. 1894, § 152; Rev. St. 1881, § 152). It is further provided by the constitution, however, that "in all cases, in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment pro tempore shall not be reckoned

a part of that term." Id. art. 2, § 11 (Rev. St. 1894, § 92; Rev. St. 1881, § 92). It will be seen, therefore, that by the constitution, which created the office and the limitation upon the eligibility of the persons who may hold the office, the appellee, at the time of the relator's appointment, was not ineligible to continue in the office. See, also, *Gosman v. State*, 106 Ind. 203, 6 N. E. 349, and authorities there cited. In the absence of the provision that pro tempore appointees should not be affected by the general limitation, we should incline to the construction that the general limitation was upon the person, and had no such reference to the tenure as to permit the computation, against a pro tempore incumbent, of the time his predecessor had occupied the office. See *Gosman v. State*, supra. To ascertain the appellee's right to hold the office, it is important that we look to the source of his authority. The constitution makes no provision for the filling of vacancies in the office of sheriff, but provides that "vacancies in county * * * offices shall be filled in such manner as may be prescribed by law." Article 6, § 9 (Rev. St. 1894, § 159; Rev. St. 1881, § 159). Pursuant to this provision of the constitution, it has been provided by law that the board of county commissioners shall fill vacancies in the office of sheriff by appointments which "shall expire when a successor is elected and qualified, who shall be elected at the next general * * * election * * * proper to elect such officers." Rev. St. 1894, § 7579 (Rev. St. 1881, § 5563). Not only do we find this legislative provision that the appellee's right to hold the office continued until his successor should be elected and qualified, but we find the following constitutional guaranty of that right: "Whenever it is provided * * * in any law which may be hereafter passed, that any officer * * * shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor is elected and qualified." Article 15, § 3 (Rev. St. 1894, § 225; Rev. St. 1881, § 225). By the sanction of the constitution and of the law the appellee's right to hold the office until his successor was elected and qualified was guaranteed; and if not ineligible, and there is no resignation, death, or other occurrence creating a new vacancy, the relator could acquire no right to the office by an appointment from the board of commissioners. *State v. Harrison*, 113 Ind. 435, 16 N. E. 384, and authorities there cited. The power of the board is only to fill a vacancy, and, no vacancy existing, their appointment was void. The language of section 7579, Rev. St. 1894 (section 5563, Rev. St. 1881), "and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general * * * election * * * proper to elect, * * *" does not warrant the position contended for by counsel, that the election provided is by the board of county commission-

ers, and that the relator's selection was pursuant to the right of the board to elect. It is not necessary that we should define and discriminate between the words "appointment" and "election," for the language of the statute directs the election of an appointee's successor "at the next general * * * election," which is understood only as meaning the election which, in the language of the constitution, "shall be held on the first Tuesday after the first Monday in November." Article 2, § 14 (Rev. St. 1894, § 95; Rev. St. 1881, § 95). Further than this, we think it manifest that the words, "who shall be elected at the next general election," do not qualify or limit the duration of the appointee's holding, but they direct the time for the election of the appointee's successor. The appointee's holding is, by the plain provision of the statute, until such successor is elected and qualified. There was no error in the ruling of the trial court, and the judgment is affirmed.

(144 Ind. 278)

LOESCH et al. v. KOEHLER.¹

(Supreme Court of Indiana. Sept. 18, 1895.)

RESERVED QUESTIONS—SUFFICIENCY OF NOTICE—KILLING OF ANIMALS BY OFFICERS—DUE PROCESS.

1. There can be no question as to the sufficiency of the notice given to the lower court of intention to reserve questions of law under Rev. St. 1894, § 642 (Rev. St. 1881, § 630), where the lower court, pursuant to the notice, fully and correctly prepares the special bill of exceptions so as to present briefly and distinctly each question urged for reversal.

2. Rev. St. 1894, § 2202, authorizing certain officers to kill any animal found neglected or abandoned, and which, in the opinion of three reputable citizens, is injured or diseased past recovery, or, by age, has become useless, is invalid so far as it authorizes the killing without any notice to the owner of the examination as to its condition.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Paul Koehler against George H. Loesch and others. Judgment for plaintiff. Defendants appeal. Affirmed.

T. E. Ellison, for appellants. Randall & Doughman, for appellee.

HACKNEY, J. Action and recovery by the appellee against the appellants for causing the death of two of his horses. The case comes to this court on reserved questions of law under section 630, Rev. St. 1881 (section 642, Rev. St. 1894). The appellee denies the sufficiency of the record, because of the general character of the notice given to the lower court of the intention of the appellants to so reserve and present such questions. The character and the sufficiency of the notice are, as a general rule, questions for the trial court; the object of the notice being to enable that court to prepare the special bill of exceptions so as to disclose briefly and distinctly such

¹ Rehearing denied, 43 N. E. 129.

part of the record or proceeding as will present to the court of review the particular question involved. No doubt, the character and the sufficiency of such notice may become questions for the court of review, as when the lower court has deemed the notice insufficient to comprehend all of the rulings sought to be presented; but where, as in the present case, the lower court has, pursuant to the notice, fully and correctly prepared the special bill of exceptions so as to present briefly and distinctly each question urged for reversal, there is properly no question as to the sufficiency of the notice. The case of *Shugart v. Miles*, 125 Ind. 445, 25 N. E. 541, instead of supporting the appellee's view of this question, sanctions the rule we have stated.

The appellants sought to justify the killing by the provisions of section §34, Elliott's Supp. (section 2202, Rev. St. 1894), which are as follows: "Any sheriff, constable, marshal, policeman or agent of any society for the prevention of cruelty to animals, may kill or cause to be killed any animal found neglected or abandoned and which, in the opinion of three reputable citizens, is injured or diseased past recovery, or, by age, has become useless." The court instructed the jury that the justification was not complete unless it was shown that the appellee had notice of the "seizure and the investigation," and unless "said horses were, in truth and in fact, so diseased or injured as to be past recovery, or, by reason of age, were useless." The evidence showed that the horses were in charge of a youth who was engaged in hauling brick with them for the appellee; that the appellants were officers and agents of the Ft. Wayne Humane Society for the Prevention of Cruelty to Animals and Children, and that the appellants, without notice to the appellee, procured the opinion of three reputable citizens that said horses had been neglected and abused, and were injured and diseased past recovery, and had, because of their age, become useless; that, with no malice, and acting upon such opinion, they caused said animals to be killed. As to whether said horses had been injured or diseased beyond recovery, or were, by age, useless, the evidence was in conflict; and we may assume that, if this was a proper issue, the jury found the weight of the evidence in favor of the appellee. It will be observed that the requirements of the instruction above quoted are not within the letter of the statute urged in justification of the acts complained of, and, as it is asserted by counsel for appellants, and conceded by counsel for the appellee, it was the theory of the trial court that, without such notice to the owner, said statute would be unconstitutional. Argument has been made, also, as to whether the legislature did not intend that the statute should apply only to animals running at large, and abandoned or neglected, and not as permitting one's team to be unhitched from the wagon, where he may have left it for the moment, and by summary proceeding have it killed. We take it that it can matter little

which interpretation is found to be correct, since, upon either view, the destruction of the animals is provided for without notice, actual or constructive, to the owner. By the fundamental law it is provided that no person shall be deprived of his property without due process of law. Does the statute under consideration violate this guaranty to the citizen?

The confiscation and destruction of the animals cannot be justified as a penalty for the violation of the law against cruelty to animals; as under the statutes of some states where it is provided that, as a part of the penalty, the property employed in an unlawful trade, an illegal act, may be seized and destroyed. Such statutes are those authorizing the destruction of gambling devices, intoxicating liquors, fish nets, traps, etc. In that class of cases it is not only a part of the prescribed penalty, but it is held to be a necessary element of, and to rest upon, a judgment of guilt and of forfeiture. *Hey Sing Ieck v. Anderson*, 57 Cal. 251; *Lowry v. Rainwater*, 70 Mo. 152; *Greene v. James*, 2 Curt. 187, Fed. Cas. No. 5,766; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978. See, also, *State v. Miller*, 48 Me. 576; *State v. Snow*, 3 R. I. 64; *Weller v. Snover*, 42 N. J. Law, 341. Though the police power may uphold statutes of that nature, the statute before us does not rest upon the exercise of that power. It does not extend the right as an element of punishment to the owner of the animals killed, and wholly omits the essential element of notice, included in the class of cases to which we have referred. Nor can it be maintained that, as an exercise of the police power, it is a method of quarantine, since it does not make the destruction depend upon the existence of infectious or contagious disease, or other condition affecting public health or comfort. The forfeiture and destruction authorized by the statute is not a part of the penalty for the offense of cruelly using the animals. It is permitted simply because the animals may be injured or diseased past recovery, or, from age, may be useless, and where the owner may have neglected or abandoned them. In *State v. Robbins*, supra, this court said: "It is fundamental that no person can be deprived of any article which is recognized as property without a judicial hearing, after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have an opportunity to contest the ground upon which the forfeiture is claimed." In *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, it was said: "That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts. *Strosser v. City of Ft. Wayne*, 100 Ind. 443; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728; *Jackson v. State*, 103 Ind. 250, 2 N. E. 742; *Johnson*

v. Lewis, 115 Ind. 490, 18 N. E. 7; Board v. Gruver, 115 Ind. 224, 17 N. E. 290, and cases cited." In *Lowry v. Rainwater*, supra, it is said: "Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscations without a judicial hearing after due notice would be void as not being due process of law." In *King v. Hayes* (Me.) 13 Atl. 882, a case involving the exact question before us, it was said: "We are of opinion that so much of the provisions of Rev. St. c. 124, § 42, as allowed the defendant to condemn, conclusively fix the value of, and destroy the defendant's horse, without any notice, actual or constructive, to the owner, in order that he might be heard, is in violation of the fundamental law, which prohibits any person being deprived of his property without due process of law. *Dunn v. Burleigh*, 62 Me. 24. Such have been the adjudications even in regard to the destruction of intoxicating liquors intended for unlawful sale. *Fisher v. McGirr*, 1 Gray, 1; *Lincoln v. Smith*, 27 Vt. 355." See, also, *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, where it is held that the slaughter by a live-stock commission of animals supposed to be suffering from contagious disease does not conclude the owner from recovering, if it cannot be shown that such animals actually had such disease, and it was said: "To permit the commissioners to determine, ex parte, that some of the horses had the glanders, and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon the appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power of the state, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." A like decision was rendered in *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, and it was there held that, in the absence of disease constituting a nuisance, the legislature could not extend the right to slaughter without notice and an opportunity to the owner to be heard.

In holding that the statute is invalid, in permitting the destruction of the property of a citizen without due process of law, we would not be understood as holding that the question as to the existence of the statutory cause for destruction must be submitted to a court of justice, nor that a notice, such as is required in ordinary civil or criminal proceedings in such courts, is necessary; but some notice, and a hearing before some tribunal, must be provided. The action of the circuit court in adding to the terms of the statute, by instructing as to the necessity for notice, it is conceded, could not remedy the omission from the statute. The finding of the jury negated the existence of notice, and, under the instruction given, presents the question as to the validity of the statute without notice. The judgment is affirmed.

(142 Ind. 113)

GRIMES v. BUTSCH et al.

(Supreme Court of Indiana. Sept. 24, 1895.)

RIGHTS OF GUARDIAN—CUSTODY OF WARD.

In habeas corpus for the custody of a minor, it appeared that the petitioner was appointed guardian in Missouri, where he resided at the commencement of the proceedings, and where the property of the ward was situated; that the ward, 17 years old, though provided with a good home and educational advantages by his guardian, ran away to his sister in Indiana, who was only 22 years of age, and otherwise unfit to have the custody of her brother. The Missouri statute provides that a guardian shall have the control of his ward's person, and charge of his support. *Held*, that petitioner was entitled to the custody and control of the ward.

Appeal from circuit court, Vanderburg county; W. M. Blakey, Special Judge.

Application by Granville P. Grimes for a writ of habeas corpus against Nellie Butsch and another to obtain the custody of a minor child. From a judgment for defendants, petitioner appeals. Reversed.

Charles L. Wedding, for appellant.

JORDAN, J. This was an application under section 1107, Rev. St. 1881 (section 1121, Rev. St. 1894), by the appellant, as the guardian of the person and estate of Frank M. Cooper, a minor, for a writ of habeas corpus against the appellee to obtain the custody of his said ward, who was alleged to be restrained by the appellees, Nellie Butsch and husband. By their return to the writ issued upon the petition, appellees denied the allegations therein, and alleged and recited other facts tending to show that the appellant had neglected to discharge his duties as guardian, and was not fit to have the custody and control of the ward. A hearing by the court of the petition resulted in a finding against the guardian, and thereupon the court made and entered the following order and judgment: "It is therefore ordered and adjudged by the court that the said Granville P. Grimes, the guardian of the said Frank M. Cooper, place the said ward in school at the military academy known as 'Riverview,' located in the city of Poughkeepsie, in the state of New York, and that said guardian provide and furnish the necessary funds for that purpose, out of the estate of his said ward in his hands, and that he do this without delay. It is further ordered by the court that said ward, Frank M. Cooper, be permitted by his guardian to spend the time of his vacation either with his sister, Mrs. Nellie Butsch, or with his guardian and relatives in Missouri, as he, the said ward, may prefer; and that said Granville P. Grimes pay the costs herein from the estate of his said ward." A motion for a new trial was filed, and, while the same was pending, the record recites that the court, being informed that the plaintiff had refused to carry out the order and judgment of the court first entered, did then order that the defendant Nellie Butsch, sister of the ward, be, and was, authorized and directed

to place said ward in said school at Poughkeepsie, N. Y., and that the ward's estate be chargeable with the expenses of his education at said school. To this order, appellant objected and excepted, and thereupon his motion for a new trial was overruled, to which ruling he excepted. The error assigned, and the questions here presented, arise upon the action of the lower court in overruling the motion for a new trial, and are based upon the evidence in the cause.

We have not been favored with a brief upon the part of appellees, and are not informed of the reasons, if any, which they urge to sustain the judgment below. The evidence which is in the record clearly establishes—and the same is not successfully controverted—the following facts: That the appellant is a foreign guardian of the person and estate of Frank M. Cooper, a minor child of David L. Cooper, deceased. That appellant was appointed guardian of said ward by the probate court of Monroe county, in the state of Missouri, at which county the guardian then and still resides. That the father of said minor resided and died at said county of Monroe. That, subsequent to the death of the father, the mother also died, a resident of the aforesaid county, leaving the guardian as the only legal protector of this ward. That, prior to the ward coming to the state of Indiana, he resided in said Monroe county, at the home of his guardian. There all his relatives resided, except the appellee his married sister, who resides at Evansville, Ind., and all of his estate, both real and personal, is situated in that county, and the guardianship is still pending and under the control of the probate court thereof. This ward is an inexperienced youth of about 17 years of age, easily susceptible to the influences of his sister, the appellee, who, as it appears from the evidence, is only 22 years of age, and, for other reasons, is wholly unfit to have the control or custody of her brother. The evidence shows that the guardian is an exemplary man in all respects; that he was an especial friend of the boy's father, and accepted the appointment of guardian by reason of the father's request, made in his last sickness. He provided the ward with a good home at his own house, and placed him in the Missouri Valley College, at Marshall, Mo., for the purpose of giving him a good education. He was appointed guardian in 1885. The ward's estate at that time amounted to about \$20,000, and by the management of the guardian it has been increased until it amounts to over \$31,000. During the fall of 1894, through the persuasions of the appellee Nellie Butsch, the ward was induced to run away from the school where the appellant had placed him, and come to Evansville, Ind., to reside with her at her home in said city. Appellant, together with a half-brother of the ward, came to Evansville to induce him to return. Appellee refused to permit the boy to leave, and

informed the appellant that he dared not take her brother back to Missouri, and, if he attempted to do so, she would call upon the police to prevent it, and further stated that the matter must be settled in the courts. The statute of the state of Missouri, which was in evidence, provides that "the guardian of the person, whether natural or legal, shall be entitled to the charge, custody, and control of the person of his ward, and the care of his education, support and maintenance," etc. Rev. St. 1889, § 5297. Here is a mandatory, positive, and controlling law of the state wherein the guardian and his ward are domiciled, and in the probate court of which state the guardianship is pending. The appellant's rights under this statute, in this respect, are higher than those of the relatives or friends of the ward. There are no reasons or grounds apparent from the evidence that would authorize or justify the trial court in denying to the appellant the rights, relative to his ward, granted to him by this statute. It cannot be controverted upon legal grounds, we think, that where, as in this case, the right of the guardian to the custody, control, and education of his ward is clearly shown under the law, it is the duty of the court to yield thereto, and award to him this right. This right, although existing under the laws of a sister state, will be respected and enforced, upon a proper showing, by the courts of this state. If it was supposed that the custody of this ward, and his care and education, and the management of his estate, should be changed, application therefor ought to be made to the proper court in the state of Missouri for an examination and determination of that question. The ward, under the facts herein, had no power to change his domicile by running away from his guardian in the state of Missouri, and coming to this state. Appellant, as the guardian in Monroe county, Mo., was entitled, under the law of that state, to have charge of this minor, in order to enable him to provide for his protection, maintenance, and education. It is manifest, therefore, that the finding and order of the court are not sustained by the evidence, and are contrary to the law. The judgment of the trial court is reversed, at the cost of the appellees, Christopher C. and Nellie Butsch, and the court is directed to sustain the motion for a new trial, and to proceed in accordance with this opinion.

(141 Ind. 701)

HUTTS et al. v. MARTIN
(Supreme Court of Indiana. Sept. 18, 1895.)

APPEAL—PARTIES.

Where plaintiffs, and 10 out of 14 defendants, have been omitted in the assignment of errors, the appeal will be dismissed.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Action against Milton T. Hutts, John B. Martin, and others. From the judgment,

Hutts and two other defendants appeal, making Martin appellee. Dismissed.

L. J. Coppage, for appellants. Paul & Bruner, for appellee.

HOWARD, C. J. An examination of the record and briefs before us would seem to lead to the conclusion that this case has been carefully tried, and a correct judgment rendered. We are first met, however, with a motion to dismiss the appeal; several reasons being given, one that the assignment of errors does not name all the parties to the judgment. Omitting those who filed disclaimers at the trial, there remain as parties to the judgment and decree the 2 plaintiffs and 14 defendants. In the assignment of errors, the plaintiffs are wholly omitted, as are also 10 of the defendants. Three defendants only are made appellants, and one appellee. In the final judgment, the court, after making partition of the real estate to the plaintiffs and certain of the defendants, subject to liens in favor of parties named, decreed that "all other defendants in said complaint have no title, claim, or interest whatever in said real estate." In *Snyder v. State*, 124 Ind. 335, 24 N. E. 891, Mitchell, J., citing authorities, and referring to the sixth rule of this court, that "the assignment of errors shall contain the full names of the parties," said: "The assignment of errors is the appellant's complaint, and the only parties before this court, or over whom it acquires jurisdiction, are those whose names appear therein." It is true that parties who do not wish to appeal may decline to do so, and their names will be considered as stricken from the assignment of errors. But in the case before us, none of the omitted parties have declined to join in the appeal. Their rights are certainly involved. In favor of some of them, title was awarded to parts of the real estate, while against others title was quieted. The merits of the appeal could not be passed upon without having all these parties before the court. See *Gourley v. Embree*, 137 Ind. 82, 36 N. E. 846; *Bozeman v. Cale*, 139 Ind. 187, 35 N. E. 828; *Elliott, App. Proc.* §§ 322, 401, and authorities cited. The appeal is dismissed.

(143 Ind. 511)

BOWEN, County Treasurer, v. HESTER.¹
(Supreme Court of Indiana. Sept. 19, 1895.)

ESTABLISHMENT OF HIGHWAYS—STATUTORY PROCEEDINGS—REPORT OF VIEWERS—AMENDMENT BY COMMISSIONERS—NOTICE.

1. The board of commissioners have authority, in proceedings to establish a highway, to amend the report of the viewers and engineer appointed by them to examine the proposed route, and report the lands that will be benefited thereby, by adding a list of the lands so reported, and to assess such additional lands together with those reported as benefited by the viewers.

2. The record of the board of commissioners of proceedings before them to establish a highway cannot be collaterally attacked.

¹ Rehearing denied.

3. Where the record of the board of commissioners of proceedings before them to establish a highway shows that the viewers' report, as originally submitted, was amended to include additional property in the assessment for benefits, a petition, in an action to restrain the collection of such assessment, which alleges that the board orally instructed the viewers not to report petitioner's land, it having subsequently been included by the amendment, is demurrable.

4. That certain property was not embraced in the report of the viewers, as benefited by the establishment of a proposed highway, will not deprive the commissioners of jurisdiction, where the notice of the return of the report, and of the time that the commissioners would meet to hear it, has been duly published, as required by Rev. St. 1894, § 6860 (Rev. St. 1881, § 5096).

Appeal from circuit court, Putnam county; S. M. McGregor, Judge.

Action by James M. Hester against Willard A. Bowen, as county treasurer, to restrain the collection by defendant of certain assessments against plaintiff's land to pay the expenses of constructing a highway. From an order overruling defendant's demurrer to the complaint, he appeals. Reversed.

Frank D. Ader and Henry H. Mathias, for appellant. G. C. Moore, D. E. Williams, and S. A. Hays, for appellee.

McCABE, J. The appellee sued the appellant to enjoin the collection of certain assessments against his land to pay the expense of the construction of the Mt. Meridian and Putnamville free macadamized road, constructed by the board of commissioners of said Putnam county under the act approved March 3, 1877. Burns' Rev. St. 1894, §§ 6855-6867 (Rev. St. 1881, §§ 5091-5103). It is assigned for error here that the circuit court overruled appellant's demurrer to the complaint, sustained appellee's demurrer to the second paragraph of appellant's answer, and overruled his motion for a new trial. The complaint is so long, with many needless averments and repetitions, making 48 pages of the transcript, that we will only outline so much thereof as appellee has seen fit in his brief to summarize, discuss, and rely on.

The principal objection made in the complaint against the validity of the assessment against appellee's land is that he, in substance, alleges that the viewers and engineer—the only ones ever appointed by the board to examine, view, and straighten said road, and report to the commissioners the public necessity of the improvement, the damages claimed, the estimate of the expense thereof, and the lands that would be benefited thereby, and ought to be assessed for the expense of the same—did not, in their report, state that appellee's land would be benefited by such improvement; that, notwithstanding the failure of such viewers to report the appellee's land benefited by the proposed improvement, said board had caused his lands to be assessed \$47 on the first assessment, and \$18.50 on a second assessment, to meet a deficiency in the first assessment, to pay the

expense of said improvement, and said sums had been placed on the duplicate as delinquent, and the same was in the hands of the defendant, as treasurer, who was threatening to proceed, by levy and sale of plaintiff's property, to collect said sums. It has been repeatedly held by this court that lands cannot be taxed for such an improvement in a sum exceeding the benefits which accrue to the land by reason of the improvement. *Board of Com'rs v. Fullen*, 111 Ind. 410, 12 N. E. 298; *Campbell v. Board of Com'rs*, 118 Ind. 119, 20 N. E. 772; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17. The fourth section of the act (Burns' Rev. St. 1894, § 6858; Rev. St. 1881, § 5094) provides that the viewers and engineer shall report to the board at their next regular session, showing, among other things, the lands that will be benefited by, and ought to be assessed for, the expense of such improvement. The next section provides, among other things, that, upon the return of said report, if, in their opinion, public utility require it, they shall enter an order of record that the improvement be made, which order shall state, among other things, the lands which shall be assessed for the expense of the same. And the next section provides that the commissioners shall immediately appoint three freeholders a committee to apportion the estimated expense of said improvement upon the real property embraced in the order aforesaid, and report the same to the county auditor. It is therefore contended by the appellee that the commissioners had no jurisdiction to embrace any lands in their record entry, ordering the improvement to be made, other than those specified in the report of the viewers and engineer; and it is alleged in the complaint that no other such lands were embraced in said order, and that plaintiff's lands were not so embraced, and therefore they had no power, in appointing the committee to apportion expense, to authorize such committee, and it is alleged that they did not authorize such committee, to apportion any of such expense on any other lands than those embraced in the order aforesaid. And hence it is contended that the action of the apportioning committee in apportioning a part of the expense on appellee's land, as is alleged they did, was without authority of law, and void, and, therefore, the board had no power or jurisdiction to order appellee's land to stand assessed. Hence it is argued that its assessment is void. But it is shown in the complaint that the appellee's land lies within two miles of the contemplated improvement, and is therefore liable, under the act, to assessment for such improvement, if benefited thereby. It is further shown in the complaint that the report of the apportioning committee was filed with the auditor on September 4, 1884, and that he gave notice, by publication in a newspaper printed and published in Putnam county, of the filing of such report, and that on November 18, 1884,

the board would meet at his office to hear the same, and that on said day they met at said office to hear said report, and entered the following order: "Comes now McC. Hartley, auditor, and presents the report of John W. McNary, William Broadstreet, and James H. Sparks, viewers in the cause filed within, and said report is as follows, after correction made by the board from the evidence submitted." Then the complaint charges that no order was made confirming the report of the apportioning committee, either as made or corrected, but that the auditor, before entering the list of lands contained in said report, made the following entry: "And now comes said viewers and report the following lands and lots benefited, which said land and lots are by the board added to the foregoing list, and, after correction, to stand assessed for the construction of the Mt. Meridian and Putnamville free macadamized road." Then the complaint charges "that said pretended entry was inserted by the auditor in the copy of said report, and was no part of said report, and the commissioners made no correction of said report showing said lands were benefited." This amended report contained appellee's lands as among those benefited by the contemplated improvement.

The allegation that the commissioners made no correction of the report of the viewers showing what lands were benefited is a direct contradiction of what the complaint itself shows that the commissioners' record states. Both entries, quoted into the complaint, taken together, show that, on evidence submitted and considered by the board, it corrected the report of the viewers and engineer, and added certain lands and lots benefited to the list of lands already contained in that report, making said report include, as the complaint shows, appellee's land. The averment that the report of the apportioning committee was never confirmed by the board is scarcely less a contradiction of what the complaint discloses that the commissioners record contains. The final order quoted into the complaint was that "said lands and lots are by the board added to the foregoing list, and, after correction, to stand assessed," etc. This pretty clearly implies that the amended report of the apportioning committee is confirmed, because such lands and lots could not stand assessed without a confirmation of the report of the apportioning committee. In *Stoddard v. Johnson*, 75 Ind., at page 31, it was said: "And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed. In this case the order for the appointment of the viewers and engineer, and fixing the time and place of their meeting, is equivalent to a find-

ing of the facts necessary to have been found, and to an adjudication of the board that the petition itself is sufficient." And in *Million v. Board of Com'rs*, 89 Ind., at page 13, it was said: "Nor was it necessary, we think, that the finding of these jurisdictional facts by the county board should be shown by its record in express terms." Under these decisions, the complaint states enough of the commissioners' record to show, at least, an implied, if not an express, confirmation of the report. Section 5 of the act (Burns' Rev. St. 1894, § 6859; Rev. St. 1881, § 5095), after providing, upon the return of the report of viewers, for the entry of an order upon the record that the improvement be made upon the conditions therein specified, further provides that: "If, at any time after making such final order, the commissioners shall find that there has been an omission of lots or lands within the territory sought to be assessed, or that there has been manifest injustice in the apportionment of taxes, or that public necessity requires any alteration in the manner of the improvement as ordered they are authorized to make such addition and reapportionment as they may deem just and proper." The complaint before us shows that the commissioners' record states that they did the very thing that the above-quoted provision authorized them to do, namely, to make such addition and reapportionment as they deemed just and proper of omitted lands or lots within the territory sought to be assessed. That territory comprised all lands and lots within two miles of the contemplated improvement, as provided in section 4 of the act. Burns' Rev. St. 1894, § 6858 (Rev. St. 1881, § 5094). In *Million v. Board of Com'rs*, supra, this court, quoting from *Ricketts v. Spraker*, 77 Ind. 371, in speaking of this provision of section 5, said: "The statute confers ample authority upon the commissioners to make all needed corrections, and to supply all omissions. * * * The presumption is that they did their duty, and placed all the lands upon the list. It was, at least, incumbent upon the appellants to show, not only that the committee omitted lands, but that other public officers did not supply the omission." To the same effect is *Gavin v. Board of Com'rs*, 104 Ind. 201, 3 N. E. 846.

The averment that the commissioners did not correct the report of the viewers so as to show that appellee's lands were benefited, or that the apportionment report was not confirmed, as before observed is a contradiction of the commissioners' record. It is true that the commissioners' record, as stated in the complaint, is not as full and complete as might have been made; but there is enough stated to indicate that the board amended the report of the viewers and engineer so as to add the omitted lands, and show that they were benefited by the improvement, as they were authorized to do by section 5 of the act, and that the apportion-

ment report, as corrected, was confirmed by the board. It was said in *Million v. Board of Com'rs*, supra, quoting from *Bittinger v. Bell*, 65 Ind. 445, that: "It is not to be expected that the orders of a board of commissioners will be drafted with that degree of legal accuracy and precision of statement usually found in orders, decrees, and judgments of the circuit court. There are no established forms or precedents for the orders of a board of commissioners; and, if those orders are right in substance, their form will be of little consequence." If the board had jurisdiction, the record of its proceedings and orders import absolute verity, and cannot be collaterally impeached or contradicted, as was attempted to be done by the complaint. *Million v. Board of Com'rs*, supra; *Ricketts v. Spraker*, supra; *Stoddard v. Johnson*, supra; *Davidson v. Koehler*, 76 Ind. 398; *Sauer v. Twining*, 81 Ind. 366. Besides, the twelfth section (Burns' Rev. St. 1894, § 6866; Rev. St. 1881, § 5102) provides that: "No person shall be permitted to take advantage of any error committed in any proceeding to lay out, construct, or improve any road under and by virtue of this act; nor of any error committed by the county commissioners or by the county auditor, or by the engineer or surveyor or other person or persons in the proceedings to lay out, construct or improve any such road; nor of any informality, error or defect appearing in the record of such proceeding, unless the party complaining is affected thereby." In *Million v. Board of Com'rs*, supra, in speaking of this provision, this court said: "Under this provision of the statute, it is not enough for the complaining party to show that he is affected by the proceeding to lay out, construct, or improve any road, but he must clearly show, we think, that he is injuriously affected, and in what respect, by the informality, error, or defect of which he complains, and that the same cannot be corrected by the county board, before he can be permitted to take advantage thereof by an action in the circuit court." To the same effect is *Stoddard v. Johnson*, supra. There is no such showing in the complaint. There is no statement, nor attempt to state, that appellee's land was not within two miles of the proposed improvement, or that it was not benefited every cent that was assessed against it by the improvement. But it is alleged in the complaint that the commissioners ordered the viewers and engineer not to report the appellee's land, along with about 4,000 acres of other lands lying within two miles of said improvement, and west of a certain described line, as benefited, and, in obedience to said order and direction, said viewers and engineer did not report any of said lands west of said line as benefited by said improvement, and the appellee's lands were among them. It is therefore urged that, as appellee's land was found not embraced in the report of said viewers as benefited, appellee had no occasion to take any

further notice of the proceedings, and that he was misled by the order. But it is alleged that such order or direction was verbal only, and never entered of record on the commissioners' record. This is nothing more nor less than an attempt to collaterally impeach the record by interpolating something into it to destroy it, to say nothing of the fact that the commissioners are not authorized to make such an order. Such record, as we have seen, cannot be thus collaterally impeached. The statute in question clothed the board of commissioners with original jurisdiction in the several counties of the state, and required them to exercise judicial powers in the location, establishment, and construction of free gravel, macadamized, or paved roads. *Million v. Board of Com'rs*, supra; *Stoddard v. Johnson*, supra. Therefore, the board had jurisdiction of the subject, as the appellee's complaint shows that a petition for such improvement was presented to said board. *Ely v. Board of Com'rs*, 112 Ind. 361, 14 N. E. 236; *Hobbs v. Board of Com'rs*, 116 Ind. 378, 19 N. E. 186.

There are two notices required by the act to confer jurisdiction over the persons affected. One is a notice, to be given by the auditor, by publication in a newspaper printed in the county for three consecutive weeks, of the time and place of the meeting of the viewers. On the return of the report of the committee to apportion benefits, the auditor is required to give notice thereof in a newspaper published and circulated in the county, and shall also give three weeks' notice of the time when the commissioners will meet to hear the same. When these notices are given, then the jurisdiction over the persons affected is complete. The notice of the time and place of meeting of the viewers is for the purpose of enabling persons who are damaged to appeal to the viewers therefrom. That only applies to a small part of the four-mile strip of land liable to assessment,—that part injuriously affected by the establishment of the road. The appellee makes no complaint that he was damaged by the road being constructed on or through his land, but his sole complaint is against his assessment. Therefore, he and all those similarly situated were not concerned with the report of the viewers and engineer, whether it did or did not include his land as benefited, because there is no provision for any hearing of such report, and no provision is made for objecting thereto on account of its including lands as benefited. No notice is required of the filing of such report. But when the report of the apportioning committee is filed with the auditor, notice thereof is required to be given, and a notice when and where the commissioners will hear the same. Then exceptions and objections may be filed thereto, and tried before the commissioners. Then, and not till then, is any landholder authorized to appear and object to the proceedings; and, if the notices above mentioned have been given, then jurisdiction has been

acquired over every person affected by or interested in the proceedings. In the injunction case of *White v. Fleming*, 114 Ind., at page 575, 16 N. E., at page 495, this court said: "In the absence of averment to the contrary, we would be bound to assume, even if it did not appear, that the auditor of Ripley county, in the discharge of his plain statutory duty, gave the notices provided for in section 5092, Rev. St. 1881 (section 6856, Rev. St. 1894), in the manner prescribed therein, and that the county board thus acquired full and complete jurisdiction of all the parties interested in the proposed improvement, and especially of the plaintiff herein. If the plaintiff felt himself aggrieved by any of the subsequent orders or proceedings by or before the county board, in the prosecution of the proposed improvement, our laws gave him a complete and adequate remedy for his grievances by providing for an appeal from such orders or proceedings to the circuit court of the county." To the same effect are *Hobbs v. Board of Com'rs*, 116 Ind. 376, 19 N. E. 186; *Board of Com'rs v. Justice*, 133 Ind. 89, 30 N. E. 1085. It appears by the complaint that the notice required by section 6860, Burns' Rev. St. 1894 (section 5090, Rev. St. 1881), as to the filing of the report of the apportioning committee, and the time and place of hearing thereof, was given. All persons owning land within two miles of the contemplated improvement were bound to take notice that such report might affect them, even though their lands were at first not reported by the viewers and engineer as benefited by the proposed improvement, because they were bound to know the law, and that law, as we have seen, authorizes the commissioners to amend or correct the report of the viewers and engineer, and make such addition of omitted lands and lots, and reapportionment thereof, as they might deem just. Until the report of the apportioning committee had been heard by the commissioners, acted upon, and finally confirmed by them, the interest of every landowner within two miles of the road was liable to be affected by such order, whether his lands had been reported benefited or not by the viewers and engineer. For this reason, they were required to be, and in this case were, notified, as already stated, of the time and place when and where the commissioners would hear such report, and where they could make any and all such legal objections to any apportionment or assessment against their lands that they might have; and, such objections proving unavailing before the commissioners, an appeal would lie, from the final order confirming such report, to the circuit court. *Tomlinson v. Peters*, 120 Ind. 237, 21 N. E. 910. Any action taken by the board on such hearing, however erroneous, within the limits of the petition, the purview and general scope of the act under which the proceeding was had, is binding upon the parties affected, over whom jurisdiction has been acquired by the notices mentioned, when col-

laterally attacked, as is sought to be done in this case. *Stoddard v. Johnson*, supra; *Ricketts v. Spraker*, supra; *Million v. Board of Com'rs*, supra; *Board of Com'rs v. Justice*, supra; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; *Railway Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *White v. Fleming*, supra, and cases there cited.

There are other objections urged to the validity of the assessment, but they are mere irregularities, such as the ones already mentioned would have been if such alleged irregularities had not been contradicted by the commissioners' record as stated in the complaint before us.

Appellee's learned counsel, quoting from cases in this court, says: "When statutory powers are conferred upon a court of inferior jurisdiction, and a mode of exercising these powers is prescribed, the course pointed out must be substantially followed, or the acts and judgments of the court are coram non iudice, and void,"—citing *White v. Conover*, 5 Blackf. 462; *Fleming v. Height*, 101 Ind. 466. The same rule was invoked in the gravel-road case of *Stoddard v. Johnson*, supra, the counsel citing a long list of cases in this court, beginning with *State v. Conner*, 5 Blackf. 325. Of those cases, all similar to the ones cited here by the appellee, this court there said, on page 32, that: "In most of these cases, the questions were raised on appeal, and involved no collateral attack. In so far as many of these cases hold that the jurisdiction of an inferior court must be shown in its own record, they accord with our present ruling, and with the cases cited supra. Some of them contain dicta against the indulgence of presumptions in favor of the proceedings of inferior courts after jurisdiction has been acquired, and to the effect that their proceedings are void unless in strict compliance with the law. If so, they are not in harmony with the cases cited, and in such respects are overruled." One of the cases cited by appellee in support of the rule he invokes is a case where the attack on the proceedings was not a collateral one, but was by way of appeal, and therefore has no application to the case at bar. The other—*State v. Conner*, 5 Blackf. 325—falls under the condemnation of this court in *Stoddard v. Johnson*, supra. In the latter case, at pages 34 and 35, this court said: "The complaint charges numerous errors and defects in the reports of the original viewers, and of the committee of apportionment; as, for instance, that benefited lands had been omitted, and other tracts so defectively described as that the assessments made thereon were void. It is evident, however, that these and like objections do not affect the jurisdiction, and, if true, constitute errors and irregularities which the law expressly authorizes the board to correct at any time." To the same effect are *Ricketts v. Spraker*, supra; *Board of Com'rs v. Justice*, supra; *McEneney v. Town of Sullivan*, supra; *Railway Co. v. Sutton*, supra. Therefore the complaint did

not state facts sufficient to constitute a cause of action, and hence the circuit court erred in overruling the demurrer thereto. The judgment is reversed, with directions to sustain the demurrer to the complaint.

(145 Ind. 506)

WINCHESTER ELECTRIC LIGHT CO. et al. v. VEAL.¹

(Supreme Court of Indiana. Sept. 19, 1895.)

CONTRACTS—PUBLIC POLICY—LOANING COUNTY FUNDS—RECOVERY.

Under Rev. St. 1894, § 2019 (Rev. St. 1881, § 1942), designating as embezzlement the conversion to one's own use, or that of another, of public funds intrusted to him, where a county treasurer loaned county funds as his own, he cannot enforce the securities taken therefor.

Appeal from circuit court, Randolph county; L. J. Monks, Judge.

Action by George W. Veal against the Winchester Electric Light Company as principal, and its directors as sureties, on certain mortgage notes taken to secure the repayment of money loaned to them by him while county treasurer, and belonging to the county. From orders sustaining demurrers to several paragraphs of their answer, defendants appeal. Reversed.

Joseph W. Thompson, for appellants. E. L. Watson and Cheney, Macy & Goodrich, for appellee.

HOWARD, C. J. This was an action brought by the appellee upon two mortgage notes executed by the appellant electric light company, as principal, and by the remaining appellants, directors of said company, as sureties. Demurrers were sustained to several special paragraphs of answer to the complaint, and these rulings present the only question for our consideration. Substantially the same state of facts is averred in each of the special paragraphs of answer, namely, that at the time the loan was made the appellee was county treasurer of Randolph county, and the money for which the notes were given was taken from the funds of the county treasury, and was illegally by appellee, as such treasurer, loaned to the appellant company, in violation of the penal statutes of the state, and hence cannot be recovered by him in this action. The particular statute claimed to have been violated (section 2019, Rev. St. 1894; section 1942, Rev. St. 1881) is as follows:

"Whoever being charged, or in any manner intrusted, with the collection, receipt, safe-keeping, transfer, or disbursement of any money, funds, securities, bonds, choses in action, or other property belonging to or under the control of the state or of any state officer, or belonging to or under the control of any county, civil or school township, city or town in this state, converts to his own use, or to the use of any other person or persons, corporation or corporations, in any manner whatever, contrary to law; or uses, by way of investment

¹ Rehearing denied, 44 N. E. 353.

in any kind of property; or loans, either with or without interest; or deposits with any person or persons, corporation or corporations, contrary to law; or exchanges for other funds, except as allowed by law, any portion of such money, funds, securities, bonds, choses in action, or other property—is guilty of embezzlement, and upon conviction thereof, shall be imprisoned in the state prison not more than twenty-one years nor less than two years, fined not exceeding double the value of the money or other property embezzled, and disfranchised, and rendered incapable of holding any office of trust or profit for any determinate period."

It seems clear that under this statute the appellee, in loaning the money in his hands as county treasurer, was guilty of a felony. It is hence argued that, having thus engaged in the commission of an act made criminal by the law of the state, the appellee is not in position to invoke the same law to aid him in the recovery of the money loaned; that by assisting him to make good his loan the law would, in effect, be but abetting him in his wrongdoing,—in other words, that the law cannot help the criminal to reap the fruits of his crime, but must leave him where it finds him; and the county can look only to the treasurer personally and to his bondsmen to make good any loss that may be occasioned to the treasury by the failure to recover the money so illegally loaned. It is admitted that the plea here made by the borrower is not one of honor, but rather of bare legal right. "We accept and adopt," say counsel for appellants, "the language of Judge Worden in *Rock v. Stinger*, 36 Ind. 346, where he says: 'We may remark, however, that the defense has nothing in it to commend itself to favorable consideration; but, notwithstanding this, it should prevail if the rigid law is with the defendants.'" Counsel also quote from *Holman v. Johnson*, *Cowp.* 343, where it was said by Lord Mansfield: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. * * * No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of his country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." It is said by counsel for appellee that the ruling of the trial court in the case before us was based upon the theory that the legal title to the money loaned was in the treasurer, and that consequently he had

the right to loan and collect the same; and that in making such ruling the court below was but following the decisions of this court. Counsel for appellants contend that these decisions were made before the enactment, in 1881, of the penal statute above set out, and that this court has not, since that date, held that the treasurer can loan the money in his hands, although it has held that the legal title to the money is still in the treasurer. *Harvey v. State*, 94 Ind. 159; *Rogers v. State*, 99 Ind. 218; *Rowley v. Fair*, 104 Ind. 180, 3 N. E. 860. It is to be noted, however, that these and other like decisions, though made since the enactment of the criminal statute in question, were not made with reference to that statute. Not until now, so far as we have been able to learn, has that statute been brought here for consideration; and now, for the first time, it becomes necessary to decide whether a contract made in violation of the statute is valid and enforceable between the parties. Moreover, even as to the treasurer's title to the money loaned, the holding in the case of *Rowley v. Fair*, *supra*, is to the effect that such title is rather technical than substantial, and is acknowledged only for the better security of the funds, and not for the use or benefit of the officer himself. In that case the court, speaking by Judge Niblack, said: "But the title of a township trustee to the money for which he is held accountable is only recognized to the extent that is necessary for the better preservation of the various funds which the money represents, and is in fact a legal title only in a technical and very limited sense. The equitable title to, and the beneficiary interest in, such money is in the township; and, in that view, the money for which the trustee is liable upon his bond really belongs to the township." It was accordingly held in that case that notes and other evidences of indebtedness which had been taken by a deceased township trustee for township moneys loaned by him were rightfully turned over to his successor in office, and did not belong to his administrator. See, also, *State v. Wilson*, 113 Ind. 501, 15 N. E. 596. As to the suggestion that such loaning of the township funds by the former trustee was embezzlement, the court expressly refused to make any decision, saying: "That is a question not now in any manner before us, and concerning which we are not now called upon either to intimate or to decide anything." In the case now under consideration, the appellee having violated an express statute in loaning the money in his hands as county treasurer, and the question being before us for decision, the holding must be that he can maintain no action based upon his own illegal act. This has been the invariable decision of all courts. "There is, to my mind," said Chancellor Kent, in *Griswold v. Waddington*, 16 Johns. 438, at page 436, "something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is

encouraging disobedience, and giving disloyalty its unhallowed fruits. There is no such mischievous doctrine to be found in the books." See, further, *Insurance Co. v. Forsyth*, 2 Ind. 483; *Slter v. Sheets*, 7 Ind. 132; *Daniels v. Barney*, 22 Ind. 207; *State v. Sims*, 76 Ind. 328; *Case v. Johnson*, 91 Ind. 477; *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 456; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707; *Bowman v. Phillips* (Kan. Sup.) 21 Pac. 230; 1 Pars. Cont. 458; *Broom, Leg. Max.* 738.

But counsel for appellee finally contend that in cases such as that before us public policy requires that, notwithstanding the violation of the statute, the contract based upon such violation should nevertheless not be declared void. Many authorities, also, including cases in this and other courts, are cited in support of such contention,—among them, 1 Story, Eq. Jur. §§ 298-300; 1 Pom. Eq. Jur. § 403, and notes; *Lester v. Bank*, 3 Am. Rep. 211; *Deming v. State*, 23 Ind. 416; *Scotten v. State*, 51 Ind. 52; *State v. Levi*, 99 Ind. 77. In these cases, however, other interests than those of the parties to the contracts were concerned; and it was to protect such other interests, and not for the benefit of those who had violated the law, that the contracts were enforced. In *Lester v. Bank*, supra, a Maryland case chiefly relied upon by counsel, the president of the bank had borrowed from its funds, contrary to a statute. Recovery under the contract was enforced, not to shield the officials who had violated the law, but for the protection of the stockholders, depositors, and other creditors of the bank. In the Indiana cases cited, county auditors, in making loans from the school fund, had violated provisions of the statute. Public policy required that these contracts should be enforced, not in favor of the auditors, but for the protection of the school fund. It would have defeated the very purpose of the law to have done otherwise. These cases are not analogous to the case at bar. Here the action was not brought in the name of the county, nor did the appellee pretend to sue in his capacity as county treasurer, even if such suit by him could in any case be maintained. *Rev. St. 1894, § 7820* (*Rev. St. 1881, § 5735*); *Vanarsdal v. State*, 65 Ind. 176; *Caldwell v. Board of Com'rs of Fayette Co.*, 80 Ind. 99. Neither is there anything in the record from which it can be known that the county was pursuing the funds belonging to its treasury, or seeking to recover them from the appellants. No public interest in the result of this action is therefore shown, nor any reason why public policy would be served by a recovery on the contract sued on, in favor of the appellee. We have no doubt that, if the county were shown to be interested in the recovery of the money here sued for, it might, by the proper officers, have been admitted as a party plaintiff in the original action. In such case, much of what is said by counsel, as also the authorities cited, would be in point to show that, on grounds of public policy, a recovery

ought to be had on the debt sued on in favor of the county. The faults, or even crimes, of public officials, ought not to be allowed to interfere with the right of the people, through their several municipal and political organizations, to recover the moneys raised from them by taxation, and wrongfully converted or misapplied by such officials. In whosoever custody the money of the county is found, it may be reached for the benefit of the county. *Vigo Tp. v. Board of Com'rs Knox Co.*, 111 Ind., at page 178, 12 N. E. 305. The judgment is reversed, with instructions to overrule the demurrers to the special paragraphs of answer, and with leave, if desired, to amend the complaint or to file a new complaint, and to admit other parties plaintiff.

MONKS, J., did not participate in this decision.

(142 Ind. 55)

MCDONALD et al. v. McDONALD et al.

(Supreme Court of Indiana. Sept. 19, 1895.)

WILLS—CONTEST—PLEADING—PARTIES—CONTINUANCE—EVIDENCE—PROOF OF HANDWRITING—PRIVILEGED COMMUNICATIONS—TRANSACTIONS WITH DECEDENT.

1. *Rev. St. 1894, § 2766* (*Rev. St. 1881, § 2596*), providing that, in contesting the validity of a will, contestant must, in an allegation in writing, verified by his affidavit, set forth improper or undue influence in the execution of the will, or that it was obtained by fraud, "or any other valid objection to its validity," does not require that a contestant must elect between his allegations that the will in contest is a forgery, and that it was obtained by undue influence, though these allegations are contained in the same paragraph.

2. Where all the parties contesting a will appear, from the statements in the complaint, to be devisees named in an alleged genuine will, which, as they have averred, has been removed, lost, or stolen, and the one in contest substituted in its stead, there is no defect in parties plaintiff, nor is it necessary that one of such contestants, being also a legatee under the contested will, should be made a party defendant.

3. *Rev. St. 1894, § 1442* (*Rev. St. 1881, § 1379*), providing for a continuance of sittings of the court beyond the term, authorizes a will contest begun during a term of the circuit court, and continued from day to day until the last day thereof, to be adjourned for its further hearing until the day fixed by statute for the commencement of the next term.

4. A witness not an expert cannot be allowed, after having been shown other instruments purporting to have been signed by testator, the signatures to which he has pronounced genuine, to testify from his "present knowledge" as to the genuineness of the signature in question, the instruments previously shown not having been papers in the case.

5. A witness cannot, in testifying as to the validity of the signature of one of the witnesses to a will, be permitted to compare the disputed signature with one found in certain account books, not papers in the case.

6. Error in the exclusion of a question put a witness is harmless, where the same evidence is elicited by other questions, in a different form.

7. There is no prejudicial error in examining a witness beyond the presence of the jury, for the purpose of determining whether his evidence will be of statements claimed to have been made to him as an attorney, and so privileged.

8. Where testator's widow, after asking his surviving law partner to call at her residence after business hours, confers with him in reference to certain claims against his estate, in regard to her own personal income, and then turns the conversation to other matters, afterwards attempting to explain away his objection that the will of her husband, as presented for probate by her, was different from one whose terms were explained by deceased to him, she cannot insist upon the exclusion of his testimony as to what she said on the ground that it was privileged, as a communication to an attorney by his client.

9. Where, in a will contest, it was admitted on both sides that a will had been executed by testator on a certain day at a certain place, attested by two certain witnesses, but contestants alleged that the will attempted to have been probated was a spurious and substituted one, and proponents insisted that it was the one then executed, there is no error in admitting the declarations of testator shortly previous to his decease as to the contents of his will, for the purpose of showing the contents of the alleged lost will, in order that the interest of the complainants may appear, and the presumption of revocation be rebutted.

10. The court having permitted evidence to be introduced of the testator's declarations as to the contents of his will, and having charged the jury that they were to be considered only for the purpose of determining the character and contents of a will alleged by contestants to have been lost, and whether it remained unrevoked, there was no error in refusing an instruction that such declarations could not be considered, to determine the question of the genuineness of the will in contest, and alleged to have been forged.

11. Rev. St. 1894, § 507 (Rev. St. 1881, § 499), controlling the admissibility of testimony as to matters occurring between witness and one since deceased, prohibits a widow from testifying, in the contest of her husband's will, in regard to circumstances under which a copy thereof came into her possession, this event having occurred during the life of the testator.

12. A witness to the genuineness of the signature to a will, after stating the facts showing him to be an expert, and giving to the jury facts which he had discovered and peculiarities observed in regard to the signatures in question by examinations which he has made, may be allowed to answer, in response to a direct question, "that they were not genuine."

13. For the contestants to prevail upon the charge of forgery of the will proposed for probate, they are not compelled to prove the charge beyond a reasonable doubt, but by a fair preponderance of the evidence, overcoming the presumption of innocence and countervailing evidence of genuineness.

14. It is not necessary that the contestants, in order to set aside a probated will upon the ground that it is a counterfeit, should specifically allege and point out in evidence the identical person who perpetrated the forgery.

15. Where the theory of the pleadings on behalf of the contestants of a will is that it is a forgery substituted for a prior and authentic instrument, the terms of which are generally set forth, but it is not contemplated to establish and probate the alleged lost will, and where proponents do not demand any such relief in any of their pleadings, there is no error in refusing, on finding for contestants, to establish the alleged lost will, at the instance of the defeated proponents, though they may have been named as devisees therein.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Malcolm A. McDonald and others against Josephine F. McDonald and Theodore P. Haughey, as executors under a sup-

posed will of defendant McDonald's deceased husband, Joseph E. McDonald. From a judgment setting aside the will, defendants appeal. Affirmed.

Fishback & Kappes, A. J. Beveridge, Geo. Shirts, and A. C. Harris, for appellants. J. M. Cropsey and Miller, Winter & Elam, for appellees.

JORDAN, J. This action was commenced by the appellees, Malcolm A., Malcolm S., Joseph E., and Jessie C. McDonald, against the appellants, Josephine F. McDonald and Theodore P. Haughey, executors, etc., to set aside what was alleged to be a pretended will of the late Senator Joseph E. McDonald. A trial resulted in the jury finding in favor of the contestants, and, over appellants' motion for a new trial, the court rendered a judgment setting aside the will in contest. To reverse this judgment, appellants prosecute this appeal. Numerous alleged errors of the trial court are assigned, and many questions thereunder are presented, by appellants' learned, able, and eminent counsel. Some of these questions are now to be considered for the first time by this court, and the examination of the many authorities cited pro and con in the very ably and elaborately prepared briefs of counsel has required much labor and time. In our examination of the voluminous record, we have been subjected to more labor, and required to consume more time, than would otherwise have been necessary, had appellants complied with rule 31 of this court, in regard to placing marginal notes upon the transcript. An observance of this rule is essential upon the part of litigants, in order to assist the judges and facilitate the business of this court, which is now virtually overwhelmed with cases and labor. A noncompliance with this rule generally results in the court's setting aside the submission of the cause, at the cost of the appellants. The penalty may be a dismissal of the appeal, when deemed proper by the court.

The amended complaint in the case at bar alleges the death of Joseph E. McDonald on June 21, 1891, and that he left surviving him Malcolm A., as his only living son, and that Joseph E. and Jessie C. are his grandchildren, being the children of one Ezekiel McDonald, deceased, and Josephine F. is alleged to be the surviving widow of the testator, Joseph E.; she, as it appears, being his second, childless wife. It is then alleged substantially as follows: That in the year 1891 a certain paper, in writing, purporting to be the last will of Joseph E. McDonald, and purporting to have been signed by him, and attested by Alpheus Snow and Parke Daniels, of date August 26, 1890, was admitted to probate in the Marion circuit court, filed and recorded therein, and that letters testamentary were issued to appellant Haughey, who was named in said will as the executor thereof; that in said pretended will cer-

tain described real estate in Marion county, Ind., known as the "Washington St. Property," of which said Joseph E. died the owner, was purported to be devised to Josephine F. McDonald, who accepted the provisions of the will; and that she asserts and maintains that the same is the true and only last will of her husband, Joseph E. The complaint then charges that said pretended will is invalid, and is not the last will of said McDonald, for the following reasons: "Said pretended will was unduly executed. Said pretended will was obtained by the undue influence of said Josephine F. McDonald, the defendant herein. Said pretended will was procured by fraud. Said pretended will was not executed by said Joseph E. McDonald, and the pretended signature of said Joseph E., thereto was not made by him or by any one in his presence, with his consent. Said pretended will was not attested and subscribed in the presence of said Joseph E. McDonald by said Alpheus H. Snow and Parke Daniels, or either of them, as witnesses thereto, and the pretended signatures of said Snow and Daniels thereto, as the attesting witnesses thereof, were not subscribed by them, or either of them, or by any one of them at their procurement, or with their knowledge or consent, and are not the act and deed of them, or either of them. That said pretended will was unduly executed, and was not executed by the said Joseph E. McDonald, deceased, for that, at or about the time said pretended will bears date, said Joseph E. McDonald executed in writing his true and genuine last will and testament, which was attested and subscribed in his presence by two competent witnesses, and which was and is in substance and to the effect as follows: (a) A direction for the payment of his debts. (b) A devise unto Josephine F. McDonald, for her life, of the real estate hereinbefore described. (c) And to said Josephine F. McDonald all his personal property at his homestead at the time of his decease. (d) To the plaintiffs Malcolm A. McDonald, Joseph E. McDonald, and Jessie C. McDonald, heirs at law of the said Joseph E. McDonald, the fee simple of the real estate above described, together with all other real and personal property of the said Joseph E. McDonald which he might have at his death, not specifically bequeathed to the said Josephine F. McDonald. (e) To the plaintiff Malcolm S. McDonald the gold watch which the said Joseph E. McDonald might have at the time of his decease, and also the law library of the said Joseph E. McDonald, if the said Malcolm should choose the profession of the law. And that said will and testament remained and was, at the death of said Joseph E. McDonald, his true and only last will and testament. And thereafter, without the knowledge or consent of the said Joseph E. McDonald or of the plaintiffs, or either of them, the said true and genuine last will and testament was removed,

lost, or stolen by or at the procurement of such person or persons, concealed, suppressed, or destroyed, without the knowledge or consent of the said Joseph E. McDonald or of the plaintiffs, or either of them, and the pretended will of the said Joseph E. McDonald, as it has been admitted to probate in said court, was thereupon, by or at the procurement of such unknown person or persons, substituted or foisted in the room and place of the true and genuine last will and testament of the said Joseph E. McDonald. All of which was done without the knowledge or consent of the said Joseph E. McDonald or of the plaintiffs, or either of them. And neither the said Joseph E. McDonald, nor either or any of the plaintiffs, at any time thereafter during the lifetime of said Joseph E., had any knowledge or consented to such removal, in any way, or concealment, suppression, or destruction of the said true and genuine last will and testament of the said Joseph E. McDonald, or of the substitution therefor of said pretended will, as it has been admitted to probate. And the plaintiffs aver that they have made diligent search and inquiry to discover the said true and genuine last will and testament, so concealed, suppressed, or destroyed, but have hitherto been unable to discover the same, or to obtain any information where, or in whose possession, control, or custody the same is, and they do not know any person or persons, whom they, or either of them, can suppose to have possession, power, or control of said true and genuine last will and testament of the said Joseph E. McDonald, or against whom they, or either of them, can justifiably invoke any process of this court looking to the possible production of such true last will and testament to this court. Wherefore the plaintiffs pray the court that said pretended will be declared void, and that the probate thereof be set aside."

We will consider the various points and contentions of appellants in the order in which the same have been presented in their brief. It is contended that the court erred in not sustaining the motion of the appellant Mrs. McDonald to compel the plaintiffs to elect whether they would prosecute their action upon the theory that the will in contest was a forgery, or upon the theory that the execution thereof by the testator was obtained by undue influence, and also in overruling a motion to make the complaint more specific. It is a well-settled legal proposition that a cause must be put to trial upon a definite theory, and that such theory must be outlined by the pleadings, and sustained by the law applicable to the case. The contention of counsel for appellants is that the appellees, in their complaint, assume inconsistent positions. After setting forth the grounds of contests as mentioned in the complaint, they say: "It must be apparent that, if the will was procured by undue influence, it could not have been a forgery;

and, vice versa, if a forgery, it could not have been procured by undue influence." Numerous authorities on the code practice in other states are cited to show that inconsistencies are not permitted in a single pleading or paragraph, and counsel then propound the question, "Does a complaint under the will statute have any exception, in this respect, to the general rule?" Section 2596, Rev. St. 1881 (section 2766, Rev. St. 1894),—of an act concerning wills,—is as follows: "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto." It is true that, under the Civil Code, different causes of action must be stated in separate paragraphs. But an action to contest the validity of a will is a special statutory proceeding. Under the section above quoted, the contesting party is required to file in the circuit court his allegation in writing, verified by his affidavit, setting forth the particular grounds of contest as mentioned in the statute, or any other valid objections to its validity. This section, we think, evidently authorizes the "allegation in writing" to consist of a complaint in one paragraph, if the pleader so desires, in which the will may be assailed upon any and all grounds that will expose its invalidity. The contest of a will being a special proceeding under the statute, we must look to section 2596, *supra*, in order to ascertain the character of the complaint required, and not to the provisions of the general Code. *Summers v. Copeland*, 125 Ind. 466, 25 N. E. 555. We recognize nothing in this section of the law which, either expressly or by implication, prohibits inconsistency, repugnancy, or duplicity, or which requires that the several grounds of contest shall be stated in separate paragraphs. The cause of action contemplated by the section is the resisting of the probate, or setting aside the will for certain specified reasons, and, in addition to these, for "any other valid objections." The complainant may charge or allege any one or more valid objections to the will as the grounds of his action, without regard to consistency or repugnancy, and upon the trial he may introduce evidence to sustain any one or more of the alleged grounds, and the court is not authorized to compel him to elect as to which he will seek to sustain. It has been the practice in this state for years, in these actions, to join in a complaint, in one paragraph (if the plaintiff so desires), different

grounds of contest; and we think it must be considered as settled that the plaintiff, in such joinder, is not confined to those grounds only which are consistent and not repugnant. *Kenworthy v. Williams*, 5 Ind. 375; *Etter v. Armstrong*, 46 Ind. 197; *Bowman v. Phillips*, 47 Ind. 341. While it is true that in actions under our Code a party who states his cause of action or defense in different forms must generally paragraph each cause, but he is not prohibited from joining in his complaint, in separate paragraphs, inconsistent causes of action or defense. *Snyder v. Snyder*, 25 Ind. 399, and cases cited. The provision of the statute which requires that a complaint to contest a will shall be verified does not necessarily imply that the grounds of contest shall be consistent. An answer of non est factum, under the Code, is required to be verified. Yet it is a common and unquestioned practice to join with such answer paragraphs confessing the execution of the instrument in suit, but seeking to avoid the action by alleging payment, or no consideration, etc. We are of the opinion that the ruling of the trial court in denying the application of appellant to require appellees to elect whether the case should be tried upon the theory of undue influence, or forgery, made before and during the trial, was correct.

There was no error in overruling the motion to make the complaint more specific, for the reason that the statement of the grounds of contest in the language of the statute is sufficient. *Reed v. Watson*, 27 Ind. 443; *Bowman v. Phillips*, *supra*.

There was no error in the action of the court in overruling the demurrer to the complaint upon the grounds of insufficiency of facts and defect of parties. All of the contesting parties appear, from the statements in the complaint, to be devisees named in the alleged genuine will of the deceased testator, which will, as it is averred in the pleading, had been removed, lost, or stolen, and the alleged spurious one in suit substituted in its place and stead. All of the complaining parties, except Malcolm S. McDonald, also appear to be the heirs at law of Joseph E. McDonald, deceased. The contention of appellants, in substance and effect, is that the theory of the complaint is twofold: That the appellees, both by their complaint and by the actions and statements of their counsel during the trial, sought to assail the invalidity of the will which had been admitted to probate, and also to establish the one said to have been lost or destroyed. The learned counsel for appellees insist and claim that the theory of the complaint is, and the only relief sought to be obtained thereby was, a decree of the court setting aside and annulling the will in contest; that the appellees sued, not as heirs, but as devisees or legatees of the destroyed will, under which they asserted their interest in the estate of the testator, and their legal right to contest the one said to have been forged; that, in order to support the character in

which they sued, it was necessary to refer to the one lost or destroyed, and show that there was a true and genuine last will, by the provisions of which they were all interested in the estate. But appellants further contend that, if the amended complaint is construed only as going to set aside the probated will, then it must follow that there is a defect of parties, for the reason that Malcolm S., being a legatee under the probated will, should have been made a party defendant, as required by the section of the statute herein cited. While it may be admitted that the complaint is not a model pleading, in all respects, nevertheless we are of the opinion that, as outlined by the facts therein averred and stated, its evident purpose or theory is, and the only relief sought was, the setting aside of the probated will. It was a part of appellees' case, and one of the grounds upon which the contest was waged, and the one, as it appears from the special findings upon which the jury based their general verdict, that no such will as the one assailed ever existed, as a genuine will. It is also apparent, we think, that appellees did not seek to maintain the action as the heirs of Joseph E. McDonald, deceased. It is not shown in the complaint that Malcolm S. is an heir of the deceased, but it shows that he, as well as all of the other co-complainants, are devisees and beneficiaries, under the lost, but true and only, will, in the place of which the spurious one, as averred, had been substituted. Under section 2596, *supra*, the contestants of a will must be persons interested in the estate. *Niederhaus v. Heldt*, 27 Ind. 480; *Schmidt v. Bomersbach*, 64 Ind. 53; *Kinnaman v. Kinnaman*, 71 Ind. 417. In the case of *Schmidt v. Bomersbach*, *supra*, on page 55 of the opinion, this court said: "The complaint must show the plaintiff to have an interest of some kind in the subject-matter involved in the contest." We think it is an evident legal proposition, under the section referred to, that any or all persons who are devisees or legatees under the lost and only will of a deceased testator have such an interest as will authorize them to contest the validity of another will, upon proper grounds, whereby the same estate, in whole or in part, affected by the one under which the claim is sought, or attempted to be distributed. Malcolm S., being interested as a devisee or legatee in the supposed lost, but genuine, will, together with his coplaintiffs, had a legal right, together with them, to join in the action; and, having properly elected to join as plaintiff, it was not necessary to make him a defendant. It follows, therefore, that there was no defect of parties, and there was no error in overruling the demurrer on that ground. The fact that the will under which appellees asserted their right to contest the one alleged to be invalid was lost or destroyed without their knowledge or consent, and without the act, agency, or authority of the testator, did not destroy their rights thereunder. It is not necessary for us, in this case, to decide as

to the right of plaintiffs to have joined in their complaint a cause of action to establish, and have admitted to probate, the lost will, upon which they relied, or to consider the conflict, if any, existing between the decisions of *Summers v. Copeland*, 125 Ind. 466, 25 N. E. 555, and *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 565. The appellees, having based their right to maintain this action on the ground that they were interested in the estate by reason of the provisions of the lost or destroyed will, were, among other things, in order to prevail upon the trial, required to establish that right.

Counsel for appellees insist that the questions presented by appellants under their assignment of error that the court erred in overruling their motion for a new trial are not in the record, and therefore cannot be considered. It appears from the record that the trial of the cause was begun during the November term, 1892, of the Hamilton circuit court, and was continued from day to day until Saturday, February 4, 1893, which was the last day of the term. The trial still being in progress on that day, and it not being possible to complete it before the expiration of the term, upon appellees' motion the court adjourned the further hearing of the cause until Monday, February 6, 1893, and from day to day until completed. February 6th was the day fixed by statute for the commencement of the next term of the Hamilton circuit court. The verdict of the jury was returned on the 17th day of that month, and the motion for a new trial was filed on the 13th day of March next following. Under the circumstances, a continuance of the sitting of the court in the cause beyond the November term was fully authorized by section 284, *Elliott's Supp.* (section 1442, *Burns' Rev. St.* 1894; section 1379, *Rev. St.* 1881).

On the trial of this cause, appellees introduced one Jesse Caldwell as a witness, who testified, from his knowledge of having seen Senator McDonald write, that his signature to the will in question was not genuine. Two points are raised by appellants relative to this witness: First. That the witness was not permitted by the court to answer the following question propounded to him upon cross-examination: "Q. Now, from your present knowledge of the signatures of Senator McDonald, tell the jury * * * whether, in your judgment, Senator McDonald always wrote the letters 'on,' and then lifted the pen before making the letters 'al,' and then lifted the pen, and then made the final letter, 'd'?" Second. That he was not permitted to answer the following, put to him upon cross-examination: "Q. Look at this letter (referring to application for a marriage license), which you mentioned in cross-examination, and tell us whether, if, in making his name, he did not make the 'e' one way, and in the signature make it different?"

The first question seems to have been pro-

pounded by appellant's counsel to show that the witness was mistaken in a statement drawn out of him upon cross-examination, to the effect that it was a peculiarity of the testator's signatures, as they had come under his observation, that the word "McDonald" was not connected all the way through. It does not appear that the witness had testified to this effect in chief. Preceding this first question, counsel for appellants exhibited to this witness, upon the stand, some 15 checks and a promissory note purporting to have been signed by the testator; and over the objections and exceptions of the appellees the witness was asked if the signatures to the checks and note were genuine, and he answered that he thought they were. Following this answer, the witness was asked the question first excluded. We think it is apparent from the fact that these checks were exhibited to the witness, and also from the form of the interrogation,—the words, "now, from your present knowledge," being used,—the answer to the question involved the taking into consideration by the witness the checks and note exhibited to him upon the stand. That it was intended that the signatures to these checks should be considered by the witness in his response more fully appears from a further question immediately asked him by counsel, to the same effect, whereupon he asked if he was to leave the checks out of the controversy, to which inquiry counsel for appellants made no direct response, but said, "Speaking from your personal knowledge, from what you know now." This witness was not an expert in handwriting, and it does not appear that he had seen the testator sign the checks and note. They were not papers in the case introduced for any other purpose, nor were the signatures thereto admitted by appellees to be genuine. The rule is firmly settled in this state that, on a question involving handwriting, the only papers that may be used in examination of even an expert witness are those which may have been brought into the case for some purpose. Other papers, not pertinent to the case, cannot be shown to the witness and used upon examination, unless the genuineness of the same is admitted by the party against whom the evidence is sought to be elicited. This rule is supported by the following authorities: *Chance v. Road Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Jones v. State*, 60 Ind. 241; *Fogey v. Hank*, 66 Ind. 123; *Hazard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500, 100 Ind. 429; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, and 23 N. E. 271; *Machine Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053; *Perry v. Newton*, 31 E. C. L. 713; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Bank v. Mudgett*, 44 N. Y. 514; *Miles v. Loomis*, 75 N. Y. 288; *Hynes v. McDermott*, 82 N. Y. 41; *Pierce v. Northey*, 14 Wis. 9. The rule seems to be a reasonable one, and the ground or reason up-

on which it is founded is that its requirements are necessary in order to avoid the evil of having collateral issues injected into the case, and the minds of the jurors distracted thereby. If the papers or documents are not in evidence, or connected with the cause for some other purpose, and their genuineness is not admitted by the adverse party, then independent proof would be necessary, upon the side of the party seeking to use them as a standard of comparison, to establish their authenticity. This evidence the opposite party would be entitled to rebut, and thereby the parties would become involved in a collateral issue. This the rule seeks to avoid. But counsel for appellants contend that there was no attempt upon their part to infringe upon this rule. It is said that there was no attempt to lay these papers before the jury. The force and effect of their contention seem to be that they had the right to exhibit the checks to the witness in order to test the accuracy of his statement as to how Senator McDonald wrote his name, or, in other words, that, these papers having been shown to the witness, he ought to have been permitted to state what his present opinion was, after having seen them, as to whether "onald," in the testator's name, was never written without a break. This rule must have the same application, and for the same reason, when a paper is shown to a witness for the purpose of testing his accuracy. If a disputed paper could be used for the purpose of testing the correctness of the opinion of the witness, a collateral inquiry would necessarily arise. *Bacon v. Williams*, 13 Gray, 525. The witness, from the fact that he had seen Mr. McDonald write his name, seemed to have had an impression in his mind, therefrom, as to the characteristics of his signatures. Then, upon cross-examination, it is drawn out by appellants that, as the witness remembered, there would be breaks in the word "McDonald," and the checks and note were then shown him, and the question asked. We think it must be apparent that the purpose of this inquiry was to have the witness to compare the exemplary in his mind, formed by his acquaintance with the signature of the testator, with the new exemplary obtained or formed by the inspection of the checks and note. If this could be held admissible, then it must be evident that the rule referred to, forbidding papers not admitted to be genuine to be used as a standard of comparison, would be abrogated, and the evil which it was intended to prevent would necessarily follow. For, if the witness had stated that the signatures to the checks and note were not genuine, then, if appellants were entitled to use them for the purpose as insisted, surely they would have been entitled to contradict him by other evidence. And likewise, if he stated they were true signatures, to the appellees must be conceded the right to show the contrary, and hence at once the collateral inquiry would

have arisen. There was no error in excluding this question. If there was any error, it was in permitting, over the objection of appellees, the witness to state that signatures to the checks and note were genuine.

This witness testified in chief that at one time he saw the testator subscribe his name to a certain request for a marriage license to be issued, which paper, he incidentally stated, he had in his possession. No evidence based upon this written request appears from the record to have been brought out by appellees. The second question seems to have been founded upon the alleged right of appellants to cross-examine the witness as to the difference of the letter "E" in this request, and the one in the signature to the will. We do not think that the appellants are in a position to be heard on their complaint on this question, for the reason that the record shows that this second question was answered by the witness as follows: "I don't know. It is different. I cannot answer that." And this answer seems to have been permitted to remain in evidence. Appellants seem to have had the benefit of all the knowledge that the witness possessed on that particular point, and for this reason alone, if for no other, we cannot adjudge that the court erred in not permitting counsel to further interrogate him relative to the capital "E" in the paper in question. It is a settled rule of practice that the extent to which a cross-examination may be conducted is largely within the discretion of the trial court, and such discretion will not be interfered with by this court unless it clearly appears by the record that it has been abused to the injury of the complaining party. *Machine Co. v. Gordon*, supra.

Maurice Butler, not an expert witness, testified, in behalf of appellees, relative to the disputed signature of the attesting witness Parke Daniels. On cross-examination he was shown some pages said to be from a cash book of McDonald & Butler, upon which the signature of Daniels appeared. These pages had not been referred to by the witness in his examination in chief. He was then asked to state whether the capital "D," as it appeared in these pages, was not above the line almost as much as the "D" in the signature to the will. This question was excluded. These pages of the cash book were not properly papers in the case, for any purpose. The authenticity of Daniels' signature therein was not admitted, and the use of them was prohibited by the rule heretofore considered. Counsel for appellants argue that, as these pages of the book were in the possession of the witness, he had the right to look at them for the purpose of refreshing his memory, under the rule laid down in *Thomas v. State*, 103 Ind. 419, 2 N. E. 808, and *Machine Co. v. Gordon*, supra. But we fail to see the application of this rule to the question raised, and it is not made apparent by the record, nor by appellants' brief. Some

criticism is urged by appellants to the ruling relative to the witness Henry L. Tolman, but as no evidence appears, from the record, to have been given by this witness under such ruling, the error, if any, must be deemed to have been harmless. There was no error in the action of the court in not permitting the witness Hurty, who seems to have examined a large number of checks signed by the testator, to state in how many of them the word "onald" was connected, and in how many divided, for the reason that appellants substantially elicited the same evidence or explanation from the witness by another question, but in a different form.

Appellants next complain and insist that the court erred in hearing apart from, and out of the presence of, the jury, certain communications made to John M. Butler, an attorney of law, by the appellant, Mrs. McDonald, which she claimed were privilege, upon the grounds that they were confidential, being made by her to him as her attorney. Butler, who was introduced as a witness by appellees to testify to those communications of Mrs. McDonald, disclaimed that the relation of attorney and client existed between him and said appellant. This, however, was a matter proper for the court to determine, we think, from the facts, after hearing them beyond the jury. *Bacon v. Frisbie*, 80 N. Y. 394. However, if we are not correct in this statement of practice, still, if the action of the trial court was erroneous in this respect, it is not available to appellants, for the reason that it does not appear that any privileged communications made by Mrs. McDonald, and detailed by Butler to the court, were given in evidence to the jury. If what he detailed to the court was not heard by the jury, we fail to see how appellant was prejudiced thereby in the trial of this cause.

Certain statements made by Mrs. McDonald shortly after the death of her husband, at her home in Indianapolis, to the witness John M. Butler, were by the court permitted to be given in evidence by him in behalf of appellees; and this ruling of the trial court, in admitting the same, is assailed by appellants for the alleged reason that these statements were privileged, under the rule that forbids the disclosure of communications made by a client to his or her attorney in the course of their professional relations. Section 497, Rev. St. 1881 (section 505, Rev. St. 1894), excludes "confidential communications made to attorneys in the course of their professional business, and as to advice given in such cases." This witness, as we heretofore said, disclaimed that at the time the communications were made he was acting in the capacity of an attorney for appellant, and stated that he was not consulted professionally by her, but that he was advising her only as a friend. As hereinbefore said, this relation must be determined by the court from all the facts appearing, and not alone from the

disavowal of the attorney. It appears that the witness Mr. Butler was an eminent lawyer, and engaged at the time in active practice of his profession. The deceased, Senator McDonald, had been his partner in the practice of the law for many years, up to the date of his death. On June 29, 1891,—a few days after the death of the testator,—Mrs. McDonald wrote and sent to Mr. Butler, at his law office in Indianapolis, the following note: "Mr. John M. Butler—Dear Sir: Mr. Snow kindly suggested your calling, should I wish to consult with you. There are many things in which I need your good advice, and would be pleased to see you Wednesday evening, after business hours, if convenient. Yours, truly, Mrs. Joseph E. McDonald." In response to this request, Butler called at the home of Mrs. McDonald. After he was seated, the conversation appears to have been commenced by her saying to him: "Mr. McDonald has always told me that if, in any emergency or condition, I desired the advice of a friend on whom I could rely absolutely, to send for you." Butler stated that there was nothing said by her about desiring to consult him professionally, or with reference to any legal questions; that she was merely asking advice of him as a friend. "Nothing," said the witness, "as to her rights, was talked about." The first item of the conversation at the house, after telling Butler that her husband had recommended her to confer with him as a friend, was in regard to some awnings at the windows that had been put up by a young man, with whom she contracted during the life of her husband. These awnings had not all been placed during the life of her husband, for the reason that the noise annoyed him while in his sick condition. After his death, it appears, she wanted the awnings that were up taken down. This the party declined to do. It was finally agreed that he should complete the placing of the awnings at the exact cost for so doing, and that after doing the work he had presented to her a bill for his services, which she thought was too large; that, when she informed this man that his bill was not correct, he got angry, and made some saucy remarks in response. After detailing this, she then said to Butler, "What am I to do?" To this he replied: "Do nothing. Mr. Beveridge is Mr. Haughey's [the executor] attorney, and, when these people present any bill, all you want to do is to turn them over to Beveridge and Haughey." That ended the conversation in regard to the awnings. The next matter to which the conversation turned was relative to Mrs. McDonald's income. She spoke about having been making some figures about her income, and how much it would be. Butler also made some estimation relative thereto, and she inquired of him if he deemed it sufficient to afford her a living, if she continued to live at the house where she then resided, and Butler told her that it would. Some other matters, relating

to debts, and money which the witness had sent her, arising out of a settlement he had made of the partnership affairs of the law firm of McDonald & Butler, were talked about. After the conversation about the income and settlement had ended, it appears to have been turned by Mrs. McDonald to another subject. This conversation was detailed by the witness as follows, and was permitted, over the objections of appellants, to go to the jury as evidence in the case in behalf of the appellees: "Turning her head to me," said the witness, "Mrs. McDonald said, 'Now, Mr. Butler, you cannot blame me about the will.' I said, 'Mrs. McDonald, I am not blaming anybody about the will.' 'Well,' she said, 'you expressed astonishment at the will when it was read by you down at the office. Now,' she says, 'you cannot blame me about it. I have done nothing more than any wife has a right to do. I have gotten all from my husband I could for my support.' I said, again, 'I am not blaming anybody about the will, but there is just one thing that worries me.' She says, 'What is it?' I said, 'In all our long-continued friendship, and years of close intimacy, Mr. McDonald never made a statement to me of a fact, in his life, that did not turn out just exactly as he said it would, except this one. Now,' I said, 'how do you account for it that he told me his will was one thing, and it turns out to be another thing?' She said, 'I can explain that.' She said, 'He did have such a will as he told you about, but I did not like it, and I got him to change it.' Well, I did not say anything, much, to that; but after thinking a moment I said: 'It would have been substantially the same, so far as the income to you is concerned, if it had been as he told me, because you would have had the whole income from it all your life. The only difference would have been, you could not will it away or sell the Washington St. property.' Then she says: 'It was putting a price on my head, and I did not like it, and I got him to change it; and I expect that, in his weak state of mind and body, his mind reverted to the will he had formerly made, and, for the time being, forgot the will as it now is.' I did not say anything more than that. I think that pretty much ended the conversation. I think, the next thing that was talked about, she was asking me when I would go away on my vacation, etc."

Counsel for appellants strenuously insist that there was error in allowing these statements as to the will to be detailed as evidence by Butler to the jury, under the rule laid down by section 497, supra, as construed by judicial decisions. Many authorities are cited upon this proposition, but we do not consider it necessary to extend this opinion in a review of these. We fully recognize the importance and the necessity for the strict enforcement of this statutory rule which forbids an attorney at law to disclose communications confided to him in the course of his

professional business, or as to advice given in such a case. We also recognize that it is well settled by the decisions of this court, and many others, that this rule is not to be extended to such communications which come to the knowledge of the attorney when the relation of counsel and client does not exist. To come under the protection of the rule in question, the communications claimed to be privileged must be addressed to an attorney in his professional character of a legal adviser, with a view to legal advice which, as an attorney, it was his duty to give. *Borum v. Fouts*, 15 Ind. 50; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; 1 Greenl. Ev. § 244. It does not clearly appear that any part of the conversation between Butler and the appellant, at her house, came within this rule. However, passing this question without deciding, we are of the opinion that the statements of Mrs. McDonald, testified to by the witness, in regard to the will, were not privileged, and were properly admitted. These were independent of, and had no connection whatever with, nor reference to, what had been previously said or talked about by the parties. That conversation seems to have ended before she introduced the other in reference to the will. It is obvious, we think, that they were not made to him as an attorney, in the course of his professional business. Neither did they have any reference to or connection with advice given by or sought from Butler as an attorney. After having disposed of all matters in which she probably might have sought his professional advice, she seeks to explain to him how it was that her husband had changed his will, and executed one whose provisions were somewhat different from those stated by the testator to Butler. The latter, as an acquaintance and friend of the husband, expressed surprise that the will of the latter, found after his death, did not correspond with the one that the deceased had referred to shortly before his decease; and these explanatory statements seem to have been made to satisfy Butler on this question, and for no other apparent purpose. The rule laid down in the case of *Maas v. Bloch*, 7 Ind. 202, cannot be extended to the question herein involved. The facts in that case and the one at bar are different and distinguishable. An attempt was there made to separate from one entire communication, a part of which was admitted to be privileged, certain statements, upon the ground that the person making such, which were all made at the same time and in the same conversation, made part thereof in the character of an agent, and part as a witness, having personal knowledge of the facts so stated. This court held that under the facts therein it was not practicable to make the separation, as it could not determine or distinguish which part was uttered as an agent, and which as a mere witness. No such difficulty arises in the question now under consideration. The state-

ments made by Mrs. McDonald at the house in regard to the will appear to be as separate and distinct from what was previously said as though they had been uttered at different times and places.

Appellants complain of the ruling of the court in admitting in evidence certain statements or declarations of the testator made to John M. Butler shortly before the death of the former, relative to the contents of his will, and also in refusing to give instruction No. 10 asked by them, and in giving, on its own motion, instruction No. 8. The will in contest bears date of August 26, 1890. It appears to have been conceded by both parties in this action that a will was duly executed at his (the testator's) law office, at Indianapolis, on that day, which was attested by two witnesses, Snow and Daniels. But at this point the lines of concession seem to diverge, the contention of the appellees seeming to be that the will executed on that day was the one that had been lost or stolen, and that the will in contest was a false one, substituted in the place of that which had been lost; and appellees further claimed that they were each interested, as devisees, in the lost or stolen will. This, under the pleadings, and at the trial, was denied by appellants, and they contended that the probated will was the genuine will executed on the date mentioned. The only essential difference, as alleged, it appears, in the will found after the death of the testator, and in contest, and the one claimed to have been lost, is that in the former Mrs. McDonald was given the Washington street property in fee simple, while in the latter one she was only given a life estate therein. John M. Butler, it is conceded, for years prior to the death of the testator, was his confidential friend and law partner. At the time of the last sickness of the deceased, and about 10 days before his death, and when the testator seemed to think that death would be the probable result of his sickness, Butler called at his house to see him, and in a conversation there, had in the absence of Mrs. McDonald, after talking over his business with Butler, the testator said to him substantially as follows: "I have made a will, and want to tell you all about its contents, and where you will find it, so, if I die, you can find it, and turn it over to the executor." He then stated, where the will would be found, and proceeded to state its contents, as follows: "I have given a life estate in the Washington street property to Mrs. McDonald, with the fee to Jessie, Joe, and Mack [meaning appellees]. I have given to Mrs. McDonald all of my private library, household furniture, bric-a-brac, paintings, and all of my household goods. I have given to Scott [meaning appellee Malcolm S.], if he becomes a lawyer, my law library and gold watch." He then requested Butler to repeat over to him the contents as he had just stated them, which he did, and the testator then said: "You have got it all right. You under-

stand it perfectly." These declarations of the testator the court permitted this witness to give to the jury. Appellants at the time objected to their being admitted as evidence, upon the grounds that there was no issue upon mental incapacity; and, second, that they were not admissible for showing the contents of a lost or destroyed will, because there had been no evidence of the execution of any such a will. But, upon appellees' stating to the court that there would be evidence of the execution of the alleged lost will, the objection was overruled. The contention of the learned counsel for appellants is that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this state that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest, upon the issue of fraud or undue influence. *Runkle v. Gates*, 11 Ind. 95; *Hayes v. West*, 37 Ind. 21. But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them, for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator. We recognize as a settled principle of law that where the testator retains the possession or control of his will; and at or after his death it is not found, or is found thereafter in a mutilated or defaced condition, the presumption arises that he destroyed or mutilated it for the purpose of revoking it. But this presumption may be rebutted by evidence. It is insisted by appellees that these statements were proper to go to the jury: First. To rebut the presumption that the lost or destroyed will in question had been destroyed by the testator *animo revocandi*. That, appellees, having brought their action as devisees under such a will, the burden was cast upon them to rebut such presumption. Second. That they were also admissible to show the contents of the lost will, in order to establish that appellees were interested in the estate as devisees or legatees, that being the capacity in which they sued. This contention of appellees, we are of the opinion, must be sustained. As we have herein held, appellees based their right to contest the probated will upon the alleged facts showing that they were interested as devisees in the genuine will, which they alleged had been lost or destroyed, and that the same had not been destroyed by or through the agency of the testator. This they were required to sustain by evidence upon the trial, or fail in their action. The proposition is not controverted, and is settled, we think, that, where a will is shown to be lost or destroyed, secondary evidence of its contents, when necessary, may be received. *Clark v. Wright*, 8 Pick. 66, *Brown v. Brown*, 92 E. C. L. 875, and other authorities, support this rule. The best second-

ary evidence in existence, under this rule, must be produced. The proposition that these declarations made to Butler by the testator were admissible to rebut the legal presumption arising from the fact, as claimed, that the lost, stolen, or destroyed will in controversy at the date of the testator's death was in his possession or under his control, had not been revoked by him, is supported by the following authorities: *McBeth v. McBeth*, 11 Ala. 596; *Conoly v. Gayle*, 61 Ala. 116; *Morris v. Swaney*, 7 Helsk. 591; *Lawyer v. Smith*, 8 Mich. 411; *Hope's Appeal*, 48 Mich. 518, 12 N. W. 682; *Betts v. Jackson*, 6 Wend. 173; *Everitt v. Everitt*, 41 Barb. 385; *Foster's Appeal*, 87 Pa. St. 67; *Pickens v. Davis*, 134 Mass. 252; *In re Johnson's Will*, 40 Conn. 587; *Patten v. Poulton*, 1 Swab. & Tr. 55; *Keen v. Keen*, L. R. 3 Prob. & Div. 105; *Ustick v. Bawden*, 2 Addams, Ecc. 18; *Welch v. Phillips*, 1 Moore, P. C. 299; *Battyll v. Lyles*, 4 Jur. (N. S.) 718; *Finch v. Finch*, L. R. 1 Prob. & Div. 371; *In re Barber*, Id. 287; *Whiteley v. King*, 112 E. C. L. 756. That the statements or declarations of testator may be received, in the absence of evidence of a higher character, to prove the contents or provisions of a lost or destroyed will, finds support in the following English and American authorities: *Sugden v. Lord St. Leonards*, 17 Eng. R. (Moake's notes) 453, 542; *Gould v. Lakes*, L. R. 6 Prob. Div. 1; *Burl v. Burl*, L. R. 1 Prob. & Div. 472; *In re Barber*, Id. 287; *Johnson v. Lyford*, Id. 546; *Battyll v. Lyles*, 4 Jur. (N. S.) 718; *Finch v. Finch*, L. R. 1 Prob. & Div. 371; *Davis v. Davis*, 2 Addams, Ecc. 223; *Keen v. Keen*, L. R. 3 Prob. & Div. 105; *Pickens v. Davis*, 134 Mass. 252; *In re Page*, 118 Ill. 576, 8 N. E. 852; *Hope's Appeal*, 48 Mich. 518, 12 N. W. 682; *In re Lamble's Estate*, 97 Mich. 49, 56 N. W. 223; *Foster's Appeal*, 87 Pa. St. 67; *Conoly v. Gayle*, 61 Ala. 116; *McBeth v. McBeth*, 11 Ala. 596; *Morris v. Swaney*, 7 Helsk. 591; *Reel v. Reel*, 1 Hawk. (N. C.) 248, 268; *Howell v. Barden*, 3 Dev. 442; *Simms v. Simms*, 5 Ired. 684; *Theo. Wills*, pp. 42, 43; *Flood, Wills*, pp. 425, 429, 432; *Walk. Wills*, p. 360; 1 *Jarm. Wills* (5th Bigelow's Ed.) pp. 130, 133, 134, 142, and notes 268; *Steph. Dig. Ev. art. 29*; 5 *Am. & Eng. Enc. Law*, 868(f); 7 *Am. & Eng. Enc. Law*, 73.

As settled by some of those authorities, such statements of the testator should be received as evidence with great caution, for the reason that they are sometimes made by him for the express purpose of misleading or satisfying curious friends or expectant relatives. But the declarations in the case at bar are not open to this objection. They are voluntarily made to a confidential friend,—one who apparently had no interest in the estate of the testator,—and not in response to any inquiry by him made. Considering the circumstances under which they were made by the testator,—at a time when sick, but in the full control of his mental faculties, and when he seemingly recognized that his death was

a near probability,—they appear to us to bear upon their face the very impress of sincerity. We think they were clearly competent for the purpose for which, as it is claimed by appellees, they were introduced. If the declarations of the testator are legitimate evidence to prove the contents in a proceeding to have a lost will admitted to probate, which the authorities, we think, seem to fully authorize and support, in reason they must be equally so, under the issues in the case at bar, to show the contents of the lost will in question, in order that the interest of the appellees in the estate might appear, and the presumption of revocation be rebutted.

Instruction 8 given by the court is as follows: "It is conceded by both the parties to this suit that a will was duly executed by Senator McDonald, at his law office in the city of Indianapolis, on the 26th day of August, 1890, and duly attested by the witnesses, Snow and Daniels; but the plaintiffs charge that said genuine last will and testament was removed, lost, or stolen without the knowledge or consent of said testator or the plaintiffs, and the will now in contest substituted and foisted in the room and place of said genuine will. The defendants deny this charge, and aver that the will in contest is the identical will so executed as aforesaid. Under this issue, I have allowed the plaintiffs to introduce in evidence certain alleged declarations of said testator relating to the contents of said will. If you find that such declarations were made, you will only consider them for the purpose of determining the character and contents of such alleged lost or destroyed will, and whether, if it ever existed, it remained unrevoked at the time of the death of the testator. No inference in support of the other issues and charges in this case can be drawn by you from these alleged declarations." At the proper time the appellants requested the court to give the following instruction (No. 10), which was refused: "If the jury shall find that Joseph B. McDonald, in his last sickness, made certain declarations touching the contents of his will, as testified to by John M. Butler, Esq., then the court instructs you that such declarations or statements of Senator McDonald cannot be considered by the jury in determining the question of the genuineness of the will in contest. For the law is, 'A testator's own declarations, to prove that a will apparently regular was forged, * * * are hearsay and inadmissible.'" It is contended by appellants that instruction No. 8, given by the court, was not sufficiently clear and explicit, in limiting the jurors in the consideration of the declarations in question, and that, hence, No. 10, as requested, should have been given. It is well settled by repeated decisions of this court that it is not error for the trial court to refuse an instruction requested, although accurately stating the law, if the same proposition is substantially given in another in-

struction. In the eighth instruction the court called the attention of the jury to the declarations admitted in evidence, and stated that these should only be considered to determine the character and contents of the alleged lost or destroyed will, and whether, if it ever existed, it remained unrevoked at the time of the testator's death. Not content with this, the court proceeded further, and impressed upon the jury the fact that they were prohibited from drawing from this evidence any inference in support of the other issues and charges in the case. The declarations of the testator for the same purpose were testified to by James D. McDonald, a witness for appellees, and the court, in this instruction, intended to, we suppose,—and did,—embrace his evidence, as well as that of Mr. Butler's; and in this respect, at least, the instruction was more favorable to appellants than the one requested, as that singled out the declarations made to Butler in the testator's last sickness only. We are of the opinion that the court embodied in its instruction all that was substantially necessary for the information of the jury as to the manner in which they were to apply and consider these declarations. We cannot presume that intelligent jurors, where evidence has been admitted for a certain purpose, will consider it upon other issues, or for other purposes, when the court has expressly stated to them that they must not do so. It must be presumed that the jury obeyed the court's injunction. There was no error in refusing the instruction asked by appellants.

The next question presented and argued by appellants in their brief is that the court erred in not allowing the appellant Mrs. McDonald to testify in regard to the circumstances under which the carbon or black will, claimed to be a duplicate of the will in contest, came into her possession. It was apparently admitted that this had reference to a matter which occurred during the life of the testator. As this was a matter occurring prior to his death, and she being a party to the issues involved, we think she was not competent to testify respecting things not open to the observation of all the friends and acquaintances of the deceased, by reason of the prohibition of section 499, Rev. St. 1881 (section 507, Rev. St. 1894). We must construe this section as applicable to parties as witnesses in an action to contest a will; the exception being that stated in *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171, namely, that parties are only competent to testify in respect to such matters as were open to the observation of all the friends and acquaintances of the deceased ancestor. Counsel for appellants insist that the action was not founded upon a contract or demand against the ancestor, and for that reason section 499, *supra*, could have no application. But the word "demand," as used in this statute, has been held to be one of broad meaning; and it may well be held to apply to an action by

or against devisees, in relation to a will of the ancestor. To say the least, however, the ultimate object of a suit to contest a will is to affect in some manner the property of the ancestor. Suits to contest a will, we think, come clearly within the spirit and meaning of this section, if not within its express letter. *Peacock v. Albin*, 39 Ind. 25; *Wiseman v. Wiseman*, 73 Ind. 112; *Staser v. Hogan*, 120 Ind. 207, 22 N. E. 990; *Larch v. Goodacre*, 126 Ind. 224, 26 N. E. 49. It was apparently sought to be shown by Mrs. McDonald that the transaction under which she came into possession of the black or carbon duplicate of the will in suit was connected with the deceased, and was confined to her and him alone. Both parties to the action were permitted by the court to testify in respect to the genuineness of the signatures of the testator, and Mrs. McDonald was also permitted to testify that, from the time of her husband's death until the date when she was examined as a party by order of court, this carbon will had been in the safety vault at the bank; but she was not allowed to testify that when she got the will out of the vault it was in an envelope, nor where this envelope was immediately upon the happening of the testator's death. The trial court seems to have excluded this last evidence upon the grounds that the envelope inquired about was not produced along with the will, under the order of court. Whether the court erred in excluding this, we need not consider, for the reason that counsel for appellants have failed to establish to our satisfaction that the evidence was relevant or material, and therefore the error of the court's ruling, if any, does not affirmatively appear.

Some objections are made to a question which the trial court permitted appellees to put to Mr. Ewell, a witness called by them as an expert upon handwriting. The witness, after stating the facts showing him to be an expert, and also giving to the jury facts which he had discovered, and peculiarities observed, in regard to the signatures in question, by an examination which he had made, was allowed by the court, over objections of appellants, to answer this question: "From the examination which you have made of these two documents [the green and black wills], what is your opinion as to whether the signatures appearing to them are genuine?" He answered "that they were not genuine." The grounds of objections urged are that an expert witness must testify either from facts stated by himself to the jury, or from those testified to, or to be testified to, by other witnesses, and put to him in the form of an hypothetical question. This latter condition has no application, as the opinion of the witness was not sought upon an hypothesis. We do not think that the question is open to the first objection, as we think the question fairly imported, and must have been so understood by the witness and jury, that the opinion asked for was one

based upon the facts derived by him from his examination made, all of which has been detailed by him to the jury. The witness was not asked to give his opinion from what he supposed he knew, but from facts testified to by him, and hence the rule laid down in *Burns v. Barenfield*, 84 Ind. 43, does not apply. There was no error, under the facts as they appear, in allowing the witness to answer this question.

Some exceptions and criticisms are urged upon the refusal of the court to give, upon the question of forgery, instructions Nos. 13, 14, and 15, requested by appellants. On this question the court instructed the jury, in its instruction No. 9, as follows: "I will now direct your attention to the law bearing upon the charge of forgery, as made in this case. In civil as well as in criminal actions, the law indulges the presumption of innocence and fair dealing in all transactions. In this particular case the law presumes that the signatures to the will in contest are genuine, and not forged, and that the defendant is innocent of all criminal conduct in relation thereto. In criminal charges the presumption of innocence must be overthrown, and guilt proven beyond a reasonable doubt, in order to secure a conviction; but in civil cases, like the present, involving a charge of criminality, the rule of proof is different, and not so strong. For the plaintiffs to recover upon the charge of forgery, they are not compelled to prove the charge beyond a reasonable doubt, but the law is satisfied, and you must be, if the charge is proven by a fair preponderance of the evidence; that is, the evidence in favor of the forgery must overcome the presumption of innocence, and all countervailing evidence of genuineness." Upon an examination of instructions 13 and 14 refused, we are of the opinion that the court did not err in so doing. Everything, as a matter of law, relative to the question of forgery, under the pleadings, to which appellants were entitled as of right, is substantially and clearly given in instruction 9. Therefore, under the firmly-settled rule, appellants have no just grounds of complaint. By instruction 15, the court was asked to charge that "the failure on the part of the plaintiffs to either allege in their complaint, or point out in the evidence, any person as the person who committed the alleged forgery, or procured the same to be committed, was a circumstance proper to be considered in connection with the other facts tending to disprove the charge of forgery." It cannot be seriously contended that the appellees, in order to set aside the probated will upon the grounds that it was a counterfeit, were required to specifically allege in their complaint, and point out in the evidence, the identical person whose hand had perpetrated the forgery. There was no attempt, by reason of this action, to convict any one of the crime of forgery. Their failure to do that which was not required in

order to maintain and succeed in their action could not be considered as a circumstance against them. The instruction is also apparently faulty because it assumed the failure to point out in the evidence, as an actual fact, regardless of the evidence upon that question, and the action of the court in refusing to give it was correct. Complaint is also made for the reason that the court refused to give instruction No. 9, relating to the probative weight of expert testimony. We think, however, that the jury was sufficiently instructed on this point in the instruction given by the court on its own motion.

The jury, on the trial, returned a general verdict for the plaintiffs, and, by their answers to interrogatories, found that the will in contest had not been executed by the testator. When the court came to enter its judgment upon the verdict, the appellant Mrs. McDonald demanded that the lost or destroyed will mentioned in the amended complaint should be adjudged as established by the decree, and probated. This the court refused to do. An extended argument is presented upon this question by counsel, pro and con. As we have held that, by the theory of the complaint, it was not contemplated to establish and probate the alleged lost will, and as the appellant was not demanding any such relief by any pleading in the case, it is evident, we think, that there were no grounds for such a demand. We do not wish to be understood, however, as deciding that the lost will in question could or could not have been established and probated in this action. As to whether this will can be established by either party in a subsequent proceeding is not a question now before the court. Other questions are referred to by counsel for appellants, but as they are not presented with any apparent earnestness, and as it does not affirmatively appear by the record that appellants were prejudiced in their rights by the rulings of the court thereon, we do not deem it necessary to specifically mention them and thereby extend this opinion. Owing to the importance of this case, and the questions involved, we have given it a patient and careful examination, and are satisfied that no error of the trial court appears that would justify a reversal. It is therefore adjudged that the judgment be affirmed.

(13 Ind. App. 181)

SHOCKNEY et al. v. SMILEY.

(Appellate Court of Indiana. Sept. 17, 1895.)

ACTION ON JUDGMENT—PLEADING.

A complaint in an action on a judgment rendered by a justice of the peace, not alleging that the summons was issued, nor that there was an appearance, nor that defendant resided in the township, nor (as is permitted by statute) that the judgment was duly rendered, is fatally defective.

Appeal from circuit court, Randolph county; E. J. Monks, Judge.

Action by Walter B. Smiley against Charles H. Shockney and others on a judgment. A demurrer to the complaint was overruled, and defendants appeal. Reversed.

Theo. Shockney, for appellants. Alex. Vorhis and Canada & Caldwell, for appellee.

REINHARD, C. J. This action is based upon a judgment rendered by a justice of the peace. The court overruled a demurrer to the complaint, and this ruling is assigned as error. There are no averments in the complaint which show that the justice who rendered it had jurisdiction. It is not shown that a summons was issued and served on the appellants, nor that there was any appearance by them, or either of them, nor that they, or either of them, resided in the township in which the action was brought, at the time of its institution. Neither is it averred that the judgment was duly rendered. A justice's court is one of limited jurisdiction, and nothing will be presumed in its favor. In the absence of averments showing jurisdiction, the complaint is insufficient, unless it be alleged that the judgment was duly rendered. The latter expression is authorized by statute as a substitute for the averment of jurisdictional facts. *Hopper v. Lucas*, 86 Ind. 48. Judgment reversed, with directions to sustain the demurrer to the complaint.

(13 Ind. App. 113)

HOLLENBECK v. WOODFORD et al.

(Appellate Court of Indiana. Sept. 17, 1895.)

CHattel Mortgages—NOTICE.

The record of a chattel mortgage executed in blank as to amount is sufficient notice to put all persons on inquiry, and takes precedence over a subsequent execution creditor's lien.

Appeal from circuit court, Monroe county; R. W. Miers, Judge.

Action by Phil Hollenbeck against George A. Woodford and others to determine the priority of their respective liens. There was judgment for defendants, and plaintiff appeals. Affirmed.

East & Miller, for appellant. Henry S. Lee, for appellees.

ROSS, J. As stated by counsel for appellant, the specifications of error calling in question the rulings of the court below present for decision the following questions, namely: "Whether a mortgage in blank as to amount gives the mortgagee a prior lien over an execution creditor on personal property of the mortgagor, and whether the recording of said mortgage, leaving the amount of notes, if any, blank as to the amount for which said mortgage is given, is notice to an innocent purchaser or an execution creditor." The appellant recovered his judgment, which,

he insists, has priority over the chattel mortgage of the appellees, George A. Woodford & Co., subsequent to the execution and recording of said mortgage, so the only question to decide is, what notice does a record give of the existence of a debt, where the amount of the debt is not stated in the instrument recorded? In other words, was the appellant bound to know, although no amount was stated in the mortgage, that any sum was secured thereby? The mortgage recites that it was given "to secure the payment of 10 promissory notes dated Sept. 9, 1893." When these notes become due, and what amount they call for, separately or collectively, is nowhere stated, and cannot be ascertained from either the mortgage or the record of it. Had the record given an amount, which, by mistake of the recorder in recording, had been made less than it actually was in the mortgage, then, under the decision in the case of *Gilchrist v. Gough*, 63 Ind. 576, a purchaser in good faith from the mortgagor would be bound only by the amount disclosed by the record. The rule announced in that case has no application here. In this case, the recital in the mortgage that it was given to secure the payment of 10 promissory notes, the amounts of which were not given, was a sufficient notice to put all persons upon inquiry. No one could assume that, because no amount was stated, nothing was owing. Persons purchasing were put upon their guard, and if the record failed to state the amount owing, but disclosed that some amount was due, it was their duty to make inquiry, and ascertain the amount of the indebtedness secured thereby. Judgment affirmed.

(13 Ind. App. 585)

SHRUM v. BOARD OF COM'RS WASHINGTON COUNTY.¹

(Appellate Court of Indiana. Sept. 17, 1895.)

DEFECTIVE HIGHWAYS—LIABILITY OF COUNTY.

A county is not liable for injuries resulting from defects in a free gravel road or ordinary highway.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by Moses Shrum against the board of commissioners of Washington county. From a judgment for defendant, plaintiff appeals. Affirmed.

John L. Shrum and Mitchell & Mitchell, for appellant. Zaring & Hottel and J. H. Masterson, for appellee.

LOTZ, J. The appellant's daughter, a minor, was injured while traveling upon a public highway in Washington county. He brought this action to recover for the loss of her services, and for medical care and nursing which he procured for and rendered to her. His complaint was in four paragraphs. It appears from the averments that the

board of commissioners of that county, under a petition filed before it, undertook to lay out, straighten, and improve a certain highway between the town of Salem and the town of Canton; in so doing a part of the old highway was vacated, and the road ordered constructed on a new line; that the board, by and through its officers and agents, undertook to and did construct the road upon a new line; that said new line at one point was constructed along the edge of a rocky bluff contiguous to Blue river; that the road-bed at this point was very narrow, and insufficient in width for persons traveling in vehicles in opposite directions to pass; that the embankment was several feet high, the slope extending down to the water of the river; that the road was out of repair, there being large holes in the embankment, and large stones placed thereon, and there was no guard rail on the embankment to prevent persons traveling thereon from falling therefrom; that appellant's daughter was traveling on horseback on said road at said point, and met a vehicle traveling in the opposite direction, and, in the effort to pass, the horse she was riding fell down the embankment, and she was injured, she being without fault. It is alleged that the road was negligently constructed, and negligently permitted to become out of repair. The allegations vary in each paragraph, but they are, in legal effect, the same. The court below sustained a demurrer, for want of facts, to each paragraph, and these rulings are the errors assigned here.

It does not appear very clearly whether the embankment was a part of a free gravel road, or of an ordinary highway. So far as the legal aspect is concerned, this is immaterial. It is clear that it formed no part of a bridge over a water course. Appellant's counsel, in their argument, assume that it is a part of a free gravel road. Proceeding upon this basis, they argue that as the laws of this state give the board power to construct such roads, and provide means and agencies for keeping them in repair, a duty arises, requiring the board to keep the road reasonably safe for public travel, and in reasonable repair; that, for a violation of this duty, the county is liable for injury resulting,—and they rely upon a long line of bridge cases, following *House v. Board*, 60 Ind. 580. Conceding those cases to have been correctly decided, it must be admitted that counsel's position is consistent and logical. The soundness of the rule announced in those decisions is questioned, and in some jurisdictions denied, the position being that the state is never liable, except by its own consent; that counties are mere subdivisions of the state, and instrumentalities of local government; that, as the state is not liable for the acts or omissions of its officers, neither should a political subdivision of the state be liable for the acts or omissions of its officers relating to political powers. The supreme court

¹ Rehearing denied.

of this state expressly refused to extend the rule in bridge cases to any other class of cases, no matter how logical in effect. Accordingly, in *Cones v. Board*, 137 Ind. 404, 51 N. E. 272, it was held that a county is not liable for injuries sustained by a person, while traveling upon a free gravel road of the county, by reason of the defects in the construction and repair of such road; that no implied liability exists in this class of cases, as applied in bridge cases. If the county is not liable in case of a free gravel road, much less is it liable in cases of ordinary highways. Judgment affirmed.

(14 Ind. App. 518)

PENNSYLVANIA CO. v. LIVERIGHT et al.
(Appellate Court of Indiana. Sept. 17, 1895.)

CARRIERS—LIABILITY FOR PASSENGER'S EFFECTS.

A railroad company's liability, as common carrier, for a passenger's baggage, continues until a reasonable time has been allowed, after its delivery at its destination, for the owner to get it, though it be delivered by the company to a warehouseman.

Appeal from superior court, Marion county; J. M. Winters, Judge.

Action by Max Liveright and others against the Pennsylvania Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Saml. O. Pickens, for appellant. Morris, Newberger & Curtis, for appellees.

GAVIN, J. Appellees sued to recover the value of a lost trunk, checked as baggage by one of them, while traveling as a passenger from Madison to Indianapolis, over appellant's railroad. The Indianapolis Union Railway Company owns the Union Station at Indianapolis, and acts as the receiving and delivering agent for appellant as to such baggage as it hauls to that point. The sufficiency of the complaint hinges upon appellant's proposition that "the relation of the Pennsylvania Company and its agent, the Union Railway Company, to the goods in question, was that of a warehouseman, from the moment the trunks were delivered by the former into the possession of the latter at Indianapolis." Counsel rely upon a number of cases involving the duty of the carrier of ordinary freight. *Bansemmer v. Railway Co.*, 25 Ind. 434; *Railway Co. v. McCool*, 26 Ind. 140; *Express Co. v. Darnell*, 31 Ind. 20; *Railway Co. v. Nash*, 43 Ind. 423; *Transportation Co. v. Merriam*, 111 Ind. 5, 11 N. E. 954, —the original case being founded upon *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263.

Without undertaking to determine the correctness of, or the limitations upon, the rule advocated as applicable to ordinary freight,

the position cannot be regarded as tenable, either upon principle or authority, when a passenger's baggage is the subject of controversy. It was ruled by this court in *Railway Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462, that "It was the duty of the appellant or its servants to give the appellee a reasonable time, after the arrival of the trunk at Russellville, to take it away, before locking it up in the warehouse, and, failing to do so, the liability of the company as a carrier did not cease." It was appellant's duty, as a carrier, not only to haul the baggage to Indianapolis, but there to deliver it to appellees, if called for within a reasonable time. If not, it could hold it as a bailee for hire, and its duty as warehouseman then arose. Its duty as carrier was not fully performed by simply delivering the baggage to its own agent at the station. It does not even follow, from its receipt by the Union Railway Company, that the trunk was so instantly ready for delivery to the passenger, although we do not base our decision upon this fact, but rather upon the broader ground that the passenger is entitled to a reasonable time within which to receive his baggage before the strict carrier's liability ceases, and the less burdensome responsibility as warehouseman begins. Our conclusion is in harmony with the almost universal opinion expressed by courts and text writers. *Roth v. Railway Co.*, 34 N. Y. 548; *Burnell v. Railway Co.*, 45 N. Y. 184; *Matteson v. Railway Co.*, 76 N. Y. 381; *Railway Co. v. Mahan*, 8 Bush, 184; *Wald v. Railway Co.*, 92 Ky. 645, 18 S. W. 850; *Mote v. Railway Co.*, 27 Iowa, 22; *Arthur v. Railway Co.*, 61 Iowa, 651, 17 N. W. 24; *Railway Co. v. Capps*, 2 White & W. Civ. Cas. Ct. App. 35; *Quilmit v. Henshaw*, 35 Vt. 605; *Lin v. Railway Co.*, 10 Mo. App. 125; *Railway Co. v. Addisoat*, 17 Ill. App. 632; *Hutch. Carr.* § 708; 3 Wood, R. R. (Ed. 1894) §§ 400, 402. In section 402 of the authority last cited it is said: "The liability of a common carrier for the baggage of a passenger continues until the baggage is ready to be delivered to the owner at his destination, and until he has had a reasonable opportunity of receiving and removing it. What constitutes such reasonable time and opportunity is a mixed question of law and fact, necessarily dependent upon the peculiar circumstances of each particular case." As to just what constitutes a reasonable time, courts differ; but we are not called upon to solve that question. *Massachusetts, in Nealand v. Railway Co.*, 36 N. E. 592, indicates a willingness to apply to baggage the rule laid down in the 1 Gray case. We are, however, satisfied that this rule should not be extended by analogy. Under the evidence, the court was fully justified in finding that the baggage never was ready for delivery to the appellees. Judgment affirmed.

1 Rehearing denied, 43 N. E. 162.

(13 Ind. App. 696)

ELLINGER v. OOMSTOCK et al.

(Appellate Court of Indiana. Sept. 18, 1895.)

SALE—FAILURE TO DELIVER.

Where the vendor failed to deliver goods within the time agreed upon, the vendee is not liable on the contract, time being of the essence thereof.

Appeal from circuit court, Kosciusko county; E. Haymond, Judge.

Action by Albert Ellinger against Henry P. Comstock and others on a contract of sale. Defendants had judgment, and plaintiff appeals. Affirmed.

Lamb & Hill, for appellant. Knefler & Ber-ryhill, for appellees.

REINHARD, C. J. The appellant is a manufacturer of cloaks, and the appellees are retail dealers in those articles. This action is by the appellant against the appellees for a balance alleged to be due appellant for merchandise sold and delivered to them. The cause was tried by the court without a jury. The only question presented relates to the sufficiency of the evidence to sustain the finding. One of the defenses relied upon was that the cloaks which the appellees ordered of the appellant, and for which the latter demands pay, were to be made and delivered to them within 10 days, which was not done, and the appellees refused to accept the cloaks afterwards. There was evidence tending to prove such defense. It was a case where time was of the essence of the contract. Judgment affirmed.

(13 Ind. App. 521)

BARLEY et al. v. BROWN.¹

(Appellate Court of Indiana. Sept. 18, 1895.)

TRIAL—VERDICT—SPECIAL INTERROGATORIES.

Where the answers by the jury to special interrogatories submitted to them will not warrant the court in holding that the damages assessed in their general verdict are excessive, there is no error in overruling a motion for judgment in a smaller sum.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Action by Hugh H. Brown against James L. Barley and Charles Barley, as partners, to recover the price of certain goods alleged to have been sold to them. There was judgment for plaintiff, from which defendants appeal. Affirmed.

R. T. St. John and Wm. H. Charles, for appellants. Brownlee & Paulus, for appellee.

ROSS, J. The appellee brought this action against the appellants, James L. Barley and Charles Barley, doing business together as partners, to recover for a quantity of wheat alleged to have been sold to them by appellee. After issues joined, the cause was submitted to a jury for trial, and a verdict returned in favor of appellee, assessing his damages at \$469.18. With their verdict, the jury returned a number of interrogatories sub-

mitted to them at the request of the appellants, with their answers thereto. Thereupon the appellants moved "that judgment be rendered against the defendants (?) for the sum of two hundred and ninety-seven dollars and seventy-six cents, upon the answers of the jury to the interrogatories propounded to the jury, notwithstanding the general verdict." This motion was overruled by the court, and the action of the court in its ruling thereon is the only question presented by the record on this appeal.

The court did not err in overruling this motion, unless the answers to the interrogatories were sufficient to warrant the court in holding that the damages assessed in the general verdict were excessive in the sum of \$171.37. If we accept as true the contention of counsel for appellants that the answers to the interrogatories show that the appellants were liable to the appellee for but 763 bushels and 25 pounds of wheat, instead of 963 bushels and 25 pounds, it was not error to overrule the motion, for the answers show that the wheat was worth 50 cents per bushel, and this, according to appellants' own showing, was sufficient to authorize a judgment in favor of appellee for \$381.71. The court below did not err in overruling this motion. Judgment affirmed.

(13 Ind. App. 130)

GIBBS v. ELY.

(Appellate Court of Indiana. Sept. 19, 1895.)

COVENANTS—ACTION FOR BREACH—DAMAGES—CLAIM AGAINST ESTATE.

1. The grantor in a deed which reserved possession to a certain date, and covenanted for delivery thereof to the grantee on that date, leased the premises to a third person for a period commencing prior to, and extending beyond, that date, and, after the date had passed, orally agreed to pay the costs of suit against the tenant for possession, and after the grantor's death his administrator orally agreed to do the same. *Held*, that such costs could not be recovered under a claim for breach of the covenant for possession.

2. A grantor, after executing a deed reserving in himself possession of the land conveyed, to a certain date, and providing that the grantee "is to have possession" on such date, made a lease of the land, commencing prior to, and ending after, such date, and on such date the tenant refused to surrender possession to the grantee. *Held* a breach by the grantor of a covenant for possession.

3. A claim against an estate, alleging a conveyance for a valuable consideration, breach of covenant for possession, and damages, is sufficient, though not verified.

Appeal from circuit court, Morgan county; George W. Grubbs, Judge.

Action by John Gibbs against Calvin Ely, administrator, for breach of warranty by defendant's decedent. From a judgment for defendant, plaintiff appeals. Reversed.

Elam M. McCord and W. R. Harrison, for appellant. Oscar & Matthews, for appellee.

ROSS, J. This action was in the nature of a claim filed against the estate of Velorus But-

¹ Rehearing denied.

terfield, of which appellee is the administrator, for the breach of a warranty contained in a deed of conveyance executed by the deceased, in his lifetime, to appellant. The record discloses that on the 12th day of October, 1894, the appellant filed his amended claim or complaint, in two paragraphs, and on the 13th day of October an additional or third paragraph. The first paragraph was merely a statement of the nature of the claim, with a bill of particulars containing the items for which a recovery was sought, and was properly verified as required by the statute (section 2310, Rev. St. 1881; section 2465, Rev. St. 1894). The amended second and additional or third paragraphs were more specific in their charges than the first, and were more in conformity with the rules of pleading required in ordinary actions. Neither of these paragraphs was verified. Demurrers were sustained to each of the paragraphs. There is but one specification of errors assigned in this court, and it calls in question the ruling of the court below in sustaining the demurrer of appellee to the additional or third paragraph of appellant's claim or complaint. The material allegations of this paragraph, as enumerated by counsel for appellant, are that the deceased, Velorus Butterfield, and wife, on the 19th day of August, 1892, in consideration of \$2,500, conveyed and warranted to the appellant a certain tract of land in Hendricks county, Ind., covenanting that the appellant "should have possession March 1st, 1893, of said property"; that said Butterfield failed to give him possession on the 1st day of March, 1893, but, on the contrary, authorized one Sellers to enter upon, take and retain possession of, the premises; that the deceased brought an action in the name of appellant, with appellant's consent, and upon the understanding that the deceased would pay all the costs and expenses of such litigation, to oust Sellers and to recover possession, but that he failed in said action; that costs and expenses accrued, by reason of such litigation, amounting to \$88.50, which appellant had to pay. It is also alleged that upon the death of Butterfield the appellee, Calvin Ely, was appointed administrator, and that he authorized and directed appellant to proceed to oust Sellers, and agreed that he, as such administrator, would pay whatever sums appellant might have to pay in such proceedings to gain possession; that he instituted proceedings, and at the end of one year recovered possession, by reason of which he was compelled to and did expend the sum of \$35. It is further charged that Sellers, the party who held possession, was insolvent, and that the rental value of said land for the year which appellant was kept out of possession was worth \$250. Finally, it is charged that these several sums are due and unpaid, etc.

Those parts of appellant's claim based upon

the agreement made with the deceased subsequent to the execution of the deed, whereby he instituted proceedings for possession, and the agreement entered into between appellant and appellee after the death of Butterfield, are not proper, upon which to base a recovery for a breach of the covenant in the deed. If appellant has any right of action for that part of his claim, it must rest upon a breach of such parol contracts. This leads to a consideration of the remaining element of the claim, and its sufficiency depends upon the force and effect to be given to the following words in the deed of conveyance, to wit: "It is understood and agreed that the said John Gibbs is * * * to have possession March 1st, 1893, of said property." Under section 5215, Rev. St. 1881 (section 7096, Rev. St. 1894), "a conveyance of real estate, or any interest therein, by a landlord, shall be valid, without the attornment of the tenant." As to a tenancy then existing, a conveyance by the landlord transfers to the grantee the possession, and enables him, without attornment, to collect the rent, and to enforce all other obligations of the tenant, and, on the other hand, requires the tenant to deliver up to the grantee possession at the end of the tenancy. Unless otherwise provided, a conveyance divests the grantor, and invests the grantee with all his rights, establishing the relation of landlord and tenant between him and a tenant rightfully in possession under the grantor. *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302; *Kelsum v. Insurance Co.*, 101 Ind. 455.

The right to possession of the property conveyed, under the provisions of the deed, did not vest in appellant until March 1, 1893; hence the grantor's right to retain possession gave him the right to lease the premises during the time he was entitled to their use and possession. The facts alleged show that the deceased, instead of delivering possession according to the covenant of his deed, retained possession,—hence broke his covenant. And it matters not whether he retained personal possession, or put another in his stead. Had the deed of conveyance made no reservation of possession to the grantor, and no tenancy existing, he would have been required to give the grantee immediate possession; so, if he reserved the right of possession until a stated time, it simply deferred the time for giving possession until that time arrived. The failure to give possession on the 1st day of March, 1893, was clearly a breach of the covenants of the deed, and entitled appellant to recover therefor.

A claim filed against an estate need not fulfill all the requirements necessary in an ordinary complaint. The third paragraph of appellant's claim or complaint was sufficient, and the court erred in sustaining the demurrer thereto. Judgment reversed.

(164 Mass. 316)

PRIOR et al. v. PYE et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 2, 1895.)**BOND—CONDITION.**

A bond recited the attachment of the goods of H. in an action against H. and W., and the wish of the former to dissolve the attachment, and bound him to pay within 30 days the final judgment "in the aforesaid action." *Held*, that the obligation applied not only to a judgment against H. or against the defendants jointly, but also to one against W. alone.

Appeal from superior court, Suffolk county.

Action of contract on a bond by George P. Prior and others against Charles Pye and others. From a judgment for defendants, plaintiffs appeal. Reversed.

J. C. Sharkey, for plaintiffs. O. A. Marden, for defendants.

LATHROP, J. The liability of the defendants in this case depends upon the contract which they have made. The condition of the bond recites the attachment of the goods of Henry E. Holbrook in an action brought by the plaintiffs against Henry E. Holbrook and W. C. Holbrook, and the wish of Henry E. Holbrook to dissolve the attachment according to law; and binds him to pay within 30 days the final judgment "in the aforesaid action." If the judgment is paid, the obligation is to be void; otherwise the principal and sureties on the bond are liable. It seems to us impossible to say that this bond can be construed to mean a promise to pay only on a judgment against Henry E. Holbrook. The case cannot be distinguished from *Campbell v. Brown*, 121 Mass. 516, which resembles it in every particular except in the fact that in that case the property of both defendants was attached. In *Eveleth v. Burnham*, 108 Mass. 374, the bond, in reciting the title of the action, only stated the name of the plaintiff and that of the defendant whose property was attached; and the promise to pay the amount recovered in such action was held to apply only to a judgment against this defendant. The case of *Walker v. Dresser*, 110 Mass. 350, was decided on the grounds that the action, being against the maker and guarantor of a promissory note, required separate judgments; and that the bond referred to a "judgment" only, and not "judgments," meant a judgment against the obligor in the bond. Since the statutes of 1871, c. 114 (Pub. St. c. 161, § 129), if the individual property of one defendant is attached in an action against several defendants, he may dissolve the attachment, "but the bond to dissolve such attachment shall be so conditioned as to apply only to a judgment recovered against such defendant alone or jointly." If the sureties in the case at bar wished to escape liability for a judgment against either defendants, they should have seen to it that the bond was drawn under Pub. St. c. 161, § 129. See

v.41N.E.no.16—23

Leonard v. Spedel, 104 Mass. 356, 360; *Poole v. Dyer*, 123 Mass. 363; *Dalton v. Barnard*, 150 Mass. 473, 475, 23 N. E. 218. Judgment for the plaintiffs.

(142 Ind. 138)

REAMER et al. v. HOGG et al.

(Supreme Court of Indiana. Sept. 26, 1895.)

DRAINAGE—PETITION FOR ADDITIONAL WORK.

Under Rev. St. 1894, § 5648, authorizing a supplemental petition for the expenditure on new work on the ditch of the balance "of drainage funds collected on assessments" remaining after completion of the ditch according to original plans, and providing that before granting the petition "the court shall determine the amount of money on hand," such petition is not authorized where it appears that all the money assessed and collected has been expended on the original work, though the amount so assessed and collected is only a portion of the benefits assessed.

Appeal from superior court, Allen county; C. W. Dawson, Judge.

Action by William Reamer and others against Nathaniel B. Hogg and others to have the unexpended balance of an amount assessed for drainage under Act March 6, 1891, used for new work on the ditch. From a judgment for defendants, plaintiffs appeal. Affirmed.

T. E. Ellison, for appellants. S. R. Alden, Morris, Bell, Barrett & Morris, Breen & Morris, H. C. Hartman, and C. W. Watkins, for appellees.

HOWARD, C. J. Section 1 of "An act concerning the drainage of wet and overflowed lands," approved March 6, 1891 (Acts 1891, p. 299; Rev. St. 1894, § 5648), is as follows: "That when the work of constructing any ditch or levee under the drainage laws of this state shall have been completed according to the original plans and specifications thereof, and there shall remain in the hands of the persons assessed for the construction of said ditch and the commissioner of drainage funds collected on assessments in excess of what was necessary to complete the same, any person interested in the same may file with the court a supplemental petition showing these facts and praying that such commissioner be required to expend the same, or so much thereof as may be necessary in deepening the channel or increasing the levee thereof at any point or points thereof whenever the same, according to the original plans and specifications, shall be insufficient to complete said drainage. Upon the filing of said petition, ten days notice, as in civil cases, shall be given the persons assessed for construction of said ditch and the commissioner having said work in charge, and upon the hearing thereof the court shall determine the amount of money on hand as aforesaid, and order said commissioner to complete said work. Said commissioner shall cause said work to be carefully sur-

veyed, and an estimate made of the work to be done, and contract therefor by letting the same to the lowest responsible bidder therefor, and require bond to be given by said contractor, as in other cases under the drainage laws of this state. Said commissioner shall pay the expense of said work as provided for under the drainage laws of this state, and in like manner report his proceedings to said court." Under the provisions of the foregoing statute the appellants, on the 10th day of June, 1893, filed their petition in the trial court. The facts of the case, as found specially by the court, and admitted to be substantially those alleged in the petition, are, so far as need be set out, as follows: On the 18th day of July, 1883, proceedings were begun in the court below for the construction of a ditch to drain certain lands in Allen, Huntington, and Whitley counties. After the taking of all steps required by law, the ditch was established, and a commissioner appointed to superintend the construction, and collect the assessments. The amount of benefits on account of the ditch as established by the court was \$318,721.75. Of this sum the commissioner made assessments aggregating 55 per cent., all of which were collected except a small sum, now in process of collection. On the 31st day of December, 1889, the commissioner made a report to the court that the ditch had been finished; and the court, after examining the report, and hearing remonstrances thereto, approved the same, and adjudged that the ditch had been fully completed according to the plans and specifications. On the 7th day of November, 1891, the commissioner, having finished paying for said work, and having paid all costs and expenses thereof except a small amount of court costs, filed his resignation, showing that he had no money in his hands. The court approved this report also. The amount of the assessments so made and collected, being 55 per cent. of the benefits, was sufficient to and did pay for the construction of the ditch in full; and said part thereof still in process of collection will be sufficient to pay all the costs and expenses still unpaid. All of said sums so collected were expended prior to the filing of the petition herein, and there were then no funds collected on said assessments in the hands of the persons assessed for the construction of said ditch and the drainage commissioner in excess of what was necessary to complete the same. No part of the remaining 45 per cent. of the benefits was ever assessed or called for, nor is the same necessary to pay for the construction of the ditch according to the plans and specifications. Upon the foregoing facts the court stated as conclusions of law that the petitioners were not entitled to have collected the balance of the benefits not assessed or called for, and not necessary for the completion of the ditch, according to the plans and specifications, and the expense incident there-

to; for the purpose of enlarging said ditch or building levies thereon as prayed for in the petition, and that the petition should be dismissed.

We are of opinion that the findings and conclusions so made by the court present for consideration all questions raised on this appeal. Counsel for appellees, in support of the conclusions of law, earnestly contend that the statute under which the petition for the supplementary work was filed is invalid, as an attempt to authorize the appropriation for a new work of moneys raised and not needed for the old work; claiming that no more should have been assessed for the original work than was necessary for its completion, and that if, through error of calculation or otherwise, more had been assessed and collected than necessary, the excess belonged to the people from whom it had been taken, and should therefore be redistributed pro rata to those to whom it belonged; citing *Cooley, Tax'n*, 664, 665; *Groesbeck v. City of Cincinnati* (Ohio) 37 N. E. 707. We do not think, however, that we need pass upon the validity of the act in question. We are of opinion that, whether valid or invalid, the statute did not authorize the petition in this case.

The petition asks to have a part of the uncollected 45 per cent. of benefits applied to the new work upon the ditch, while the statute provides only for the application for such purpose "of drainage funds collected on assessments" in excess of what was needed to complete the original work. The statute also requires that before granting the petition "the court shall determine the amount of money on hand." Not only does the petition in the case before us fail to show any funds collected and on hand, left after the completion of the original work, but the court expressly finds that there was no such money left, that all of the sums collected had been expended prior to the filing of the petition. Even, therefore, if in any case money left in the hands of the commissioner after the completion of the original work could be applied to such supplementary work as indicated in the statute and in the petition thereunder, still we do not think that the facts in this case would warrant any application of the statute. There was no money on hand, and assessments on the original benefits could be made only for the original work. The judgment is affirmed.

(141 Ind. 688)

PELLEY et al. v. WILLS.

(Supreme Court of Indiana. Sept. 18, 1895.)

INTOXICATING LIQUORS—APPLICATION FOR LICENSE—EVIDENCE—INSTRUCTIONS.

1. No evidence having been introduced that the bartender previously employed by the applicant for a license was a competent or careful person, it was error to instruct that if one employs a competent and careful person as bartender, and gives him positive instructions that

he is to comply with the law, and not to violate it, and, notwithstanding this, the bartender, in the absence of the applicant, and without his knowledge, violates the law, this fact alone would not deprive the applicant of his right to a license.

2. Such instruction is erroneous, as infringing upon the province of the jury to determine the question of the fitness of the applicant.

3. A witness, in proceedings upon an application for a license to sell intoxicating liquors, having testified that he never saw the applicant playing a game of dice with any one in the saloon, and that the applicant had never been present when a game of chance was being played, it was error to exclude a question, asked him on cross-examination, as to whether dice were in the saloon when the applicant was present.

Appeal from circuit court, Carroll county; A. W. Reynolds, Judge.

Application by Bert Wills to E. G. Pelley and others, as county commissioners, for a license to retail intoxicating liquors at Burlington. On appeal to the circuit court, the cause was tried by a jury, and from a judgment rendered for the applicant on a verdict in his favor, and overruling a motion for a new trial, the commissioners appeal. Reversed.

Smith & Julien and L. D. Boyd, for appellants.

MONKS, J. This was an application made to the board of county commissioners to obtain a license to retail intoxicating liquors. The cause was appealed to the circuit court, tried by a jury, and a verdict returned for appellee, and, over a motion for a new trial, judgment was rendered in favor of appellee for such license. The only error assigned is that the court erred in overruling the motion for a new trial. The causes for a new trial set out in the motion are: (1) The verdict of the jury is not sustained by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) the court erred in giving instruction No. 4 on its own motion; (4) the court erred in sustaining appellee's objection to questions asked the witness Charles Stockton on cross-examination.

It appears from the undisputed evidence that appellee, prior to the application in this cause, had been engaged in the sale of intoxicating liquor, under license, at Kirkland, in Clinton county, where he lived, and personally managed the business; that he also, during the same time, was engaged in the same business, under license, at Burlington, Carroll county, the place where he was seeking in this case to again obtain license; that the business at Burlington had, for five months prior to the trial of this cause, been in charge of a bartender called Stockton, the applicant only visiting the saloon at Burlington once or twice a week, and then not for a month or two, remaining a few hours at a time. At the saloon in Kirkland, appellee sold intoxicating liquor on Sunday, and, with his knowledge and consent, such saloon was used for gaming, in which he occasionally participated. In the saloon at Burlington, managed by the

bartender, Stockton, liquor was sold to men in a state of intoxication, and gaming was carried on, with the knowledge and consent of the said bartender, who at times took part therein. Appellee testified that he never saw any games of chance of any character played in the saloon at Burlington, and that he never sold, or saw any one else sell, intoxicating liquor to persons in a state of intoxication, in said saloon. The bartender, Stockton, testified that appellee "was not present when games of chance were played in the saloon in Burlington, and that he did not think he was present when intoxicating liquor was sold to persons in a state of intoxication."

Instruction No. 4, complained of by appellants, is as follows: "There has been some evidence given tending to prove that the applicant in this case has heretofore been granted a license to sell intoxicating liquors, in less quantity than a quart at a time, in the town of Burlington, but that he intrusted the management of the business to a bartender; that said bartender violated the law in selling to persons in the habit of becoming intoxicated, and that he allowed parties to shake the dice for the drinks in said place of business. A person to whom a license is granted is responsible for the manner in which the house is kept; but if he employs a competent and careful person as bartender, and gives him positive instructions that he is in all respects to comply with the law, and not to violate it, but, notwithstanding this, the bartender has, in the absence of the applicant, and without his knowledge, violated the law, this fact alone should not deprive the applicant of his right to a license." This was the only instruction given by the court in relation to the management of the saloon by a bartender or an agent in the town of Burlington. The objections urged to this instruction are that the same was not applicable to the evidence, and that it did not state the law correctly. It is a well-settled rule that the instructions to the jury should be relevant to the issue in the case, and pertinent to the evidence. *McMahon v. Flanders*, 64 Ind. 336; *Wallace v. Morgan*, 23 Ind. 390. There was no evidence given that the bartender, Stockton, was either a competent or careful person, or that appellee gave him any instruction, positive or otherwise, that he must comply with the law. To this extent, at least, the instruction in question was not applicable to the evidence, and should not have been given; and, unless harmless to the appellants, the case should be reversed therefor. *McMahon v. Flanders*, supra; *Nicklaus v. Burns*, 75 Ind. 97, 98; *Moore v. State*, 65 Ind. 382; *Hays v. Hynds*, 28 Ind. 531; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973. Neither do we think the instruction contains a correct statement of the law. The statute provides that the applicant must be a fit person to be intrusted with the sale of intoxicating liquors. Rev. St. 1881, § 5315 (Rev.

St. 1894, § 7279). The question of fitness is one of fact, for the jury, not the court, to determine. *Hardesty v. Hine*, 135 Ind. 72, 84 N. E. 701. The fitness of appellee, who resided at a point remote from the place where he seeks a license to sell intoxicating liquors, and who intrusts his business to the management of a bartender, would be of small importance if he could avoid responsibility in the manner stated in the instruction. A liquor dealer is responsible for actionable injuries caused by sales of liquors made by his agent or servants, and it is no defense that such sale was made without his knowledge, or against his express orders. *Barnaby v. Wood*, 50 Ind. 405; *Keedy v. Howe*, 72 Ill. 135; *Worley v. Spurgeon*, 38 Iowa, 465; *George v. Gobey*, 128 Mass. 289; 3 Am. & Eng. Enc. Law, 258; *Carey v. Railway Co.*, 48 Am. Dec., note on page 627; *Black, Intox. Liq.* § 298. So, in this case, if the appellee's saloon was run in violation of the law, his agent selling intoxicating liquors to persons in violation of law, playing and permitting games of chance to be played in the saloon, he cannot avoid the effect of such conduct by merely showing that the bartender was a competent and careful man when he employed him, and that he gave him positive instructions to comply with the law, and not to violate it, and that such violations of the law were in his absence, and without his knowledge. The court well said, in the instruction, that "a person to whom a license is granted is responsible for the manner in which the house is kept"; and it is equally true that such responsibility cannot be avoided merely by hiring a competent and careful man, and giving him instructions to obey the law. He must, in addition, at least, use proper care and diligence to see that the business is carried on by whoever he employs in the manner required by law. And whether the appellee had done this was a fact to be determined by the jury. It was the exclusive province of the jury to say what weight the facts stated in the instruction, if true, should have in determining the fitness of the appellee to be intrusted with the sale of intoxicating liquors. It is clear that the court erred in giving said instruction. *Hardesty v. Hine*, supra; *Groscop v. Rainier*, 111 Ind. 361, 12 N. E. 694; *Bronson v. Dunn*, 124 Ind. 252, 24 N. E. 749.

Stockton, appellee's bartender, and a witness for him, was asked, on cross-examination, questions in regard to whether dice were in the saloon when appellee was present, and, as it was claimed, was playing games of chance in which dice were used. Appellee objected to each of such questions, for the reason that the same were not a proper cross-examination, which the court sustained, and appellants excepted. Witnesses had testified, on behalf of appellants, that appellee had taken part in games of chance played with dice in his saloon in Burlington. He testified, in his own behalf, that he never

had taken part in such games, and had no knowledge that any games of chance were played there. Stockton had testified in chief that he "never saw appellee shake a game of dice with any one in the saloon in Burlington," and that appellee "was never present when a game of chance was shook between any persons." By the examination of this witness in chief, appellee had opened the subject of his (appellee's) playing games of chance in the saloon at Burlington, and his knowledge of others playing such games there, and, on cross-examination, appellants had the right, by proper questions, to go into that subject in all its details. *Railway Co. v. Wood*, 113 Ind. 544, on page 557, 14 N. E. 572, and 16 N. E. 197, and cases cited. The presence of dice when the game was played was an essential fact. It would certainly have been proper to ask appellee, on cross-examination, if, at the time it was claimed he participated in the game, dice were not in the saloon, or concerning anything that was essential or necessary to playing the game. The same rule applies to the cross-examination of this witness.

As the judgment must be reversed, for the reasons stated, it is not necessary to determine whether or not this verdict was sustained by the evidence. The court erred in overruling the motion for a new trial. Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

(149 Ind. 94)

TATE v. HAMLIN et al.¹

(Supreme Court of Indiana. Sept. 24, 1895.)

APPEAL—INEFFECTUAL NOTICE—DISMISSAL—EXCUSABLE MISTAKE.

1. Rev. St. 1894, § 652 (Rev. St. 1881, § 640), providing that "appeals may be taken by procuring from the clerk of the court a transcript of the record and proceedings in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court, who shall indorse thereon the time of filing, and issue a notice of the appeal to the appellee," does not make the notice essential to the perfecting of an appeal; but it is perfected by filing the transcript, with an assignment of errors thereon.

2. Such section does not authorize the issuance of a notice of appeal to the attorney for the appellee; and therefore, where the notice directs the sheriff to notify the appellees, or their attorneys of record, and is served only on the attorneys, it is ineffectual, within the meaning of rule 36 of the supreme court, which provides that where a notice has been issued, and proves ineffectual from any cause, and no steps have been taken for more than 90 days after the issuance of the ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal.

3. Where a notice of appeal issued by the clerk of the supreme court is not in accordance with the statute and the rules of court, but is such a notice as the clerk has been in the habit of issuing for years without objection, appellant's failure to have a proper notice issued within the time limited therefor is due to an excusable mistake; and the appeal will not be dis-

¹ Petition for modification of opinion overruled, 41 N. E. 1035. See 47 N. E. 5. Rehearing denied.

missed, but the submission of the appeal will be set aside, and a new notice ordered.

Appeal from superior court, Marion county.

Action between Warren Tate and Catherine E. Hamlin and others. From the judgment rendered, Warren Tate appeals. Appellees move to dismiss the appeal. Denied.

McCulloch & Spann and S. M. Shepherd, for appellant.

MCCABE, J. A special appearance has been entered in this cause by the appellees for the sole purpose of making a motion by them to dismiss this appeal. The reasons assigned in the motion are (1) that this court is without jurisdiction of the appellees; (2) said appeal was taken without filing a bond, and without notice to these appellees; (3) no notice of appeal was ever issued to or served by any officer of this court, nor was any return of service of notice of appeal ever made to this court by a person authorized by law to make returns to this court.

The appeal, it is conceded, is not a term-time appeal, but was taken, if at all, after the close of the term at which the judgment appealed from was rendered. It is therefore a conceded proposition that notice to the appellees is necessary before this court can acquire jurisdiction over them, to hear and determine the same. Appellant's learned counsel, however, contend that the appellees have been duly notified of the appeal as the law directs. On the filing of the transcript, with the assignment of errors thereon, the clerk of this court issued a notice, directed to the sheriff of this court, commanding him to notify the appellees (naming them), or their attorneys of record (naming them, also), that on the 8th day of May, 1895, the appellant had filed in his said office a transcript of the record and proceedings in the cause (naming it), and that, at the expiration of 30 days from the service of that writ, said appeal would be submitted to said supreme court. The return of the sheriff of Marion county states that the writ came to his hands May 9, 1895, on which day he served it by reading the same to the attorneys therein named. Affidavits filed with the motion show that appellees now reside in the city of Indianapolis, and have ever since the litigation began, and have not been served with any notice of the appeal, and that their attorneys on whom the process was served had been discharged as far back as 1890, and that appellant knew that fact. It is contended on behalf of the appellees that, if no legal notice of the appeal has been given, the same has not been perfected, and hence no appeal has been taken within the time limited therefor, and, as no appeal can be now taken, the appeal must be dismissed. On the other hand, the appellant contends that filing the transcript, with an assignment of errors thereon, within the time limited, perfects the appeal. It

is conceded that the transcript, and the assignment of errors thereon, were filed in time.

The section of the Code that regulates ordinary appeals after the term at which the judgment is rendered reads as follows: "After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were had, stating the appeal from the judgment or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee."¹ Two methods of giving notice of an appeal are provided for in this section. If the language of the first clause of the section were to be construed according to its strict letter, regardless of other sections concerning appeals to this court, we should be constrained to hold that the appeal therein referred to could be taken by giving the notices therein specified, without doing anything else. But it has been held by this court that that part of the section must be construed along with the other sections on the subject, and, when so construed, it means that it is essential to such an appeal that the transcript must be filed within the time limited therefor in other sections. *Johnson v. Stephenson*, 104 Ind. 368, 4 N. E. 46. It is also well settled by the decisions of this court that the filing of the transcript, with a proper assignment of errors thereon, within the time limited for taking an appeal, perfects the appeal, without the service of notice on the appellees. *Harshman v. Armstrong*, 43 Ind. 126; *Johnson v. Stephenson*, *supra*; *Wright v. Manns*, 111 Ind. 422, 12 N. E. 160. Counsel for appellees, however, contends that "the giving of notice is just as essential to the perfecting of an appeal as the filing of the transcript and assignment of errors, and all must be done within the time limited for perfecting the appeal," and cites *Holloran v. Railway Co.*, 129 Ind. 274, 28 N. E. 549, in support of that proposition. The notice there involved was not a notice to the appellees, but was a notice to a coparty. While that appeal, like the one before us, was attempted to be taken after the close of the term, yet it did not belong to exactly the same class of appeals, in all respects. The judgment in that case was rendered on May 15, 1888; the transcript was filed on November 15th, following; and no notice was ever given to the coparty to the judgment who did not appeal, as required by section 647, Burns' Rev. St. 1894 (Rev. St. 1881, § 635). On March 20,

¹ Rev. St. 1894, § 652 (Rev. St. 1881, § 640).

1891,—nearly three years after the judgment had been rendered,—the appellee filed a motion in this court to dismiss the appeal. The appellants thereupon procured the written consent of the nonappealing coparties to appear in this court and decline to join in the appeal, and the appellants filed the same in the clerk's office, and also asked leave to amend their assignment of errors so as to make such nonappealing coparties parties to the appeal in this court. This court there said: "The appeal cannot be maintained by filing in the clerk's office of this court a written appearance of the judgment defendant not made a party to the appeal, and his refusal to join in the appeal, after nearly three years have elapsed from the time of the rendition of final judgment in the circuit court." And the appeal was dismissed for those reasons. That is far from deciding that notice to the appellee is essential to the perfecting of the appeal, nor is that case in conflict with those cited above to the effect that filing the transcript with an assignment of errors thereon perfects the appeal, without notice to the appellees. The appeal, therefore, in the case before us, was duly taken.

The question remains whether there has been legal notice of the appeal served on the appellees, and, if not, what effect that has on the appeal. The section quoted provides for two kinds of notice, as already observed, either one of which, at the option of the appellant, may be given. The first is an unofficial notice, and the second kind is an official notice. The first is an unofficial notice because there is no provision that it shall be issued by an officer, or served by an officer; while the second is required to be issued by an officer, namely, by the clerk of this court, and section 7801, Burns' Rev. St. 1894 (Rev. St. 1881, § 5833), requires the sheriff of this court, or his deputy, to serve such notice. The appellant in this case elected to rely alone upon an official notice. He could have written out and served the other kind of notice himself,—one on the clerk of the court, and the other on the adverse party, or his attorney. But he relied on the direction, doubtless, usually given by an appellant to the clerk of this court,—to issue the proper notice of the appeal.

The process, as we have seen, was issued for the appellees, or their attorneys (naming them). It was not served on the appellees named therein, but was served on the attorneys that had formerly acted in the case as appellees' attorneys. There is no question but that the process would have been good if it had been served on the appellees therein named. Whether its service on the appellees' attorneys was notice to the appellees must depend on the question whether the clerk of this court had any legal authority to issue notice of an appeal to the attorneys of the appellee. That question is answered in the negative by the express language of the section we have

quoted, which requires such clerk to "issue a notice of the appeal to the appellee." In *Vogel v. Brown Tp.*, 112 Ind., at page 301, 14 N. E. 77, this court said: "It is apparent, therefore, that the utmost that can be granted the appellant is that he asked and obtained a writ against the agent, and not against the principal. This certainly will not support a judgment against the principal, for the general rule—and it is an elementary one—is that the summons must issue against the principal, and not against the agent." And in *Vogel v. Brown School Tp.*, 112 Ind., at page 317, 14 N. E. 78, it was said: "This case is substantially the same as that of *Vogel v. Brown Tp.*, 112 Ind. 299, 14 N. E. 77, and is governed by the principles there declared. In this case, as in that, the summons was directed against the agent, and not against the principal. * * * As there was no summons against the school township, there could be no legal notice, and without legal notice there could be no valid judgment. * * * Nor is the objection to the form of the writ. It goes much deeper. It is that the writ was not issued against the defendant, but against another person."

In the case now before us the writ was issued against the appellees,—the proper persons,—and also against their agents or their former attorneys, and the service was alone upon such agents. It follows from the principles announced in the cases cited that there was no legal authority in the clerk to issue the notice of the appeal against the agents of the appellees, even if they had not been discharged long before the process was issued. Some confusion has crept into the practice of the clerk of this court in issuing process under this section. It seems to have been supposed that, if the unofficial notice provided for in the section might be served on the attorney of the appellee, the official notice might be likewise served. But, according to elementary principles declared above, process must go against the principal, and not his agent, unless the contrary is expressly authorized by statute. We have seen that the contrary is not expressly, nor even impliedly, authorized by statute, as to the official notice provided for in the section now under consideration. The contrary is only partially provided for therein, as to the unofficial notice therein authorized. The unofficial notice therein authorized would not be good, served on the appellee's agent and attorney alone. It must also be served on the clerk of the court in which the proceedings were had. So that in no case can service of notice of an appeal to this court on the attorney of the appellee, alone, confer jurisdiction over the appellee, whether it be an official or an unofficial notice. The notice or process in this case, as to its legality and validity, stands practically as if it had been issued against the agents or attorneys of the appellees, as it was alone served on them. There being no legal authority in the clerk to issue notice of an appeal to or against the attorneys of an appellee, that part of the writ

in this case was void, and consequently its service upon the attorneys named therein was without authority of law and void, and was no legal notice of the appeal to the appellees.

The want of notice to the appellee was held by this court not to be ground for dismissing the appeal, but a proper ground for setting aside the submission, in *Johnson v. Miller*, 43 Ind. 29. That, we think, is the proper disposition to make of such a case, unless it falls under, and is controlled by, rule 36 of this court. That rule provides that: "Where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of the ineffectual notice to bring the appellee into court the clerk shall enter an order dismissing the appeal." Notice was issued in this case, because it was issued against the appellees, the proper parties, though it also included the attorneys, who, as we have seen, were not the proper persons to issue notice to or against; but that, as we have seen, did not vitiate the notice to the proper parties, if it had been served upon them. Therefore the case does not fall under the first clause of the rule. It does fall under the second clause, because the notice proved ineffectual, being served upon the wrong persons. The notice was served, as we have seen, May 9, 1895, and was returned and filed in the clerk's office of this court on May 18th, following. If the fact that it was served on the former attorneys of the appellees, instead of being served on appellees, makes the notice ineffectual, within the meaning of the rule, then the appeal ought to be dismissed. The rule ought to have a reasonable interpretation. It was evidently intended to prevent an appellant from delaying the speedy hearing of the appeal, either through his negligence or design. The case most likely in the minds of the framers of the rule, as liable to happen, was where the notice is returned by the officer that the appellee was not found in his county. The failure to take other steps to get notice of the appeal served for 90 days after such return would clearly be such negligence on part of the appellant as the rule was intended to punish with a dismissal of the appeal. But in the case now before us there was a service of a notice such as the clerk of this court has been in the habit, through misapprehension of the law and our rules, of issuing, and the sheriffs of the several counties of serving, as this was served, for years, in like cases. And such process, coming as it did from a source so near this court that the practice has gone unquestioned, up to the present case, by the bar of the state, under the probable supposition that this court had, under some rule or order, authorized notice of appeals to be issued and served as this one was, to hold that the failure to take out other process within 90 days after the return

of the notice served on appellees' attorneys, the cause having been submitted on that service, would be to hold that an appeal ought to be dismissed for unintentional and excusable negligence of the appellant under that rule. In two appeals this court relieved appellants against their excusable mistakes in complying with certain statutory provisions in taking their appeals. *Hutts v. Martin*, 131 Ind. 1, 30 N. E. 698; *Bank v. Inman*, 133 Ind. 287, 32 N. E. 885. Under the circumstances, the appellant's failure to take out other process after his appeal was submitted is not sufficient cause, under the rule, to warrant the dismissal of the appeal, especially as the appellees have not asked the dismissal of the appeal on that ground. The conclusion reached renders the other grounds urged for the dismissal of the appeal wholly unimportant and we do not consider them.

The motion to dismiss the appeal for want of notice thereof served on the appellees is overruled, and the submission of the appeal is set aside, at the costs of appellant, with directions to the clerk to issue new notice to the appellees, in accordance with this opinion, unless otherwise ordered by the appellant or his attorneys. And the cause is retained on the docket of this court for further action therein.

(142 Ind. 117)

GOODWIN, City Clerk, v. STATE ex rel.
FOLEY.

(Supreme Court of Indiana. Sept. 25, 1895.)

CITY ATTORNEY—TENURE OF OFFICE—REMOVAL.

1. Rev. St. 1894, § 3476 (Rev. St. 1881, § 3043), providing that "the officers of a city shall consist of a mayor," etc., "and, if the common council deem it expedient, a city attorney," authorizes a common council, after electing a city attorney, to abolish or discontinue such office.

2. The proviso in Rev. St. 1894, § 3476 (Rev. St. 1881, § 3043), continuing city officers then in office until September, 1894, being intended to fix a uniform time when the terms of such officers should commence, does not take from the council the power granted by a preceding proviso of removing an officer or abolishing his office before September, 1894.

Appeal from superior court, Vigo county; Cyrus F. McNutt, Judge.

Application by Peter M. Foley for a writ of mandamus to compel Charles H. Goodwin, clerk of the city of Terre Haute, to issue a warrant on the treasurer of said city for salary alleged to be due applicant as city attorney of said city. Judgment for plaintiff. Defendant appeals. Reversed.

James E. Piety and John O. Piety, for appellant. F. W. Harper, J. C. Foley, V. J. Barlow, and P. M. Foley, for appellee.

MONKS, J. This was a proceeding brought by the relator, Foley, to compel, by writ of mandamus, appellant to issue a warrant on the city treasurer for salary alleged to be due him as city attorney for the quarter ending June 30, 1894. An alternative writ was

issued, to which appellant filed a return in four paragraphs. A demurrer was sustained to the second, third, and fourth, and, the first paragraph being withdrawn, judgment was rendered that a peremptory writ of mandate issue commanding appellant to deliver the warrant as prayed for. The only errors assigned and not waived call in question the action of the court in sustaining a demurrer to the second and third paragraphs of the return.

It appears from the complaint and alternative writ that Foley was city attorney of the city of Terre Haute February 21, 1893, when the act of 1893, extending the terms of office of city officers, took effect (Rev. St. 1894, § 3476; Acts 1893, p. 50), and that he complied with said act by filing a written consent of the sureties on his bond to such extension. The second and third paragraphs of the return are substantially the same. They allege, in substance, that on the 8th day of May, 1894, the common council of the city abolished the office of city attorney, for the reason that they deemed it inexpedient for the city to have and employ an attorney, and that the relator was duly notified of such fact, and never performed or rendered any service for said city as such city attorney after said date. That part of the act of 1893 (section 3476, Rev. St. 1894) necessary to the decision of this question is as follows: "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, civil engineer, street commissioner, chief of the fire department, health officer, marshal and (if the common council deem it expedient) a city attorney and a city judge. The city attorney, the street commissioner, the civil engineer, the chief engineer of the fire department and the health officer shall be appointed by the common council: provided, that the common council may dispense with the street commissioner and require the marshal to perform his duties. All such officers shall hold their respective offices for four (4) years, and until their successors are elected or appointed and qualified, those who are appointed by the common council being subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May. Said officers shall respectively hold their offices as follows: The mayor, city judge, clerk, marshal and treasurer, four years each: and provided, that the term of office of the aforesaid officers shall commence on the first Monday in September following the general election in May, and that the terms of office shall be four years from such Monday in September: and provided, further, that the mayor, clerk, treasurer, civil engineer, street commissioner, marshal, city attorney, city judge, chief engineer of the fire department and health officer now in office, and whose terms expire in May and September, 1893, or at any other time, shall hold their respective offices until the first Monday in the month of September, 1894,

and that all and each of such officers as shall so hold shall procure from their sureties a written consent to the aforesaid extension, or give a new bond to the satisfaction of the council, otherwise their term of office shall terminate in May or September of the original term for which they were elected or appointed, or at such time as their terms now expire." Since the act approved June 18, 1852 (1 Rev. St. 1852, p. 203), it has been provided by statute that the officers of a city should consist of a mayor, etc., and if the common council deem it expedient, or in their opinion the interest of the city requires, a city attorney. Acts 1857, p. 44, § 9; Acts 1859, p. 208, § 2; Acts 1867, p. 35; § 8; Acts 1877, p. 12; Rev. St. 1881, § 3043; Acts 1893, p. 50; Rev. St. 1894, § 3476. Under these acts the common council had the power to say whether or not a city attorney should be one of the officers of the city. If they deemed it expedient and elected one, they had the power at any subsequent time to abolish or discontinue such office. *State v. Wilson* (Ind. Sup.; this term) 41 N. E. 361; *Ford v. Board*, 81 Cal. 19, 22 Pac. 278; *City of Augusta v. Sweeney*, 44 Ga. 463.

The legislature, by the act of 1893 (section 3476, supra), did not create the office of city attorney, within the full sense of the term, but authorized the common council to determine whether the city should have such an officer. The power that creates an office may abolish it before the expiration of the term of the officer, and from the date the office is abolished the officer is discharged. *State v. Hyde*, 129 Ind. 302, 28 N. E. 186, and cases cited. But it is claimed by appellee that, by the proviso continuing the city attorney in office until the first Monday in September, 1894, the legislature placed such officer beyond the power of the common council, provided he filed the consent of his surety to such extension. We cannot concur in this contention of appellee. No such intent is stated in the section, and no such construction can be given it, unless such intention is expressed clearly and with unmistakable certainty. It is expressly provided that the city attorney and other officers named are subject to removal by the common council after the first general election on the first Tuesday in May; that is, after the first Tuesday in May, 1894. The power of the common council to determine whether a city attorney shall be one of the officers of the city was not limited to any particular time. The language is: "The officers of such city shall consist of a mayor," etc., "and, if the common council deem it expedient, a city attorney." The act took effect in February, 1893, and speaks from that date; and from that time the common council was given the power to determine whether a city attorney should be one of the officers of the city. When we consider that the purpose of the legislature was to make the terms of office four years instead of two, and to fix a uni-

form time when such terms should commence, and that the terms of the city officers then in office were extended to conform to this change, the question becomes one of easy solution. In the construction of a statute, every part of it must be considered in connection with the whole; and it must be construed so as to give effect to every word and clause, as well as the whole act, if possible. If different portions seem to conflict, the court must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. *Paving Co. v. Edgerton*, 125 Ind., on pages 460, 461, 25 N. E. 436, and cases cited. Applying the rules of construction, it is evident that the legislature, by the proviso in question, merely intended to extend the terms of office of the city officers then in office beyond the time for which they were elected or appointed, and not to place them above the power of the common council during such time. It follows that, after the act of 1893 took effect, the common council had the power to abolish or discontinue the office of city attorney; that the common council, at its pleasure, had the power after the first Tuesday in May, 1894, to remove the city attorney from office (*State v. Wilson*, supra); that the action of the common council, whether considered as an abolishment of or removal from the office, was valid, and the exercise of a power given by the statute in controversy; that, even if the common council had no power to abolish the office, the action taken was equivalent to a removal from office, and valid as such an exercise of power.

The court erred in sustaining the demurrer to the second and third paragraphs of return. Judgment reversed, with instructions to the court below to overrule the demurrer to said paragraphs, and for further proceedings not in conflict with this opinion.

(143 Ind. 600)

GOODWIN, City Clerk, v. STATE ex rel. FOLEY.

(Supreme Court of Indiana. Sept. 26, 1895.)

Appeal from superior court, Vigo county; Cyrus F. McNutt, Judge.

Application by Peter M. Foley for a writ of mandamus to compel Charles H. Goodwin, clerk of the city of Terre Haute, to issue a warrant on the treasurer of said city. There was a judgment in favor of relator, and defendant appeals. Reversed.

James E. Piety and John O. Piety, for appellant. F. W. Harper, V. J. Barlow, and Foley & Foley, for appellee.

MONKS, J. The questions presented in this cause are in all respects the same, and the parties the same, as in the case of *Goodwin v. State* (Ind. Sup.; decided at this term) 41 N. E. 359, on the authority of which case the judgment is reversed, with instructions to overrule the demurrer to the second and third paragraphs of answer, and for further proceedings not in conflict with this opinion.

(142 Ind. 102)

STATE ex rel. BLAIR v. WILSON.

(Supreme Court of Indiana. Sept. 24, 1895.)

MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTER—REMOVAL OF OFFICERS—POWER OF COUNCIL.

Rev. St. 1894, § 3476, in extending the term of office of city attorney (an officer appointed by the council) from May to September, provided the consent of his surety to such extension was filed, and conferring on the common council power to remove such officers as they might appoint under its provisions, amending Rev. St. 1881, § 3043, under which the council already possessed the power of removal of the city attorney, extended his term subject to the council's right to abolish the office, or remove its incumbent, at its pleasure, at any time between May and September.

Appeal from circuit court, Shelby county; W. A. Johnson, Judge.

Information by Alonzo Blair, to determine, between himself and David L. Wilson, which was entitled to the office of city attorney of Shelbyville. From a judgment in favor of respondent, relator appeals. Affirmed.

Adams & Carter, for appellant. D. L. Wilson, for appellee.

MONKS, J. The relator, Blair, filed an information against appellee, in the court below, for the purpose of determining, between himself and the appellee, which was entitled to the office of city attorney of Shelbyville. A demurrer was sustained to the complaint, and, the appellant refusing to amend, judgment was rendered in favor of appellee.

The only error assigned is that the court erred in sustaining the demurrer to the complaint. As the question to be decided is one of statutory construction, it is necessary only to state such facts as will fully present that question. The relator, Blair, was elected city attorney by the common council of the city of Shelbyville on the 19th of May, 1891, and on the next day filed his bond, took the oath of office, and entered upon the discharge of his duties, as such officer. At the time of his election it was provided by statute (Rev. St. 1881, § 3043; Rev. St. 1894, § 3476; Acts 1877, p. 12) that the officers of such city should consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner, and marshal, and, if the common council deemed it expedient, a city attorney and a city judge; that the city attorney should be appointed by the council; and that all such officers should hold their respective offices for two years, and until their successors were elected and qualified, except that the city attorney, street commissioner, and civil engineer were subject to removal at any time by the common council, at its pleasure. *City of Madison v. Korbly*, 32 Ind. 74; *City of Madison v. Kelso*, Id. 79; *State v. Sohn*, 97 Ind. 101. Before the expiration of the two years for which relator was elected city attorney, the legislature, by an act which took effect

February 21, 1893, amended section 3043, Rev. St. 1881, which amendment reads as follows: "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, civil engineer, street commissioner, chief of the fire department, health officer, marshal and (if the common council deem it expedient) a city attorney and a city judge. The city attorney, the street commissioner, the civil engineer, the chief of the fire department and the health officer shall be appointed by the common council: provided, that the common council may dispense with the street commissioner and require the marshal to perform his duties. All such officers shall hold their respective offices for four (4) years, and until their successors are elected and qualified, those who are appointed by the common council being subject to removal by the council at its pleasure, after the first general election in May. Said officers shall respectively hold their offices as follows: The mayor, city judge, clerk, marshal, and treasurer, four years each: and provided, that the term of the aforesaid officers shall commence on the first Monday in September following the general election in May, and that the terms of office shall be four years from such Monday in September: and, provided further, that the mayor, clerk, treasurer, civil engineer, street commissioner, marshal, city attorney, city judge, chief engineer of the fire department and health officer now in office, and whose terms expire in May and September, 1893, or at any other time, shall hold their respective offices until the first Monday in the month of September, 1894, and that all and each of said officers as shall so hold shall procure from their sureties a written consent to the aforesaid extension, or give a new bond to the satisfaction of the council, otherwise their term of office shall terminate in May or September of the original term for which they were elected or appointed, or at such time as their terms now expire. And the councilmen shall be elected by the legal voters of their respective wards; and the councilmen from each ward whose terms will expire in May, 1893, is hereby continued in office, and his term extended until May, 1894, and the councilmen of each ward whose term would expire in May, 1894, is hereby continued in office and his term extended until May, 1896; and hereafter when two councilmen are chosen at the same time from the same ward it shall be determined by lot at the first regular meeting of the council after their election who shall hold his office for two years and who for four years, and biennially thereafter one councilman shall be elected by the legal voters of each ward. The term of councilmen shall be four years, and they shall be elected biennially. The successors of those whose terms are extended until May, 1894, shall then be elected and their terms continued four years, and the successors of those whose terms are extend-

ed until May, 1896, shall then be elected and their terms continued four years; and all of said officers shall hold their respective offices during their respective terms and until their successors are elected and qualified. The said clerk, treasurer and marshal, with the consent of the common council, may appoint one or more deputies when necessary: provided further, that the common council of a city governed by this act may order the election of an auditor who shall be elected as other city officers are elected, and shall hold his office for the term of four years, and until his successor is elected and qualified; and the common council shall have power to prescribe the manner of qualifying for such office, and to prescribe the powers and duties thereof, which shall in nowise conflict with the provisions of this act: and provided further, that no person shall hold the office of councilman unless at the time of his election he is a resident of the ward from which he was elected; and in case of the removal of any councilman from the ward from which he was elected, the common council shall have the power to declare his office vacant and to elect his successor to fill such vacancy as provided by law. All officers who are not specifically named herein whose terms expire prior to the first Tuesday in May, 1894, at which date the first election under this amendment shall be held, are hereby continued in office until said time, and until their successors are elected and qualified, they to give bond as the council may direct." Rev. St. 1894, § 3476 (Acts 1893, p. 50). On the 2d day of May, 1893, and while he was still in office by virtue of such election, the relator filed with the common council the consent of the surety on his bond to the extension of the term of such office until the first Monday in September, 1894, as required by said act. On May 8, 1894, the common council of the city, without notice to the relator, by a proper vote, declared the relator removed from office of city attorney, and that said office was vacant, and proceeded to and did elect appellee to said office. Afterwards, on the 15th day of May, 1894, appellee took the oath of office, and filed his bond, with sufficient surety, which was approved by the common council, and took possession of said office, and excluded the relator therefrom.

The only question presented for decision is, did the common council of the city have the power, under section 3476, Rev. St. 1894 (Acts 1893, p. 50), to remove the relator from the office of city attorney? Under section 3043, Rev. St. 1881, which was amended by section 3476, Rev. St. 1894, the city council had such power, without any offense being charged, but simply at the pleasure of the council. *City of Madison v. Korbly*, supra; *City of Madison v. Kelso*, supra; *State v. Sohn*, supra. It is claimed, however, by counsel for appellant, that the act of 1893, supra, by expressly extending the term of the city attorney until the first Monday in September,

1894, took away from the common council the power to remove such officer before that time, provided the consent of his surety to such extension was filed as required by said act; that the power of removal given by the amendment of 1893, *supra*, to the common council, applied only to such officers as they might appoint after the amendment took effect. We cannot concur in this view. The purpose of the act of 1893 (section 3476, Rev. St. 1894) was to provide that the terms of office for all the city officers should be four years, instead of two, as the section amended provided; to fix the time when such terms should commence; and to extend the terms of the city officers then in office to conform to this change. That part of the act of 1893 providing that the officers of the city should consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner, and marshal, and, if the common council deem it expedient, a city attorney and a city judge, and that the city attorney should be appointed by the common council, is a re-enactment of section 3043, Rev. St. 1881. The section amended provided that the city attorney was removable by the common council at its pleasure, while the section as amended provided that such officer was removable by the common council, at its pleasure, after the first Tuesday in May, 1894. The legislative intention is to be ascertained from an examination of the whole, as well as the separate parts, of the act, and the intention so ascertained will prevail over the literal import of particular terms; and in searching for this meaning the court will look to each and every part of the act, the circumstances under which it was enacted, the old law upon the subject, and the evils, if any, to be remedied. *Association v. Black*, 136 Ind., on page 555, 35 N. E. 829. The act in controversy spoke from the time it took effect, and had reference, from that date, to all officers then in office, as well as those thereafter to be elected or appointed, unless the contrary is clearly and expressly stated. We think it clear that after the act of 1893 took effect the common council had the same power to abolish or discontinue the office of city attorney, if they deemed it inexpedient to have such office, as they had under the section amended. And if such power was exercised prior to the first Monday in September, 1894, the city attorney then in office, whether appointed before or after the amendatory act of 1893 took effect, would at once cease to be such officer. It is also clear that after the first Tuesday in May, 1894, the common council had the power to remove, at its pleasure, any person holding the office of city attorney, no matter when elected, and appoint his successor. Such power is expressly given by the amendatory act of 1893. By the terms of said act, one councilman for each ward was to be elected on the first Tuesday in May, 1894, and the act gave the common council, as con-

stituted after such election, the power to remove the city attorney, and appoint another, who would execute the line of policy it might adopt. This is clearly the policy of our form of government, for otherwise the common council would not have the power necessary to enforce the execution of its orders. *City of Madison v. Korbly*, *supra*. The extension of the term of office of the city attorney to the first Monday in September, 1894, was subject to the right of the city council to abolish the office at any time, or remove the incumbent thereof, at its pleasure, after the first Tuesday in May, 1894, and elect his successor. It is only by such a construction that effect can be given to all the parts of said act, and at the same time avoid any contradiction of terms. If the extension of the terms of office of the city officers had the effect to place such officers beyond the power of the common council, as claimed, then such officers could not have been removed for cause, upon charges preferred under the provisions of section 3101, Rev. St. 1881 (section 3536, Rev. St. 1894). *City of Madison v. Korbly*, *supra*. No such construction should be given to the act, unless the language is so plain as to leave no doubt that the legislature so intended.

We find no error in the record. Judgment affirmed.

HACKNEY, J., did not participate in this decision.

(142 Ind. 159)

CULP et al. v. CULP et al.

(Supreme Court of Indiana. Sept. 27, 1895.)

WILL CONTEST—INSTRUCTION.

Testator gave his entire estate to his "children, share and share alike." When the will was made he had living 10 children and 1 grandchild, the daughter of a deceased daughter, with whom he was on friendly terms. *Held* that, in an action by the grandchild and others to set aside the will on the ground of unsoundness of mind and undue influence, it was error prejudicial to plaintiffs to charge that the presumption is that testator overlooked such grandchild, and if she was so overlooked, while she would not take under the will, she would take her one-eleventh under the law, just as if there were no will, and in that case would get her share, no matter how the case is decided.

Appeal from circuit court, Elkhart county; J. M. Van Fleet, Judge.

Action by Joseph Culp and others against Simon Culp and others to set aside the will of Anthony Culp, deceased. From a judgment for defendants, plaintiffs appeal. Reversed.

Henry C. Dodge, for appellants. Wilson & Davis, for appellees.

HACKNEY, J. Elizabeth Weaver, a daughter of Anthony Culp, died February 18, 1892, and her only surviving child was the appellant Rosa Weaver. Thereafter, on May, 23, 1892, said Anthony Culp executed

his last will, by which he directed the payment of his debts and the erection of a monument from his personal estate, and any residue thereof, he directed, should be equally divided among his children. His 160 acres of land he devised, the south half to his wife, during her natural life; and the north half was to be rented, and the proceeds applied to the taxes and repairs on the whole, and the residue paid, in equal parts, to his children. It was further provided that upon the death of the wife the whole of said lands should be sold, and the proceeds equally divided "among all of my children, share and share alike." At the date of the execution of said will the said Anthony Culp had 10 living children and 1 grandchild, said Rosa Weaver, all of whom were living at the date of his death, to wit, August 20, 1892. After the death of said Anthony Culp the appellants brought this action to set aside said will, alleging unsoundness of mind and undue influence. One of the facts upon which the appellants relied was that though the testator knew of the death of his daughter Elizabeth, and knew and was on friendly terms with the child, Rosa, he did not mention her name in said will, or make provision therein for her, either directly, or as in her mother's right.

At the trial the court gave, among other instructions, the following: "It is undisputed that the decedent left ten living children and one granddaughter, the plaintiff Rosa Weaver, who is a child of his deceased daughter, Elizabeth. The will uses the term 'children,' which does not include Rosa, as she is a grandchild, and the presumption is that he overlooked or forgot her, and if she was so overlooked or forgotten, while she would not take under the will, she would take her one-eleventh under the law, just the same as if there were no will; and in that case Rosa will get her share all the same, no matter which way the case is decided." The question of the correctness of this charge is presented by the record. The appellees insist that the instruction was too favorable to the appellants, in that, by the law, Rosa was included under the designation of "children," and that no presumption that she was forgotten or was overlooked was authorized. The appellants, on the other hand, insist that the instruction was harmful to them, in that it advised the jury that the law, notwithstanding the will otherwise disposed of the entire estate, provided one-eleventh thereof for Rosa, and that the verdict could not defeat her in that provision.

There can be no doubt that the word "children," having been employed here without manifesting an intent that it should include grandchildren, would not include the granddaughter. *West v. Rassman*, 135 Ind. 278, 34 N. E. 991; *Pugh v. Pugh*, 105 Ind. 552, 5 N. E. 673; *Cummings v. Plummer*, 94 Ind. 403. That the law made provision for the

granddaughter, notwithstanding the disposition of the entire estate to the 10 children, was, in our judgment, an error, and was such as might have prejudiced the rights of the appellants. Memory, that it has sufficient strength to call to mind the objects of one's bounty, and sufficient grasp to retain them until the will is executed, is always of supreme importance, when inquiring as to testamentary capacity. That a testator failed to provide for one who was the natural object of his bounty, when the circumstances do not appear to indicate a previous just provision, by way of gift or advancement, or that there was such hostility between them as to render probable the desire to deprive such a one of a share in his bounty, is a circumstance to be considered by the jury in determining whether the omission arose from the lack of memory to recall or to retain in mind those for whom, naturally, he would make provision. This the appellees' learned counsel concede. They say: "It is always a question that may be considered by the jury, in determining one of the two commonly alleged causes to set aside a will, namely, 'unsoundness of mind' and 'undue influence,' whether the testator had forgotten so much, and his memory had failed to such degree, that he didn't know what he was about when he wrote his will; and to prove this it is always competent to show that the name or names of one or more of the children were omitted by the testator in his will." This conclusion, it seems to us, demonstrates the error of the court's charge; for why should it be a pertinent fact that the testator omitted provision for a child, when, in the absence of provision by the will, the law made just that provision which he would naturally make? The jury, in weighing the fact that the testator omitted provision for a child or grandchild, and considering that when the will was drawn the law provided an ample and just share in the estate for that child, could, with reason, decide that it was no evidence of an unsound mind that a testator omitted to make provision where the law had already made just the provision he would naturally have made. This state, unlike many other states, has no statute providing for children whose ancestors have, by their wills, made no provision for them. It is a privilege of an ancestor to make such inequality of division among his children as he may desire; and, if he so desires it, he may leave a child without an interest in his estate. The child, unlike the wife, has no such legal interest in the father's estate that it can be enforced regardless of testamentary provision. When, in this case, the testator gave his entire estate to his 10 children, there was no remedy by which the granddaughter could reach the one-eleventh thereof, as instructed by the court. It would have required a statute, to become a part of the will and bind the testator in its execution, to take from each of

the 10 children a fraction of his share, and give it to the omitted child. However just such a statute might appear, its absence cannot be supplied by the courts. And, as we have already said, if such were the law, there would be but little room for the rule that the failure to provide for a child is a circumstance tending to establish unsoundness of mind. The failure gets its strength as a circumstance from the improbability that, without cause, a father will disinherit his child; that he would be so unjust with those to whom his bounty is equally due as to enrich some, and leave others without a share. But if the child is not disinherited, and if that injustice is not done, but if the law, which all are presumed to know, has done what the father should have done, that very fact may have influenced the father to omit provision by will, excepting where he desired to make special provision, and to permit the law to control where he does not provide. Instead of becoming a circumstance betraying a weak memory, it might be regarded as a most rational view. The instruction was erroneous, and we cannot say that it was harmless. The judgment of the circuit court is reversed, with instructions to sustain the appellants' motion for a new trial.

(143 Ind. 449)

LAKE ERIE & W. R. CO. v. STICK.¹

(Supreme Court of Indiana. Sept. 27, 1895.)

INJURY AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action for injuries at a crossing it appeared that plaintiff was familiar with the locality, and that he had good sight and hearing. Plaintiff testified that before going on the track he stopped, looked, and listened; that he did not see any train, or hear any signals; that his view was unobstructed for 200 feet. His own witnesses testified that the engine was moving at the rate of from 25 to 35 miles per hour, and that they heard it as it passed. Many witnesses testified for defendant that the speed was about 15 miles per hour, and that the signals were given. *Held*, that plaintiff had failed to establish his freedom from contributory negligence.

2. Where plaintiff, an active man, was struck by an engine while attempting to cross the tracks, it was error to charge that a railroad company must stop the engine, in order to avoid injury to one on the crossing, if by the exercise of reasonable care such person might have been seen in time to have stopped the engine, as such instruction, not being applicable to the facts in the case, was misleading.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by Jesse Stick against the Lake Erie & Western Railroad Company for personal injuries. Plaintiff had judgment, and defendant appeals. Reversed.

W. E. Hackedorn, La Follette & Adair, R. H. Hartford, and Gregory & Seiverburg, for appellant. W. W. Orr, for appellee.

MCCABE, J. The appellee sued the appellant in the Delaware circuit court to recover

damages on account of a personal injury which he alleged was inflicted on him by the negligence of the appellant. The venue was changed to the Jay circuit court, where a trial resulted in a verdict and judgment against the appellant for \$4,000 over its motion for a new trial. It is assigned for error here that the circuit court erred in overruling a demurrer to each of the first and second paragraphs of the complaint, in overruling the defendant's motion for judgment in its favor on the answers to interrogatories notwithstanding the general verdict, and in overruling appellant's motion for a new trial. Among the reasons assigned in the motion for a new trial are that the verdict is not supported by, and is contrary to, the evidence and law, and that the court erred in giving and refusing certain instructions. The principal ground relied on by the appellant is the insufficiency of the evidence.

The appellant's railroad track runs in a southwesterly direction from the northeast through the westerly edge of the unincorporated village of Albany, in Delaware county, whose streets run due north and south and east and west. The street known as the "Albany and Mississinawa Pike" or "Pike Street" runs east and west through the town, and crosses the appellant's track about 200 feet southwest of appellant's passenger depot, situated 20 feet southeast of said track. A bay window on the west or northwest side of the depot left 16 feet and 8 inches between the east or southeast rail of the track and the bay window. The appellant's right of way is level, and nearly straight, there being no curves from Pike street to the east or northeast until it crosses the Albany and Platon pike, which is northeast from Pike street crossing 1,665 feet. Pike street crossing is where the injury occurred. That street is sometimes called the "Albany and Mississinawa Pike" and sometimes "Pike Street." Appellant's roadway was 100 feet wide, and Pike street was 50 feet wide. The appellee lived on the west or northwest side of appellant's track, and south from Pike street some 100 yards or more. The principal business part of the town was east or southeast of appellant's roadway. Appellee had before that time been in the habit, when coming from home up into town, of passing from his house to the west or northwest embankment of the railway, then passing along that to Pike street, and thence along that street up into town; and traveling the same route in returning home. He had lived at that place for a number of years, and was familiar with all the surroundings, including the railroad track, buildings, crossings, etc. He had often passed over the track at Pike street crossing. He also knew the character of trains, including engines with tenders attached thereto, that passed at regular and irregular times. His eyesight and hearing were both good, and he was a spry, active man, able to walk and step around actively.

¹ Rehearing denied.

Shortly before the time he was injured he had left his home, and by the usual route walked up into town, and while there did some shopping, and then started on his return home. For a short distance he walked on the side of Pike street, and before reaching the crossing of the railroad he passed out into the middle of Pike street. The street and the railroad were substantially on a level, so that ordinarily an engine could be seen approaching on the track a half mile east or northeast from the Pike street crossing by a person standing within six or eight feet southeast of the east or southeast rail at said crossing. The appellee proceeded along Pike street west, approaching the railroad crossing, and on reaching the crossing was struck by a passing engine of appellant, and injured. Appellant, as had been its custom, was transferring an engine and tender attached thereto from Lima to Lafayette. It was being run by T. A. Hurley, engineer, and A. T. Railsback, fireman. Another similar engine and tender, also being transferred, was some 300 to 350 feet behind the first, in charge of another engineer and fireman. The engineer and fireman above named were sober, and competent to discharge their respective duties. The collision occurred on the 19th day of February, 1891, between 5 and 6 o'clock, sun time, or at 5:20 o'clock p. m. railroad time. It was not dark, but was between sundown and dark; it was twilight. During the afternoon some rain had fallen, but at the time of the injury it was not raining. The engine was what is known as a "mogul engine," with tender attached, and 55 feet in length. It had six wheels. The tender was 19 feet long, and had eight wheels, four on a side. The height of the engine from the smokestack to the ground was 15 feet, the smokestack rising 54 inches above the body of the engine. The engine weighed 80 tons, including the tender. The evening, at the time appellee was injured, was still and quiet. The engine at the time was running at the rate of 25 to 35 miles per hour.

The appellee testified that when within six or eight feet of the track he stopped, and attentively listened and looked for an approaching train, both ways, and did not see any train or hear one. Could have heard a watch ticking 10 or 12 feet away, but did not hear the engine until it struck him. "Did not go inside the rail until I was struck by the engine. With a headlight burning, I could see an engine at night a mile up the track. From where I stood I could not see further east than to the depot, on account of the weather. It was about 200 feet to the depot. My eyesight was good. I could then read an ordinary newspaper without glasses. There was no machinery of any kind near there to make noise to interfere with me hearing. Nothing to keep me from hearing. The engine made no noise as it came up behind me. I heard no ringing of the bell or

sound of the whistle. There were no signals whatever given. I had no notice of any engine coming. I saw no headlight. I presume I looked up the track past the big part of the depot. I knew it was a dangerous place at the crossing. There are generally some trains running on the road after night. They go through at irregular hours." The foregoing statement of facts, outside of the appellee's testimony, is either uncontradicted, or where there is a conflict the version of the facts most favorable to the appellee, and as given by his witnesses, has been adopted.

Actionable negligence is made up of three elements, according to our decided cases, all of which must be alleged and proven affirmatively by the plaintiff in order to recover. Those elements are: First, the defendant's negligence; second, the plaintiff's freedom from fault or negligence in the matter complained of; and, third, damage to the plaintiff, proximately caused by the defendant's negligence. The failure to establish any one of these elements by the evidence is as fatal to a recovery as the failure to establish each and every one of them. *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Railway Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Railway Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737; *Pennsylvania Co. v. Meyers*, 136 Ind. 242, 36 N. E. 32; 16 Am. & Eng. Enc. Law, 388, 389. The plaintiff is required to establish all these elements of his cause by a fair preponderance of all the evidence. The particular acts of negligence charged against the appellant were: "That, as the plaintiff approached the crossing, the defendant, by its agents and servants, was also approaching said crossing from the northeast, with two engines or locomotives, to which no car was attached, one following the other, and about 300 or 350 feet apart, * * * negligently racing one of said engines with the other * * * at a great and dangerous rate of speed * * * of 45 miles per hour, to the deadly peril of limb and life of plaintiff. * * * That no signal or warning was given of the approach of said engines, and the whistle was not sounded, nor was the bell rung, within 100 rods of said crossing; it then being the twilight hour, and the sky overcast with clouds; and said engines were running so swiftly that they made no rumbling sound, and gave no warning whatever of their approach. * * * And without fault or negligence on his part he was struck and run upon by one of said engines, * * * and * * * was knocked and thrown from the crossing to the ground with great violence, and the bones of his shoulder and upper part of the arm and * * * of his leg and hip, and other bones of his body, were broken and crushed," etc. From the evidence, as it appears to us in the record, not only was there no preponderance of evidence in support of the charge of negligence against the defendant, and the plaintiff's freedom from

negligence contributing to his injury, but, as it appears to us on paper, the overwhelming preponderance of the evidence establishes that the appellant was not guilty of the negligence alleged, or any part of it, and that the appellee was guilty of negligence contributing to his injury. But we have no power to weigh the evidence, and, if there is evidence tending to support the verdict which is legally sufficient, standing alone, to establish the material allegations of the complaint, this court cannot reverse the judgment, and order a new trial, even though what appears to be the fair or overwhelming preponderance seems to be against the verdict. In *Railroad Co. v. Madden*, 134 Ind., at pages 469, 470, 34 N. E. 227, this court said that: "The jury and the trial court are the best judges of the weight of the evidence where there is a conflict in it, because they have vastly better opportunities and means of weighing and estimating the weight of conflicting evidence than this court has. The judge of the trial court has just as good an opportunity and as efficient means of weighing the testimony as the jury has. And though the jury are the exclusive judges of the weight of the evidence, that only lasts until their verdict is returned, and a motion for a new trial is filed, in which is assigned as a reason therefor that the verdict is not supported by sufficient evidence. Then the trial judge becomes the judge of the weight of the evidence, and if, in his opinion, the preponderance of the evidence is against the verdict so strong that he should have felt compelled to have found the other way, the law makes it his duty to grant the motion for a new trial. While it is sometimes strongly asserted that the trial judges, for want of courage, shrink from this plain duty, yet the legal presumption is that the trial judge has conscientiously, faithfully, and courageously discharged his whole duty, and that presumption continues on an appeal until the contrary is made to appear affirmatively by the record in this court. Hence the propriety of the rule in this court that affirms the verdict if the evidence that tends to support it, considered alone, is sufficient to justify the jury in finding it. This court cannot know but that the jury had good and sufficient reasons for discrediting the evidence that conflicted with their finding, and, even if it were possible to suppose the jury had made a mistake in weighing the evidence, the trial judge, we are bound to presume, has calmly and impartially reviewed it, after having heard it all, with the same means of observing the manner and appearance of the witnesses, and all other circumstances of the trial likely to aid in correctly weighing the evidence; and by his action in overruling the motion says, in effect, to us that he thinks the weight of the evidence justifies the verdict of the jury." That such a record as the one now before us should reach this court once in a while is not so

passing strange as to call for special notice. But when we find such a condition of the verdict and evidence appearing here so frequently and uniformly in this class of cases, it is enough to excite our wonder. If it sometimes happened that the verdict was for the defendant in such cases, and that what appears to us as a preponderance of the evidence was against such verdict, or that it was not supported by such preponderance, then it would look more than it does like the jury had fairly, candidly, and for good reason discredited and disbelieved the testimony of some of the witnesses. But when we find that they uniformly, and with scarcely a single exception, always discredit the witnesses that happen to testify on behalf of the defendant in such cases, it does seem passing strange, and naturally excites suspicion, that juries have the impression that railroads and other corporations are the legitimate prey of every one who is bold enough to file a claim against them in court, regardless of the evidence or the facts. These things reflect no credit upon our jurisprudence, nor can we close our eyes to them. But, however great the suspicion that the jury has through prejudice or sympathy or both disregarded the weight and preponderance of the evidence, this court is powerless to remedy the evil, because it has no power to weigh the evidence. *Deal v. State* (Ind. Sup.) 39 N. E. 930. The remedy for the evil is solely in the hands of the trial judge. The occurrences mentioned, happening so frequently and uniformly, ought to arouse his wakeful vigilance, and his courage, when need be, to set aside a verdict where the jury has usurped the power to disregard the plain preponderance of the evidence, and thus make his court a court of justice in reality as well as in name. His failure or refusal to do so is fraught with the most dangerous consequences to the rights of property, because, in case of conflict of evidence there is no other remedy. It is to turn over to the unbridled will of juries the property of such defendants, to bestow the same on such plaintiffs as the pleasure or sympathy of the jury may dictate, regardless of the legal rights of such defendants.

While the condition of the evidence is such as to the negligence charged against the appellant under the foregoing rules that we cannot disturb the verdict on account of the apparent preponderance of the evidence being against the verdict, yet that is not the case as to the appellee's alleged freedom from negligence contributing to his injury. In *Railway Co. v. Greene*, 106 Ind., at page 282, 6 N. E., at page 605, this court said: "It may suffice to say, since it is the established rule of this court, as it is of the courts in a large majority of the states, that it must be affirmatively shown that the injured party was in the exercise of due care at the time the accident occurred. At least it must be made to appear that want of care on his part in no

way contributed to bring about the injury, or helped to produce the accident for which compensation is sought." If we must accept the testimony of the appellee as true, then perhaps he has brought himself within the above rule, and shown affirmatively that he was in the exercise of due care when the accident occurred. In *Mann v. Stockyard Co.*, 128 Ind., at pages 142, 143, 26 N. E., at page 820, this court said: "When one approaches a point upon the highway where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution; and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. * * * If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw,"—citing authority. "Where a person thus approaching a railroad crossing could have seen the train by looking before he attempts to cross, and a collision occurs, it will be presumed he did not look, and by the neglect of so plain a duty he is guilty of such negligence as precludes him from recovering,"—citing authority. "Mental absorption, or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen." But the appellee testifies to a full compliance with this rule of legal duty; that he stopped within six or eight feet of the track, and looked and listened attentively for an approaching train, both ways, and did not see or hear any, though his hearing and eyesight were exceptionally good, and that he did not hear the engine until it struck him. But he says that he could see from the crossing to the depot 200 feet east from whence the engine was coming. It is undisputed that the engine and tender weighed 80 tons, and altogether had 14 wheels; and appellant's witnesses put the rate of speed it was running at 25 to 35 miles per hour. The puzzling question arises: How could such a vast weight of iron or iron wheels, 14 in number, run at that rate of speed over iron or steel rails, and make no noise, so that a person of exceptionally good hearing, able to hear the tick of an ordinary watch 10 or 12 feet, could not hear it? In the case last quoted from, at page 144, 128 Ind., and page 821, 26 N. E., it is said: "The

courts cannot close their eyes to matters of general notoriety and to matters of every-day observation. We must know that a train of cars passing over iron or steel rails at a speed of thirty miles an hour does not do so without noise. We must know, too, that where a person possessing good eyesight, located within one hundred feet of a track, has an unobstructed view of such track for a distance of near one-half mile, he cannot fail to see an approaching train before it reaches him, if he looks attentively; and that, if he is possessed of ordinary hearing, he could not fail to hear it when listening attentively, if running at the speed of thirty miles an hour." 12 Am. & Eng. Enc. Law, 195, and authorities there cited.

Appellee introduced four witnesses only as to the accident besides himself, two of them being his daughters, living with him, and two of them disinterested. The first one after himself was William Waltz. He testified that: "I was at his house when he got hurt. * * * The young ladies [appellee's daughters] were sitting in the room at his house. I saw an engine coming very fast. * * * The engine, when I saw it, was 400 or 500 feet west of the water tank. * * * I first saw the engine 100 to 150 feet from the house. * * * I could see the man that sat on the engine next to me. I think the engineer stopped about 300 feet from where I first saw it. * * * The engine * * * was not puffing, but I could hear it as it went by. * * * It was about dusk. It was not dark. * * * Some one got off the engine, and came back along the track, and gave notice that the old gentleman was hurt." Appellee's next witness was William Smith, who testified that: "Just as I came to the track, I looked up to the northeast, and saw an engine coming down the track from the northeast. * * * I waited till it passed me. There was * * * another engine * * * following this one. There was no noise made and no signal given, or sound of any kind, before it came up to where I was. * * * The head engine made so much noise after it passed me that I could not hear the second one." This witness, when the engine passed him, was east or northeast of the Pike street crossing. The appellee's next witness was his daughter Flora Stick, who testified: "I was in the house when the accident occurred. * * * I heard the engine passing, and saw it passing the house. I went to the door, to see what it was that passed so fast. * * * I saw it stop, and saw the fireman come running, and told us that father was hurt. * * * We heard the engine as it went by. We went to the door, and saw the engine. Myself and Mr. Waltz 'was' at our house. We both went to the door. * * * I noticed the number on the side of the engine. It was 2. I could see it from the door. * * * Saw the number on the engine 150 feet from the house." Appellee's next witness was his daughter Ruth

Gillan, who testified: "I saw the engine as it passed the door. Our house fronts towards the railroad. I saw the fireman get off the engine. When he got off he run back towards our house, and first gave us notice that father was hurt. * * * I could hear the noise of the engine as it went past." These four witnesses, all introduced by the appellee, two of them his children and members of his household, all squarely contradict him, as our common knowledge also does, as to whether the engine made noise, and could be heard several hundred feet. They also contradict his testimony saying: "I looked and listened as I came up to the railroad. I looked both ways. I heard no sound, and saw no train." If his four witnesses tell the truth, he either did not look and listen as he approached the track, or, if he did, his eyesight and hearing being good, as he states, he saw and heard the approaching engine, but did not heed what he saw and heard. In either case, according to the established law as above stated, he could not recover.

Yet it may be true that he had a right to contend before the jury and the trial court, and convince them if he could, that he told the truth on that point, and that all of his own witnesses upon that point besides himself, as well as all of appellant's, testified falsely, and, having secured a verdict to that effect, which the trial judge upheld against a motion for a new trial, he may now insist that the jury were the exclusive judges of the weight of the evidence until after verdict, and that thereupon the trial judge had the exclusive power to review and reweigh the evidence on the motion for a new trial, and say, as he has done in overruling it, that the preponderance of the evidence supports the verdict, and that this court cannot disturb it by reweighing the evidence. While this may all be true, yet we are unable to see upon what principle of moral ethics, reason, or philosophy the jury and the trial judge could have reached the conclusion that these four witnesses introduced by appellee were all unworthy of belief on the point now in question, and that the interested plaintiff was worthy of more credence than all of them together, and yet at the same time believe those same four witnesses against an array of ten witnesses on behalf of the appellant on the question of appellant's alleged negligence. This great array of witnesses on behalf of appellant shows clearly and plainly that appellant was not guilty of any negligence in connection with appellee's injury. They show that the speed of the engine was moderate,—from 12 to 15 miles an hour; that all proper signals were given; that the whistle was sounded at the proper times and places, and that the bell was continuously rung from the time the engine approached the town until it stopped, after the collision with the appellee. And the evidence shows that these witnesses had the very best of means of knowing the facts

about which they testify. We do not mean to say that it was not the exclusive province of the jury to determine which set of witnesses whose testimony conflicted with the others' was most worthy of belief. But we do say that, after the jury had condemned the appellee's four witnesses as unworthy of belief as to his alleged freedom from negligence, it is past our comprehension to conceive any reason consistent with good faith on their part to turn round and believe those same four witnesses as to appellant's alleged negligence against an array of ten witnesses to the direct contrary. Especially is this so in view of the legal presumption arising when a person crossing a railroad track is injured by a collision with a train that the fault is *prima facie* his own (*Railroad Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Railway Co. v. Hammock*, *supra*; *Hathaway v. Railway Co.*, 46 Ind. 25), and the further legal presumption, if the view is unobstructed, as was shown beyond dispute here, that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened (*Cones v. Railway Co.*, 114 Ind. 328, 16 N. E. 638). The action of the trial judge in overruling the motion for a new trial looks very much as if he were laboring under the supposition that he possessed no power to review and reweigh the evidence on a motion for a new trial. Such is not the law. *Railroad Co. v. Madden*, *supra*. The jury are not omnipotent; they are not a law unto themselves; but their verdict and finding must be according to the law and the evidence, however much they may desire through sympathy, friendship, or prejudice to bestow by their verdict the property of one party litigant on the other. It is the bounden duty of the trial judge to see to it that they do not do so, and, if they do, to set aside their verdict promptly.

Excluding from consideration all evidence in the case, as we must under the rules above stated, that conflicts with the testimony of the appellee as to his exercise of due care and his freedom from fault and negligence contributing to his injury, but considering alone his testimony upon that point, and the matters of general notoriety and matters of every-day observation and our knowledge of the laws of nature, we must and do know that, the engine going at the rate of speed of 25 to 35 miles an hour, the appellee must have and did hear it, but must have been so absorbed in mental reverie or abstraction that he did not realize that he heard it; and, with an unobstructed view as he had, he must have seen it in time to escape if he looked as he says he did, but that the same causes prevented him from realizing that he did see it. And therefore his evidence was not sufficient to prove that he was free from contributory negligence. Therefore, one of the indispensable elements or facts constituting

the appellee's cause of action being unproved, that is, the evidence being legally insufficient to establish that fact,—the verdict is not supported by the evidence, no matter how much such evidence may tend to support the other essential averments in the complaint. *Railway Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

Among the instructions complained of in the motion for a new trial was the fifteenth given at the request of the plaintiff, as follows: "A railroad company owes a positive duty to persons lawfully using a public highway and the crossing of its track at the same grade or level to so run and manage its engines and trains, and control and regulate their speed, and to have and hold them in such reasonable control and subjection, that they may not inflict unnecessary and reasonably avoidable injury upon the persons lawfully and necessarily using the crossing. The company must not only give the signals required by the statute, but, in any case where ordinary care and reasonable prudence dictates, it must give such other signals and warnings, and so regulate and control the rate of speed, as the surroundings and the necessities of the case demand. It must even stop the engine if the necessity of the case requires that that should be done in order to avoid injury to one on the crossing, if, by the exercise of reasonable and proper care, such person might or could have been seen in time, by the proper and reasonable use of the means at command, to have stopped the engine, and thereby avoid the infliction of injury." This instruction possibly might be correct in a case wherein the facts made it applicable, but we do not decide whether it would or not. As was said in *Railway Co. v. Phillips*, 112 Ind., at page 62, 13 N. E., at page 132: "If the employes see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man; * * * nor could it, even in such a case, be held liable unless the employes knew of the helpless condition of the person on the track." To the same effect are *Railway Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310; *Railroad Co. v. Huffman*, 28 Ind. 287; *Railroad Co. v. Miller*, 25 Mich. 274. But the facts in the case before us were such as to make the latter part of the instruction totally inapplicable, and therefore calculated to mislead the jury. There is no dispute about the facts that the appellee was an active, spry man, having ability to move and walk around with ease, and that there was nothing to hinder him from quickly stepping off of the track when on it. In such a case the following instruction was held by this court to correctly state the law: "Though a railroad company and the public have equal rights at the intersection of the track of the former with a public highway, those operating a train upon the railroad are under no obligations to slacken the speed of such train, or to bring the same

to a stop, when they notice a person crossing, or about to cross, the track at its intersection with the highway; but they may presume that such person will himself take all proper precautions to avoid injury." The same rule was declared by this court in *Railroad Co. v. Boggs*, 101 Ind. 522; *Railway Co. v. Phillips*, supra. Though the instruction now before us be ever so correct as an abstract proposition of law (which we need not and do not decide), yet, it being wholly inapplicable to the evidence, its tendency could only be to mislead the jury. They were justified in believing from that instruction that the law made the appellant guilty of negligence for its failure to stop the engine long enough to allow the appellee to pass over the crossing in safety. It has been generally held by this court to be erroneous to give instructions to the jury not applicable to the case proven by the evidence. *Hill v. Newman*, 47 Ind. 187; *McMahon v. Flanders*, 64 Ind. 334; *Moore v. State*, 65 Ind. 382; *Nicklaus v. Burns*, 75 Ind. 93; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973; *Hays v. Hynds*, 23 Ind. 531. There are cases where, from the record, it appears that such instructions were harmless, and therefore held not reversible error. But it does not so appear in this case. In *Nicklaus v. Burns*, supra, this court said: "After the evidence has been heard, and argument of counsel had, for the court to instruct the jury upon a state of facts not embraced in the evidence, nor discussed by counsel, is asking them to decide questions which have not been submitted to them for trial. Jurors are liable enough to consider matters outside of the evidence, without being led off in that direction by instructions from the court. Such practice is well calculated to confuse and mislead the jury." And in *Hays v. Hynds*, supra, this court said: "Instructions should be pertinent to the case. Juries are apt to assume, and are justified in assuming, that they are applicable. This could only be so upon the ground that Alexander, acting as a pork dealer, was doing business for the bank; and, unless the jury utterly disregarded the instruction, it could scarcely fail to mislead them." And the same is true in the case now before us. To the same effect are *McKeen v. Porter*, 134 Ind. 483, 34 N. E. 223; *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 860; *Blough v. Parry* (Ind. Sup.) 40 N. E. 70. The court erred in overruling the motion for a new trial. The judgment is reversed, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

(148 Ind. 558)

HOLDEN v. CITY OF CRAWFORDSVILLE.¹

(Supreme Court of Indiana. Sept. 24, 1895.)
MUNICIPAL CORPORATIONS—OPENING OF STREETS
AND ALLEYS—PROCEDURE.

1. There being a provision in the statute authorizing the opening of streets and alleys

¹ Rehearing denied.

(Rev. St. 1894, §§ 3629-3657; Rev. St. 1881, §§ 8166-8194) that the council may delay the proceedings until the benefits are collected, an objection that the resolution of the council appropriating land for an alley contained a proviso that the owners' damages should not be paid until after the collection of the assessments for benefits will not compel a dismissal of the proceedings.

2. Rev. St. 1894, § 3637 (Rev. St. 1881, § 8174), providing that, if the common council shall determine to appropriate land for a proposed street, they shall adopt a resolution accepting the report of the city commissioners, leaves the determination of the question of public utility with that body.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Proceedings for opening an alley in Crawfordsville. Objections by Charles N. Holden to the resolution of the council approving the report of the commissioners were overruled, and he appeals. Affirmed.

Kennedy & Kennedy, for appellant. Thomas & Whittington, for appellee.

HOWARD, C. J. This was a proceeding under the statute for the opening of an alley in the city of Crawfordsville. Rev. St. 1894, §§ 3629-3657 (Rev. St. 1881, §§ 8166-8194).

Complaint is first made of the form of the resolution of the common council approving the final report of the city commissioners, and appropriating the land for the alley, for the reason that coupled with such resolution was a proviso that appellant's damages should not be paid until after the collection of the assessments for benefits. It is provided in the statute that the common council may delay the proceedings for the opening of a street or alley until the benefits are collected. Unless this is done, the damages assessed are due and collectible from the city as soon as the appropriation of the land is made. *City of Terre Haute v. Blake*, 136 Ind. 636, 36 N. E. 422, and 9 Ind. App. 403, 36 N. E. 932. If the proviso for delay in this case were sufficient, under the statute, then the taking of the land would be postponed; while, if the proviso were insufficient, there would be no delay, and appellant's damages would be at once due and payable. In either case he would have no cause to complain, except, perhaps, as to the amount of the damages. His land could not be taken until his damages were paid or tendered. We do not think the error, if any, warranted a dismissal of the proceedings. See *Graves v. Town of Middletown*, 137 Ind. 400, 37 N. E. 157.

It is also contended that the alley could not be opened unless it was found to be of public utility; and counsel endeavor to apply to these proceedings the laws relating to public highways, as laid out by boards of county commissioners. Cities and towns, however, have special needs in this as in other particulars; and the laws have been so framed as to give to the corporate authorities large discretion in the management and control of municipal affairs. The statute (Rev.

St. 1894, § 3637; Rev. St. 1881, § 3174) provides that, if the common council shall determine to make the appropriation of the land proposed for a street, they shall adopt a resolution accepting the report of the city commissioners, and such action of the council has always been held to be final. It is true that an appeal is provided for in section 3643, Rev. St. 1894 (section 3180, Rev. St. 1881); but, as said in that section, "upon such appeal, the regularity of the proceedings of the commissioners, and the questions as to the amount of benefits or damages may be tried; but such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change or improvement." The legislature has thus, in effect, declared that the question of public utility in the opening of streets and alleys is one left exclusively to the judgment of the common council. No appeal, as to that question, is provided for. There is no doubt that the lawmaking power may leave such matters of local government to the sole decision of the municipal authorities. *Reeves v. Grottenpick*, 131 Ind. 107, 30 N. E. 889. Nor is there any doubt that in this case the legislature has seen fit to say that only the regularity of the proceedings, and the amount of the benefits and damages, may be considered on appeal. So it was said in *Spiegel v. Gansberg*, 44 Ind. 418, in relation to the vacation of an alley: "We have nothing to do with the question of the expediency or inexpediency of vacating the alley. That question belonged to the common council." The judgment is affirmed.

(143 Ind. 144)

FORSYTH v. WILCOX et al.¹

(Supreme Court of Indiana. Sept. 25, 1895.)

HIGHWAYS—PROCEEDINGS TO ESTABLISH—WAIVER OF OBJECTIONS—APPEAL—REVIEW OF FINDINGS.—HARMLESS ERROR—VERDICT—SUFFICIENCY—CONSTITUTIONAL LAW.

1. In proceedings to establish a highway, where remonstrant appears generally, and raises in the commissioners' court and the circuit court only the questions of public utility and the amount of his damages, he waives all objections to the qualifications of petitioners, sufficiency of the petition, notice, order to view, report of viewers, and the failure to appoint second viewers.

2. On appeal in proceedings to establish a highway, the supreme court will not disturb findings, supported by the evidence, as to public utility and the damages sustained by remonstrant.

3. In proceedings to establish a highway, the question of the sufficiency of proof in the circuit court as to the qualifications of the petitioners cannot be raised for the first time in the supreme court.

4. In proceedings to establish a highway, it is harmless error to read to the jury, as evidence, either by mistake or otherwise, a petition in another proceeding.

5. A verdict, in proceedings to establish a highway, that the road would be of public utility, and that remonstrant "is entitled to damages in the sum of \$—," is a finding that he is entitled to no damages, and is sufficient.

¹ Rehearing denied.

6. Under the rule that in case of the establishment of a highway, as against damages found, the jury may consider benefits found by it, a verdict and judgment establishing a highway, and awarding the landowner no damages, are not open to the constitutional objection that it is a taking of his property without compensation and without due process of law.

Appeal from circuit court, Porter county; J. H. Gillett, Judge.

Proceeding by Albert B. Wilcox and others to establish a highway, in which Caroline M. Forsyth, remonstrant, appealed to the circuit court. From a judgment establishing the highway, and disallowing remonstrant's claim for damages, she appeals. Affirmed.

Thos. J. Merrifield, for appellant. J. P. Peterson, for appellees.

HACKNEY, J. This was a proceeding by the appellees for the establishment of a highway. It originated in Lake county, and upon appeal to the circuit court of that county the venue was changed to the Porter circuit court. In the commissioners' court the appellant made a general appearance, and filed her remonstrance, alleging the inutility of the proposed highway, and claiming damages. Reviewers were appointed and qualified, and reported the proposed highway of public utility, and that the appellant would sustain damages in the sum of \$2,100. Thereupon the board of commissioners ordered the highway to be opened and established after 28 days, upon the condition that the petitioners pay the damages reported, in excess of \$300, which sum was ordered paid from the county treasury, in the event of the payment by the petitioners of the additional damages. Before the expiration of said 28 days the appellant perfected her appeal from the board to the circuit court. In the Porter circuit court the only proceedings had, and which have been reserved, were in the trial of the questions of public utility and damages, which resulted in a verdict finding for "the petitioners, and that the highway petitioned for would be of public utility," and, further, that "Caroline M. Forsyth is entitled to damages in the sum of \$——." Over appellant's motion for a new trial, the circuit court rendered judgment, from which this appeal is prosecuted.

The grounds of error which appellant has assigned are substantially as follows: (1) The board of commissioners of Lake county had no jurisdiction to appoint said viewers under said petition, in this: (1) That said petition did not state facts sufficient to authorize such board to make such appointment; (2) that no sufficient notice of the filing of said petition was ever made or proven. (2) That said board had no authority to proceed in the matter of said petition, for want of a legal and sufficient report by said viewers. (3) That the order to view was wholly void, for want of certainty in the description of the proposed highway. (4) That no reviewers were appointed after the filing of the remonstrances upon the question of public utility.

(5) That the proceedings of said board of commissioners were wholly illegal, without jurisdiction, and void. (6) The Lake circuit court had no jurisdiction in the case. (7) The Porter circuit court had no jurisdiction in the case. (8) The court below erred in overruling appellant's motion for a new trial. (9) The judgment of the court below is in violation of the sixty-sixth section of the first article of the constitution of the state of Indiana. (10) The judgment of the court below is in violation of the fourteenth amendment of the constitution of the United States.

The first, second, third, and fourth of said assignments, as suggested upon their face, apply to the proceedings before the board of commissioners, upon which that court assumed jurisdiction of the subject-matter and of the parties; and, upon the argument of counsel, the general assignments numbered 5, 6, and 7 are but conclusions from the preceding assigned causes of error. In our opinion, all of these assignments must fail, since none of the causes therefor were presented, by objection, motion, or otherwise, in the commissioners' court, or in the circuit court. *Wells v. Rhodes*, 114 Ind. 467, 16 N. E. 830; *Lowe v. Brannan*, 105 Ind. 247, 4 N. E. 580; *Forsyth v. Kreuter*, 100 Ind. 27; *Watson v. Crowsore*, 93 Ind. 220; *Green v. Elliott*, 86 Ind. 53; *Kemp v. Smith*, 7 Ind. 471; *Millhollin v. Thomas*, Id. 165; *Daggy v. Coats*, 19 Ind. 259. The petition did not, in the body thereof, allege that six of the petitioners resided in the neighborhood of the proposed road; but that fact, and the fact of the posting of notices of the intended filing of the petition, appeared from an affidavit filed with, and as a part of, the petition. The commissioners expressly adjudged that "due proof of the legal qualifications of the petitioners, and of the legal posting of notices," was made. By the cases cited, it is the settled law of this state that questions as to the qualifications of the petitioners, the sufficiency of notice, the formal averments of the petition, and other questions of like character, are waived by the failure of a remonstrant to raise them before the board; that the judgment of the board as to the sufficiency of notice is final; and that only such questions as have been affirmatively put in issue before the board, or such as may be permitted by amendment on appeal, may be tried in the circuit court.

The case of *Green v. Elliott*, supra, fully considers the doctrine of waiver, and cites many of the decisions in this state supporting its conclusions. In the appellant's case (*Forsyth v. Kreuter*, supra), this court said: "It is settled by the decisions of this court that nothing can be tried, on appeal from the board of commissioners to the circuit court, except what is put in issue before the board; and it is equally well settled that objections can only be taken to the facts upon which the jurisdiction of the board depends, by appearing before the commissioners and making such objections at the time the peti-

tion is presented, and before the appointment of viewers. Whether the petition was signed by twelve freeholders, six of whom resided in the immediate neighborhood, etc., was jurisdictional, and the finding of the commissioners on that subject was conclusive." The hearing afforded, under the law, to land-owners, is not designed to permit those interested to make a partial resistance, and to remain silent as to errors in the proceedings which, upon motion, could be corrected, and when they have taken the chances of success upon their partial resistance, and when the petitioners have been taken to the court of last resort, where such errors cannot be corrected by amendment, but the costs of the entire proceeding must be visited upon them, to then, for the first time, raise an objection that any such error exists. If such practice were permitted, instead of establishing and promoting a just system of procedure, the rule would constitute an unjust method of delaying public improvement, and of burdening with the cost of litigation those who institute such proceedings. None of the defects suggested, as to the order to view, as to the report of viewers, nor as to the failure to appoint second reviewers, which we learn from the argument to be the other objection raised by the fourth assignment, even if such were authorized, should have passed through the commissioners' court and the circuit court, and remained unchallenged until they had reached this court, when, by the vigilance of the appellant, they could have been cured in the earliest stages of the proceeding. As we have shown, the board acquired jurisdiction of the proceeding; the appellant's appearance was general; her only objections were as to the utility of the road and the damages she might sustain; the order establishing the highway contained enough, aside from the condition as to the payment of damages, to fix the location, width, and termini of the road. If there were irregularities in the intermediate proceedings, and the appellant, without objection thereto, appealed to the circuit court, and there again submitted only the questions of utility and damages, such intermediate irregularities should be deemed waived. By the rule that the questions tried before the board are tried de novo in the circuit court, the inquiry of this court is necessarily limited to the questions tried in the circuit court, unless it is found that the proceedings of the board were wholly void.

The eighth cause of error assigned, the overruling of the motion for a new trial, is next urged by the appellant. In support of the motion were filed numerous affidavits charging misconduct of parties and of jurors, and counter affidavits in denial and in explanation of such charges. These, it is practically conceded by counsel for appellant, are not in the record by bill of exceptions, and therefore present no question for review by this court.

The weight of the evidence is discussed, and we are urged to pass upon it. As to the question of the public utility of the proposed highway, there is much evidence, and, in parts, sharp conflict. There is evidence which, if standing alone, would support the conclusion that the road was of public utility. This evidence we must accept as supporting the verdict upon that question, as we cannot weigh the evidence, to determine conflicts, and pass upon the question of its preponderance. As to the question of appellant's damages, an entire failure of evidence would be fatal to her claim, since the burden of that issue rested upon her. The evidence offered by her, however, was met and opposed by much evidence from the appellees; and we are not, as we have said, at liberty to weigh the conflict.

It is further urged that there was a failure of proof, in that there was no evidence of the statutory qualifications of the petitioners, and that, as the cause should have been in the circuit court, such qualifications were in issue. To this trial de novo contention are cited *Reynolds v. Shults*, 106 Ind. 291, 6 N. E. 619; *Clift v. Brown*, 95 Ind. 53; *Schmied v. Keeney*, 72 Ind. 309; *Coyner v. Boyd*, 55 Ind. 166; *McPherson v. Leathers*, 29 Ind. 65; *Beeler v. Hantsch*, 5 Blackf. 594. These cases, like many of those already cited by us, held that in the circuit court the cause is tried de novo on the issues made in the commissioners' court. As we have shown, the only issues made in that court were as to the utility of the road and the damages claimed by the appellant, and other issues were waived.

Objection is made that the appellees introduced in evidence the petition for a highway in another proceeding. At the point in the record where this petition appears to have been read, and on objection by the appellant to the introduction of the petition in this proceeding, the court ruled that the petition and remonstrance were in evidence by force of law, and without formal introduction. Thereupon, and without further objection or an exception, the appellees read in evidence such petition. The record of another petition than that in review is explained as arising from an error of the stenographer in copying the wrong document; but it seems to be unimportant, since no exception was reserved, and, in our opinion, it could not have been harmful. No prejudice of the rights of the appellant by reason of the reading in evidence of such petition is suggested, and we observe none.

Complaint is made of the giving of three of the court's charges to the jury. The record does not disclose that it contains all of the instructions given to the jury. By the settled rule of practice in this state, the sufficiency of any instruction must be determined in the light of all of the instructions given; and, to make compliance with this rule possible, the appellant must make it ap-

pear from the record that all charges given are in the record. *Board v. Nichols* (Ind. Sup.) 38 N. E. 526, and authorities there cited. Two of the charges so complained of relate to the right of the jury to consider, as against any damages found, the value of any benefits which they might find also. Of this proposition, appellant's counsel says, "It is well understood that this is the doctrine prevailing in the courts of Indiana." We adopt this concession of counsel to show that his complaint seeks to overturn an established rule of law in this state, and that he is not harmed by the technical rule of practice which denies us the privilege of considering his complaint.

In the oral argument it is insisted that the verdict found that the appellant sustained damages, and was insufficient in failing to specify the extent of damages sustained. The verdict should be construed as a finding that appellant sustained no damages. The form was evidently supplied by the court, and its blanks filled to suit the finding, and without erasing unnecessary words.

The ninth and tenth causes of error assigned are earnestly pressed for a reversal of the lower court's judgment. It is said that "no man's property shall be taken without just compensation" (article 1, § 66, Const. Ind.), "nor shall any state deprive any person of * * * property without due process of law" (section 1, art. 14, Amend. Const. U. S.). The point is not made, and we do not stop to inquire, whether this argument may be made under this assignment, instead of that upon the overruling of the motion for a new trial, or whether it should have been raised upon motion to modify the judgment. These propositions are urged upon the idea that benefits may not be considered in connection with any damages sustained by the property owner, in ascertaining what, if any, sum should be awarded to the property owner. As has already been suggested, appellant's counsel concede that, by the settled rule in Indiana, such benefits may be considered. *McIntire v. State*, 5 Blackf. 384; *Vanblaricum v. State*, 7 Blackf. 209; *Railroad Co. v. Hunter*, 8 Ind. 74; *Hagaman v. Moore*, 84 Ind. 496; *Burk v. Simonson*, 104 Ind. 178, 2 N. E. 309, and 3 N. E. 826. Some of the cases cited consider the question with reference to the first of the constitutional provisions mentioned. No reason has been given for the suggestion that "due process of law" is not afforded by the hearing provided by the statute to the property owner, and no reason has occurred to us.

Finally, it is suggested that "the petition, though purporting to be for the laying out of a new road, was in fact for the lengthening and widening of an old road"; and it is said, "This cannot be done, under the law." Just what assignment of error raises this question, we are not advised. Judged from the purport of the petition, it would not appear to be for the purpose stated by appel-

lant. If the purpose were disclosed by the evidence, the argument does not suggest it, or make reference to where it may be found. If error, it is not available. Finding no available error in the record, the judgment of the circuit court is affirmed.

(142 Ind. 123)

KIRLAND v. BOARD OF PUBLIC WORKS OF CITY OF INDIANAPOLIS et al.

(Supreme Court of Indiana. Sept. 25, 1895.)

STREET IMPROVEMENTS—CONTRACT—SEWERS—ASSESSMENTS.

1. Under Rev. St. 1894, § 3830, authorizing a board of public works "to design, order, and contract for the improvement" of any public street, the board has authority to order the construction of a drain to carry off the surface water from a street.

2. Rev. St. 1894, § 3844, provides that portions of the improvement of a street which are uniform in extent and kind shall be apportioned to the property abutting on such portions of the street, by the running foot. *Id.* §§ 3857, 3858, provide that the assessment for sewers constructed for local use shall be according to the area of the private land benefited. *Held*, that an assessment for the cost of a sewer constructed as part of a street improvement, to carry off surface water, should be by the running foot.

3. The expression "resident freeholders," as used in Rev. St. 1894, § 3844, providing that on confirmation of an order for street improvement the same shall become final, unless, within 10 days, two-thirds of the "resident freeholders on such street" remonstrate against the improvement, includes only resident freeholders on that street.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Antoinette Kirland against the board of public works of the city of Indianapolis and others for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Chester Bradford and Miller, Winter & Elam, for appellant. Elliott & Elliott, D. W. Howe, and J. E. Scott, for appellees.

HOWARD, C. J. This was an action for injunction, arising under a construction of the city charter of the city of Indianapolis. The assignment of errors presents for consideration the correctness of the court's rulings in sustaining the several demurrers of appellees to the appellant's amended complaint. From the complaint it appears: That on the 11th day of May, 1894, the board of public works of the city of Indianapolis adopted a resolution for the improvement of a part of West Washington street, in said city, upon which appellant's real estate is situated, "by grading and curbing and paving the roadway with brick on concrete foundation, and constructing drains or sewers and appurtenances thereto, according to the drawings and specifications set out in said resolution." That notice of said resolution was duly given. That remonstrances thereto were heard, and that on the 1st day of

June, 1894, said resolution was confirmed by said board. That thereafter, within ten days, "two-thirds of all the freeholders, residents in the city of Indianapolis, owning property on such part of said street so to be improved, remonstrated in writing against such improvement." That said board, in disregard of said remonstrance, did not refer said matter to the common council of said city, but advertised for bids to do said work, and on July 6, 1894, did let the same to the appellee Daniel Foley, who is now proceeding with the same. "That in the plans, specifications, notices, and contract for said work, there is included, as a part of the same work, and under the same contract, the construction, underneath the part of said street so to be improved, for its whole length, a drain or sewer for the pretended purpose of carrying off the surface water from said street, which may fall thereon, or flow thereon from neighboring property and cross streets." Said drain or sewer is constructed of brick, is of varying size,—from 2 to 2½ feet in diameter,—and is sunk from 4 to 9 feet beneath the street. Other drain pipe, also of smaller size, is placed under said street. That the additional cost of said improvement, caused by the construction of said drain or sewer, will be from 25 to 30 per cent. of the entire cost. That there is no provision in the statute for the construction of a drain or sewer such as that here provided for. That, whereas the statutes provide that persons assessed for the construction of sewers may use the same, yet it is not permitted that the property owners along said improvement use the sewer herein provided for. "That there is no pretense that said drain is constructed under any of the provisions of the city charter touching drains or sewers of any kind, but it is claimed by the board of public works of said city, and by the city engineer, that the same may be, and is to be, and is being constructed as an incident to and a part of the street improvement; that is, as an incident to the paving of said street with brick. And according to the plans and specifications, and the declared purpose, of said board of public works and of said city engineer, the entire expense of such sewer or drain, or whatever it may be called, is to be charged upon, and enforced as a lien against, the abutting property along the line of said sewer, by the front foot, and not according to the superficial area of said property," and not according to any other method provided by the statute for paying the cost of the construction of sewers. It is finally claimed that the building of such drain beneath the street, as a part of such improvement, and charging the cost to the property owners by the front foot, as in the case of street improvements, is without warrant of law, and should therefore be enjoined.

By section 74 of the act of March 6, 1891, as amended by the act of February 22, 1893, being the act for the government of cities

having a population of more than 100,000, and commonly known as the "Indianapolis City Charter" (Acts 1891, p. 137; Acts 1893, p. 56; Rev. St. 1894, § 3845), it is provided that the cost of street improvements shall be assessed against abutting lands and lots, per running front foot, without regard to benefits to or area of such lands or lots. By sections 83-88 of the city charter, it is provided that the cost of the construction of sewers shall be assessed in certain cases according to benefits to, and in others according to area of, lands affected. It is evident, therefore, that under the statute it would not be lawful to assess the costs of a sewer upon the abutting lands and lots by the running front foot. The principal question in this case, then, is whether the drain described in the complaint is a sewer, as contemplated in the statute, or whether it is a part of the street improvement. By section 59 of the charter (section 3830, Rev. St. 1894) the board of public works is given very full powers over the streets, alleys, and public places of the city,—among others, "to design, order, contract for, and execute the improvement or repair of any street, alley, or public place within such city." By section 73 of the charter (section 3844, Rev. St. 1894), it is provided that "whenever the board of public works shall order the improvement of any street, alley, sidewalk or other public place in such city, in whole or in part, it shall adopt a resolution to that effect, setting forth a description of the place to be improved, and full details, drawings and specifications for such work." What the improvement shall be is not defined by the statute. That is plainly left to the discretion of the board. The only limitation is found in the succeeding section,—that the cost shall be estimated according to the whole length of the street or alley, "or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement," per running foot. Provided, then, the improvement is uniform in kind and extent, the board must say, by resolution, what that improvement shall be. The end to be attained, however, namely, the better preparation of the street for public travel, must evidently determine the nature of the improvement to be made. The mere grading of the street may be deemed sufficient in some instances. Afterwards it may be thought necessary to raise the center, or roadbed, and sink gutters along the sides, so as to make a drier and firmer highway. If the travel increases, graveling may be thought needful. Finally the board may be of opinion that the street has become so important a thoroughfare that it should be paved with brick or stone. If the ground were low and wet, it would seem that, in connection with any of these improvements, it might be necessary to draw the water from the street by gutters, drains, or otherwise, as the board should judge best. In this case, as stated in plaintiff's complaint,

the board, by resolution, expressed its judgment to the effect that said street should be improved "by grading and curbing and paving the roadway with brick on concrete foundation, and constructing drains or sewers and appurtenances thereto." The uniformity of the whole work, as well as the particular purpose of the drain under the roadway, are likewise shown in the complaint, where it is said: "In the plans, specifications, notices, and contract for the said work, there is included, as a part of the same work, and under the same contract, the construction underneath the part of said street so to be improved, for its whole length, a drain or sewer for the pretended purpose of carrying off the surface water from said street, which may fall thereon, or flow thereon from neighboring property and cross streets." Certainly, no purpose is here indicated but the improvement of the street. Indeed, the complaint says elsewhere that the drain is not to be used as an ordinary sewer, no intersections or connections with house or other drains being permitted. It is therefore built exclusively for the improvement of the street, and not, except incidentally, as a sewer. There can be no doubt that the board had power, under the charter, to make the improvement as provided for in the resolution. Indeed, it would appear that the drainage of the street was a necessary part of the improvement. It may seem that it would have been better to have first constructed a sewer along the street, under the sewer provisions of the charter, and then lay the pavement under the provisions for street improvements, and doubtless this would be true generally. There is nothing shown, however, from which we may discover that the board abused its discretion in this case; and the course pursued, for aught that appears, may have been the wisest, under the circumstances. However that may be, it cannot be said that the draining of water from a street may not be a necessary part of the improvement of such street. And in this case, as we have seen, the board was of opinion that such drainage was necessary. It has frequently been decided that a drain may be constructed in connection with other street improvements, and as a part of the same. *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895; *Cone v. City of Hartford*, 28 Conn. 363; *Hastings v. Columbus*, 42 Ohio St. 585; *Bronson v. Borough of Wallingford*, 54 Conn. 519, 9 Atl. 393; 6 Am. & Eng. Enc. Law, 19. See, also, *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711; 10 Am. & Eng. Enc. Law, 282.

It is further contended that the board had no authority to let the contract, for the reason that, in compliance with section 73 of the charter (section 3844, Rev. St. 1894), and within 10 days after the confirmation of the resolution ordering the work done, two-thirds of all the freeholders residents in the

city of Indianapolis, owning property on such part of said street so to be improved, remonstrated in writing against such improvement. The words of the statute are that, after the confirmation of the original resolution, the same shall be conclusive on all persons, unless, within 10 days thereafter, "two-thirds of all the resident freeholders upon such street or alley remonstrate against such improvement." Counsel for appellant argue that "resident freeholders" here means resident within the city, and owning property upon the street; while counsel for appellees contend that the words mean what they seem to say, namely, resident freeholders upon the street. We think the latter to be the evident meaning and intent of the law. After the adoption, but before the confirmation, of the resolution, provision is made for notice to property owners and others interested in or affected by the work, and for the hearing of remonstrances from them. Sections 63, 73, of the charter; sections 3834, 3844, Rev. St. 1894. After the confirmation of the resolution, 10 days additional are allowed, during which resident property owners upon the street may make further remonstrance. We do not think that a second remonstrance was intended for all persons within the city who might own property upon the street. The right to a second remonstrance was rather a favor to those most particularly interested, namely, the resident freeholders upon the street. The terms "resident freeholders" within, near to, along, or upon a given place, are frequently used in this and other statutes; and the meaning is usually limited to the locality so designated, unless some other signification is shown by the context. In the statute for the opening and improvement of highways (sections 6742, 6750, Rev. St. 1894; sections 5015, 5023, Rev. St. 1881), similar provision is made in favor of freeholders residing along the line of the proposed improvement.

Other questions discussed by counsel need not, as we think, be considered. The injunction was properly refused. The judgment is affirmed.

(143 Ind. 174)

GLASSBURN et al. v. DEER et al.¹
(Supreme Court of Indiana. Sept. 25, 1895.)

HIGHWAYS—APPEAL—RECORD—BONDS.

1. Rev. St. 1894, § 6754 (Rev. St. 1881, § 5027), providing that any person aggrieved by the decision of the board of commissioners in laying out a highway may appeal therefrom, and that, in case proceedings be had in more than one county, the auditors of each county, on being notified of such appeal, shall transmit to the court to which the appeal is taken all the proceedings in such county, and upon the determination of such appeal such clerk shall notify the auditors of all the counties interested therein, does not make each appeal a separate case, which must be brought up on a separate transcript of the record.

2. Under Rev. St. 1894, § 6754 (Rev. St. 1881, § 5027), providing for appeals from any

¹ Rehearing denied.

decision of the board of commissioners in laying out a highway, and the filing by appellants of a bond with surety, a bond given by one appellant, with another appellant as surety, is sufficient.

Appeal from circuit court, Johnson county; William A. Johnson, Judge.

Petition by Willis H. Deer and others for the establishment of a highway. From a decision of the board of commissioners awarding damages, David Glassburn and others appeal.

Miller & Barnett, for appellants. Leach & Barker, for appellees.

MCCABE, J. The appellees petitioned the board of commissioners of Johnson county for the establishment of a certain public highway in said county, upon which viewers were appointed, who reported in favor of the public utility of the road. Appellants Cleveland and Cleveland filed their joint remonstrance against the public utility of the road. New viewers were appointed thereon, who reported in favor of its public utility. Appellant Glassburn filed a remonstrance for damages, and the Cleavelands filed a remonstrance on account of damages to them. Appellant Groseclose filed his remonstrance for damages. Reviewers were appointed by the board to assess damages, who reported assessing damages in favor of appellant Groseclose in the sum of \$25. No other damages were assessed. The board approved the report, and ordered the highway opened on the payment of said damages by the petitioners. Appellants Glassburn, Groseclose, and the two Cleavelands appealed to the circuit court. Glassburn and Groseclose each filed a separate appeal bond, with the same surety, John Hardin, on each. The two Cleavelands filed a joint appeal bond with the same surety thereon as that on the other bonds, namely, John Hardin.

On the motion of the appellees, the petitioners, the appeal as to Groseclose and Glassburn was dismissed by the circuit court, because they did not each of them file in the circuit court a separate transcript of the record and proceedings in the cause before the board of commissioners, but filed only one single transcript. This action of the circuit court is called in question by the assignment of errors here. The circuit court overruled appellees' motion to dismiss the appeal as to the two Cleavelands, that motion being urged in that court on the same ground that the motion to dismiss as to Glassburn and Groseclose was urged. But the court, for some cause not disclosed by the record, appropriated the transcript to the benefit of the Cleavelands, and retained their appeal thereon in court. Counsel inform us in their brief that it was done because the Cleavelands were tenants in common in the lands owned by them and affected by the road. It is contended by the appellants that any one or more of the parties to a proceeding to es-

tablish a highway may appeal from the final action of the board of commissioners thereon, and, in case more than one appeals, it may and must be tried as one appeal, and hence only one transcript is necessary. The appellees, on the other hand, contend that, if more than one appeal, and file separate appeal bonds, and seek to retry questions affecting the separate interests of each,—as, for instance, a remonstrance for damages to the separate real estate of each,—the appeals must be separate, and can only be prosecuted by filing a separate transcript by each one in the circuit court. In support of this contention appellees cite *Leffel v. Obenchain*, 90 Ind. 50. The question there arose on a motion to dismiss the appeal in the circuit court for failure to file an appeal bond. In the commissioners' court, after a report of viewers in favor of the public utility of the road, nine landowners affected filed separate remonstrances denying the public utility of the road, and asking for damages in case of its establishment. Reviewers thereupon appointed reported in favor of its public utility, and assessed damages in favor of each remonstrator. Each then appealed to the circuit court, filing his appeal bond, with one of the other remonstrators as his surety thereon. Separate transcripts were filed, and separate cases docketed, in the circuit court. These were ordered consolidated, after which the petitioners moved to dismiss the appeal on the ground that an appeal bond had not been executed with surety, as required by statute. This motion was overruled, the cause tried, the road adjudged of public utility, and a larger amount of damages assessed to each remonstrator. It was there said: "Proceedings to establish a highway, when several remonstrances for damages sustained by each of them, constitute a single suit for some purposes; while for others they constitute separate suits. An issue formed by A. as to his damages affects him and the petitioners alone. * * * For these reasons we think each remonstrator could appeal from his allowance, and that his bond was not bad simply because signed by some other remonstrator as surety." This is very far from holding that separate transcripts must be filed by each appealing remonstrator. The consolidation of the several appeals brought on separate transcripts in that case is a tacit recognition of the right of such several appealing parties to the circuit court to prosecute their appeals on one transcript.

In *Reynolds v. Shultz*, 106 Ind., at page 294, 6 N. E. 619, it was said: "In *Schmied v. Keeney*, 72 Ind. 309, it was held, as we have uniformly held, both before and since, that upon an appeal from an order of the county board, in a proceeding for the location of a public highway, to the circuit court of the county, the cause must be tried *de novo*; that is, all questions in issue before the county board on such appeal must be tried anew in

the circuit court. The court there said: 'Where a remonstrance is filed by the owner of lands, either against the public utility of the proposed highway or on account of damages he will sustain by the establishment of such highway, such remonstrance constitutes an answer to the petition, and tenders an issue which must be examined by the commissioners, and must be tried on appeal to the circuit court. Where such landowner remonstrates against the public utility of the road and also on account of the damages, two issues are presented, which must be tried in the circuit court on appeal from proceedings to establish the highway.' To the same effect are *Coyner v. Boyd*, 55 Ind. 166; *Scraper v. Pipes*, 59 Ind. 158; *Bowers v. Snyder*, 66 Ind. 340; *Grimwood v. Macke*, 79 Ind. 100; *Fleming v. Height*, 95 Ind. 78; *Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222. According to appellees' contention, if there were 100 dissatisfied remonstrators, and they appeal from the order of the board, there must be 100 separate transcripts of the same record filed in the circuit court, or no appeal can be prosecuted if they have filed remonstrances for damages only. That would make 100 cases to be tried in the circuit court on appeal from the board of commissioners in a highway case that was tried before the board as a single case. The appeal authorized by the statute in such cases (*Burns' Rev. St. 1894*, § 6754; *Rev. St. 1881*, § 5027), it has been correctly held, can only be prosecuted from the final order or judgment of the board putting an end to and making a final disposition of the cause. *Freshour v. Turnpike Co.*, 104 Ind. 463, 4 N. E. 157; *Smith v. Seearce*, 34 Ind. 285. And it has been decided by this court again and again that on appeal in such cases not only that the case must be tried de novo, but that the whole case must be tried de novo. *Bowers v. Snyder*, 66 Ind. 340; *Scraper v. Pipes*, supra, and authorities cited; *Hays v. Parrish*, 52 Ind. 132. What is meant, then, by the whole case? Plainly it must be such case as was made by the issues presented before the board of commissioners. *Reynolds v. Shults*, supra; *Schmied v. Keeney*, supra. In *Green v. Elliott*, 86 Ind., at page 66, this court said: "The same proceedings cannot be had in the circuit court as before the county board. In the circuit court the matter to be tried de novo is the matter which was in controversy before the county board, unless the issues be amended in the circuit court. * * * The petitioners are not required to prove in the circuit court matters upon which no issue was made below, or matters the regularity of which was either expressly or impliedly admitted below."

In *Jameson v. Board*, 56 Ind. 466, *Metsker* remonstrated before the county board on the ground that the proposed highway would be of no public benefit. The reviewers thereupon appointed by the board reported that it would be of public utility. *Metsker* thereupon remonstrated on account of damages re-

sulting to him from the opening of said highway. Reviewers thereupon appointed reported that he would sustain no damages, which report was approved, and the highway established by the board. *Metsker* took two separate appeals, one from the order of the board denying his claim for damages, and the other from the order declaring the proposed road of public utility. In the circuit court there was a verdict and judgment that the road was of public utility, and that it be established, and that *Metsker* would be damaged to the amount of \$150. The circuit court, before trying the appeals, consolidated them into one cause, and, after judgment, on motion taxed half the costs against *Metsker*. It was there said, at page 473: "On this state of facts, it seems to us, that it would have been unjust and inequitable to have taxed the entire costs of the consolidated case against the appellants. The appellee, *Metsker*, had very unnecessarily, in our opinion, made two cases out of one, and they had been continued as separate cases, in the court below, for about eighteen months, before they were consolidated." It is true, a remonstrance asking damages by one landowner tenders a separate issue between such remonstrator and the petitioners in which other landowners affected are not interested, but that does not make such remonstrance a separate cause from the petition and the highway proceeding. The only issues triable in the circuit court on appeal are those formed by the petition and remonstrance. *Schmied v. Keeney*, supra; *Green v. Elliott*, supra. These issues all pertain and belong to one entire cause, and that is the establishment of the entire proposed highway, with all the incidents thereto belonging, as provided in the statute. It cannot be cut up and divided into a multiplicity of causes after it leaves the commissioners' court by appeal to the circuit court. It is but one cause in the commissioners' court, though there may be several issues in which all the parties are not interested; yet these are mere incidents to that one cause, and that cause does not change its nature by a transfer into the circuit court on appeal. It still remains a unit there. This is evident from several other provisions of the statute on the subject. The first 14 sections of the original act, carried forward into the several revisions of our statutes, provide for the establishment of highways running into more than one county. *Burns' Rev. St. 1894*, §§ 6726-6739, inclusive (*Rev. St. 1881*, §§ 5001-5014). The manner of proceeding is very much like that provided in the succeeding sections as to the establishment of highways running into but one county only. But it is provided that copies of the petition shall be filed with the auditor of each of the other counties through which the proposed road is to pass, and provision is also made for the filing of remonstrances by landowners affected in each county with the auditor of the respective counties. It requires the concurrence of a majority of the county boards to establish

the road vacation or change. No provision is made in those sections for an appeal in any case. But among the sections relating to such proceedings in a single county is section 6754, Burns' Rev. St. 1894 (section 5027, Rev. St. 1881), the first part of which provides for an appeal in case of proceedings to establish a highway in one county only, and the latter part of the section provides that: "In case proceedings shall be had in more than one county, the auditors of each county, on being notified of such appeal by the auditor of the county in which the appeal is taken, shall transmit to the clerk of the court to which the appeal is taken all the proceedings in such county, and upon the determination of such appeal such clerk shall notify the auditors of all the counties interested thereof." Under this provision there may have been several remonstrators in the other counties, some of whom had damages assessed to them, and others in whose favor no damages were assessed, none of whom have taken any appeal. And yet the appeal taken in the other county brings to the circuit court of that county all the proceedings in each county, though there is no appeal taken in any county but the one. So strongly did the legislature deem the appeal provided for in such cases an entirety, or but a single appeal in each highway case, that they provided that when an appeal is taken in one county it carries with it all the proceedings in each county, whether there is any appeal in such other counties or not, where the proposed road extends into more than one county. In such a case it takes all the proceedings in each county to be sent to the court of the county where an appeal has been taken to constitute one appeal, though there is no appeal in any other county. It certainly, therefore, cannot be maintained that the legislature meant to require several and separate transcripts of the same record to be filed in order that several appealing parties may prosecute an appeal from the final order of the board establishing a highway running into a single county.

Rich v. Starbuck, 45 Ind. 310, cited by the appellees, has no application, because in that case one appeal was attempted to be prosecuted from two separate judgments in the common pleas court to this court, the party attempting to appeal being plaintiff in one case and defendant in the other. He embraced both records in one transcript, under one certificate, and his appeal was rightly dismissed by this court for those reasons. Section 197, *Elliott*, App. Proc., also cited by appellees, asserts nothing more than the same principle.

The appellees have filed an answer in bar of the assignment of errors, or in bar of the appeal as to the appellant *Groseclose*. The answer states that the amount of damages assessed in favor of *Groseclose*, being \$25, was paid by the petitioners into the county treasury for his use, and was paid to and accepted by him on the 6th day of March, 1895,

the treasurer taking his receipt therefor. This answer is verified. The final order of the board establishing the road was made on December 12, 1893, and on the 4th day of September, 1894, the circuit court entered the final judgment of dismissal of the appeal as to *Groseclose* and *Glassburn*. So that, when the appeal as to these appellants was dismissed the damages had not yet been paid. Neither had such payment been made when the transcript was filed in this court, and the appeal taken, if we take for granted the facts stated in the answer in bar of the appeal. It is contended by the appellees that it is established law that a party cannot accept the benefits of a judgment, and at the same time maintain and prosecute an appeal therefrom to reverse it, or in any way question the judgment; and cite *Clark v. Wright*, 67 Ind. 224; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127; *Id.*, 111 Ind. 408, 12 N. E. 719; *McCracken v. Cabel*, 120 Ind. 268, 22 N. E. 136; *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006. Many other cases assert the same doctrine, and it seems to be a well-established rule everywhere. 2 *McKinney*, Enc. Pl. & Prac. 174, 175, and authorities there cited. It is to be observed, however, that the judgment appealed from in the appeal of *Groseclose* to this court is not the judgment the payment of which he is charged in the answer with accepting. The judgment from which he has appealed to this court is the judgment of the circuit court dismissing his appeal from the commissioners' court. It is the judgment in the commissioners' court, from which that appeal was taken, whereof the answer charges him with accepting the payment. It is further to be observed that there is no reply denying the answer, nor proof thereof, except the verification thereof. Said appellant *Groseclose*, by accepting the payment of the amount of damages awarded him in the commissioners' court, has waived his right to further contest the amount of damages he has sustained, or the public utility of the road, and therefore is not in a condition to complain of the dismissal of his appeal by the circuit court, and therefore it amounts to a release of the error in the circuit court in dismissing his appeal. He was duly notified in writing, long before the answer in bar of the appeal was filed, the service of which, attached to the answer, he acknowledged, informing him that such answer would be filed. He has not seen fit to put in any denial of the facts therein stated in any form of pleading or otherwise. Therefore, under the established rules of practice in this court, we are authorized to presume that the facts stated in the answer are true. *Buntin v. Hooper*, 59 Ind. 589; *Day v. School City of Huntington*, 78 Ind. 280; *Elliott*, App. Proc. §§ 408-410, and authorities there cited. Having waived the error of the circuit court in dismissing his appeal, the judgment of that court as to *Groseclose* is affirmed, and as to *Glassburn* the judgment is reversed,

with instructions to overrule the motion to dismiss his appeal, and for further proceedings in accordance with this opinion.

(142 Ind. 148)

SANDAGE et al. v. STUDEBAKER BROS. MANUF'G CO.

(Supreme Court of Indiana. Sept. 27, 1895.)

PATENTS—ASSIGNMENT OF LETTERS—RESCISSION—RESTRAINING ACTION.

1. Where letters patent were assigned by the patentee, with a guaranty of validity, but they were afterwards declared to be void, the assignee is entitled to an injunction restraining the patentee from bringing suits in a foreign jurisdiction to recover the unpaid installment of the purchase price.

2. To effect a rescission of sale, and recover back the purchase price of letters patent declared to be invalid, it is only necessary that the vendee offer to return the letters.

3. Rev. St. 1881, §§ 6054-6056 (Rev. St. 1894, §§ 8130-8132), provide that it shall be unlawful for any person to sell any patent right in any county without filing with the clerk of the court of such county copies of the letters patent, and require that the obligation given for such patent shall have the words, "given for a patent right," inserted therein. *Held*, that a failure to comply with said sections renders the sale of a patent invalid, as to the parties themselves.

4. Rev. St. 1881, §§ 6054-6056 (Rev. St. 1894, §§ 8130-8132), imposing a penalty on a vendor of patent rights who fails to file copies of his letters in the office of the clerk of the county court, etc., are not in conflict with the federal constitution.

5. A citizen of one state may be enjoined from prosecuting an action against another citizen of the same state, in a foreign jurisdiction, for the purpose of evading the laws of his own state.

6. Where a written contract of sale of a patent right recited that the vendor guaranteed the validity of the letters patent, and that contract was afterwards supplemented by another relative to the payment of costs in case of litigation over the patent, parol evidence is not admissible to show that the second contract was made in consideration that the vendor would be relieved from his liability assumed in the first contract, in guarantying the validity of the patent.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Action by the Studebaker Bros. Manufacturing Company against Joshua Sandage and another to recover certain moneys paid for a patent, and for other relief. Plaintiff had judgment, and defendants appeal. Affirmed.

A. L. Brick and Chas. Pickard, for appellants. Andrew Anderson and L. Hubbard, for appellee.

JORDAN, J. The only questions arising and argued by appellants in this appeal are those based upon the alleged error of the court in overruling their separate motions for a new trial. Two principal propositions are presented for our consideration by appellants' learned counsel, namely: (1) That the decision of the court is not sustained by sufficient evidence, and is also contrary to

law; (2) that the court erred in excluding certain evidence of the appellant Joshua Sandage. Appellee, by this action, sought to recover a certain sum of money paid by it to appellant Sandage in the purchase of letters patent for an improvement in steel skeins, and to enjoin him, together with his coappellant, the Sandage Steel-Skein Company, from bringing or further prosecuting suits in the courts of Cook county, in the state of Illinois, upon certain contracts in writing, mentioned in the complaint, and for the cancellation of these contracts. The complaint is in two paragraphs and the following is, substantially, a correct summary of the facts, as alleged in this pleading: Appellants, at and long before the commencement of this action, were residents, and had their domiciles, at the city of South Bend, Ind. Appellee is a corporation, also having its domicile at said city, long prior to the instituting of this action, and is there engaged in the business of manufacturing wagons and carriages. On July 19, 1882, appellant Sandage was the owner of certain letters patent for an improvement of steel axle skeins, issued to him by the government of the United States. On the date mentioned he sold and transferred these letters patent to the appellee by a contract in writing executed by him and appellee. By this contract the latter agreed to manufacture the patented skein, and to employ Sandage as a foreman in its factory for a period of two years, at a salary of \$1,500 per year, and to pay him \$2,000 in cash, and one-third of the net profits arising from the manufacture of the skeins, until he should receive \$20,000. Sandage agreed to also assign to the company any improvements which he might make in the patent, and in the contract he guaranteed the validity of the letters, and agreed to pay all costs and expenses in enforcing and sustaining the same, and to defend the appellee in all suits for infringements, and to pay all costs and expenses occasioned thereby. Upon the execution of this contract, and the transfer of these letters to appellee, it erected buildings and provided machinery, and engaged in the making and selling of the steel skeins; and Sandage was taken into its employ for two years, as per agreement. He was paid his stipulated salary, also \$2,000 in cash, and, in addition, appellee paid him \$7,000 in profits accruing up to 1886, as the consideration for the sale and assignment of the patent. On November 20, 1886, the parties executed what was termed a "supplemental contract," whereby they changed the original agreement by providing that Sandage, as a final and additional compensation for, and in consideration of, his letters patent, and any improvement he might make thereon during the life of the patent, should be paid by the appellee the sum of \$13,000, to be payable as follows, to wit: January 1, 1888, \$4,000; January 1, 1889, \$3,000; January 1, 1890, \$4,000; Jan-

uary 1, 1891, \$2,000. It was further provided in this supplemental contract that in the event that appellee was compelled to defend its right and title to the patent, or if it should find it necessary to prosecute persons for infringements between November 26, 1886, and January 1, 1891,—the date of the last payment,—then and in that event the reasonable expenses of these suits should be paid by Sandage, to an amount not to exceed the final payment of \$2,000; but, in the event the appellee brought a suit and was defeated, appellant was not to be held liable for the costs of such suit. It was also stipulated that: "So much of the agreement made between the Studebaker Bros. Manufacturing Company and Joshua Sandage on the 19th day of July, 1882, as relates to the payment by the said Studebaker Bros. Manufacturing Company to the said Sandage of moneys for and in consideration of his letters patent herein indicated, or which is in any way inconsistent with this agreement, is hereby repealed and made of no effect." On January 3, 1888, appellee paid Sandage \$4,000, being the installment due, under the supplemental agreement, on the 1st of that month. After receiving said sum, appellant, in November, 1889, made an assignment of both the aforesaid contracts to his coappellant, the Sandage Steel-Skein Company. The second installment, of \$3,000, was not paid at maturity; and the latter company, claiming to be the holder of these contracts, by virtue of an assignment to them by Sandage, brought an action in the circuit court of Cook county, Ill., upon the contract, in the name of Joshua Sandage, for its use, against appellee, to recover this unpaid installment. In 1890, after the second installment of money specified in the second or supplemental contract had become due, and which appellee had refused to pay, the Sandage Steel-Skein Company commenced a second action in the same court against appellee to recover this latter installment. After the assignment of these contracts to said steel-skein company, and the commencement of these actions, in January, 1890, appellee began a suit in the circuit court of the United States, at Chicago, Ill., against the Illinois Iron-Bolt Company, for an infringement of said patent, and on January 27, 1890, served both of the appellants with notice to the effect that such an action had been commenced in that court, and that the validity of the patent would be assailed and in issue therein, and requested that said parties assist in said cause, in defending the validity of the letters patent; claiming an estoppel against them by any judgment that might be rendered therein against the validity of the patent. At the March term, 1890, of said United States court, in said action, these letters, by that court, were adjudged and held to be invalid, for want of

novelty. 42 Fed. 52. Thereupon, on May 16, 1890, appellee executed and tendered to appellant Joshua Sandage a reassignment of said letters, and a cancellation of said contracts, and requested him to repay to it the sum of \$20,000, all of which was refused by him. A like demand for cancellation of said contracts was made upon the Sandage Steel-Skein Company, which was also refused. That, in addition to the two suits already commenced by said skein company against appellee, said company was threatening to bring other actions on these contracts in the courts of Illinois, and attach appellee's property situated in that state. Sandage, at the time of the sale of the patent right to the appellee, had wholly failed and neglected to comply with the requirements of sections 6054, 6055, Rev. St. 1881 (sections 8130, 8131, Rev. St. 1894), in relation to the sale of patent rights, and sold his said patent to appellee in violation of this statute. The supreme court of Illinois having held a statute of that state in relation to patents (being one similar to the statute cited above) void on the ground that it violated the federal constitution, it is averred that the appellants have resorted to the courts of Illinois in order to escape the laws of Indiana on that subject. It is also averred that after this action was commenced, and a temporary restraining order was granted against the appellants, they made a sale of these contracts in suit to a resident of Chicago, Ill. It is also shown that the tender of a reassignment of this patent was continued by bringing the same into court for appellants' use. These are the conspicuous facts, as presented by the record in this action. A trial upon the issues joined, in the lower court, resulted in a judgment to the effect that appellants be perpetually enjoined from prosecuting or commencing any suit or suits for the purpose of enforcing the contracts in question, and that the same be canceled and delivered up to appellee, and that appellee recover of Joshua Sandage the sum of \$13,447.42 and costs.

One of the contentions of appellants is that "the facts in this case, as alleged in the pleadings and as shown by the proofs, do not make such a case as entitled the appellee to the equitable relief prayed in the petition, and granted by the decree." Upon the contrary, appellee contends that the evidence fully authorized and justified the court in finding that the appellants commenced their suit in the state of Illinois for the purpose of evading the laws of Indiana, and thereby gaining an advantage over the appellee in the forum of a sister state. We have examined the evidence in the record, and are of the opinion that it establishes the facts alleged in the complaint, and sustains the finding and judgment of the court. It is insisted by counsel for the appellants that the alleged facts in the case at bar are a complete and adequate defense at law to the actions commenced

upon the contracts in controversy in the courts of Illinois. Conceding this contention, however, can it be urged, consistent with reason, that this principle of equity can be invoked to require appellee, under the facts, to go into the courts of another state, and there assail these contracts by pleading the facts in bar to the actions therein pending? This contention cannot be sustained upon any reasonable grounds. It is, however, a familiar rule that it is not sufficient that there is a remedy at law, but the same must be plain and adequate, and as practical and efficient to the ends of justice, and its prompt administration, as is the remedy in equity. It is manifest, we think, that had appellee been compelled to avail itself of the facts on which it based its cause of action in this case, as a cause of defense to the suits already commenced by the appellee, or to others that they might institute upon the obligation in question, its remedy would not have been as adequate and efficient as the one invoked in this cause. Two actions had been commenced upon the alleged invalid contract, and another was threatened, in order to recover the installment of \$2,000 not yet matured. By waiting to contest, by way of defense, the right of appellants to enforce these payments of money under this contract, appellee might have been at least harassed by and subjected to repeated and vexatious litigation, and much expense incident thereto, by appellants, or those to whom they might have assigned the contract in controversy. By appealing to a court of equity, the remedy was at once adequate and complete, and by one action all the relief to which appellee was entitled under the facts could be awarded.

Counsel further contend that appellee was not entitled to have this contract rescinded until it had placed Sandage in statu quo. We recognize the full force of the rule that, where a party desires to rescind a contract, he must do so in toto, and return the consideration which he received thereunder, and otherwise do that which will put him and the other party in statu quo. But what was necessary to be done, in view of the facts and circumstances in this case, to put Sandage in statu quo? All that appellee received from him was an assignment of his right and title to the patent right in question. This right proved to be invalid and worthless, and appellee reassigned the letters, and tendered back the same to Sandage. This, evidently, in our opinion, was all that appellant could, at the furthest, demand. Sandage had guaranteed the validity of these letters. Their validity was assailed in a court of competent jurisdiction. Of this fact he was notified, and requested to sustain them. They were adjudged by the court to be void for the reason herein stated. By this judgment appellant was bound. That money paid for worthless securities or rights, or where the purchaser does not get that for which the money was paid, may be recovered back, is a well-settled

proposition. Whart. Cont. § 744; Benj. Sales, p. 540; Burt v. Bowles, 69 Ind. 1; Jarboe v. Severin, 85 Ind. 406. It was established on the trial that Sandage had failed to comply with the prerequisites of sections 6054, 6055, Rev. St. 1881 (sections 8130, 8131, Rev. St. 1894), by neglecting to file copies of his letters with the clerk of the circuit court of St. Joseph county, wherein the said patent was sold, and by not inserting in the written contract wherein appellee obligated itself to pay the purchase price of the patent the words, "given for a patent right." The penalty for disobeying this statute is a fine, or imprisonment in jail. Rev. St. 1881, § 6056 (Rev. St. 1894, § 8132). That the noncompliance with this law rendered the contract—at least, so far as appellee therein obligated itself to pay the purchase price of this patent—invalid, as between the parties, is no longer a disputed question. New v. Walker, 108 Ind. 365, 9 N. E. 386; Brechbill v. Randall, 102 Ind. 523, 1 N. E. 362; Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104. That there can be no recovery on a contract made in violation of a statute, as between the parties thereto, the violation of which is prohibited by a penalty, is a principle well recognized by the courts. This is true, although the statute does not in terms pronounce the contract void, nor expressly prohibit the same. This doctrine is well supported by many English and American decisions. Woods v. Armstrong, 54 Ala. 150, and the authorities collected in note to this case in 25 Am. Rep. p. 674; Dillon v. Allen, 46 Iowa, 299; Electric Light Co. v. Veal (at this term) 41 N. E. 334. Counsel for appellant urge that this statute is in conflict with the federal constitution, and therefore void. This question has been settled to the contrary in this state, and is no longer an open question. New v. Walker, supra; Hankey v. Downey, 116 Ind. 118, 18 N. E. 271; Pape v. Wright, 116 Ind. 502, 19 N. E. 459. It was in evidence that the supreme court of Illinois, in the case of Hollida v. Hunt, 70 Ill. 109, held a similar statute of that state, relating to patent rights, to be repugnant to and inconsistent with the rights exercised by congress in regard to such rights, and therefore void. In view of this latter fact, in connection with the other evidence in the case, we are of the opinion that it is shown that appellants, by bringing actions upon this contract in Illinois, instead of instituting the same in Indiana, where all the parties resided, did so for the purpose of obtaining an advantage over the appellee which they were not entitled to under the laws of the latter state. As long as a citizen belongs to a state, he owes it obedience; and, as between states, that state in which he is domiciled has jurisdiction over his person, and his personal relations to other citizens of the state. Keyser v. Rice, 47 Md. 203. That a citizen of a state, under a showing of sufficient facts, can be enjoined from commencing or prosecuting a suit against his fellow citizen in the courts of

another state, is an equitable rule, recognized and enforced by this court and many others. See *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616; *Keyser v. Rice*, supra; *Dehon v. Foster*, 4 Allen, 545; 23 Cent. Law J. 208. This rule seems to be sustained by a clear weight of authority in this country. See 10 Am. & Eng. Enc. Law, p. 900. It is declared in the decisions that the court, in the exercise of this authority, does not proceed upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the grounds that the person against whom the restraining order is issued resides within the jurisdiction, and within the power of the restraining court. The court issuing the writ does not pretend to direct or control the one in the foreign state, but, without regard to the subject-matter of the dispute, it considers the equities between the parties, and decrees in personam according to these equities, and enforces obedience to its decree. We think that in the case at bar the facts sufficiently show a manifest equity in favor of appellee, as to entitle it to the decree herein.

Appellants complain of the action of the court in not permitting Joshua Sandage to answer the following question over the objections of appellee: "What, if anything, was the consideration of the second or supplemental contract, as to releasing you of your guaranty in the second contract?" The appellants' attorney explained to the court, on the court's request, as follows: "That that statement in the first contract, and the second statement in the supplemental contract, in reference to the having of suits and payment of costs, are ambiguous and not fully explained in the contract; that the contract was entirely abrogated, and that was a part of the consideration of the second contract; that the first contract was for royalties, and in consideration that Mr. Sandage gave up his right to the royalties, more valuable to him than the second contract gave him,—in consideration that he gave that up,—he should not be held responsible for the patent, and not be liable for any expense on the patent, explained as stated in the contract; and that the defendants wished to show by this witness, in answer to this question, that the second contract was made upon the consideration, and with the full understanding of the plaintiff; that they had investigated the said patent, and told the defendant Joshua Sandage that they were willing to take their chances as to the patent being upheld in the courts; and that the said Joshua Sandage should not be held responsible for such patent if such patent was at any time held to be invalid." By this question appellants' counsel say that they desired and sought to show what the consideration of the supplemental contract was, and to explain what was meant to be repealed by it. It is obvious, we think, that the purpose of the evidence sought to be elicited by this question was to contradict the written obligation. The written contract

in question is not incomplete, and there is no apparent ambiguity therein that requires an explanation by parol evidence. Nor was it in any way rendered necessary to show what part of the first agreement had been repealed and rendered of no effect by the second. This was easily disclosed by a comparison of the one with the other. The evident purpose of the question, as it appears from the statements of counsel, was to show that the guaranty of appellant Sandage, made in the first contract, as to the validity of his patent right, had been repealed by a parol agreement contemporaneous with the second written contract, and thereby contradict this latter instrument. The cases of *Kleith v. Kerr*, 17 Ind. 284, to the effect that, when a written contract is incomplete, parol evidence that does not contradict it may be admitted to show the whole contract, and *Martindale v. Parsons*, 98 Ind. 174, where it is held that parol evidence may be received to aid in the construction of ambiguous contracts, lend no support to appellants' claim upon this question, as herein presented. The court did not err in excluding this question.

We have examined all the questions necessarily presented by this appeal, and are of the opinion that there is nothing appearing in the record that would entitle appellants to a reversal. The judgment is therefore affirmed.

HOWARD, C. J., was absent, and took no part in the decision of this cause.

(13 Ind. App. 197)

WATERBURY et al. v. MILLER.

(Appellate Court of Indiana. Sept. 20, 1895.)

EXAMINATION OF WITNESS—INSTRUCTIONS— REPLEVIN—NEW TRIAL.

1. A question which does not obviously bear on the issues is properly excluded, unless there is an offer that the witness will, if permitted to answer the question, testify to a given fact.

2. In an action to recover twine from one who purchased it from a vendee of the original purchaser, plaintiffs gave evidence that the original purchaser, who was insolvent at the time he bought the twine, concealed his insolvency from the vendor, intending not to pay for the property, and that defendant had knowledge of such fraudulent intent when he bought from the intermediate purchaser. Defendant gave evidence to prove that he was a bona fide purchaser. In the verdict as first returned there was a finding that the original purchaser was insolvent at the time he purchased, but no finding as to whether he intended not to pay for the property, or whether defendant was a bona fide purchaser; and the court directed the jury to return and find one way or the other on these issues. *Held*, that there was no error.

3. Where one knowing himself to be insolvent purchases property from another, intending not to pay for it, and conceals his insolvency, the sale may be avoided for fraud, and the vendor maintain replevin for the property sold.

4. A motion for a venire de novo can only be entertained when the verdict or finding is so defective on its face that no judgment can be rendered on it.

5. In an action to recover property from the purchaser of an alleged fraudulent vendee,

plaintiffs alleged that the original vendee was insolvent at the time of the purchase; that he concealed his insolvency, intending not to pay for the property, and that defendant had knowledge of such fraudulent intent. The latter claimed to be a bona fide purchaser, and the jury found that the original purchaser was insolvent when he purchased, and that defendant was a bona fide purchaser, but disagreed as to the fraudulent intent of the first vendee. *Held* that, though the verdict was defective in not finding on the latter issue, the finding for defendant on his affirmative defense entitled him to a judgment.

Appeal from circuit court, Warren county; J. M. Rabb, Judge.

Action by James M. Waterbury and others against Robert J. Miller for the recovery of personal property. From a judgment for defendant, plaintiffs appeal. Affirmed.

Chas. M. McCabe, for appellants. Elliott & Elliott, for appellee.

LOTZ, J. The appellants (plaintiffs in the court below) in their complaint alleged that they were the owners of and entitled to the immediate possession of 200 bales of binder twine, of which the appellee had and unlawfully detained the possession thereof. The appellee answered the complaint by the general denial. The cause was submitted to a jury, which, at the request of the parties, and under the direction of the court, returned a special verdict, upon which judgment was pronounced in favor of appellee. The errors assigned and discussed by appellants are: (1) The overruling of the motion for a new trial, (2) the overruling of the motion for a venire de novo, and (3) in rendering judgment in favor of appellee and against the appellants.

It appears from the undisputed evidence, and the jury so found, that the appellants were engaged in selling twine, with their place of business in the city of New York. Kirkwood, Miller & Co., a copartnership, were wholesale and retail dealers in farm implements and binder twine, with their principal place of business at Peoria, Ill. The appellee was a retail dealer in farm implements and binder twine at Hillsboro, Ind. On December 5, 1892, Kirkwood, Miller & Co. purchased of the appellants 100 tons of binder twine. On December 15th the appellants shipped from New York City two car loads of the twine sold, consigned to Kirkwood, Miller & Co., at Peoria, and which were received by the latter,—one on the 24th and one on the 28th of December. The twine in controversy was a part of this shipment. On December 30, 1892, Kirkwood, Miller & Co. made an assignment under the laws of the state of Illinois for the benefit of their creditors. On the 1st day of January, 1893, the twine in controversy was shipped from Peoria to Hillsboro, Ind., consigned to the appellee, and was received by him on January 6th of that year. On the trial the appellants gave evidence which tended to prove that at the time Kirkwood, Miller & Co. contracted for the twine they were insolvent,

and that they concealed their insolvency, and that they did not intend to pay for the twine; that the appellee had knowledge of such fraudulent intent, and was not a purchaser in good faith and for value. On the other hand, the appellee gave evidence which tended to prove that Kirkwood, Miller & Co. sold the twine to one John R. Miller prior to the assignment, and that John R. Miller sold it to appellee, and that he was a purchaser in good faith and for value, and without notice of the alleged fraud of Kirkwood, Miller & Co.

The appellants produced a witness who was a retail dealer in binder twine at Hillsboro, and who was acquainted with the wants of the trade at that place, and propounded this question: "You may state to the jury what grades of twine are required there to meet the demands of the trade in that community, if you know." An objection was sustained to this question, and this ruling was made one of the causes for a new trial. The appellants insist that the testimony sought to be elicited by this question would have tended to establish one of the badges of fraud, and that it was error to exclude it. Whenever the evidence offered does not obviously bear upon the questions at issue, the court should be advised of its character, that its relation to the case may be seen. There must be an offer in some form that the witness will, if permitted to answer the question, testify to a given fact. *City of Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. 559. The question itself does not disclose what kind or grades of twine the witness would have testified to, nor whether or not they were suitable for that market. Nor was there any offer as to what the witness would state in answer to the question. *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096. There is no available error in this action of the court.

In the verdict, as first returned, there was a finding that Kirkwood, Miller & Co. were insolvent at the time they purchased the twine, but there was no finding as to whether or not Kirkwood, Miller & Co. purchased the twine with the intention not to pay for the same; nor was there any finding as to whether or not appellee was a good-faith purchaser for value. Thereupon the court, on its own motion, directed the jury to return to the jury room with instructions to find one way or the other upon the intent of Kirkwood, Miller & Co. when they bought the twine. Subsequently the jury reported that it was unable to agree as to the intent of Kirkwood, Miller & Co., whereupon, the court, over appellants' objection, instructed and directed the jury to make a verdict so far as it could agree, and to report the facts it could not agree upon. Subsequently, and upon appellee's motion, the jury was recalled, and instructed by the court to find one way or the other upon the question as to whether or not, at the time of the purchase of the twine and at the time of the payment therefor, the appellee acted in good faith, and

whether or not he paid the sum of \$488.25 in cash, and whether or not, at either of said times, he had any knowledge of the fact that Kirkwood, Miller & Co. had purchased or procured the twine from the plaintiffs with intention not to pay therefor. The verdict, as finally returned upon these questions, states or finds as follows: "(4) That at the time of the sale and delivery of said twine as aforesaid the said Kirkwood, Miller & Co. were insolvent. And we, the jury, are unable to agree upon the question as to whether at the time of said sale and delivery of said twine said Kirkwood, Miller & Co. intended not to pay for said twine, and whether they concealed their insolvency, and their intention not to pay (if any)." The verdict also finds that one Henry L. Miller was a member of the firm of Kirkwood, Miller & Co., and that one John R. Miller was the traveling salesman of Kirkwood, Miller & Co.; that Henry L. and John R. were brothers, and that they and the defendant were cousins; and, continuing, it is found: "(10) That said Henry L. Miller made sale of said twine so shipped to the defendant to John R. Miller, * * * and said John R. gave his note therefor, payable four months after date to Kirkwood, Miller & Co., bearing date of December 30, 1892, but was not executed for several days thereafter, which note is now in the hands of the assignee; and said John R. was then, and still is, wholly insolvent. (11) That said John R. Miller made sale of said twine, and took in payment therefor a note signed by John R. Miller, and bearing date of February 19, 1892, and payable to the defendant eight months after date, with interest at 8 per cent., and by giving to said defendant a receipt for \$488.25, to cover the balance of the price of said twine." "(14) We find that at the time of the purchase of the twine in controversy, and at the time of his payment therefor, defendant acted in good faith, and that he paid cash \$488.25, and had not at either of said times any knowledge or notice of the fact, actual or alleged, that said Kirkwood, Miller & Co. had purchased or procured such twine from plaintiffs with the intention not to pay for such goods." One of the causes for a new trial brings in review this action of the court in requiring the jury to find one way or the other upon the questions as to whether or not the appellee, at the time he purchased the twine, acted in good faith, and whether or not he paid \$488.25 cash, and whether or not he had any notice of the fact, actual or alleged, that Kirkwood, Miller & Co. had purchased the twine with intention not to pay for the same. Appellants insist that this instruction coerced the jury into making an express and positive finding on points upon which the evidence may have been evenly balanced, as strong upon one side as upon the other, in which event the jury had the right and it was its duty to disagree. There is a marked distinction be-

tween a general and special verdict. In the first the jury apply the law to the facts. It is the result of the application of the law, as given by the court, to the facts proved. While in a special verdict the jury find the facts, and the court applies the law. *Railway Co. v. Balch*, 105 Ind. 93, 4 N. E. 288. It is the duty of the jury, in returning a special verdict, to find all the ultimate facts within the issues, and upon which evidence was given one way or the other. And in the event it cannot agree upon any fact upon which evidence has been given, the verdict should state what fact or facts it cannot agree upon. The duty of the jury in finding the ultimate facts in a special verdict is identical with its duty in answering proper interrogatories in case of a general verdict. They must be answered one way or the other, or a statement that it cannot come to an agreement. *Rowell v. Klein*, 44 Ind. 290; *Maxwell v. Boyne*, 36 Ind. 120; *Railway Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140; *Peters v. Lane*, 55 Ind. 391. It was the duty of the court to require the jury to find one way or the other, or report a disagreement. But the appellants insist that the instruction left the jury no option to disagree upon the questions embodied in it. But it is a familiar rule that instructions must all be construed together. In a previous instruction the court said to the jury that, if it could not agree upon any of the facts, it might report a disagreement; and in the verdict as finally returned it did state a disagreement as to a certain fact. The fact about which the jury did disagree was similar in character to the one involved in this instruction. If the jury were given to understand that it might disagree as to one fact, it might reasonably infer from all the instructions that it might disagree as to the facts embraced in the instruction complained of.

Another cause for a new trial is the refusal of the court to discharge the jury upon its failure to agree upon the question as to whether or not Kirkwood, Miller & Co. intended to pay for the twine at the time they purchased it. The record does not show that the appellants made any motion or request of the court to discharge the jury. It does not necessarily follow that, because the jury disagreed upon a material fact, it became the duty of the court to discharge it, independently of any motion to that effect. A verdict of some kind was returned. The verdict may have found a fact that defeated the right of action. At any event, the same question can be better presented by a motion for a venire de novo. The appellants moved for a venire de novo, assigning as causes therefor that the verdict is defective, uncertain, and ambiguous; that it states evidence and conclusions of law, instead of facts; and that it fails to find upon some of the issues by reason of a disagreement. A motion for a venire de novo is an ancient

process of the common-law practice, and is unknown to our Code. *Shaw v. Bank*, 60 Ind. 83. A "venire facias juratores," frequently called simply a "venire," is the name of a writ directed to the sheriff, commanding him to cause to come from the body of the county a certain number of qualified citizens to act as jurors. *Bouv. Dict.* When, for certain causes, the proceedings under the writ have been ineffectual, or failed to secure a fair and impartial determination of the issues submitted to the jury, another writ may be issued. This writ is called a "venire facias de novo." It will be awarded at common law when, by reason of some irregularity or defect in the proceedings on the first venire or trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as where the jury have been improperly chosen, or returned an uncertain or ambiguous verdict. This motion, although unknown to our Code, is not unknown to our practice. With some modification of the common-law procedure, it continues to be a very serviceable method of arresting the proceedings after verdict when the justice of the judgment to follow is not apparent. The object and purpose of the motion is to secure a new trial. It should not, however, be confounded with the motion for a new trial. The essential difference is that a motion for a venire de novo is never granted except for cause appearing on the face of the record, while a new trial may be obtained for extrinsic causes. While they accomplish the same final result, they proceed upon entirely different grounds. *Witham v. Earl of Derby*, 1 Wils. 48; *Locke v. Bank*, 66 Ind. 353; *Steph. Pl.* p. 100; *Gould, Pl.* 526; *Tidd. Prac.* 922. The scope of a motion for a new trial is broad, embracing nearly everything that tended to prevent a fair trial; yet there are some things that may occur on the trial that cannot be reached by it. These latter things generally relate to the verdict itself, and can only be reached by a motion for a venire de novo. At common law an irregularity in securing or impaneling the jury is reached by a motion for a new venire, but under our practice such defect is reached by motion for a new trial. So, too, a verdict is bad at common law if it fail to find upon all the issues. But under our practice the failure to find upon all the issues, or the failure to find any material fact within the issues, does not entitle the moving party to a venire de novo. Silence upon any issue, or upon any material fact within the issues, is regarded as a finding against the party having the burden of proof upon such issue or fact. If the verdict is contrary to the evidence upon such issues or facts, the remedy is by motion for a new trial, and not by a venire de novo. *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 735; *Glantz v. City of South Bend*, 106

Ind. 305, 6 N. E. 632. Strictly speaking, the term "venire de novo" is only appropriate when applied to a verdict, but, as there is such a close similarity between verdicts by the jury and findings by the court, the term as well as the motion is applied to both under the practice in this state. *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407. It is settled by the decisions in this state that a motion for a venire de novo can only be entertained when the verdict or finding is so defective, uncertain, or ambiguous upon its face that no judgment can be rendered upon it (*Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508), and the question of insufficient or indefinite findings can be presented in no other way (2 Elliott, *Gen. Prac.* § 935; *Chaplain v. Sullivan*, 128 Ind. 50, 27 N. E. 425). These imperfections always lie in matters of form and for no other reasons will the writ be awarded. *Mitchell v. Friedley*, 126 Ind. 545, 26 N. E. 391; *Hamilton v. Bryam*, 122 Ind. 283, 23 N. E. 795; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725; 2 Elliott, *Gen. Prac.* § 978. The defect in the verdict or finding may arise because it states only conclusions of law, and not facts; or the defect may arise because it states merely evidence, or evidentiary facts, and not the ultimate facts. If there be an attempt to find under an issue, or an attempt to find an ultimate and essential fact, and such attempt fall short because of conclusions or of evidence or evidentiary facts stated, then the verdict or finding must go down before a motion for a venire de novo. *Wysong v. Nealis* (Ind. App.) 41 N. E. 388; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033. It is true that, in considering a judgment on a special verdict or finding, conclusions of law, evidence, and evidentiary facts, and findings not within the issues, may, as a general rule, be disregarded; and if, after such elimination, the verdict is still complete, definite, and certain, and will support a judgment for either the plaintiff or defendant, then a motion for a venire de novo will not prevail. *Railroad Co. v. Branyan*, 10 Ind. App. 570, 580, 37 N. E. 190; *Railway Co. v. Adams*, 105 Ind. 151, 160, 5 N. E. 187. But this general rule must not be carried to an unlimited extent, or it will nearly, if not entirely, do away with the motion for a venire de novo. There are exceptions to the general rule above stated. There are cases where conclusions of law and evidence and evidentiary facts cannot be disregarded; as where there is an affirmative defense, and the verdict or finding states the facts showing a right of action in the plaintiff, and then states conclusions of law or matters of evidence in attempting to find upon the affirmative defense, which, it is apparent, if in proper form, would defeat the plaintiff's action. In such a case the conclusions of law and matters of evidence could not be disregarded, and a motion for a venire de novo should prevail. So, if the issue should be that the defendant converted the plaintiff's

property, and the special verdict state a conclusion of law that the defendant did convert the property. Here, it is true, the plaintiff would not be entitled to a judgment, but he would be entitled to *venire de novo*. *Railway Co. v. Balch*, 105 Ind. 93, 4 N. E. 288. The plaintiff, who has the burden of proof upon the allegations of his complaint, is bound to produce such a state of facts in the verdict or finding as will support the legal conclusions of his right to recover. While he may not be entitled to a judgment, owing to the legal conclusions and matters of evidence found in the verdict or finding, he is nevertheless entitled to his motion for a *venire de novo*.

Bearing these rules in mind, we come to the consideration of the verdict before us. The allegations of the complaint are that the plaintiffs are the owners of and entitled to the possession of the property. The defendant answered the general denial, but under this he is permitted to show property in himself or a third person, and he sought to show that he purchased the property from an intermediate purchaser, for value, and without notice of any infirmity in the title of his vendor. The burden of the first issue was upon the plaintiffs, and the burden of the last upon the defendant. The plaintiffs were required to show such a state of facts as from which the legal conclusion would follow that they were the owners of the property. Such legal conclusion has no proper place in the verdict, nor does the one before us contain such conclusion. *Kitts v. Willson*, 130 Ind. 492, 29 N. E. 401. It is well established that, where one knowing himself to be insolvent, purchases property from another, intending not to pay for it, and conceals his insolvency, the sale may be avoided for fraud, and the vendor maintain replevin for the property sold. *Railway Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215; *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Tied. Sales*, § 1701. It is equally well settled that where the property so purchased is subsequently sold by the fraudulent purchaser to a third person, who buys in good faith, for a valuable consideration, and without notice of the fraud, such facts are a good defense to a suit by the original vendor to recover the property. The burden of proving that the defendant was an innocent purchaser under the issues rested upon him.

The appellants insist that the verdict is fatally defective, because the jury disagreed on a material fact,—the fraudulent intent of Kirkwood, Miller & Co. at the time they purchased the twine,—and that for this reason the motion for a *venire de novo* should have been sustained. Fraud, under the rules in this state, is a question of fact, and not of law; and where it is essential to the existence of a cause of action, it must be found and stated as a substantial fact, or the plaintiff will suffer defeat. The finding must show the fraud, and not merely the badges

of fraud. *Rev. St. 1894*, § 6649 (*Rev. St. 1881*, § 4924); *Wilson v. Campbell*, 119 Ind. 286, 21 N. E. 893. The verdict is defective and uncertain by reason of the failure to agree upon a material fact, and the motion for a *venire de novo* should have been sustained, unless for some other reason apparent upon the record. Substantial justice has been done by the judgment rendered.

The jury further found by their verdict that the appellee purchased the property of an intermediate vendee, in good faith, and for value, and without notice of the fraud, actual or alleged, of Kirkwood, Miller & Co. The appellants contend that this finding embraces evidence and evidentiary facts, and not the finding of ultimate facts. It is often difficult to distinguish between evidentiary facts and ultimate facts, and between ultimate facts and conclusions of law. No general rule can be laid down for such determination. Each case must depend largely upon its own particular issues, character, and circumstances. The appellee was required to show that he purchased the property of the intermediate party, and paid a valuable consideration, without any notice of any defect in the title of his vendor. He was required to show absence of fraud on his part. Fraud is a fact, and it may be said that the absence of fraud is also a fact. There is no finding, in so many words, that the appellee had no knowledge of the fraud on the part of Kirkwood, Miller & Co. But when the finding of an evidentiary fact is such as to necessarily involve the essential or ultimate fact, the failure to find the ultimate fact in direct terms may be immaterial. If the existence of the evidentiary fact is not inconsistent with the nonexistence of the ultimate fact, or if the existence of the ultimate fact is equivocal or doubtful, then the verdict or finding is insufficient. *Young v. Berger*, 132 Ind. 530, 32 N. E. 318. It is inconceivable how the appellee could be a good-faith purchaser for value and without notice of the fraud of Kirkwood, Miller & Co., and still be a participant in their fraud. We are of the opinion that the verdict in this respect is not open to the objection made. We have here, then, a fact found by the verdict, which, under the issues joined, defeats the appellants. Had there been a finding in their favor on the point about which the jury disagreed, the verdict would still have been insufficient to support a judgment in their favor, and the appellee would have been entitled to judgment on the verdict notwithstanding such finding. In *Henderson v. Dickey*, 76 Ind. 264, 271, this language is used: "Where there are several issues, and the verdict does not find at all upon some of them, but the finding on others is definite, the verdict, according to the authorities above cited, is to be taken as a finding against the party having the affirmative of the issue as to the issue or issues concerning which it is silent; but if, on other

issues, found in his favor, the successful party is entitled to judgment, a *venire de novo* should not be granted."

It is also contended that the appellee is not a good-faith purchaser, because the purchase price was partly paid by the \$500 note, an antecedent debt. But the finding also shows that the appellee paid cash \$488.25. To that extent, at the least, he was an innocent purchaser. The questions in issue here involve the title to the whole lot or parcel of twine as an entirety. If the action were trover, a different rule might prevail. There was no reversible error in overruling the motion in view of the finding in favor of the appellee on his affirmative defense. What we have said in disposing of this motion also disposes of the last assignment of error. Judgment affirmed.

ROSS, J., concurs in the result.

(13 Ind. App. 165)

WYSONG v. NEALIS et al.

(Appellate Court of Indiana. Sept. 20, 1895.)

ADMINISTRATION—EXCEPTIONS TO REPORT—BURDEN OF PROOF—TRIAL—FINDINGS—NEW TRIAL.

1. When exceptions are filed to the claims of an executor, in his final account, for credits against the estate, the burden of proof is on him to establish the correctness of his report.

2. A special finding or verdict should determine the ultimate facts embraced within the issues that give rise to the legal conclusions.

3. A *venire de novo* should be awarded for formal defects in the verdict or finding, such as ambiguity and uncertainty.

4. The granting of a motion for a *venire de novo* does not rest wholly in the discretion of the court, but must be granted in a proper case.

5. Where a finding of fact stated certain legal conclusions, without finding the facts necessary to determine the issue, or for drawing the legal conclusions, a motion for a *venire de novo* should prevail.

6. Where an executor's decedent conveyed certain real estate, with covenants of seisin, and, before final settlement, a judgment was rendered against a subsequent grantee, requiring him to pay a certain amount to one who was adjudged to be the owner of an undivided interest therein, and the decedent was the first grantor dating from the infirmity of the title, the executor is justified in paying the amount of said judgment, and is entitled to credit therefor, though the claim was not formally filed and allowed.

7. The granting of a motion for a *venire de novo* extends to all the issues, and cannot be granted as to a part only.

Appeal from circuit court, Boone county; J. G. Adams, Special Judge.

Adolphus Wyson, as executor of the estate of James Nealis, filed his final account, and to certain items thereof Emma Nealis and others excepted. The exceptions were sustained, and the executor appeals. Reversed.

Terhune & New, for appellant. Abbott & Ratcliff and Artman & Lewis, for appellees.

LOTZ, J. The appellant, as the executor of the will of James Nealis, deceased, filed

his final report as such executor. The appellees, as the legatees and heirs at law of James Nealis, appeared and filed many exceptions to various items or credits claimed by him. By voucher No. 127 the executor claimed a credit of \$533.73 paid to the clerk of the Boone circuit court to satisfy a judgment and decree in a cause wherein Minerva J. Shanefelter was plaintiff, and William H. and Ella Stephenson were defendants; by voucher No. 128 he claimed a credit of \$1,922.74 for his services as such executor; and by voucher No. 129 he claimed a credit of \$200 paid his attorneys. There does not seem to be any formal exception to voucher No. 127, but, perhaps, under the general supervisory powers given to the trial court in the settlement of estates of deceased persons, it was its duty to ascertain the correctness of this item. The exception to the item represented by voucher No. 128 assigned as a cause that the claim for services was excessive. The same exception was made to voucher No. 129. The court, at the request of the parties, made a special finding of the facts, and stated conclusions of law. So much of the special finding as is necessary to determine this controversy is as follows: "That in said final report filed on the 31st day of January, 1894, said executor asked credit, as shown by vouchers No. 98 to 131, inclusive, in the sum of \$6,101.91, leaving a balance of \$418.35, which said executor has paid to the clerk of the Boone circuit court for the benefit of the heirs and legatees herein, which the court finds to be correct, except vouchers 127, 128, and 129. The court finds that said voucher 127, for \$533.73, was paid to satisfy a judgment and decree of the Boone circuit court wherein Minerva J. Shanefelter was plaintiff, and William H. and Ella Stephenson were defendants; that the estate of James Nealis was in no sense bound or liable for said amount to the said Minerva J. Shanefelter, or any one else, and that said sum was wrongfully paid out of said estate by said executor; that, by the exercise of ordinary diligence, said executor could have ascertained that the estate of James Nealis was not liable for any amount in said litigation. The court further finds that voucher 128 in said final report, for \$1,922.74, the same being for the personal services of the said executor, is in excess of the value of said executor's services in the sum of \$422.74; that the value of the said executor's services in connection with said estate is \$1,500. The court further finds voucher 129 in said final report, for \$200 paid to Terhune and New, attorneys at law, for legal services, is incorrect, in this, that \$100 of said amount was paid in the case of Minerva J. Shanefelter v. William H. and Ella Stephenson, in which said estate was not a party, nor liable for any amount growing out of said cause, and, by the exercise of ordinary diligence on the part of said executor, he could have discovered the same; that all the acts of

said administrator in the management of said estate, including all compromises, claims both in favor of and against said estate, were correct, and for the best interest of said estate, and all exceptions and objections to said reports, inventories, and sale bills are without foundation, except as to vouchers 127, 128, and 129 in said final report." The court stated its conclusions of law as follows: "On the foregoing facts, the court concludes the law to be: That said executor is liable to said estate in the sum of \$533.73, wrongfully paid to the clerk of the Boone circuit court for the benefit of Minerva J. Shanefelter, as shown by voucher 127 of said executor's final report; that said executor is liable to said estate in the sum of \$422.74, being the amount, embraced in voucher 129 of said final report, in excess of the value of his services as executor of said estate; that said executor is liable to said estate for the sum of \$100 of the amounts embraced in voucher 129 of said final report, said amount being paid by said executor to Terhume and New as attorneys' fees in a case wherein said estate was not a party to said suit, and not liable,—making the total amount for which said executor is liable to said estate \$1,056.47, in addition to the amount, \$418.35, now in the hands of the clerk of the Boone circuit court." The appellant excepted to the conclusions of law, and has assigned as error in this court that the conclusions are erroneous.

The claims of the executor in his final report for credits against the estate are in the nature of separate complaints or allowances, and the exceptions to them, or any one of them, placed the burden on him, and he was required, to establish the correctness of his report in respect to such matters as were embraced in the exceptions filed. *Hamlyn v. Nesbit*, 37 Ind. 284. He is regarded as the plaintiff, and the exceptors as the defendants. *Brownlee v. Hare*, 64 Ind. 311. The issue joined on the claims for credits and the exceptions thereto should be tried and determined, and the law applied, by the same rules that govern in the ordinary civil actions arising out of claims filed against estates of deceased persons. The office of a special finding or verdict is to determine such facts embraced within the issues as give rise to the legal conclusions. The facts found must be sufficient to set in operation the law and to support the judgment pronounced. These facts are usually the ultimate facts; the proof as contradistinguished from the evidence. Sometimes an ultimate fact contained in the verdict is a conclusion or inference from other facts. The verdict should also find and set out the facts which give rise to the inference or conclusion. *Barr v. Railroad Co.* (Ind. App.) 37 N. E. 814.

If the verdict or finding contain irrelevant and foreign matter, such matter may be disregarded in stating the conclusions of law. If, after eliminating all such matter, the facts re-

maining are sufficient to support the conclusions of law, the verdict or finding will not be deemed insufficient to support the judgment by such foreign matter. A conclusion of law cast among the facts or a fact cast among the conclusions of law cannot be considered for any purpose. *Johnson v. Bucklen*, 9 Ind. App. 154, 36 N. E. 176; *Stalcup v. Dixon*, 136 Ind. 9, 35 N. E. 987.

It is also well settled that, when the verdict or finding is silent upon a material fact or issue, such silence is equivalent to a finding against the party having the burden of such fact or issue. *Graham v. State*, 66 Ind. 386. The appellant was the plaintiff, and, before he was entitled to a judgment, he was required to produce a state of facts which would support the legal conclusions of his right to recover, or to the credits claimed. The fact that the court may have stated some legal conclusions not warranted by the findings will not avail the appellant if the legal conclusions correctly drawn support the judgment. If a finding will not support a judgment for the plaintiff, and the defendant has asked no affirmative relief under any issue, then the finding will support a judgment in favor of the defendant. In all such cases, if the verdict or finding will not support a judgment in favor of the plaintiff, it will support one in favor of the defendant. Tested by these rules, there was no available error committed by the court in stating the conclusions of law, in view of the issues joined. The appellant made a motion for a venire de novo, assigning as reasons therefor: (1) That the special findings do not cover and embrace all the issues; (2) that the findings are vague, uncertain, and indefinite, and state conclusions of law, instead of the facts proved by the evidence; (3) that the findings do not find or state the facts in respect to the claim paid to the clerk of the Boone circuit court for the benefit of Minerva J. Shanefelter, as shown by voucher 127 of the executor's final report, but that the finding in respect to said matter states conclusions of law only; (4) that the findings do not find or state the facts in respect to the item of \$100 paid Terhume & New as attorneys' fees, as shown by voucher 129, but that the findings in respect to said matter states conclusions of law only. This motion was overruled, and this ruling is one of the errors assigned. A motion for a venire de novo is a common-law process still recognized by the courts of this state. It has some resemblance to a motion for a new trial, in that they both accomplish the same result when successful; that is, they each secure a new trial. The scope of a venire de novo has been narrowed in some respects, and enlarged in others, by the adjudications in this state. It is awarded, at common law, when the verdict of the jury is ambiguous or uncertain, or on account of some irregularity or defect in the proceedings on the trial, from which it appears that the proper effect of the first venire has been frustrated, as where the jury has

been improperly chosen. It is only awarded in our practice for formal defects in the verdict, such as ambiguity and uncertainty. Irregularities in impaneling the jury must be reached by a motion for a new trial. Its scope has been enlarged so that it applies to a finding made by the court, as well as to the verdict of a jury. *Waterbury v. Miller* (Ind. App.) 41 N. E. 383. It reaches defects in a verdict or finding; that, in some instances, can be reached in no other manner. If conflicting evidence has been given upon an issue or material fact, and the verdict or finding in respect thereto is ambiguous or uncertain, the defect cannot be reached by a motion for a new trial. *Elliot, Gen. Prac.* § 978. The ambiguity or uncertainty in a verdict or finding may arise from conclusions of law, evidence, and evidentiary facts stated therein. While it is true that such statements and conclusions may be disregarded in drawing the legal conclusions, and in pronouncing judgment, still the party upon whom the burden of proof rests on any issue or any material ultimate fact is entitled to have a finding thereon that is clear, certain, and unambiguous. *Railway Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140. If a verdict or finding is silent upon any issue or material fact, it may be said to be a clear and certain finding against such issue or fact; but if there be an attempt to find upon such issue or fact, which falls short, owing to the statement of legal conclusions and evidentiary matters such as to render the verdict ambiguous or uncertain, then the motion for a venire de novo must prevail, and the verdict or finding go down before it. *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033. It is true that some of the cases hold that the granting or refusal to grant a motion for a venire de novo is discretionary with the trial court, such discretion being subject to review for abuse only. *Shaw v. Bank*, 60 Ind. 83. But the later, better-considered, and more logical cases hold that in a proper case the motion must be granted, for it is the only process by which the defect can be reached, in some instances. *Perkins v. Hayward*, *supra*.

The appellant asked for credits in his report as shown by vouchers 127, 128, and 129. These claims were separate and distinct, as much so as if they had been stated in different paragraphs of complaint. Separate and distinct issues were formed thereon. It is true that the burden of proof thereon was upon him, but he was entitled to a finding thereon. Had the finding been silent in respect thereto, then it would be construed as a finding against him. The finding is not silent. There was an attempt to determine the issues joined on these items. This attempt, in so far as voucher 127 is concerned, culminated in stating certain legal conclusions, without finding the facts necessary to determine the issue, or for drawing the legal conclusions. It is true that, if it appear from the whole record that substantial justice has been done by the judgment rendered, then no

intervening error will avail in securing a reversal. But the mere fact that the executor was not a party to the action brought by Shanefelter against the Stephensons does not support the legal inference that the estate was not liable. There was evidence given on the trial which tended to prove that the executor's decedent had executed a deed to certain real estate, with covenants of seisin; that suit was instituted against the Stephensons, who were remote grantees in possession; that a trial was had, and a finding made showing that Shanefelter was the owner of an undivided one-third part of the realty; that the Stephensons, as occupying claimants, had paid taxes and made improvements. The court rendered judgment and ordered that Shanefelter pay to the Stephensons a given sum of money within a fixed time, and that her title be thereafter quieted to the one-third part; that, upon the failure of Shanefelter to pay the sum fixed, the Stephensons should then pay to Shanefelter a given sum, and thereafter have their title quieted as to the whole. Shanefelter failed to pay within the time fixed, and the executor then paid to the clerk of the court the sum named in voucher 127, in discharge of the judgment against the Stephensons. It also appeared that the deceased was the first grantor dating from the infirmity in the title. It is a familiar principle that when the grantor of real estate puts his grantee in possession, with covenants of seisin, such covenants run with the land, and a remote grantee may enforce them against his remote grantor upon failure and eviction. It is not necessary to show that a remote covenantor be notified and required to defend when suit is instituted against a more immediate grantor. The grantee may enforce the covenant when he shows that he has yielded to a paramount title, but where he does this the burden of showing that it was paramount is upon him. *Bever v. North*, 107 Ind. 544, 8 N. E. 576; *McClure v. McClure*, 65 Ind. 482; *Craig v. Donovan*, 63 Ind. 513. It is true that in such cases the grantee cannot recover more than nominal damages upon a breach until there has been an actual eviction. To establish liability upon the covenant, all the material facts should be found and stated in the finding. Whether the judgment rendered was equivalent to an eviction we need not now determine. It is sufficient to say that no strained or technical rule should be applied to defeat a just claim in settling the estate of a deceased person. If the breach occurred before a final settlement, then it was a proper claim against the estate. If it occurred afterwards, then the heirs and legatees would be liable, to the extent of property received by them. *Burns' Rev. St.* 1894, § 2597 (*Rev. St.* 1881, § 2442). While the statute contemplates that claims should be filed and allowed before being paid, still, if the administrator or executor has paid a just and valid claim, he is entitled to credit therefor.

This rule extends even to an administrator de son tort. *Leach v. Prebster*, 35 Ind. 415; *Reagan v. Long*, 21 Ind. 264. The estate may or may not have been ultimately liable on the breach of the covenant. The legal conclusion of liability or want of liability cannot be drawn unless all the material facts established by the evidence be stated in the finding. If the estate was justly liable for the debt, the executor should have his credit, although the manner in which it was adjusted was informal. The finding with reference to voucher 127 is indefinite and uncertain, and the motion for a venire de novo should have been sustained.

It is unnecessary to inquire as to the sufficiency of the findings relating to vouchers 128 and 129, for sustaining a motion for a venire de novo has the same effect as granting a new trial, and a new trial, when granted, extends to all the issues. It cannot be granted as to a part only. *State v. Templin*, 122 Ind. 235, 23 N. E. 697. Judgment reversed, with instructions to sustain the motion for a venire de novo.

ROSS, J., concurs in the result, but not in that part of the opinion holding that a special finding or special verdict should contain anything except the ultimate facts.

(18 Ind. App. 135)

ROMACK, County Surveyor, v. HOBBS.¹
(Appellate Court of Indiana. Sept. 20, 1895.)
DRAINAGE—APPEAL FROM ASSESSMENT—NECESSARY PLEADINGS.

1. Under Rev. St. 1894, § 5631, providing that one aggrieved at a drainage assessment may appeal by filing an appeal bond; that the clerk shall then issue a notice to the county surveyor, who shall file with such clerk a copy of the record of the assessment, and the notices thereof; and that these shall be all the pleadings necessary on such appeal,—one appealing from an assessment need not file a complaint.

2. Under Rev. St. 1894, § 5631, providing that, on an appeal by one aggrieved at an assessment for the repair of a ditch, the only question triable shall be the costs of such repair, and what amount thereof should be assessed against appellant's lands, it is error, on such appeal, to declare the whole assessment void because the repairs made the ditch larger than the original specification required.

Appeal from circuit court, Tipton county; Dan Waugh, Judge.

Action by Jacob B. Hobbs against James L. Romack, county surveyor. Judgment for plaintiff. Defendant appeals. Reversed.

Gifford & Fippen and W. R. Oglebay, for appellant. Waugh & Kemp and Beauchamp & Mount, for appellee.

REINHARD, C. J. On the 21st day of February, 1888, the appellee, Jacob B. Hobbs, filed in the office of the clerk of the Tipton circuit court the following appeal bond: "State of Indiana, County of Tipton—ss.: Tipton Circuit Court, February Term, 1888. Whereas, certain lands of Jacob B. Hobbs have been

assessed and had been apportioned to him by James L. Romack, as surveyor of the county of Tipton, in the state of Indiana, in the sum of \$316.45, for the purpose, as he, the said surveyor, alleged, of reimbursing the treasury of said county for the cost of the repair and cleaning out of a certain ditch in said county, known and designated on the records of the board of commissioners of the said county as 'Ditch No. 48,' and the said Jacob B. Hobbs being aggrieved by the said apportionment and assessment, and desiring to appeal therefrom: Now, therefore, the said Jacob B. Hobbs, as principal, and Andrew J. Hobbs, as surety, are held and firmly bound unto the said James L. Romack, as surveyor of the said county, in the penal sum of \$682.90, conditioned that the said Jacob B. Hobbs will duly prosecute his appeal to effect, and pay all costs that may be adjudged against him. Witness our hands, this 21st day of February, 1888. [Signed] Jacob B. Hobbs. [Signed] Andrew J. Hobbs. Approved 21 Feb., 1888. [Signed] Henry H. Thomas, Clerk." On the 10th day of May, 1888, the appellant, Romack, filed in said office a copy of the record of assessments of said drain or ditch, and a copy of the notices thereof, duly certified by him as such surveyor. The cause was docketed by the clerk, and at the November term, 1888, of said court, it was consolidated with other causes, and submitted to the court for trial, the said Jacob B. Hobbs being designated as plaintiff, and the said Romack as defendant. The court, having heard all the evidence, took the cause under advisement until the December term, 1888, at which time it made a general finding for the plaintiff, and held the assessments null and void. Judgment was rendered on the finding, and the appellant filed a motion for a new trial, which was overruled and proper exceptions saved. Within the time fixed by the court, the appellant filed his bill of exceptions, and subsequently appealed the cause to the supreme court, whence it was transferred to this court. The errors assigned are: "(1) That the complaint does not state facts sufficient to constitute a cause of action. (2) That the court erred in overruling appellant's motion for a new trial."

In support of the first assignment, it is argued by appellant's counsel that whatever objections the appellee, Jacob B. Hobbs, may have had to the assessment, should have been made by him in writing, and filed with the surveyor, that the latter might consider them, and, if tenable, that he might correct the assessments; that, in order to take an appeal from the surveyor to the circuit court, it was necessary for said appellee to file a complaint in the circuit court, setting forth his cause of action, and showing the facts upon which he relied, and with said complaint file his appeal bond, the latter not being sufficient without a complaint. This position cannot be maintained. The statute under which the proceedings were had, and the appeal was

¹ On rehearing. For former opinion, see 32 N. E. 307.

taken, provides that, after the construction of the work contemplated by the said statute, the county surveyor shall keep the ditch in repair, to the full dimensions as to width and depth as required in the original specifications, and certify the cost thereof, including his own per diem, to the county auditor, who shall draw his warrant on the county treasurer, payable to the persons to whom the money is owing, which warrants shall, for the time being, be paid out of the county revenue; but the treasury shall be reimbursed, as thereafter provided. To raise the necessary money to reimburse the treasury, he shall apportion and assess the cost of such repairs, upon the lands adjudged by the court benefited by the construction of the ditch, in like proportion as benefits were assessed against said lands for the construction of said work. It is further provided that the surveyor shall make a record of such assessment, to be kept in his office, and open to public inspection, and shall, within five days after such assessment, post up notices thereof. It is then enacted that "any person aggrieved may appeal from such assessment to the circuit court of the county where such county surveyor lives, by filing with the clerk of said circuit court, within twenty days from the time such notices are posted, an appeal bond payable to such county surveyor in twice the amount of his assessment, with surety to be approved by such clerk, and conditioned that he will duly prosecute his appeal and pay all costs that may be adjudged against him, whereupon said clerk shall issue a notice, in the nature of a summons, to such county surveyor, which shall be served by the sheriff, whereupon said county surveyor shall file with such clerk a copy of the record of such assessment and the notices thereof, when and where posted, which shall be all the pleadings necessary in such appeal, and such appeal shall stand for trial at the same time that an appeal would from a judgment from a justice of the peace. Such appeal shall be tried by the court, without a jury, and the only question tried shall be to determine the costs of such repair and what amount thereof should be assessed against the appellant's lands." Rev. St. 1894, § 5631 (Elliott's Supp. 1193). From the reading of the above statute, it is readily seen that no complaint, other than the appeal bond, is required; and what the statute does not in terms require we cannot inject into it by construction. That the legislature had the right to dispense with the necessity for a complaint in an appeal of this character cannot be doubted. It has long been the recognized rule in this state that no other pleadings are necessary in tribunals of limited jurisdiction than those which the statute requires. It is true, the circuit court is not such a tribunal, but in cases of appeal to that court from justices and other inferior tribunals or bodies the same rules are applied as govern the courts from which the appeal is taken. Thus, where the statute provided that the fil-

ing of the instrument sued on was all the complaint necessary to be filed in a suit before a justice of the peace, it was held that in an action on a penal bond, commenced before a justice, no statement of the demand, or averment as to the breaches of the bond, was necessary. *Evans v. Shoemaker*, 2 Blackf. 237; *Vandagriff v. Tate*, 4 Blackf. 174; *Ruble v. Massey*, 2 Ind. 636. It is the common practice in justice of the peace courts simply to file the contract or other chose in action upon which suit is to be brought, and no other complaint or statement of the cause of action is necessary. Certainly, if the legislature has the power to dispense with formal pleadings in a justice's court, it has also the power to dispense with them in cases of this character. That it has that power we do not think admits of serious doubt. The first assignment of error is, therefore, not well taken.

Did the court err in overruling the appellant's motion for a new trial? One of the grounds relied upon for a new trial was the alleged insufficiency of the evidence to support the finding. Another is that the finding is contrary to law. As we have seen, the court held the entire proceedings void. The proceedings were had under and by virtue of the law of 1885, heretofore referred to. That law provides that the only question triable by the court shall be the total costs of the repairs, and what amount thereof shall be assessed against the lands of the appellant. We are strongly impressed with the view that the court tried this case upon a wrong theory. It certainly was not the intention of the statute that the court should determine, upon the trial of the issues in such an appeal, whether or not the ditch had been cleaned out, and left with the same dimensions as the original ditch. The surveyor is required to follow the original plans and specifications, and he cannot stop to inquire how much of the dirt which he is to take out of the drain has fallen into it since its construction, and what portion of it was left in the original ditch. *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20. If he proceeds under color of the statute, and in good faith performs the work as nearly as may be according to the original plans and specifications, he has discharged his duty, and the only questions for the court to determine are whether the appellant's lands are subject to the assessment, and the proportion of such assessment that should be placed upon them. The question of the propriety of the repairs can neither be reviewed nor taken into consideration, as upon this the surveyor's decision is final. *Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50; *Artman v. Wynkoop*, 132 Ind. 17, 31 N. E. 468. Whether the ditch was originally smaller than the repairs made it is not a question to be considered, and, even if it is made larger than warranted by the original specifications, the appellant will not be thereby relieved from the payment of all assessments. As said by the supreme court in a late case:

"It would be unjust and inequitable to hold that, because the surveyor exceeded his jurisdiction in some particular, the appellants should be relieved from the payment for benefits received by the performance of such work as came within the jurisdiction of the surveyor." *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953. That the surveyor had the right and authority to make the repairs in the present case, we think, is indisputable. The appellee admitted in his evidence that the proper cost of the repair was as much as \$800, while the appellant contended that the proper cost and expense was \$2,700. That the appellant was entitled to recover some amount is, in our judgment, clearly established by the undisputed evidence. The only basis for the contention that the assessments are void is that the repairs made the ditch larger than the original specifications required; but this, as we have seen, does not invalidate the entire assessments. It was the duty of the court to determine the correct amount which the appellee was required to pay.

There are other questions in the record, but as we must, in any event, adjudge a reversal, and as the same or similar questions may not arise again, we need not pass upon them here. We think the appellant is entitled to a new trial. Judgment reversed.

(14 Ind. App. 81)

KELLEY v. CITY OF CRAWFORDSVILLE.¹

(Appellate Court of Indiana. Sept. 20, 1895.)

PLEADING—DEMURRER TO ANSWER—HARMLESS ERROR.

In an action for the penalty for the violation of an ordinance, the error, if any, in sustaining a demurrer to a paragraph of the answer seeking to test the validity of the ordinance, is harmless; *Rev. St. 1894, § 1582 (Rev. St. 1881, § 1460)*, providing that matters of defense may be given in evidence without plea.

Appeal from circuit court, Montgomery county; J. F. Hamey, Judge.

Action by the city of Crawfordsville against John Kelley to recover the penalty for the violation of an ordinance. From a judgment for plaintiff, defendant appealed to the supreme court. Transferred to the appellate court. 40 N. E. 1082. Affirmed.

Wright & Seller, for appellant. Thomas & Whittington, for appellee.

GAVIN, J. Appellant's argument relates solely to the error of the trial court in sustaining a demurrer to one paragraph of its answer, by which it sought to test the validity of the city ordinance upon which the prosecution was based. In its opinion transferring the case to this court (40 N. E. 1082), and in the decision upon which that opinion is founded (*Berkey v. City of Elkhart* [Ind. Sup.] 40 N. E. 1081), the supreme court expressly adjudged that the question presented by counsel was not properly raised by the

answer, because all matters available under this answer might have been given in evidence without plea, and any error (if it existed) in sustaining the demurrer was harmless. The judgment is therefore affirmed.

(13 Ind. App. 125)

FARR v. BACH.

(Appellate Court of Indiana. Sept. 19, 1895.)

PLEADING—REFERENCE TO EXHIBITS—CONTRACT—CONSIDERATION—BILL OF EXCEPTIONS—REVIEW.

1. Where several paragraphs of an answer refer to, and are based on, the same written instrument, and each alleges that a copy thereof "is filed herewith," a single copy of the instrument, filed with one of the paragraphs, is sufficient.

2. The assumption by a surety of a part of his principal's debt, and release of the principal therefrom, is a sufficient consideration to support a contract releasing a claim against the surety by the principal.

3. Where a plea of want of consideration has been filed, the sustaining of a demurrer to a subsequent paragraph setting up facts to show want of consideration cannot be urged as error.

4. Where it appears on the face of a bill of exceptions that it does not contain all the evidence, any questions depending on the entire evidence will not be considered.

5. A general statement, in a bill of exceptions, that the record contains all the evidence, cannot control where the bill also recites that a contract was put in evidence and read, but such contract does not appear in the record.

Appeal from circuit court, Wabash county; H. B. Shiveley, Judge.

Action by James B. Farr against David Bach to recover money paid on a note as surety. From a judgment for defendant, plaintiff appeals. Affirmed.

H. C. Pettit, for appellant. Slick & Hunter, for appellee.

LOTZ, J. The appellant, plaintiff below, alleged in his complaint that the appellee and one William Farr were partners, doing business in the firm name of Farr & Bach; that as such partners they executed their promissory note, payable to the order of the First National Bank of Wabash, for the sum of \$1,724.63, due in 90 days from the date thereof, with 8 per cent. interest; that the plaintiff signed said note as the surety of said partners, Farr & Bach; that Farr & Bach failed to pay said note when it became due, and the bank instituted suit thereon in the Wabash circuit court, and recovered a judgment thereon, against Farr & Bach and the plaintiff, in the sum of \$1,865.40 and costs of suit; that the plaintiff was compelled to, and did, pay on said judgment the sum of \$925.77, for which amount, including the interest thereon, he asked judgment. The defendant answered in three paragraphs, the first being the general denial. A demurrer for want of facts was sustained to the second, and overruled as to the third. The plaintiff replied in three paragraphs,—the first being the general denial; the second, want of consideration as to a certain contract set out in the third

¹ Rehearing denied, 42 N. E. 491.

paragraph of answer; and a demurrer for want of facts was sustained as to the third. The issues joined were submitted to a jury for trial, which returned a general verdict for the defendant. The plaintiff's motion for a new trial was overruled, and judgment rendered on the verdict in favor of the defendant. The errors assigned are: (1) The overruling of the demurrer to the third paragraph of answer; (2) the sustaining of the demurrer to the third paragraph of reply; and (3) the overruling of the motion for a new trial. We will consider them in the order named.

The third paragraph of answer alleges that, after the recovery of the judgment as stated in the complaint, the plaintiff and one Sarah Farr and one William Farr desired to borrow \$11,000, and to secure the loan by mortgage on 225 acres of land, situated in Wabash county, owned by the plaintiff, James B., Sarah, William, Charles, and Cora Farr, as tenants in common; that the purpose of securing said loan was to use the money to pay off judgments, aggregating the sum of \$8,000, which had been rendered against the plaintiff and William and Sarah Farr, which were liens upon their respective interests in said lands; that at the same time the defendant held a judgment against the said Sarah Farr, in the sum of \$868 and costs of suit, which was a lien on the interest of Sarah Farr in said lands; that the judgment named in the complaint was also a lien on the interests of the plaintiff, Sarah, and William Farr in said lands; that owing to the existence of said judgments, and the liens thereof, the plaintiff and Sarah and William Farr were unable to procure said loan unless the liens were removed; that, to secure a removal of said liens, the plaintiff and William Farr and Sarah Farr entered into a written agreement with the defendant, in which it was agreed that if the defendant would pay off one-half of the judgment held by the bank, and cancel and release 15 per cent. of the judgment held by him against Sarah Farr, and would release all liens, in judgment or otherwise, held by him against the plaintiff, James B., William, Sarah, Charles, and Cora Farr on said lands, they, the said James B., Sarah, and William Farr, would pay one-half of the bank's judgment, and release the defendant from all further liability thereon; and that it was further agreed with the defendant that the payment so made by William for Sarah Farr and the plaintiff should be a payment by William Farr on the debts of the firm of Farr & Bach; and that the defendant fully complied with said contract on his part. It is also averred that a copy of the written agreement "is filed herewith."

The second paragraph of answer, to which a demurrer was sustained, is copied into the record. This paragraph was based on the same written contract, and it is referred to therein, and it is alleged "that a copy of which is filed herewith." Following this

paragraph, the written instrument is copied into the record. This is the only place in which it appears, and the appellant earnestly insists that the third paragraph is bad for want of the original or a copy of the contract. It is well settled that where several paragraphs are based upon the same written instrument, each professing to set out a copy, one copy is sufficient. To require more would unnecessarily incumber the record. *Maxwell v. Brooks*, 54 Ind. 98. The contract copied into the transcript conforms in all respects to that described in this paragraph of answer. It is sufficiently identified to make it a part of this answer. *Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716; *Insurance Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582.

The appellant further contends that the contract which is the basis of the pleading is invalid for want of consideration; that the appellee was bound in law to pay the whole of the judgment, while the appellant was only liable thereon as a surety; that they were each bound to pay the whole debt. It is well settled that a promise to pay a debt for which the promisor is already bound does not constitute a sufficient consideration to support a contract. *Harris v. Cassidy*, 107 Ind. 158, 8 N. E. 29. But this principle has no application here. The relation of principal and surety is not identical with that of creditor and debtor. If a surety contracts to assume a part of the principal's obligation, and release him therefrom, he may do so. Here the principal was relieved of a part of his obligation, and his surety, with others, assumed it, and, in consideration thereof, he surrendered a part of another judgment held by him, and enabled the surety and others to raise money on their lands to discharge other liens. The answer is sufficient.

As to the second assignment of error, questioning the sufficiency of the third paragraph of reply, it is sufficient to say that the appellant admits this paragraph to be equivalent to a plea of want of consideration for the agreement referred to in the answer. The second paragraph of reply being want of consideration, there is no available error in sustaining a demurrer to the third.

The last assignment brings in review the overruling of the motion for a new trial. Many reasons for a new trial were urged. These reasons all depend upon the evidence, and on certain instructions given to the jury. The appellee makes the point that all the evidence is not in the record. The bill of exceptions recites, at the end thereof, that "this was all the evidence given in the above-entitled cause." In the body of the bill is this statement: "Counsel for the defendant here introduces and reads in evidence the contract between the Farris and David Bach, which is marked 'Exhibit 1.'" This contract nowhere appears in the evidence, as appellant concedes. It has been uniformly held that the general statement will not control when it

affirmatively appears from the body of the bill itself that it does not embrace all the evidence given in the cause. If the omitted evidence be much or little, the appellate court will not decide any question which depends, for its proper consideration, on the evidence. *Rhea v. Crunk* (Ind. App.) 39 N. E. 879. True, this rule does not prevail when the question presented does not depend on the entire evidence. *Insurance Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. 659. All the material questions presented under the motion for a new trial here depend upon a consideration of all the evidence.

The judgment comes to this court with every presumption in favor of its correctness, and it is incumbent on him who assails it to present a record affirmatively showing its infirmity. In the absence of all the evidence, this presumption must prevail. Judgment affirmed.

(13 Ind. App. 121)

CITY OF BLOOMINGTON v. ROGERS.

(Appellate Court of Indiana. Sept. 18, 1895.)

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—DEFECTIVE STREETS—NEGLECT OF TRAVELER.

1. In an action to recover for injuries suffered by falling into an open ditch in the street, findings that plaintiff knew of the ditch; that the night was dark; that she had reasonably good eyesight, and was walking carefully when injured,—are not sufficient to support a verdict in her favor, in the absence of a finding that she was looking out for the ditch, or paying attention to where she was stepping, at the time of the injury.

2. In an action to recover for injuries suffered by falling into an open ditch in the street in front of plaintiff's residence, there is no error in admitting evidence touching the surroundings, and the means of ingress and egress to and from plaintiff's residence.

Appeal from circuit court, Lawrence county; B. W. Miers, Judge.

Action by Rachael Rogers against the city of Bloomington to recover for injuries suffered by her through defendant's negligence in leaving an open ditch in one of its streets. On a former appeal a judgment for plaintiff was reversed (36 N. E. 439), and from a second judgment for plaintiff defendant again appeals. Reversed.

Duncan & Batman, for appellant. East & Miller, for appellee.

DAVIS, J. This case is here for the second time. 9 Ind. App. 230, 36 N. E. 439. On return to the lower court, the venue of the cause was changed, an amended complaint was filed, and a trial by a jury resulted in a special verdict, on which judgment was rendered in favor of appellee for \$1,800. The jury find, among other facts, that appellee knew the ditch was in the street, that the night was dark, that she had reasonably good eyesight, and that she was walking slowly and carefully when she was injured. There is no finding that she was using her

sense of sight, or that she had the ditch in mind, at the time, and that, in view of her knowledge of its existence, she was looking out for the ditch, or paying attention to where she was going. Neither is the inferential fact found that she was, under the circumstances, using due care and caution on her part at the time she was injured. *City of Bluffton v. McAfee* (Ind. App.) 40 N. E. 549; *Railway Co. v. Grames*, 136 Ind. 30, 34 N. E. 714; *Railway Co. v. Costello*, 9 Ind. App. 463, 36 N. E. 299; *Railway Co. v. Sears* (Ind. App.) 38 N. E. 837; *Railway Co. v. Klitch* (Ind. App.) 37 N. E. 560. The finding, in a special verdict, that an injured party, at the time of receiving the injury, was in the exercise of due care, is in many cases such a conclusion as should be disregarded; but, where two inferences may be reasonably drawn from the facts and circumstances descriptive of the acts and conduct of the injured party at the time of receiving the injury, then, under the authorities cited, it becomes a question for the jury to determine, whether the injured party did or did not exercise ordinary care under the circumstances surrounding her when she was injured. The facts descriptive of appellee's conduct on this occasion are not fully and clearly found in the special verdict. If it appeared in the special verdict, in addition to the facts therein found, descriptive of her conduct, that she had the ditch in mind at that time, and that in view of this knowledge she was using her sense of sight in looking out for the ditch, or paying attention to where she was stepping, and then, on the facts and circumstances so found, the jury should draw and find the inference that she was using due care and caution on her part when she was injured, the verdict would perhaps be sufficient, under the rule enunciated in the cases hereinbefore cited. All, however, that it is necessary for us to determine, and all, therefore, that we do decide, on this question, is that, on the facts and circumstances as found in the verdict, we cannot adjudge, as a matter of law, that appellee was entirely free from fault at the time she was injured.

There was no error in admitting the evidence touching the surroundings, and the means of egress and ingress to and from appellee's residence. These circumstances were proper to be considered, in connection with the other facts, in determining whether appellee, at the time she was injured, was in the exercise of care commensurate with the known danger.

The earnings of a married woman ordinarily belong to her husband, but there may be circumstances existing which would entitle appellee to recover for the value of her own services. *Railway Co. v. Cosby*, 107 Ind. 82, 7 N. E. 373; *Railway Co. v. Twilname*, 121 Ind. 375, 23 N. E. 159. Assuming that appellee was a married woman; that her husband had abandoned her, or was not supporting or providing for her; and that

she was engaged in carrying on any trade or business on her own account,—such facts should be averred in the complaint, proven on the trial, and found in the verdict. Judgment reversed, with instructions to sustain appellant's motion for a new trial, with leave to appellee to amend complaint, if desired.

ROSS, J., concurs in result.

(13 Ind. App. 134)

WALDORF v. ELKHART & W. R. CO. 1
(Appellate Court of Indiana. Sept. 19, 1895.)

RESERVATIONS IN DEED—RIGHTS OF GRANTOR.

Plaintiff, who owned land upon which was a brickyard and a clay bed (already opened),—both of which were unfit for any use but brickmaking,—conveyed the land, reserving to himself the right of possession of the entire tract for one year, except a strip for a right of way. *Held*, that plaintiff was entitled, not only to the naked possession of the land, but to the use and enjoyment thereof, including the right to dig clay from the opened pit.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Action by Cyrus Waldorf against the Elkhart & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

A. L. Brick and Alexander Wilhelm, for appellant. Henry C. Dodge, for appellee.

GAVIN, J. Appellant owned a tract of 11 acres of land, upon the south part of which was located a brickyard. Upon this there were machinery and sheds worth about \$800, intended and adapted for carrying on the business of brickmaking; also, a clay bed, already opened, from which clay had been recently taken, and brick manufactured. The brickyard, including the clay bed, was adapted for that purpose, and the land was unfit for any other use. In the spring of 1893 the appellee, desiring to construct its railroad over said land, bought it, and received a deed containing (after correction of mistakes) the following clauses: "Said grantor reserves the right to possession of the entire tract of land above described for a period of one year from the date hereof, except a right of way 66 feet wide across the first above described tract of land; also, the right of possession, for a period of two years from date hereof, to all that portion lying south of said right of way, unless said party shall desire all or any portion thereof, except that portion occupied by said brickyard, for railroad purposes. The grantee hereby agrees to put in all necessary crossings for the use of the grantor during his occupancy of said premises. Grantee reserves the right to enter any portion of said premises at all times to make any needed repairs, or to protect said property in any manner. Said grantor, during his tenancy, agrees to keep the same occupied and cared for, the same as if he was the owner." Shortly after the execution of

this deed, appellee entered the brickyard, and constructed a track across the clay bed, making it impracticable to dig the clay and run the brickyard. For this invasion of his rights appellant sought damages.

There is some evidence given or offered to sustain the above facts, upon which the claim of the appellant is based. The trial court seems to have disposed of the case upon the theory that, under the provisions of the deed, appellant had no right to dig up the clay for brick. Counsel for the appellee are of the opinion that the truth of this proposition is self-evident, and needs no authority. With this view we are unable to agree. It is true that, as a general rule, reservations and exceptions in a deed are to be construed against the grantor. *Nicholson v. Carens*, 45 Ind. 479; *City of Ft. Wayne v. Lake Shore, etc., Ry. Co.*, 132 Ind. 558, 32 N. E. 215. Yet it has been said that this "rule is one of dernier ressort, applicable only where the language of the instrument will equally admit of either of two or more interpretations. In such a case that effect will be given which is most unfavorable to the grantor. *Adams v. Warner*, 23 Vt. 395." *Falley v. Giles*, 29 Ind. 114. Where the intention of the parties can be fairly ascertained from the instrument, such intention will govern. 5 *Lawson, Rights, Rem. & Prac.* § 2293. In *Allen v. Scott*, 21 Pick. 25, it is said: "When property is granted, all that is necessary to the enjoyment of the grant is impliedly granted as incident to the express grant, and the same rule of construction applies to an exception in a grant." The case is cited with apparent approval by Judge Hackney in *Indianapolis, etc., Ry. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679. It is settled law that tenants for life or years are entitled to work mines, quarries, clay pits, or gravel beds which had been opened and used before the time of the commencement of the particular estate. *Reed v. Reed*, 16 N. J. Eq. 248; *Findlay v. Smith*, 6 Munf. 134; *Neel v. Neel*, 19 Pa. St. 323; *Lynn's Appeal*, 31 Pa. St. 44; 1 *Wood, Landl. & Ten.* p. 138, § 53; 1 *Washb. Real Prop.* 111, 314; *Co. Litt.* 546. This rule is founded upon the principle that the holder is entitled to use and enjoy the land according to the previous and accustomed method. The opening of new mines would be waste, but the working of the old ones is a simple continuation of the use of the land made by the owner. In *Allen v. Scott*, supra, it was held that where a deed conveyed a tract of land and the buildings thereon, "except the brick factory," the reservation included the right to occupy the land on which it stood, and the water privilege necessary to the carrying on of the factory. In *Russell v. Bank*, 47 Minn. 286, 50 N. W. 228, it is decided that where a brick factory had been erected upon lands owned by tenants in common, and the business lawfully undertaken, the grantee of an owner of an undivided interest was not authorized to prevent its continuation by the cotenant. In this case it was clearly the in-

tention of the parties, as expressed in the deed, that the grantor was to have, not only the naked possession, but the use and enjoyment, of the land; and that certainly included the right to use it for a brickyard, and to dig the clay from the opened pit, these being essential to the use of that portion of the land for the only purpose for which it was fitted.

The appellant was entitled to have his evidence admitted in support of his theory. Whether all the evidence would then have sustained, it would have been for the court to determine. Counsel for appellee are in error in their statement that there is no map in the record. As the transcript comes to us, it is attached to the evidence. Judgment reversed, with instructions to the trial court to sustain the motion for a new trial.

(13 Ind. App. 188)

SPURGEON v. SWAIN.

(Appellate Court of Indiana. Sept. 24, 1895.)

NEGOTIABLE INSTRUMENTS—BILLS OF EXCHANGE—CONSIDERATION—ACCEPTANCE—PLEADING.

1. An oral acceptance of a bill of exchange is valid.

2. The complaint, in an action by the payee of a bill of exchange against the drawee on an oral acceptance thereof by the latter, need not allege that defendant had, at the time of his acceptance, funds of the drawer in his hands wherewith to meet the bill.

Appeal from circuit court, Delaware county; G. H. Koons, Judge.

Action by Ellihue L. Swain against William A. Spurgeon on a bill of exchange. There was judgment for plaintiff, from which defendant appeals. Affirmed.

Wagner & Bingham, for appellant. Warner & Brady, for appellee.

DAVIS, J. The writing on which this action is based is in the words and figures following, to wit: "Muncie, Ind. July 7th, 1893. Mr. William A. Spurgeon: Pay to E. L. Swain or order seventy-five $\frac{00}{100}$ dollars as balance due on painting of your house, and charge to account of J. B. Miller. \$75.00." It is conceded that this is a bill of exchange. The definition of a bill of exchange by Chancellor Kent is: "A written order or request by one person to another for the payment of money at a specified time, absolutely and at all events." See 3 Kent, Comm. 74, side paging. It is alleged in the complaint that appellant accepted said bill, and that the same is due and unpaid, but it does not aver that appellant had, at the time of his acceptance, funds of the drawer in his hands wherewith to meet the bill. Is the complaint sufficient to withstand a demurrer for want of facts? Counsel for appellant insist that an oral acceptance is within the statute of frauds, unless it appears that there was a consideration for the acceptance; that, where no consideration is shown, the oral acceptance is the promise to pay the debt

of another. It is, and long has been, the law that a consideration is presumed in the case of bills of exchange and promissory notes, and in complaints thereon it is not necessary to aver the consideration. *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Hinkley v. Bank*, 77 Ind. 475. The consideration being presumed, the oral acceptance by appellant was a promise to pay his own debt to Miller, and not the debt of Miller to appellee. *Railway Co. v. Caldwell*, 98 Ind. 245. In our opinion, the court did not err in overruling the demurrer to the complaint. In view of the fact that the jury found in answer to an interrogatory that appellant was indebted to said Miller at the time he accepted the bill of exchange, there was no available error on account of the giving of the fifth instruction. In the light of the fact that the jury expressly found that appellant's acceptance was unconditional, there was no harmful error against appellant in the seventh instruction. We find no reversible error in the record. Judgment affirmed.

GERMAN-AMERICAN BUILDING ASS'N v. DROGE.¹

(Appellate Court of Indiana. Sept. 17, 1896.)

SALE—ACTION TO RECOVER PRICE PAID—AUTHORITY OF AGENT—BEST AND SECONDARY EVIDENCE.

1. A complaint stating substantially that plaintiff purchased of defendant building association nine shares of stock, for which he paid a certain sum, and that defendant neglected and refused to issue such stock, states a good cause of action for recovery of price paid.

2. Where defendant gave a person credit to the public as a suitable and worthy agent for the transaction of the business in which he was engaged, and plaintiff acted in good faith in dealing with him within the scope of his apparent authority, he will be protected as against the principal.

3. Where defendant brought into court copies of letters written to its agent, who had absconded, it was proper to permit plaintiff to introduce such copies in evidence, in the absence of the originals.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Action by Garrett F. Droge against the German-American Building Association to recover the value of certain shares of stock. Plaintiff had judgment, and defendant appeals. Affirmed.

Carson & Thompson and Burrell & Brannaman, for appellant. A. M. Munden, for appellee.

DAVIS, J. The substantial averments in the complaint are that appellee purchased of appellant nine shares of prepaid stock for \$450, which he paid, and that appellant neglected and refused to issue such stock to him, to his damage in the sum of \$1,000. The complaint is not a model pleading. The theory of the pleader is not clear and definite. The trial court proceeded on the theory that

¹ Superseded by opinion, 43 N. E. 475.

It was an action to recover the purchase price paid by appellee for the stock which appellant failed to issue to him, and on this theory the complaint, in our opinion, states a good cause of action, and there was no error in overruling the demurrer thereto. If we are correct in this conclusion, there was no error in granting appellee a trial by a jury. We have carefully read the entire record, and are of the opinion that there was no error in overruling the motion for a new trial. There is ample evidence in the record to show that Warner in this transaction was acting within the scope of his apparent authority. The company gave him credit to the public as a suitable and worthy agent for the transaction of the business in which he was engaged. The appellee, an ignorant man, having acted in good faith in dealing with the agent within the scope of his apparent authority, and seeing that somebody must be a loser by his deceit, the jury were justified, under the facts and circumstances of this case, in the conclusion that it is more reasonable that he that employs and puts confidence in the deceiver should be a loser than a stranger without notice of the limitation or restriction of his authority. *Kerlin v. Association*, 8 Ind. App. 628, 35 N. E. 39; *Railway Co. v. Racer*, 10 Ind. App. 503, 37 N. E. 280. It appears clear from the evidence that appellee paid Warner \$450, the purchase price fixed by the company, for nine shares of prepaid stock. It further appears that the carbon copies of letters written to Warner introduced in evidence were brought into court by appellant. As these copies of letters were in the possession of appellant, and were brought into court by appellant, and as it appears that Warner had absconded, we are not able to see wherein, under the circumstances, the introduction in evidence of the copies was error. The instructions, when considered as an entirety, state the law of the case clearly and correctly. A careful reading of the record, as before stated, impresses us with the belief that the cause was fairly tried in the court below, and that no error occurred which would justify a reversal of the judgment of the trial court. Judgment affirmed.

(13 Ind. App. 155)

EVANSVILLE ST. RY. CO. v. MEADOWS.
(Appellate Court of Indiana. Sept. 24, 1895.)

NEGLECT OF STREET-CAR DRIVER—SUFFICIENCY OF COMPLAINT—APPEAL—RECORD.

1. Where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference is for the jury.

2. A complaint alleged that the driver in charge of defendant's car invited plaintiff, a child 10 years old, to ride on the car; that plaintiff rode to the end of the line, when he negligently left the team standing alone, and went to the rear of the car; that while engaged there the team started forward with a violent jerk, and plaintiff was, because of the negligence thrown from the car, while it was in motion, injuring her. *Held* sufficient to state a cause of action.

3. A bill of exceptions is not properly in the record where there is nothing to show that it was filed with the clerk after it had been signed by the judge, as required by Rev. St. 1894, § 641 (Rev. St. 1881, § 629).

Appeal from circuit court, Warrick county; Edward Gough, Judge.

Action by Sarah A. Meadows, by next friend, against the Evansville Street-Railway Company, to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Gilchrist & De Bruler, for appellant. G. A. Hoff and Cullop & Kessinger, for appellee.

ROSS, J. Sarah A. Meadows, a minor, by her next friend, Susan Meadows, brought this action to recover damages for personal injuries alleged to have been received by being thrown from one of appellant's street cars. The gist of the action, as stated in the complaint, is that the driver in charge of one of appellant's cars invited appellee, who was a child but 10 years of age, to ride upon the car; that she got on and rode to the end of the line, when the driver changed his team from the then front end of the car to the other end, and then, "carelessly and negligently, left said team of mules standing alone, without any person having hold of the lines with which it was driven, and the same was loosely thrown over the brake at the end of the car; that the defendant, negligently and carelessly, went to the rear or eastern end of said car, and while engaged in and around the rear end thereof the said team of mules started forward rapidly, and with a violent jerk and motion, and the plaintiff, Sarah A., was, with great force and violence, and by and on account of the negligence and carelessness of the defendant, thrown from the car, while it was in motion," injuring her, etc. It is insisted on the part of appellant that the complaint is insufficient, and that the court below erred in overruling the demurrer thereto, for the reasons—First, that the facts alleged fail to show actionable negligence on the part of appellant resulting in appellee's injury; and, second, that the facts show that appellee was guilty of negligence contributing to her injury.

The first contention of appellant is met by counsel for the appellee by the assertion that the facts alleged, namely, that the driver went away and left the "mules attached to and hauling said car unattended and unguarded, and with the lines loosely wrapped around the brake of said car, and thereby permitted said mules to give a quick and sudden jerk of said car, and moved it forward rapidly," throwing appellee from the car and injuring her, "constitute the defendant's [appellant's] negligence, which proximately caused the injuries to the plaintiff [appellee], of which she complains." It seems to be conceded by both appellant and appellee that the complaint contains no charges of negligence, other than those above set out, with

reference to the acts of the driver in leaving his team as charged. Before attempting to enter into a consideration of these facts, and their sufficiency to state a cause of action, it is necessary to determine the rule that must govern the court in considering whether or not a given state of facts are sufficient to warrant the court in inferring negligence therefrom. When the allegations in a complaint charging negligence are general, the court has little difficulty in determining their sufficiency, but when the specific facts are alleged, upon which the negligence complained of rests, another and different rule, and one which is not well settled, applies. Under the earlier decisions of the courts of last resort in this state, it was held that when the facts relied upon as constituting negligence were alleged in the complaint, found in a special verdict, or agreed to, whether they did in fact make a case of negligence was purely a question of law, for the court. *Railway Co. v. Goddard*, 25 Ind. 185; *Railway Co. v. Hunter*, 33 Ind. 335; *Railway Co. v. Spencer*, 98 Ind. 186; *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. 441; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. 226; *Brannen v. Gravel-Road Co.*, 115 Ind. 115, 17 N. E. 202; *Railway Co. v. Eves*, 1 Ind. App. 224, 27 N. E. 580; *Brummit v. Furness*, 1 Ind. App. 401, 27 N. E. 656; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327. As late as the case of *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, was this rule adhered to; for in that case Hackney, J., speaking for the court, says that in none of the adjudicated cases has it been decided "that the jury are the exclusive judges of the existence or nonexistence of negligence, as an ultimate fact. A moment's reflection will show the error of a rule which would deprive the court of the right to determine whether a given state of facts—uncontroverted—does or does not constitute actionable negligence. When the facts are submitted to the court upon demurrer to a complaint, the court exercises the power of determining whether such facts, if proven, will constitute actionable negligence." This, I may add, was considered to be the rule until the decision of the same court in the case of *Railroad Co. v. Grames*, 136 Ind. 39, 34 N. E. 714, when it was held that, in cases where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference of negligence or no negligence therefrom is for the jury, as one of fact, and not one for the court, to be inferred as one of law. The latter holding has been tenaciously adhered to by this court. *Railroad Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565; *Bridge Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *Railway Co. v. Costello*, 9 Ind. App. 462, 36 N. E. 299; *Railway Co. v. Sears* (Ind. App.) 38 N. E. 837.

Applying this rule to the facts before us, it seems evident that there is room for a differ-

ence of opinion between reasonable men as to whether negligence should be inferred from them. Were it not for a difference of opinion, the sufficiency of the complaint would not be in issue here. For instance, the court below, in holding the complaint good, must have thought a cause of action was stated; and the able counsel for appellee very earnestly insist that those facts are sufficient, while, on the other hand, the learned counsel for appellant as earnestly insist that no inference of negligence can be inferred from them. It is plain, therefore, that all men are not agreed upon what inferences should be drawn from the facts alleged. The experience of almost every man convinces him that men, from nature and habit, vary materially in their conceptions of what constitutes negligence. Hence, if the duty one man owes to another is not fixed, but must be determined by a jury, the court cannot consider the sufficiency of a given state of facts until a jury has first determined what inference shall be drawn from them. If the facts show a duty, a violation of that duty is negligence. Negligence results only from a violation of some duty. The question as to whether a duty exists cannot depend upon the judgment of men; for a duty is created by law, and for its nonobservance, resulting in injury, the law affords a remedy. Law itself signifies a rule of action. It is the "rules or methods by which society compels or restrains the conduct of its members." 2 Bouv. Law Dict. One disobeying such rules, by reason of which injury befalls another, is guilty of negligence, and must answer in damages for such failure of duty. Every duty becomes such because the law makes it so. It is fixed and certain. Unless fixed and certain, it cannot be a duty. In cases where the question arises as to whether or not a party has been guilty of negligence, the first thing to be determined is what duty, if any, has been violated. In the case before us, we must first determine what duty, if any, appellant owed the appellee. To those who were passengers on its cars, it owed the duty to carry safely. If the appellee was a passenger, then appellant's duty was to carry her safely to her destination. *Railroad Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469. Counsel for appellant apparently concede, in their argument, that appellee was rightfully on the car; hence we must assume that appellant owed her some protection. Not being an employé, if she was there rightfully, it must have been as a passenger; hence, was entitled to all the protection the law imposes for the benefit of a passenger.

Under the contention that the facts alleged show that appellee's own negligence contributed to her injury, counsel insist that the general allegation of freedom from fault on her part is overcome by the facts specially pleaded. In this contention we cannot concur.

Other questions are argued by counsel for

appellant which are not properly presented by the record. Incorporated in the transcript is what purports to be a bill of exceptions containing the evidence and instructions, but it is not properly in the record, for the reason that there is nothing to show that it was ever filed. Section 629, Rev. St. 1881 (section 641, Rev. St. 1894), makes it necessary to file the bill with the clerk after it has been signed by the judge, in order to make it a part of the record in the cause. *Davee v. Board of Com'rs*, 7 Ind. App. 71, 34 N. E. 308; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305; *Prather v. Prather* (Ind. Sup.) 39 N. E. 310. It clearly appears from the certificate of the clerk attached to the transcript that the long-hand manuscript of the shorthand notes of the evidence was filed in the clerk's office on the 24th day of February, 1894, and what purports to be a copy of a bill of exceptions containing this long-hand manuscript of the evidence, bearing the signature of the judge of the Warrick circuit court, under date of March 19, 1894, is copied into the transcript; but the record nowhere recites, neither does it in any manner appear, that after the bill was signed it was filed as required by section 629, supra. On account of the condition of the record, and the manner in which the questions are presented, we are compelled to affirm the judgment without a consideration of the merits of the controversy. Judgment affirmed.

GAVIN, DAVIS, and LOTZ, JJ., concur in result. REINHARD, C. J., absent.

(13 Ind. App. 161)

LOUISVILLE, N. A. & C. RY. CO. v.
PALMER.

(Appellate Court of Indiana. Sept. 25, 1895.)

RETAXATION OF COSTS—STATEMENT.

A motion on appeal to retax costs will not be heard where no brief to support it or statement of costs accompanies the motion.

Appeal from circuit court, Porter county.

Action by Adelbert D. Palmer against the Louisville, New Albany & Chicago Railway Company. Judgment for plaintiff, and defendant appealed. On motion to retax costs. Overruled.

Field & Kinnan and E. D. Crumpacker, for appellant. Thos. J. Wood, for appellee.

PER CURIAM. Appellant has filed a motion to retax costs "in this, to wit: That the sum of \$18 is taxed as costs for stenographer's fee, when none whatever is due; second, that about \$22 is taxed for the transcript, more than is lawfully due; third, that about \$12 too much is taxed for the clerk's fee." No brief or argument is filed in support of the motion. No statement of the costs taxed accompanies the motion. There is nothing more than we have set out. There is not sufficient presented to call upon this court to examine into the matters complained of. The motion is therefore overruled.

(13 Ind. App. 183)

BOWEN v. JONES.

(Appellate Court of Indiana. Sept. 25, 1895.)

EVIDENCE—PROOF OF HANDWRITING.

1. The genuineness of defendant's signature to a paper not in evidence cannot be established for the purpose of comparing that signature with the one attached to the obligation sued on, and thus establishing the genuineness of the latter.

2. Witness having testified in his deposition, introduced in chief, that defendant had signed the instrument sued on, there was no error in refusing to permit him, in rebuttal, to state whether or not he had seen him sign it.

Appeal from circuit court, Delaware county; George H. Koons, Judge.

Action by Alvin W. Bowen against James H. Jones to recover on certain subscription contracts. There was judgment for defendant, from which the plaintiff appeals. Affirmed.

J. N. Templer, E. R. Templer, and C. B. Templer, for appellant. C. E. Shipley and W. W. Orr, for appellee.

ROSS, J. The appellant brought this action against the appellee to recover upon three separate contracts. To the complaint the appellee filed an answer of non est factum. Upon the issues thus formed the cause was submitted to a jury for trial, and a verdict returned in favor of appellee. The appellant filed a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict.

Of the reasons contained in the motion for a new trial the first, third, fifth, eighth, and twelfth are the only ones discussed. Those not discussed are waived. On the trial of the cause the appellant offered to prove by appellee the genuineness of his signature to tax assessment lists purporting to have been made by him in the years 1892, 1893, and 1894 for the purpose of comparing the signatures attached to such lists with the signatures attached to the obligations sued on, and thus establish the genuineness of the latter. The rule is settled in this state that the signature to a paper not in evidence cannot be proven for the purpose of comparing it with the disputed signature, and thus establish the genuineness of the latter. *Hazzard v. Vickery*, 78 Ind. 64, and cases cited. But where a writing or signature, admitted to be genuine, is already in evidence for some other purpose, it may be compared with that in dispute, either by the jury or by experts, for the purpose of establishing the genuineness of that in controversy. *Shorb v. Kinzie*, 100 Ind. 429, and cases cited. Upon a careful examination of the evidence, we think it such as justified the verdict returned by the jury. Were there no conflict in the evidence, the contention of appellant might avail. The court committed no error in refusing to permit the witness, Anson W. Greenwalt, in rebuttal, to answer the following question, viz.: "You may state

if you saw James H. Jones sign that subscription contract?" Mr. Greenwalt's deposition had been introduced in chief, in which he testified that the appellee signed the subscription order or contract. Again, one paragraph of the complaint counts upon the subscription contract, and under the issues formed it devolved upon appellant, in making his case in chief, to prove the execution of the contract. We find no available error for which the judgment should be reversed. Judgment affirmed.

(147 N. Y. 69)

In re SEAMAN'S ESTATE.

(Court of Appeals of New York. Oct. 8, 1895.)
CONSTRUCTION OF WILL—TRANSFER TAX—WILL
MADE BEFORE ENACTMENT OF TAX LAW.

1. A testator devised an undivided half of his estate in trust for his daughter during her life, and by the words of present gift, "I give, devise, and bequeath," devised the remainder "upon her decease" to his son's children living at her death. *Held*, that the children, on the death of the testator, took vested interests in the residuary property, subject to the rights of after-born children, or to be defeated by their death without issue during the life estate of the daughter.

2. Testator, who died in 1876, devised his property in trust to pay the income thereof to his nephew during life, with remainder to his children. The nephew died in 1893, and his children were all living at testator's death. *Held*, that under the transfer act (Laws 1892, c. 399), which imposes the tax on transfers of property by will to collateral heirs, "where any such person becomes beneficially entitled in possession or expectancy of any property or the income thereof, whether made before or after the passage of this act," the estate was not liable to taxation, as the latter clause applies only where a transfer was made before the passage of the act, and the beneficial interest therein vests afterwards. 32 N. Y. Supp. 906, reversed.

Appeal from supreme court, general term, First department.

Action by Henry P. Talmadge and others, as trustees, against George W. Seaman and others, for approval of their accounts as trustees, and for the appointment of new trustees in their stead. The comptroller of the city of New York was made a party defendant to determine the liability of part of the trust estate to be taxed under the transfer tax act of 1892. A judgment of the general term (32 N. Y. Supp. 906) reversed a judgment of the special term (30 N. Y. Supp. 304) declaring the interest not taxable. Plaintiffs appeal. Reversed.

Lucius H. Beers, for appellant. Edgar J. Levey and Joseph H. Choate, for respondent.

FINCH, J. This action was brought by two surviving trustees, acting under the will of John B. Seaman, for a settlement of their accounts, and for the appointment of new trustees to administer two trusts not yet terminated. A question of taxation under the revised act of 1892 (chapter 399) arose, and the comptroller of the city of New York was made a party defendant to effect its solution.

The controversy depends upon the following facts: Seaman died in October of 1876, having made and executed his last will and testament in the January preceding. By its terms he devised and bequeathed a residue of his estate in these words: "Sixth. All the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath to my executors, hereinafter named, in trust to apply and pay over the income of one equal undivided half part thereof to my said adopted daughter and niece, Elizabeth Seaman, during her natural life, and upon her decease I give, devise, and bequeath said equal undivided one-half part of my estate so held in trust for my said adopted daughter and niece to the children of my nephew, George A. Seaman, living at the time of her death, share and share alike. Seventh. I direct and order my said executors, hereinafter named, to apply and pay over the income of the other equal undivided half part of my estate so held in trust by them to my said adopted son and nephew, George A. Seaman, during his natural life, and upon his decease I give, devise, and bequeath the said equal undivided half of my estate so held in trust for my said adopted son and nephew to the children of my said nephew, George A. Seaman, living at the time of his death, share and share alike." Both of these life tenants were living at the date of the testator's death, and both died in January of 1893. When the will took effect there were living four children of George A. Seaman, who still survive, and who took into their possession the remainders upon the termination of the trust. There was no inheritance tax law when the will took effect and the estates which it created devolved, but the act of 1892 was in force when the life tenants died and possession of the remainders passed to the four children; and the question involved is whether that vesting in possession which occurred after 1892 is a transfer or succession then for the first time passing, and so taxable under the act, or, if not then first occurring, is at least made taxable by the explicit language of the statute. The special term held that the tax law did not operate retrospectively, and subject to taxation rights of succession which accrued before the tax law came into existence, and that the remainders of the four children were not taxable. The general term reversed the judgment, and subjected the remainders to the tax, apparently putting their conclusion upon two grounds, which are that no interest vested in the four children of George until the death of the life tenants, or at least no such beneficial interest in possession or expectancy as is made subject to taxation, and that the act of 1892 explicitly operates upon such a transfer as occurred.

I think the four children of George took vested interests in the residuary property, both real and personal, at the death of the testator, subject, on the one hand, to open and let in after-born children, and, on the

other, to be defeated by death without issue during the running of the life estates. *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811. The case cited related to real estate, but, except as to a suspension of absolute ownership, limitations of future or contingent interests in personal property are subject to the same rules as those which relate to future estates in land. 1 Rev. St. 773, § 2. The respondent, nevertheless, relies upon the rule applying to bequests of personalty that, where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives. *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 N. Y. 92. A reference to those cases, and others which have followed them, shows that the rule formulated was for the construction of bequests where there was no gift at all, except that involved in the direction to divide at a future time. Here there are words of present gift, for the phrase "upon her decease," like the expression "from and after," does not prevent the legacy from vesting. *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1098. Explicitly the will says, "I give, devise, and bequeath" the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide.

Upon that view of the will, it is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children, and was a vested interest, although subject to be defeated or modified by subsequent contingencies. If the inheritance tax law had been in existence at the date of the testator's death, these interests would have been taxable at once, in the sense that the incumbency of the right of the state would immediately attach. We have held that the tax is not upon the property which is transferred, but upon the right of succession which passes to the successor. In *re Swift*, 137 N. Y. 88, 32 N. E. 1096. A right of succession passed to the four living children of George at the death of testator. It came from him; it was transferred by him; taking effect at his death; and passed then or never. But the right itself, although vesting in the successors at once, had its own peculiar character. It could not ripen into possession or enjoyment until the death of the life tenants, and before that event was contingent solely as to the persons who should eventually take, and the proportions to be observed. The legatees as a class were certain; the particular individuals were alone uncertain. But in just such a case difficulties arose in respect to the application of the inheritance tax law, and received their solution in the *Case of Curtis*, 142 N. Y. 219, 36 N. E. 887. There, as here, a right of succession passed by the will, and at the date of the death of the testatrix, but was contingent as to the specific

legatees; and it was seen that the immediate assessment and collection of a tax was impossible, because, as the law then stood, the succession of the children was exempt while the substituted succession of the nephews and nieces would be taxable; and we determined that the state must wait for the collection of its tax until the contingency was settled. I sought in that case to free the subject from the nice and difficult questions which attend the construction of wills, but, desirable as the result is, I am less confident than I was then of our ability to accomplish it. The case did not decide what is now contended on behalf of the respondent. In the counsel's brief it is described as holding that no beneficial interest passed, and that construction is reached by emphasizing half of a sentence with a neglect of the remaining half. The language used was: "The state cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable, and until it can show that vital and necessary fact its right to the tax cannot arise." To say that no beneficial interest passed into hands where it was taxable is very different from saying that no beneficial interest passed at all. The doctrine of the case and its manifest trend was that, where the particular persons who were to have the beneficial possession were uncertain, the appraisal and collection must be adjourned until the uncertainty ended; but no new doctrine of the passing of the right of succession at a date later than that of the will was at all asserted.

It is said, however, that the right of succession passing in remainder by the will was at best merely technical and nominal, and that the beneficial interest did not pass until the termination of the life estates. In one sense that is true. The right of succession to specific individuals might prove barren, and for that reason the claim of the state should be adjourned, and the law of 1892 fully recognizes and provides for such an adjournment, but a necessary and admissible delay in appraisal and collection is a very different matter from an assertion that no beneficial right of succession passed at all until after the decease of the life tenants. Next, the language of the act is relied on to effect the result, and it presents the real and difficult question requiring solution. Section 1 of the act imposes a tax upon all transfers of property to persons or corporations not exempt from taxation in the cases thereafter specified. The first subdivision embraces transfers by will or by intestacy from residents of the state. The second covers similar transfers of property within the state, where the decedent was a nonresident at the time of his death. So far the transfers take place necessarily at the moment of death, for the will on the one hand and the intestate laws on the other operate and speak from that date, and any special provision about that was needless. But then comes

the third subdivision, introducing a new case. It reads thus: "When the transfer is of property made by a resident or a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." At this point are evidently referred to grants or gifts *causa mortis*; that is, those affecting the result of a will or of intestacy by a grant or gift made during life, and so by a different process. The subdivision then proceeds: "Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy to any property or the income thereof by any such transfer whether made before or after the passage of this act." If we give this language a general and broad application, making it cover not only grants or gifts *causa mortis*, but also transfers by will or intestacy, we give the act a retrospective operation, and subject to taxation rights of succession which accrued before the statute came into existence. Of course, we ought not to do that upon any doubtful or ambiguous expression. The words of the statute have their full and natural force when applied to the new case, immediately preceding, of grants or gifts *causa mortis*. A grantor may have conveyed and delivered his deed before 1892, in contemplation of death, and to take effect upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment, during his lifetime; and the legislature certainly intended to put such a transfer on the same footing as one by will. It is of no consequence that the will was executed before the statute if the death occurs after, and the same rule was intended to be explicitly applied to grants *causa mortis*. Though the deed precedes the tax law, as the execution of the will precedes that law in a possible case, yet the transfer in both instances is to date from the one event which makes it operative and effective. So much the legislature certainly intended, and so much can be admitted without making the statute operative retrospectively. Did the legislature mean more than that? The argument for an affirmative answer rests somewhat upon the expression, "shall be beneficially entitled in possession or expectancy." But these four children, at the death of the testator, were "beneficially entitled" to their remainders in "expectancy." An estate "in expectancy" is one where the right to the possession is postponed to a future period, and it is "beneficial" where the devisee takes solely for his own use or benefit, and not as the mere holder of the title for the use of another. So that the four children, as I have said, were beneficially entitled in expectancy, at the date of testator's death, to the estates which later came into their actual possession.

In addition, it should be observed that the statute draws the distinction between the passing of the right of succession and the subsequent enjoyment, or termination of a defeasible quality. The right of the state attaches when the right of succession accrues, but may not be enforced in advance of that future possession and enjoyment, or indefeasible ownership, which identifies the persons who ought to pay. I think that is the meaning of the statute, although in some respects it is not free from ambiguity; and that we ought not to give it the retrospective effect for which the respondent contends. The order of the general term should be reversed, and the judgment of the special term affirmed, with costs. All concur. Judgment accordingly.

(147 N. Y. 184)

HATCH et al. v. FOURTH NAT. BANK OF CITY OF NEW YORK et al.

(Court of Appeals of New York. Oct. 8, 1895.)

BANKS AND BANKING — LIEN ON DEPOSITS — FOLLOWING TRUST FUNDS.

1. Plaintiff deposited a stock certificate with a firm who unlawfully used it as collateral security. The money borrowed thereon was in the form of a check, which said firm deposited to its credit in defendant bank. Said firm was also indebted to defendant, which was authorized to apply to the payment of said indebtedness any moneys on deposit to the credit of said firm. *Held* that, as against plaintiff, defendant had the right to apply the moneys collected on the check to the firm's indebtedness, even after the firm had assigned. 31 N. Y. Supp. 530, affirmed.

2. So, where said firm deposited with said bank stock belonging to another person as collateral to secure its indebtedness to said bank, and the bank, after applying the moneys on deposit to said indebtedness, sold the collateral to satisfy the balance remaining due, the amount realized on the sale in excess of the balance due the bank belonged to the owner of said collateral, and not to plaintiff.

Appeal from supreme court, general term, First department.

Action by Mary D. Hatch and another, as executors of Mary D. Sanford, against the Fourth National Bank of the City of New York and others to recover the proceeds of a certificate of stock. From a judgment of the general term (31 N. Y. Supp. 530) affirming a judgment for defendants, plaintiffs appeal. Affirmed.

Geo. W. Wingate, for appellants. David Wilcox and Henry H. Man, for respondents.

FINCH, J. We ought to affirm this judgment upon a single ground, which rests upon facts not at all controverted or in dispute. For that purpose we may assume as true the plaintiff's version of what actually occurred, without criticism at doubtful points of the way. She was the owner of a certificate of stock of the Adams Express Company, of the par value of \$15,000. That certificate, in a negotiable form, and capable of transfer by delivery, she intrusted to the

temporary custody of Mills, Robeson & Smith. Her son and agent, E. S. Sanford, placed it in a sealed envelope, marking it on the outside with his name, and left it with the firm to be placed in their safe until the following Monday. On the day of that deposit, the firm, acting through Smith, borrowed of Ferris & Kimball the sum of \$20,000, giving the note of the partnership therefor, and depositing as collateral the certificate which the plaintiff had committed to the care of the firm, and which Smith converted to its use. We may admit that his act was, in substance, a larceny, and the certificate in his hands stolen property, but, nevertheless, the title of Ferris & Kimball to the pledged certificate, which they sold upon default in the payment of the loan, and to the proceeds of such sale, is not here and now questioned or assailed. The plaintiff's certificate was but a part of the collateral which stood as security for the note. It is found that 8 shares of Chicago, Cincinnati, Cleveland & St. Louis preferred stock, raised by a forgery to 80 shares, and 2 Union Pacific first mortgage bonds of \$1,000 each, also formed part of the collateral. The lenders gave their check for the \$20,000 thus borrowed to Mills, Robeson & Smith, and they indorsed it and deposited it to their own credit in the Fourth National Bank. That bank held the deposit upon an express contract with its customer, which gave to it rights beyond those flowing from the ordinary relation, and outside of the mere banker's lien. The deposit was made on the afternoon of November 14, 1890. Previous to that date Mills, Robeson & Smith had borrowed of the bank, first the sum of \$50,000, and next the sum of \$5,000, giving in each case their note, payable on demand, and certain collateral securities. The special agreement between the parties added to such collateral any balance of the customer's deposit accounts standing to their credit on the books of the bank, and contained the following explicit provision: "The undersigned do hereby authorize and empower the said bank, at its option, at any time, to appropriate and apply to the payment of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due." On November 15, 1890, the balance standing to the credit of the firm was a little more than \$16,000. On that day Mills, Robeson & Smith failed and made a general assignment. On November 17th, which was the next business day thereafter, the bank demanded payment of the loan, and in default thereof applied the credit balance of the firm to the payment of its debt, thereby so far canceling and extinguishing that liability. This act the plaintiff resists, contending that the \$16,000 was her money, as proceeds of her stock stolen from

her by Smith, and which proceeds she was able to trace into the thief's deposit account, and sufficiently identify as her own money. There is more or less of difficulty in that identification, and the subject has occasioned a large part of the argument addressed to us, but need not now be discussed. For the purposes of the decision, at least until we reach the case of *Mrs. Crabb*, we may concede that the credit balance was proceeds of the stolen stock, and sufficiently identified, and yet the opinion of the general term will remain intact and unanswered. If Mills, Robeson & Smith, on receiving the check of Ferris & Kimball, had at once collected it and turned it into money, and then had paid that money to the bank in discharge of their debt to it, and the bank had accepted that payment in ignorance of the source from which the money had been derived, and had surrendered the notes and discharged their debtors' liability in entire good faith, the owner of the stolen money would have had no right of recovery against the bank. *Justh v. Bank*, 56 N. Y. 478; *Stephens v. Board*, 79 N. Y. 183. This doctrine goes upon the ground that money has no earmark, that in general it cannot be identified, as chattels may be, and that to permit, in every case of the payment of a debt, an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy, as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances. If, therefore, Smith had come with the money, and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actual proceeds of the stolen certificate. I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected. If Smith had brought that, and the bank had accepted it as cash, or conditionally, upon its proving good, the result would have been the same. The debt would have been paid and the money become the absolute property of the bank. In *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316, it was a draft which paid the debt, and which the comptroller received and collected. Nor does it change the result that Smith deposited the check, and did not at the moment direct its application upon the liability of the firm. He made the deposit under an existing specific contract by which Mills, Robeson & Smith consented and agreed that the bank might at any time apply it upon the existing liability. When it did so, on the 17th of the month, it acted with the written consent and authority of the firm, as completely effectual and operative as if the debt-

ors on that day had personally directed the application to be made. The contract was a continuing direction, a daily consent, an agreed permission. The loan was a call loan, payment of which could be demanded on any day, and the option to make that demand and apply the credit balance was a part of the written agreement, and an essential and material stipulation of the contract of loan. I think the application of the deposit account upon the debt, resting upon that continuing consent, had the same effect as if Mills, Robeson & Smith, without an assignment, had personally on that day directed the application, and so paid the debt. As against them, and as against their assignee, the application was in all respects lawful and effectual. The recent case of *Refining Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, which is pressed upon our attention, does not at all determine the present question. There the proceeds of the sugars, obtained by fraud, remained in the hands of the insolvent's assignee without having been applied to the payment of debts. If the insolvent himself had applied those proceeds to some existing liability, or his assignee innocently and without notice had so paid them out, and the fund was sought to be wrested from the hands of the creditor paid, a very different question would have been raised, and one requiring a different solution. Nor does the case of *Van Alen v. Bank*, 52 N. Y. 1, govern the one before us. There was there no claim by the bank upon the fund deposited. Concededly, they were bound to pay it over to the proper party, and the only question involved was who that proper party in truth was. The depositor was an agent, the deposit the money of his principal, impressed with a trust in favor of that principal, and the inquiry addressed to the court was whether the principal, for lack of privity, could enforce payment of the deposit to himself.

The rule we have applied is further resisted upon the ground that the application of the credit balance was made after the debtor's failure and assignment, and with knowledge of that fact on the part of the bank. The inference sought to be drawn is that the payment was not in good faith, but under circumstances sufficient, at least, to put the bank on inquiry. But business embarrassment or a general assignment does not warrant or suggest a presumption of fraud, and certainly not of a theft producing moneys on deposit. The fact of the failure undoubtedly led to a call of the loan, and a resort to the contract right. It was just such an emergency that the agreement was framed to meet, and against which it was to serve as a protection. The fact of the failure had not the least tendency to indicate that the deposit balance was the product of a larceny.

The further question in the case is over the right of Mrs. Crabb, which has been sus-

tained. After the failure the whole credit balance of Mills, Robeson & Smith was first applied to the debt due to the bank. It was not enough to pay that debt. When it was wholly exhausted, so that no surplus was left, there still remained a sum due to the bank. Thereupon it resorted to its collateral, as it had a right to do. Among the securities pledged by the debtor firm were some belonging to Mrs. Crabb, which she had deposited for safe-keeping, and which Smith had appropriated for collateral. To these pledged securities the bank resorted, and sold most of them after the failure, and after the credit balance had been fully exhausted. The result of that sale produced a surplus after completed payment of the bank's debt. The proceeds were credited by the bank, after payment of their debt in full, to the deposit account, and that surplus has been awarded to Mrs. Crabb. Obviously, no part of it could be said to be proceeds of plaintiff's stock. Those proceeds had been previously applied in payment of the bank debt, and utterly exhausted. What remained was the collateral, and that produced the surplus, and such surplus was clearly the product of Mrs. Crabb's bonds, together with what is conceded to have been Fay's. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 208)

DEMAREST v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 8, 1896.)

DE JURE OFFICERS—RIGHT TO SALARIES.

An action to recover salaries by persons claiming to have been officers de jure will not lie where it appeared that such offices were filled, and the salaries attached thereto paid to persons who claimed to be legally elected, and whose title to said offices had never been judicially determined, and that the said offices were in existence prior to the election of any of the claimants. 26 N. Y. Supp. 585, affirmed.

Appeal from supreme court, general term, First department.

Action by William E. Demarest against the mayor, aldermen, and commonalty of the city of New York to recover for salaries alleged to be due to plaintiff and his assignors as aldermen of the city of New York. From a judgment of the general term (26 N. Y. Supp. 585) affirming a judgment for defendants, plaintiff appeals. Affirmed.

George W. Miller, Seaman Miller, and George C. Eldridge, for appellant. David J. Dean, for respondent.

GRAY, J. The plaintiff brings this action for himself and as assignee of others to recover the salaries alleged to be due them as aldermen of the city of New York for the year 1877. The claim is that they were elected to such offices pursuant to the act of the legislature contained in chapter 137 of the Laws of 1870, as amended by chapter 574 of

the Laws of 1871, which provided for the election upon a general ticket, from the city at large, of a board of 15 aldermen. The defense of the city is that those laws were repealed by chapter 335 of the Laws of 1873 and, further, that pursuant to the latter act, which contained a charter for the city, other persons were duly elected as aldermen at the election at which the plaintiff and his associates claimed to have been elected, who entered upon and executed the duties pertaining to the office of an alderman of the city, and were paid the salaries claimed by the plaintiff. When the action came on for trial no evidence was given. The whole case was agreed to be contained in the pleadings, it being expressly admitted by the plaintiff that the salaries claimed by the plaintiff in his complaint had been paid by the city to other persons, assuming to have been elected, and who acted as a board of aldermen under the charter of 1873. The complaint was thereupon dismissed by the court upon the motion of the defendant.

Section 4 of chapter 335 of the Laws of 1873 provided for a system of minority representation in the board of aldermen of the city of New York, by restraining the right of a voter to vote for all the aldermen to be elected. It is unimportant to more particularly refer to the provisions of the section, as the system was, not long thereafter, abolished. Laws 1882, c. 403. The plaintiff's propositions are that those provisions were unconstitutional and void, for being in violation of that part of the constitution of the state which guarantees to every qualified voter the right to vote for all officers that may be elected by the people (article 2, § 1), and that the acts of 1870 and 1871 remained in force, under whose provisions he and his associates were elected, and became the legally constituted board of aldermen, and, as such, were entitled to their salaries. The determination of the question of constitutionality, however, is not necessary to the determination of the case, and, as the ground upon which the decision of the general term of the supreme court has been placed is clearly presented in the case, and is perfectly tenable, our judgment may and should rest upon it. We should not pass upon the constitutionality of a statute if the question is immaterial to the case. *Frees v. Ford*, 6 N. Y. 176. It is a salutary principle, and founded upon the respect due to the legislative department of the government, that the constitutionality of its exercise of power should not be passed upon by the court until a case arises in which a decision of such a question is unavoidable for the determination of the case itself.

This action is to recover the salaries of the plaintiff and his associates as aldermen of the city for the year mentioned, and if we should assume all they claim as to the unconstitutionality of the provisions of the fourth section of the charter of 1873, and the validity of their election, and that they were

de jure aldermanic officers, there is the answer that others assumed to have been elected, received their certificates of election, were inducted into and occupied the office, exercised its duties and, as officers de facto, were paid salaries. That is a complete answer, and one which has the sanction of the authorities. Their title cannot be questioned collaterally in such an action, and, even were the action of such a nature as to permit the question, the payment already made to the de facto officers of the salary belonging to the office would be a good defense to the claim of the plaintiff. The case of *Dolan v. Mayor*, 68 N. Y. 274, where this principle was asserted, was rested upon the ground of public policy, which requires that fiscal officers, charged with the payment of salaries, should be deemed justified in paying them to persons clothed with the apparent title to an office, without inquiring whether others have the better right. The remedy, it was said, of the person wrongfully deprived of the office is to recover his damages for the wrong against the usurper. In *McVeany v. Mayor*, 80 N. Y. 185, and in *Terhune v. Mayor*, 88 N. Y. 247, the doctrine was upheld that payment to a de facto officer, while he is holding the office and discharging its duties, is a defense to an action brought by the de jure officer to recover the same salary. It is unnecessary for us to reason now upon a doctrine which has so often been discussed in the cases. Offices are created for the benefit of the public, and the title of their incumbents is not to be inquired into except in some way prescribed by law. Their acts will not be invalidated nor official dealings with them be affected, by reason of some illegality in their election, not judicially declared. The appellant, however, undertakes to meet this phase of the matter by the suggestion that, if section 4 of the act of 1873 was unconstitutional and void, no legal office of alderman was created by its provisions, and therefore there could not be either a de jure or a de facto incumbent thereof. But that office, as a part of the local government, existed by law, and was not created by the act of 1873. In the case of *Norton v. Shelby Co.*, 118 U. S. 441, 6 Sup. Ct. 1121, relied upon by the appellant, it was held that, as the act attempting to create the office never became a law, the office never came into existence. A board of commissioners was provided for to take the place of the county court of Shelby county, and commissioners were appointed to take the place of justices of the peace, and because the constitution did not permit this to be done it was adjudged that the act was void, and it followed that the office never legally existed. That was not this case. Here the office of alderman always existed, and the legislative intent, as evidenced in the act of 1873, was to introduce the experiment of minority representation in the municipal government. The provision of that act in question did not, as in the *Shelby County Case*, attempt to create an office where none before

existed. Unless the office did exist by law, how could the plaintiff and his associates base their present claim to have been elected to it? This very demand and suit are an ample concession that aldermanic offices existed to be filled. The plaintiff's position is that the law of 1873 was void, and that, although so expressed in terms, it was ineffectual to even accomplish the repeal of the previous acts of 1870 and 1871, under which they claimed to have been elected. But if, by existing provisions of law, there were the offices of aldermen to be filled by election, then the fact is that they were assumed by other persons, claiming to have been elected; and, though the provisions of the law regulating the composition of the board, and the mode of election thereto, and under which they entered into office, might be unconstitutional, that would not affect the existence of the office. They would, though usurpers, be de facto officers, exercising the particular governmental duties incident to the office usurped. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 49)

HUGHES v. MONROE COUNTY.

(Court of Appeals of New York. Oct. 8, 1895.)

COUNTIES.—LIABILITY FOR TORTS OF EMPLOYEES.

Under Laws 1863, c. 82, and Laws 1870, c. 633, the county of Monroe assumed the maintenance of an insane asylum. A board of supervisors were placed in control, and were authorized to elect a warden, who was the chief officer of the asylum, and a board of trustees, in whose name all contracts were made. *Held* that, as the county was engaged in the discharge of a public duty, it was not liable for injuries sustained by one employed as a servant in said asylum, through the negligence of a person in charge thereof. 29 N. Y. Supp. 495, affirmed.

Appeal from supreme court, general term, Fifth department.

Action by Elizabeth G. Hughes against the county of Monroe for personal injuries. There was a verdict for plaintiff, but defendant's motion for a new trial, made at general term (29 N. Y. Supp. 495), was granted, and plaintiff appeals. Affirmed.

Eugene Van Voorhis, for appellant. F. E. Drake, for respondent.

BARTLETT, J. The plaintiff appeals from an order made on a motion heard at the general term in the first instance, granting a new trial after verdict at the Monroe circuit in her favor. The plaintiff, an employé at the Monroe county insane asylum, was severely injured while operating a machine known as a "steam mangle," which was used in the laundry. At the trial it was insisted on behalf of the defendant that the county of Monroe was not liable, in any event; that, assuming its liability, the plaintiff had failed to make out a cause of action. As we are of opinion that the county of Monroe is not liable, under the facts as disclosed in this

record, it is unnecessary to determine whether the plaintiff was entitled to go to the jury. The plaintiff was injured February 11, 1891. Before this action was commenced the county law of 1892 was in force; but it is unnecessary to examine its provisions, as the status of the county of Monroe on the 11th day of February, 1891, must determine its liability. Prior to the year 1863 the county of Monroe cared in part for its insane in a department of the county poorhouse. By chapter 82, Laws 1863, it was enacted that the insane asylum of the county of Monroe should be a separate and distinct institution from that of the Monroe county poorhouse, and the board of supervisors were placed in control, and authorized to elect a warden, who was to hold office for three years, and a board of three trustees for a like term. The warden was constituted the chief officer of the asylum, subject to the regulations established by the board of supervisors. All purchases for the asylum were to be made by the warden, under the direction of the trustees. All contracts with the attendants and assistants were to be made in the official names of the trustees. The warden was also required to make out and deliver to the trustees, annually, an inventory of all property belonging to the asylum. The warden was also authorized to make contracts for the support of insane persons of the county, and, by the direction of the board of supervisors or the trustees, to demand from the state lunatic asylum all persons who were chargeable to the county of Monroe, or to any town or city in the county. It was further provided that no insane person residing in the county of Monroe, and likely to become a county charge, should thereafter be admitted to the state lunatic asylum without the written consent of the trustees of the Monroe county asylum, or the chairman of the board of supervisors. By chapter 633, Laws 1870, it was made the duty of the trustees to determine all questions in relation to the indigent insane, as to whether their maintenance was properly a charge upon a specified town within the county of Monroe, or upon the city of Rochester, or upon the county of Monroe. The trustees were also empowered, when any lunatic, not indigent, was placed in the asylum, to charge his estate, or the person legally responsible for his maintenance, and to collect the same.

It will thus be observed that the county of Monroe, being legally chargeable, as one of the political divisions of the state with the care of its insane, saw fit in 1863, with the consent of the legislature, to undertake the discharge of that duty through the instrumentality of a county asylum. In other words, the county of Monroe from that time shared with the state the burden of caring for the insane, withdrew from the state lunatic asylum all indigent insane for whose maintenance it was liable, and secured legislation requiring all the pauper insane of the

county to enter its own asylum. When an insane person is deprived of his liberty and the custody of his property, placed in close confinement, and separated from family and friends, it is an extreme exercise of the police power by the state, or some political division thereof, for the protection of society, and to promote the best interests of the unfortunate victim of mental alienation. It therefore follows that the county of Monroe, while acting under the statutes referred to, was engaged in the discharge of a most important public duty, and consequently not liable to the plaintiff in damages by reason of her injuries. *Dill Mun. Corp.* (4th Ed.) § 693; *Add. Torts* (Banks' Ed.) p. 1298, § 1528. In *Maxmillian v. Mayor of New York*, 62 N. Y. 160, this court laid down the rules of law that control this case. The plaintiff sought to recover damages for the death of her intestate, who was killed by an ambulance wagon which was driven by an employé of the commissioners of charities and corrections. It was held that when the city of New York, by legislative enactment, was required to elect or appoint an officer to perform a public duty, laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable, even though the officer had in charge, and was negligently using, corporate property. Judge Folger said (page 164): "There are two kinds of duties which are imposed upon municipal corporations: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, under the exercise of which it is as a sovereign. The former power is private, and is used for private purposes. The latter is public, and is used for public purposes. *Lloyd v. Mayor*, 5 N. Y. 374. * * * But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284." In the case at bar, it is true, we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the state, and, at most, only a quasi corporation; but, nevertheless, the reasoning in the opinion just cited is applicable.

By the act of 1863 the county of Monroe, through its board of supervisors, was required by the legislature to elect a warden and trustees of its insane asylum to perform an important public duty, in which it had no private interest, and from which it derived no special advantage. The warden and trustees, when so elected, were in no legal sense

the agents of the county of Monroe, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and in which the general public were interested. While the county of Monroe, by its board of supervisors, was empowered to enact general rules and regulations for the government of the asylum, and to elect its warden and trustees, it had no power to interfere directly with the management of the institution, unless the warden so elected was guilty of misconduct, when he could be removed by the board of supervisors. The nonliability of counties, and also of municipal and other corporations having special charters, for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. *Ensign v. Board of Sup'rs*, 25 Hun. 20; *Alamango v. Board of Sup'rs*, Id. 551; *Ham v. Mayor*, 70 N. Y. 459; *Smith v. City of Rochester*, 76 N. Y. 506; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13, 1 N. E. 836; *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781.

The learned counsel for the plaintiff, evidently appreciating the force of the general rule to which we have adverted, sought to show that the case at bar was, by reason of special facts, not within its operation. It is insisted that the defendant, at the time of this accident, was not only caring for the pauper insane of Monroe county, but also for other patients, through contracts made for that purpose. There is no evidence that the county of Monroe was caring for insane patients not residing in the county, for a consideration; but, if such were the case, it would be without warrant of law, as we think a fair construction of section 7 of chapter 82 of the Laws of 1863 limits the contracts to be made "to any individual of said county" who wishes to contract as to the care of the insane of Monroe county. There can be no doubt that the committee of a lunatic, or any one legally liable to support him, should, in the first instance, be required to pay for his maintenance; and the income derived in this manner is in no sense a source of profit to the county, so that it would be deemed, in law, as conducting a private business. We may also consider in this connection the suggestion that, as the asylum received a small sum annually from the sale of surplus farm products, it was to be treated as engaged in a private enterprise resulting in profits. The revenue derived from both of the sources referred to is merely incidental, and tends, to some little extent, to lessen the public burden assumed by the county of Monroe. *Curran v. City of Boston*, 151 Mass. 505, 510, 24 N. E. 781; *Alamango v. Board of Sup'rs*, 25 Hun. 151-153; *People v. Purdy*, 126 N. Y. 679, 28 N. E. 249, and 58 Hun. 386.

We have considered the other suggestions of counsel for appellant, contained in his

brief, and consulted the authorities to which he refers, but find nothing to take this case from the operation of the general rule. The order of the general term should be affirmed, and, under the stipulation of plaintiff, judgment absolute ordered for the defendant, dismissing the complaint on the merits, with costs to defendant in all the courts. All concur, except HAIGHT, J., not sitting. Ordered accordingly.

(147 N. Y. 59)

HOLMES v. JONES.

(Court of Appeals of New York. Oct. 8, 1895.)

LIBEL—MITIGATION OF DAMAGES—EVIDENCE.

In an action for libel by an undertaker for the publication of statements that plaintiff charged the family of a deceased person an exorbitant sum for services, and was intoxicated when such services were rendered, it appeared that plaintiff had caused to be published statements that he had presented a just bill for services, which the family of decedent had refused to pay. The alleged libelous article was published in reply to such statements, and on the trial defendant pleaded justification as to both charges, but failed to prove justification of the charge of intoxication. *Held*, that evidence that plaintiff's charge for services was exorbitant was admissible in mitigation of damages for the false charge of intoxication.

Appeal from supreme court, general term, Fifth department.

Action by Ebenezer Holmes against George Jones, treasurer of the New York Times, for libel. After the commencement of the action, defendant died, and it was continued against Gilbert E. Jones as treasurer. From an order of the general term (28 N. Y. Supp. 1117) affirming a judgment entered on a verdict for plaintiff, defendant appeals. Reversed.

For prior report, see 24 N. E. 701.

This is the second appeal to this court in this action. On the former appeal the judgment in favor of the plaintiff was reversed because of the refusal of the trial judge to instruct the jury that the defendant had established a justification of the charge in the article of November 22, 1886, imputing dishonesty and unfair dealing on the part of the plaintiff in presenting an unjust and exaggerated claim to the family of Gen. Grant for his services as undertaker on the occasion of the death of Gen. Grant, July 23, 1885. On the second trial the plaintiff, although he had set forth in his complaint this charge as to the unjust and extortionate character of the claim of Holmes & Co. as one of the grounds of action, omitted to read this part of the libelous article to the jury, but put in evidence and read to the jury that part only which alleged, in substance, that on the afternoon and evening of the 23d of July, during the time when, as the plaintiff claimed, he was rendering service as undertaker, he was intoxicated. The defendant, in his answer, justified both the charge of attempted extortion and the charge of drunkenness, and also alleged, in mitigation of damages, the circumstances under which the publica-

tion was made. The defendant, after the plaintiff had rested, put in evidence and read to the jury the whole article, and gave evidence tending to justify the charge of drunkenness. This was met by counter evidence on the part of the plaintiff, and upon this issue (the only one which was submitted to the jury) the jury found for the plaintiff, and rendered a verdict in his favor for \$3,500. During the course of the trial the defendant offered to prove in mitigation of damages that the plaintiff presented to the family of Gen. Grant an exorbitant bill for his services, and, in substance, to prove the truth of the alleged libel relating to that subject. The plaintiff objected to the evidence, and the court excluded it, and the defendant excepted. The question is, was it competent for the defendant, in mitigation of damages as to that part of the alleged libel charging drunkenness, to show that the charge of attempted extortion made in the article was true? The plaintiff, who carried on the business of an undertaker at Saratoga Springs, was, through Mr. Arkell, and by direction of Dr. Douglas, notified from Mt. McGregor, on the morning of July 23, 1885, to come to the latter place, and immediately responded to the notification, and took charge of the body, and proceeded with the process of embalming. In the afternoon of the same day Mr. Merritt, an undertaker from New York, who had been sent for by the son of Gen. Grant, arrived, and from that time assumed control. He superseded the plaintiff, and practically the whole service rendered by the plaintiff was confined to what he did preceding the arrival of Merritt. He, however, visited Mt. McGregor daily until the 30th of July, the day when the body was taken to New York. Subsequently the plaintiff sent a bill for \$500 to Col. Grant for his services and disbursements. The bill was given by Col. Grant to Merritt. Correspondence ensued between Merritt and the plaintiff. At Merritt's suggestion, the plaintiff had an interview with an army officer of the United States with respect to the bill, but it was not paid. Several months later the plaintiff sent the bill again to Col. Grant, who returned it, accompanied with a letter, in substance denying the validity of the claim, and stating that Mr. Merritt was alone employed to superintend the preparations for the funeral of Gen. Grant, and advising plaintiff that the bill should be presented to Merritt. On the 30th of September of the next year a telegraphic dispatch, purporting to have been sent from Saratoga Springs, was printed in the Sun, a newspaper of the city of New York, stating that the plaintiff's firm had notified Mr. Arkell of a suit about to be brought against him for services rendered by the firm in embalming the body of Gen. Grant, and purporting to give an account of the services. It stated that the bill (a copy of which was given) had been presented to everybody connected

with the family of Gen. Grant except Mrs. Grant, and had been "repudiated all around," and that the attorney for the plaintiff said "that he had found no one connected with the deceased general who seems to feel any moral obligation to pay for the care of his remains and their preservation for burial, and so they decided to sue Mr. Arkell." Appended to the dispatch as published was a statement from the editor of the Sun that, "If Messrs. Holmes & Co. will be good enough to send the bill in question to the editor of the Sun, he will remit them the amount." A few days later, on the 4th of October, 1886, a letter from Holmes & Co., addressed to the editor of the Sun, was printed in that paper, purporting to be "a plain statement of the facts" relating to the bill of Holmes & Co., in answer to the many statements made in the public press, "which are either perversions of the truth or positive falsehoods." The letter then proceeded to narrate the circumstances of the employment of Holmes & Co., the services rendered, the efforts made to collect the bill, and their failure, and that as a last resort they were advised to fall back on Mr. Arkell. Referring to the circumstances of this employment, and their subsequent treatment, the writers said: "We feel a degree of certainty, however, that if the dead general were now alive, he would see that similar services rendered to his household should not remain long unpaid, nor hesitate to acknowledge a claim in favor of those who performed them." The letter concluded with an intimation that if the offer of the Sun was still open, and those whom the writers deemed "legally and morally bound to pay the claim" do not pay it, the offer would be accepted. Subsequently, and on the 13th of October, 1886, the bill was paid to Holmes & Co. by the Sun, and the fact of such payment was announced in that paper. Meanwhile, after the publication of the letter of October 4, 1886, and the payment of the bill, letters were written to the Sun by Harrigan and Sullivan, who assisted Merritt in taking charge of and embalming the body, controverting in many respects the statements in the letter of Holmes & Co.; but these letters the Sun did not publish. Subsequent to the payment of the bill by the Sun, and before the publication of the alleged libel, correspondence took place between Col. Grant and the Sun, in which Col. Grant, while denying the justice of the claim, stated that the family were unwilling that the bill should be paid by the Sun, and he inclosed a check for the amount, which the Sun declined to receive, and it was returned to Col. Grant. On the 22d of October, 1886, a communication from Harrigan, the embalmer employed by Merritt, was published in *The Press & Knickerbocker*, denying many of the statements in the letter of Holmes & Co., and which referred to the payment by the Sun of a bill which the family of Gen. Grant pronounced "blackmailing

in color," language which was quoted in the alleged libelous article, and which forms one of the libelous paragraphs counted on in the complaint.

It was subsequent to the circumstances above mentioned that the alleged libel of November 22, 1886, was published in the *New York Times*. The article is headed "Even Beyond the Grave. The Malice of the Sun Hounds Gen. Grant." It states that an undertaker's bill was used as a "pretext for causing pain to the dead hero's family." The plain intent of the article was to denounce the Sun for its officious and offensive interference in paying the bill of Holmes & Co. without the knowledge of the family of Gen. Grant, and the justice of which they denied. The article purports to give a history of the services rendered by Holmes & Co. It refers to the publication of the dispatch of September 30, 1886, and the appended offer of the Sun to pay the bill of Holmes & Co., made without consultation with the family of Gen. Grant; to the letter from Holmes & Co. of October 4, 1886, and the refusal of the Sun to publish the letters from Harrigan and Sullivan; to the pain caused to Gen. Grant's family by the payment by the Sun of the bill, and to the subsequent correspondence between the Sun and Col. Grant, before alluded to. It characterized the action of the Sun as wholly "unnecessary and malicious." The article then proceeds to give the statements made by Merritt, the undertaker, who superseded the plaintiff in charge of the body, to a reporter of the *Times*. The interview relates to the services rendered by Holmes & Co., and the report contains the statements as to the intoxication of the afternoon and evening of the 23d of July, 1885, which, with the charge as to the extortionate character of the bill of Holmes & Co., constitute the libelous matter counted on in the complaint.

B. F. Einstein, for appellant. Matthew Hale, for respondent.

ANDREWS, C. J. (after stating the facts). The primary purpose of the article published in the *New York Times* November 26, 1886, containing the defamatory matter for which the action was brought, was to expose the conduct of the Sun in officiously offering to pay, and in subsequently paying, the claim of Holmes & Co., for alleged services in embalming and caring for the body of Gen. Grant, after the claim had been repudiated by his family, and its justice had become the subject of public comment. The offer to pay the bill made in the columns of the Sun, who, as was stated by Holmes & Co. in their letter of October 4, 1886, "was under no legal or moral obligation" to pay it, appended to a statement which imputed to the family of Gen. Grant in their dealings with Holmes & Co. a disregard of honor and moral obligation, was well calculated to wound the feel-

ings of the members of the family, and to excite the indignation of their friends and the friends of the illustrious soldier whose name was associated with the transaction. The offer carried an implication that the family of Gen. Grant had disregarded and refused to recognize an honest claim for services connected with the preparation of his body for burial, which, if well founded, would justly expose them to animadversion. This was the occasion for the article in the Times, and the plaintiff had made himself a party to the controversy by his letter to the Sun of October 4, 1886, in which he put himself in the attitude of having a just claim for services rendered for the amount of the bill rendered by Holmes & Co., which the family of Gen. Grant had declined to recognize; and, to accentuate the alleged injustice with which he was treated, he intimated his willingness to accept the public offer of a stranger to the transaction to pay the claim in case "those whom we think are legally and morally bound to pay the claim do not sooner recognize their obligation by its payment." The plaintiff had, by his own act, in writing,—the letter of October 4, 1886,—thrust himself and his conduct into the arena of public discussion, and, as might reasonably have been anticipated, the charge made against the family of Gen. Grant of delaying and repudiating the payment of an honest claim was met by public denial in the New York papers, and a public criticism of the origin and character of the claim asserted by Holmes & Co. The defendant failed to establish before the jury the justification set up in the answer to the statement in the article in the Times that the plaintiff was intoxicated in the afternoon and evening of July 23, 1885, during his alleged employment at Mt. McGregor. The evidence upon the point was conflicting, but the finding of the jury determines the fact in favor of the plaintiff. The plaintiff was, therefore, entitled to recover damages for this misstatement. It was defamatory, and, while there is no ground to suppose that the statement was instigated by actual malice or ill will towards the plaintiff, its absence constitutes no answer to the claim for damages. The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and, in the absence of legal excuse, gives a right of recovery, irrespective of the intent of the defendant who published it; and this although he had reason to believe the statement to be true, and was actuated by an honest, or even commendable, motive in making the publication. But the amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages, or damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called "punitive" or "vindictive" damages, by way of example or punishment, when, in their judgment, the

defendant was incited by actual malice, or acted wantonly or recklessly, in making the defamatory charge. *Taylor v. Church*, 8 N. Y. 452. The trial judge left it to the jury to determine, in case they should find for the plaintiff, the whole subject of damages, and whether punitive damages should be awarded. The plaintiff having practically withdrawn from the jury the consideration of the charge in the article that he had presented an unjust and extortionate bill, by not reading that part of the article to the jury, although it was counted on in the complaint, the defendant had no occasion to justify that charge, although a justification was set up in the answer. The omission of the plaintiff to rely upon this charge was apparently to avoid a trial of the issue of justification thereon, which, on the former appeal in this case, was held to have been established. 121 N. Y. 461, 24 N. E. 701. On the trial now under review the defendant offered, in substance, to prove, in mitigation of damages of the charge of intoxication, that the bill presented by Holmes & Co. was unjust and extortionate, and, if the evidence was competent for that purpose, the pleadings were in proper form to permit its introduction. We are of the opinion that, under the circumstances of the case, the evidence should have been admitted. Of course, the fact that the plaintiff had presented an extortionate bill did not tend to show the truth of the charge of intoxication, nor did it tend to disprove malice on the part of the defendant in making the latter charge that another and dissimilar charge in the same article was true. When the article was published, the defendant only knew from information as to the truth of either charge. That the Times believed the article to be true in both respects, and that in making the statements therein it relied upon what it supposed to be credible information, was permitted to be shown. Whether the information was actually true, it could not know at the time, and, so far as its motive was concerned, and whether or not it was actuated by actual malice in making the charge of drunkenness, the actual fact subsequently proved of the truth of the charge of extortion could have no retroactive influence in determining the *quo animo* of the publication. *Hatfield v. Lasher*, 81 N. Y. 246. But we think the excluded evidence was admissible as bearing upon the conduct of the plaintiff in the transaction which he had aided in bringing before the public. It must be assumed, in view of the evidence offered, and its rejection upon the plaintiff's objection, that he had posed before the public as having an honest claim, which had been dishonestly rejected, when in truth the claim made was dishonest and unjust. The plaintiff had, by his conduct, invited public discussion of the transaction. The article was written and published to meet the aspersions cast by the plaintiff and others upon the family of Gen. Grant. It truly (as must now

be assumed) exposed the conduct of the plaintiff as a distinct attempt, through appeals to the public and otherwise, to coerce the payment of a dishonest claim. In giving what purported to be a history of the transaction, the Times superadded a false and calumnious incident, without actual malice, as the jury might well have found. The two charges were made in respect of the same subject-matter. They related to the same transaction. The plaintiff makes no denial of the main matter in which the calumny originated, namely, the extortionate and unjust bill; but does deny the truth of one of the incidents of his conduct alleged in the article. He comes claiming damages for injury to his character. It is well settled that a defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities, but can attack only the plaintiff's general character. But the charges in the article were not disconnected and independent in any proper sense, and we think it plain in reason that the plaintiff ought not to have been permitted to recover punitive damages for a misstatement in the article as to his intoxication, if it appeared that his conduct in other matters in the transaction to which the charge related had been reprehensible, and when he himself had provoked public discussion. The conduct of both parties in the whole matter should have been permitted to be shown, so as to aid the jury in determining the extent of the injury suffered by the plaintiff. The judgment should be reversed and a new trial ordered. All concur. Judgment reversed.

(147 N. Y. 43)

CUNNINGHAM v. DAVENPORT, Public Administrator.

(Court of Appeals of New York. Oct. 8, 1895.)

BANK DEPOSITS—TRANSFER—CREATION OF TRUST.

A bank depositor changed a deposit standing in his own name to one in his name in trust for his brother, but did not inform his brother of the account, stated that he did not intend to give the money to his brother, and retained possession of the bank books until after his brother's death. *Held*, that no trust arose in favor of the brother. 26 N. Y. Supp. 322, reversed.

Appeal from supreme court, general term, second department.

Action by John Cunningham against Margaret F. Woods to restrain defendant from disposing of certain books of deposit, and to have plaintiff declared owner thereof. William B. Davenport, public administrator, as administrator of the goods of Patrick Cunningham, deceased, claiming one of such books in behalf of deceased, was admitted as a party defendant. From a judgment of the general term (26 N. Y. Supp. 322) affirming a judgment for plaintiff against defendant Woods, and in favor of defendant Davenport, plaintiff appeals. Reversed.

J. Stewart Ross, for appellant. James J. Rogers, for respondent.

BARTLETT, J. The plaintiff appealed from the judgment of the general term, Second department, which affirmed that part of the judgment of the special term adjudging that William B. Davenport, public administrator, as administrator of the goods, etc., of Patrick Cunningham, deceased, recover of the plaintiff a judgment for \$2,830.15. This case presented questions between other parties that were determined by the judgment of the special term in plaintiff's favor, and as to which no appeal is taken. In order to properly understand that portion of the special term judgment appealed from, it is only necessary to examine a few of the facts as found. It appears that the plaintiff, on the 2d day of July, 1869, opened an account in the Bowery Savings Bank in the city of New York by a deposit of his own money, and made other like deposits down to about the year 1881, when the account was transferred, at plaintiff's request, to a new account entered on the books of the bank to the credit of "John Cunningham, in trust for Patrick Cunningham, his brother," and so remained until the 17th day of April, 1890, when plaintiff surrendered to the bank his deposit book, and had the account transferred to his own credit, and on the 6th or 7th of June, 1890, withdrew all of the money, amounting to \$2,322.54. It further appears that the plaintiff always retained possession of the bank books representing these accounts; that there is no evidence that plaintiff ever informed Patrick Cunningham of the transfer of the account to the credit of plaintiff 'n trust for him; that there is no evidence that plaintiff ever received any moneys from Patrick Cunningham; and plaintiff claims never to have intended to give the money contained in the account to Patrick Cunningham, or to have ever intended it for his benefit. It also appears that Patrick Cunningham, the alleged beneficiary, died April 14, 1890, three days before the account in the Bowery Savings Bank was changed back into the name of plaintiff individually.

The question now presented is whether, under the facts as stated, the plaintiff created a trust in favor of his brother, Patrick Cunningham, when he opened the alleged trust account in 1881, which he could not afterwards revoke. It is insisted by the learned counsel for the respondent that this is no longer an open question in this court, and that plaintiff's action in 1881 created an irrevocable trust in favor of Patrick Cunningham, and that the administrator of the latter can recover of plaintiff the money he withdrew from the Bowery Savings Bank, with interest and costs. We are of opinion that this case is distinguishable from the cases in this court to which we have been referred, and that the recovery against plaintiff by the administrator of Patrick Cunningham's estate cannot be sustained. The first case is *Martin v. Funk*, 75 N. Y. 134. The account was here opened: "The Citizens' Sav-

ings Bank, in account with Susan Boone, in trust for Lillie Willard." The depositor opened this account in 1866, and retained possession of the bank book until her death, in 1875. A like account was opened at the same time in trust for Kate Willard, a sister of the other beneficiary. Neither beneficiary was informed of the account. The court held that such a transaction, unexplained and followed by the death of the depositor with the accounts still existing, created a valid trust. The case of *Willis v. Smyth*, 91 N. Y. 297, was quite similar in its facts to *Martin v. Funk*, and the latter case was held to be a controlling authority. In the case of *Mable v. Bailey*, 95 N. Y. 206, the deposit was the same in form as in *Martin v. Funk*, but the intention of the depositor was not left to inference, it being shown that the pass book had been exhibited to plaintiff's mother, and was matter of conversation on several subsequent occasions. Judge Andrews, after calling attention to this proof, also pointed out that *Martin v. Funk* left undecided the point whether, in respect to such a transaction, surrounding circumstances may not be shown to vary or explain the apparent character of the acts and the intent with which they were done, and he then adds: "If it was now necessary to decide that point, I should incline to the opinion that the character of such a transaction, as creating a trust, is not conclusively established by the mere fact of the deposit so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund." In the case of *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, the matter of deposit in savings bank by father in name of his son was under consideration. Owing to the peculiar circumstances of that case, it was held that the plaintiff's title to the fund depended upon the question of gift rather than trust. Judge Andrews uses this language in a general discussion of the subject: "It may be justly said that a deposit in a savings bank by one person of his own money to the credit of another is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit." Judge Andrews, pointing out various motives that impel depositors to open accounts to the credit of third parties or fictitious persons, with no intention of divesting themselves of ownership, continues as follows: "We are inclined to think that to infer a gift from the

form of the deposit alone would, in the great majority of cases, and especially when the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case." We think the reasoning of this opinion is equally applicable to a case presenting the question whether a trust is created by opening an account in the name of, or in trust for, a third party. The doctrine laid down by this court in the previous cases amounts to this: that the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank book, and failing to notify the beneficiary, creates a trust if the depositor dies before the beneficiary, leaving the trust account open and unexplained. If the intent can be strengthened by acts and declarations of the depositor in his lifetime amounting to publication of his intent, a more satisfactory case is made out; but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing.

In the case at bar we have a state of facts in every way distinguishable from the cases heretofore passed upon by this court. John Cunningham, the depositor, is alive, denying the trust, and seeking in his old age to hold his own money as against the administrator of his deceased brother, the beneficiary under this alleged trust. This case was tried at special term. The record does not contain the evidence, and the findings of fact are conclusive. The findings show, as already stated, that this was a transaction between John Cunningham and the Bowery Savings Bank; that the depositor first opened the account in his own name, then changed it to his own name in trust for his brother, then changed it back to his own name, three days after the death of the alleged beneficiary; that the depositor at all times retained possession of the bank books representing these accounts until delivered up to the bank; that Patrick Cunningham, the brother, was not informed of the account; that John never received any money from Patrick; that John claims never to have intended to give the money represented by the account to Patrick, nor to have ever intended it for his benefit. Surely this is a full and complete explanation by the living depositor of his intentions in this matter. The learned trial judge uses this language in his opinion, viz.: "An intention not to give it to his brother is inconsistent with his act and the form of his deposit, and his evidence is insufficient, to my mind, of what would otherwise be the legal effect without some explanations of the reasons for making the deposit in the form he did." We think it was quite sufficient for the depositor to state, as he did, that he did not intend to create a trust, and never intended to give his brother the money. He was not

called upon to disclose his reasons for opening the account in trust for his brother. We have presented here the case of a man who takes his own money, and deposits it to his own credit in trust for another, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, and then survives the proposed beneficiary. We are of opinion that such a transaction does not create a trust. There are no sufficient circumstances or declarations from which a court of equity can spell out a trust even, under the liberal rule as to the creation of trusts in personal property, which holds no formal or written agreement or particular form of words necessary. The death of the beneficiary three days before the trust account was closed is urged as a reason why this alleged trust should be sustained. It is a circumstance of no moment, for the opening of the account, as now explained, did not create a trust. The order and judgment appealed from are reversed, with costs to plaintiff in all the courts. All concur.

Order and judgment reversed.

(147 N. Y. 124)

KOUNTZE et al. v. KENNEDY.

(Court of Appeals of New York. Oct. 8, 1895.)
ACTION FOR DECEIT—FRAUDULENT CONCEALMENT
—EVIDENCE.

1. To sustain an action for deceit, intentional fraud must be shown.

2. In an action against the president of a corporation for deceit in the sale of corporate bonds, the fact that defendant, in furnishing a statement of the assets and liabilities to the purchaser, omitted a certain claim against the company, does not amount to fraudulent concealment, where it appears that defendant and the company believed the claim to be invalid, and were so advised by counsel. Bartlett, J., dissenting.

3. The mere fact that the president of a corporation, in person, furnished a statement purporting to contain the true condition of the assets and liabilities of the company to an intended purchaser of corporate stock, is no evidence that such statement was made on his personal knowledge.

Appeal from supreme court, general term, first department.

Action by Luther Kountze and others against Edward S. T. Kennedy, executor of the will of John P. Kennedy, deceased, for deceit in the sale of corporate bonds. From a judgment of the general term (25 N. Y. Supp. 682) affirming a judgment dismissing the complaint, entered on the report of a referee, plaintiffs appeal. Affirmed.

Wheeler H. Peckham and George W. Van Slyck, for appellants. William R. Bronk, for respondent.

ANDREWS, C. J. The plaintiffs on this appeal are met by the serious difficulty that the finding of the referee, affirmed by the general term, exonerated the defendant's testator from the charge of fraud in making the representations upon which the plaintiffs re-

lied in purchasing the bonds and stock of the Howe Machine Company. If this finding has support in the evidence it ends all controversy upon the merits here, because, although it was found that the statement of the liabilities of the company presented by Kennedy to the plaintiffs, upon the faith of which the purchase was made, was grossly inaccurate, and largely understated the actual liabilities of the company, nevertheless, if Kennedy believed the statement to be a true exhibit of the affairs of the company and was guilty of no dishonesty, the action must fail. The principle stated by Croke, J., in 3 Bulst. 95, in respect to actions for damages for deceit, that "fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies," has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase "legal fraud," which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant, when he made it, knew that it was false, or, not knowing whether it was true or false, and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. The law affords remedies for the consequences of innocent misrepresentation. A contract induced thereby may, in many cases, be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation. While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the

other. We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it is made, carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777, "He takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception." So, also, it has been held that one who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results. We shall refer to the subject again when we come to consider one of the points made by the plaintiffs.

In the present case the plaintiffs invested more than \$100,000 in the bonds and stock of the Howe Machine Company in April, 1884, and the company went into the hands of a receiver in the fall of 1885, and the plaintiffs practically lost their whole investment. They purchased upon the application of Kennedy, who was president of the corporation, and the statement of assets and liabilities furnished by Kennedy at their request after the application and before the purchase, showed that the assets, real and personal, as valued in the statement, exceeded \$1,000,000, and that the liabilities were \$500,000. And the referee found that the statement was presented by Kennedy as a statement of the entire assets and liabilities. The voluminous record before us is taken up to a large extent with the evidence on the one side to show the untruthfulness of the statement both as respects the assets and liabilities, and of circumstances which, as was claimed, tended to establish that the defendant's testator knew of its falsity when he presented it to the plaintiffs, and on the other side with evidence in rebuttal and by way of explanation of the discrepancies between the value of the assets as given in the statement and what was realized therefrom, and between the actual liabilities and the liabilities as represented, and also evidence bearing upon

the good faith of the defendant's testator in making the representation. The evidence was taken before an intelligent and able referee, and we are satisfied that his conclusion that the defendant's testator acted in good faith, and that the statement, although in material respects untrue, was believed by him to be true, is supported by evidence. The facts were fully considered in the opinion of the general term, and a recapitulation here to any considerable extent is unnecessary. The learned counsel for the plaintiffs insist that the omission from the statement of liabilities of the claim against the Howe Machine Company in favor of the Credit Company, Limited, of England, was upon the undisputed facts a fraudulent concealment. The claim originated in or prior to 1878, and was based on acceptances alleged to have been made by the Howe Machine Company of drafts drawn by one Stockwell upon the company, accepted by his brother, the secretary and treasurer, in the name of the company. It seems to be conceded that the acceptances were made without authority of the company, and that the proceeds were used by the Stockwells in stock speculations in London on their own account. Suit was brought against the company on the drafts in the state of Connecticut in 1878, and as in all cases in that state were commenced by attachment. The company defended the action. In the fall of 1883 the facts were reported, and in 1886, two years after the plaintiffs had purchased their bonds, the court rendered judgment in the action against the Howe Machine Company for the sum of \$62,475, the chief justice dissenting. The existence of this claim was not disclosed to the plaintiffs and was not embraced in the items of liabilities mentioned in the statement. It was claimed on the part of the defendant Kennedy that this item was omitted for the reason that the company was advised by counsel that the acceptances did not bind the company, and that it could not be made liable in the action, and evidence was given that neither the company nor its counsel regarded the claim as a valid obligation of the company. The referee further found that the defendant Kennedy and the other officers and directors of the company "had reasonable cause to believe that said company was not liable on said claims," and he refused to find the request of the plaintiffs, "that the said defendant (Kennedy) knew of said claim and suit, and concealed and intended to conceal the same from the plaintiffs." The defendant's testator was bound to include in the statement all liabilities of the company known to him. He was not required to include claims made which were not valid or enforceable obligations. The defendant omitted this claim from the schedule because he believed it was not a liability of the company. It may be admitted that he was blameworthy in not calling the matter to the attention of the plaintiffs, leaving

them to determine whether it constituted a reason for declining the transaction. But if the nondisclosure was attributable to an honest belief that the claim was not valid and could not be enforced, the fraudulent intent is lacking, and the charge of deceit falls. The recent case of *Derry v. Peek*, 14 App. Cas. 337, decided in the house of lords, contains a very full discussion of the principles governing the action for deceit and of the adjudged cases. The action was brought against directors of a company for damages for a false representation contained in a prospectus issued by them, to the effect that the company had authority to use steam motor power on its tramway, whereby the plaintiff was induced to buy shares of the company. The judges who gave the opinion united in asserting that actual fraud—that is, fraud in intention, and not constructive or implied fraud—was necessary to be shown to uphold the action, and applying this general principle they held that if the defendant believed the representation made by him to be true, although without reasonable cause for such belief, the action would not lie. It is not necessary to go to this extent to uphold the present judgment, for the referee, as has been stated, found that the belief of Kennedy that the claim of the Credit Company, Limited, of London, was unfounded, was based upon reasonable grounds.

The plaintiffs requested the referee to find that the representations of Kennedy to the plaintiffs were so made as to convey the impression that he had actual knowledge of their truth and the referee refused to find as requested. This, it is urged, was error requiring a reversal of the judgment. It must be assumed that the referee found that the representations contained in the statement presented by Kennedy were not made, or understood by the plaintiffs to have been made, by him upon his personal knowledge. The evidence and the circumstances support this conclusion. Kennedy testified that, when the plaintiffs requested a statement of the assets and liabilities of the company, he informed them that he would request the secretary to prepare it, and after the statement was delivered to the plaintiffs. Luther Kountze, at Kennedy's request, went to Bridgeport to examine the property, and while there the items of the statement were gone over between him and Mr. Parmly, the person having the principal management of the business, and the referee found that the inquiries of Mr. Kountze were truthfully answered. It cannot be assumed from the mere form of the statement that the assets and liabilities were given upon the personal knowledge of Kennedy. It related to the affairs of a large corporation, widely extended and having agencies in a great number of the large cities of the country. It would ordinarily be understood that a statement furnished by the president or director of the company of its assets and liabilities would be furnished upon in-

formation derived from the books and other sources. Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge. There was conflicting evidence upon the trial upon the point whether, outside of the statement, such an affirmation was made, but that issue was decided against the plaintiffs. Their claim, therefore, that Kennedy represented that the statement was true of his own knowledge, rests solely on the facts that he was president of the corporation, and that he furnished the statement as a statement of the entire assets and liabilities. The most that the plaintiffs could claim was that it became a question of fact, but we are of opinion that the evidence was wholly insufficient to have warranted a finding that Kennedy asserted the truth of the statement as of his own knowledge.

Upon a full examination of all the questions presented by the plaintiffs we have reached the conclusion that there was no material error committed on the trial, and the judgment should therefore be affirmed. All concur, except BARTLETT, J., who dissents on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company for the reason that he is of opinion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud. PECKHAM, J., not voting. Judgment affirmed.

(147 N. Y. 164)

PEOPLE ex rel. ONONDAGA COUNTY
SAV. BANK et al. v. BUTLER.

(Court of Appeals of New York. Oct. 8, 1895.)

COUNTY CLERK—SALARY—CONSTRUCTION OF
STATUTE.

Act 1893 (Laws 1893, c. 520), making the compensation of the clerk of O. county a salary in place of the fees which he had been receiving and providing for management of the office, passed May 2, 1893, when the office was occupied by one whose term would expire December 31, 1894, and providing that "this act shall take effect on the 1st day of January, 1895," applies to the clerk whose term commenced on that day, it not being intended that it should merely have the effect of an act the birth and existence of which commenced on that day.

Appeal from supreme court, general term, Fourth department.

Application by the people, on the relation of the Onondaga County Savings Bank and the county of Onondaga, for mandamus to James Butler, clerk of Onondaga county. From the order and judgment of the general term affirming an order and judgment of the special term overruling a demurrer to the return of the defendant and dismissing the writ

of alternative mandamus, relators appeal. Reversed.

William Andrews and B. J. Shove, for appellants. Charles E. Ide and William G. Tracy, for respondent.

PECKHAM, J. The sole question in this case is whether the provisions of the act known as "Chapter 520 of the Laws of 1893," and entitled "An act to make the office of county clerk of Onondaga county a salaried office, and to provide for the management of said office, and to fix the salary of said clerk and deputies," apply to the county clerk whose term of office commenced on the 1st day of January, 1895. It would seem as if there ought not to be much difficulty in answering such a question; and yet, upon reading the whole act, it can be seen that a strict and literal adherence to the very words of the text leaves it somewhat open to the construction that the act does not apply to the clerk whose term of office commenced on that day. The cardinal rule in the interpretation of statutes is to arrive at and give effect to the intention of the legislative body which enacted them. This intention is primarily to be deduced from the language used in the statute itself, and it has been said that where such language is clear and unambiguous there is no room for construction, and that effect must be given to its plain and obvious meaning. Language which, when separated from the rest of the act, is thus plain and unambiguous, may, when read in connection with the whole act, be thereby rendered ambiguous, and the necessity for construction become for that reason quite apparent. Sometimes the language of some parts of a statute, when considered with reference to the ordinary meaning attributed to such language, is so clear and unambiguous that it would seem not to be open to any construction other than its plain, obvious meaning calls for; and yet, when read in connection with the whole act, and in the light of what the real intention of the legislature must, in the nature of things, have been, the construction properly to be favored leads to a result which is different from what it otherwise would have been. A notable instance of such a construction is to be found in the case of *Smith v. People*, 47 N. Y. 330. The act, chapter 137 of the Laws of 1870, by section 120, well and accurately described three preceding acts by their titles and the dates of their passage, and with other acts relating to the government of the city of New York, were in the language of that section "hereby repealed." There was no qualification or limitation annexed to the repealing clause, and it was conceded that it was in terms sufficient to accomplish all that was claimed for it, and that, literally interpreted, it effectually abrogated the Laws of 1853 and 1857, reorganizing the criminal courts of the above-named city. In the language used in section 120 of the act of 1870 there was nothing that

could have been called ambiguous. On the contrary, it was exceedingly plain, and it in terms repealed the prior statutes, and yet, when the section was read in connection with the rest of the statute, and when the effect of a literal adherence to the strict meaning of the language used in that section was considered, it was held that such could not have been the intention of the legislature, for in that event all the proceedings in and the judgments of the two great criminal courts in New York City for two years would have been annulled, and the consequences would have seriously affected the public as well as individuals. It was accordingly held that, notwithstanding the general language used in the section repealing the former sections, it was not the intention of the legislature by the repealing clause to affect the organization of the criminal courts in the city of New York. Words which are plain enough in their ordinary sense will not be given their ordinary meaning when such meaning involves an absurdity or inconsistency, or when it is repugnant to the clear intention of the legislature, to be collected from the whole act, or from acts in *pari materia*, to be construed with it, or from other legitimate sources of interpretation. In such case the ordinary meaning will be modified or altered so as to avoid the absurdity, inconsistency, or repugnance. *Miller v. Salomons*, 7 Exch. 546, cited in *Smith v. People*, *supra*. The reasons for the conclusion of the court in the *Smith Case* are most admirably set forth, and the general rules for the construction of statutes are most clearly given in the opinion of the late Judge Allen. The cases he cites, and the illustrations of the principles of statutory construction he gives, are abundant and satisfactory. This case just cited has always been regarded as an extreme illustration of the doctrine under consideration, and it is much further than it is necessary to go in this case. We have simply followed out what, from a consideration of the whole act, is plainly evident was the intention of the legislature. The five words at the end of the act are, therefore, construed in harmony with the clear language of the enactment which precedes those words.

Another instance of the action of courts in the discharge of their difficult and delicate duty of construing statutes is to be found in the recent case of *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, where it was held that the legislature never could have intended that the statute of wills should apply in favor of one who was a devisee under a will, but who, in order to prevent its revocation, had murdered his deviser and testator. The legislature had not, in terms, made such an exception to the operation of the statute; and yet it was held that it was inconceivable that it could have intended such a result, and the doctrine and policy of the common law, that no one should be permitted to profit by his own fraud, were allowed full effect, notwith-

standing the text of the statute there under consideration. These cases are not cited as being applicable in their facts to the case now before the court, but for the purpose of showing that it is the intention of the law-makers that is to govern, and that intention is to be gathered from the whole statute, and sometimes from statutes in pari materia; and that, for the purpose of arriving at such intention, where there is a possible ambiguity in the phraseology of some portions of the statute if regarded in connection with and with reference to some other portion thereof, it is sometimes competent to refer to the circumstances under which and the purpose for which a statute is passed. In the present case it appears that the term of the county clerk in office at the time the act in question was passed would not expire until the 31st of December, 1894. This fact must have been known to the legislature which enacted the statute in question. Of that there can be really no doubt. It is equally clear that it was the intention of the legislature to change the manner of compensation of the clerk of Onondaga county from fees to a salary. This was the purpose of the act itself, expressed both in its title and in its body. The compensation by fees had become too great, and hence the proposed change. Aside from any constitutional objections to reducing the salary of a public officer like the county clerk during the term for which he had some time prior thereto been elected, it is obvious that there would be a seeming injustice in making such a change during the incumbency of the official elected prior to the passage of such an act. The constitutional provision is itself founded upon such a plain fact. With this knowledge on the part of those composing the legislature of 1893, and yet intending to make a change in the method of compensation of the clerk of Onondaga county, the legislature enacts in 1893 the act, the title to which is above given. The act is not lengthy, and it is perhaps as well to quote it. It reads as follows:

"Section 1. The clerk of the county of Onondaga next elected and thereafter to be elected or appointed shall receive as compensation for his services an annual salary to be fixed by the board of supervisors of said county, prior to the election of every such clerk; the salary so fixed shall be three thousand five hundred dollars per annum, and shall not be increased or diminished during the term for which said clerk shall have been elected.

"Sec. 2. It shall be the duty of said clerk to perform all services which he is or shall be required or authorized by law to perform, by virtue of or by reason of his holding such office, for the state, for the county and for individuals, including his duty as clerk of every court of which he is or shall be clerk, and no compensation, payment or allowance shall be made to him for his own use for any such services except the salary aforesaid.

"Sec. 3. All the fees, emoluments and perquisites which such clerk shall charge or receive, or which he shall legally be authorized, required or entitled to charge or receive, shall belong to the county of Onondaga. It shall be his duty to exact, collect and receive all such fees, emoluments and perquisites now permitted by law and not exceeding the amounts now fixed by law as from time to time shall be prescribed by resolution of the board of supervisors of said county at any annual session thereof, except that the charge of filing, entering or recording judgments, decrees, orders, deeds and mortgages shall be and remain the same as provided by statute; provided, however, that any resolution thus passed by said board of supervisors shall be general in its character, establishing a uniform rate of charges, and no resolution changing the fees to be charged shall be passed except at the regular annual session after the adoption of the resolution prescribing the same after the passage of this act. No fee shall be charged by such clerk or assistants for any service rendered to soldiers or sailors, or the widows, minor children or dependent relations of deceased soldiers, for taking any affidavit or acknowledgment or the vouchers for the payment of pensions, or application for pensions of any soldier or sailor, or the widow, minor children and dependent relations of deceased soldiers, or certifying as to the official character of any officer on any such paper relating to pensions. Said clerk shall require payment in advance for recording all papers left with him for record, and shall also, in each case, require payment for all other service rendered by him or his assistants in his or their official capacity by virtue of any law of this state or by order of the board of supervisors of said county. It shall be the duty of said clerk to make and certify all abstracts of title to, and incumbrances upon, real property for which he shall receive as compensation for each year for which the search is made for each name and each kind of conveyance or lien three and one-half cents. He shall also furnish and deliver the person ordering such abstract of title a certified copy thereof free of charge, and such original abstract shall be kept on file by him in his office as a part of the records thereof, and certified copies thereof shall thereafter be furnished by said clerk to any person or persons ordering the same, at ten cents per folio.

"Sec. 4. In a proper book or books, to be provided at the expense of said county, such clerk shall keep an exact and true account of all official services performed by him or his assistants, and of all fees, perquisites and emoluments received or chargeable by him or them pursuant to law. Such book or books shall constitute a part of the records of said office, and shall at all times during office hours be open to the inspection, without fee or charge therefor, of all persons desiring to examine the same.

"Sec. 5. Such clerk shall make a full and true statement for each calendar month of all moneys received each day by him or his assistants for fees, perquisites and emoluments for all services rendered by him or them in his or their official capacity, and shall transmit such statement to the county treasurer of said county within five days after the expiration thereof. Such statement shall specify in the following order the amounts so received for the calendar month: For recording deeds, for recording mortgages, for recording other documents and papers, for docketing judgments and canceling dockets, for searches and certificates thereof, for copies and exemplifications of papers and records, for filing papers and for all services, and shall also show the total receipts for said month. Each such statement shall have attached thereto an affidavit of said county clerk in effect that the same is in all respects a full and true statement as herein required.

"Sec. 6. At the time of rendering any such statement such clerk shall pay over to the treasurer of the county of Onondaga for the benefit of said county the whole amount of money so received by him since making the last preceding monthly statement.

"Sec. 7. Every county clerk elected or appointed in said county shall, before entering upon the duties of said office, execute to the people of this state, and file with the county treasurer of said county a bond in such penal sum, and with such sureties as shall be fixed and prescribed by the board of supervisors of said county. Such bond shall be conditioned that said county clerk shall well and faithfully discharge all the duties of his office, and all trusts imposed on him by law or by virtue of his office, and shall safely keep and pay over to the said county treasurer as herein provided all moneys which shall come into his hands. Said bond shall be approved as to its form and sufficiency of sureties by the board of supervisors, and if any such clerk shall neglect for thirty days to execute or file such bond, according to the provisions of this act, his office shall thereupon become vacant.

"Sec. 8. There shall be one deputy clerk, and the board of supervisors shall have the power to designate the number of special deputy clerks, and said county clerk shall appoint such deputy and such number of special deputies as so designated by said board; also as many assistants as may be necessary for the faithful discharge of the duties of his office, and shall be responsible for their official acts, and the salaries of said clerks and assistants shall be paid in the same manner as the salaries of other county officers are paid. The salary of the deputy clerk shall not exceed one thousand five hundred dollars per annum, and of the first special deputy clerk shall not exceed one thousand two hundred dollars per annum, and of each additional special deputy clerk not to exceed nine hundred dollars per annum; and the board of

supervisors may determine the number of assistants and fix their salary or compensation; provided, however, that all work done by such assistants may be done and paid for by the piece or folio, at the discretion of the clerk, and the amount of work so performed shall be certified to by the county clerk for each calendar month.

"Sec. 9. Any officer referred to in this act, who shall receive to his own use, or neglect to account for any fees, perquisites or emoluments, by this act declared to belong to and be for the benefit of the county of Onondaga, or who shall neglect to render to the said county treasurer an account of all fees received at his office, or to pay over the same, as herein required, shall be deemed guilty of misdemeanor, and on conviction shall be punished by fine or imprisonment, or both, at the discretion of the court before whom said officer may be convicted, and shall be liable to said county in a civil action for all moneys so received and not accounted for.

"Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed.

"Sec. 11. This act shall take effect on the first day of January, eighteen hundred and ninety-five."

A perusal of this act, having in mind the fact above stated as to the time of the termination of the official term of the clerk in office at the time it was passed (May 2, 1893), leaves no doubt in our minds as to the actual intention of the legislature. The clerk intended to be affected by it was the clerk who would be elected in the fall of the year 1894, and who would take office on the 1st of January, 1895. We are at a loss to ourselves imagine any reason, and none at all adequate has been suggested to us, for the intentional postponement of this alteration of the manner of compensation until January, 1898. Such postponement would be the result if the act really designated the clerk who should be elected after 1895 as the first one to be subject to its provisions. To be sure, the clerk commencing his official term in 1895 might die while in office, and his successor might be elected prior to 1897, in which case the act would apply to him; but in the regular course of events, by the construction asked for by the defendant, the legislature was engaged in the enactment of a statute in May, 1893, which would not come into actual effect until January 1, 1898, and by which the full term of a county clerk to be elected a year and a half after its passage was to elapse totally unaffected by the provisions of such act. This is a manifest absurdity. No ingenuity can suggest a reasonable explanation for such an extraordinary intention on the part of the legislature. We cannot attribute any such intention to that body. And yet it is claimed that just this intention is made manifest, plain, unambiguous, and controlling by the language of the eleventh section, which provides that the act shall take effect on the

1st day of January, 1895. The argument is that it is only from the 1st day of January, 1895, that the act can be said to speak, and that it is to be regarded in the same light as if it had been enacted on that day with a section ordaining that it should take effect immediately. As a general rule, an act of the legislature speaks for the future, and as of the time when it takes effect, and not as of the time it was passed. The question is always, however, what meaning is to be attached to the language which provides in a general way for an act to take effect at some future time. The phrase, "This act shall take effect on the first day of January, 1895," standing alone, is plain and unambiguous. So is the phrase "Chapter 217 of the Laws of 1853 and chapter 446 of the Laws of 1857 are hereby repealed." Yet this court held that all portions of those laws were not repealed, because it was manifest the legislature did not so intend. Looking at the eleventh section of this act before us, after reading the whole act, and being possessed with the knowledge which the legislature had as to the expiration of the official term of the then county clerk, and we can come only to one conclusion as to the meaning of the section. The legislature did not mean that the actual birth and existence of the statute should commence in January, 1895, and that the clerk who would be thereafter elected should be the first subject of its provisions. By the expression used, the enacting body plainly meant that the provisions of the act that was passed by it should apply to and govern the clerk who was to take office on the 1st day of January, 1895. This is too clear for any serious controversy, and we are but carrying out the plain intention of the legislature when we attribute this meaning to the language used. It is easily capable of such meaning, and, regarding the facts already stated, and within the knowledge of the legislature, it is the meaning which that body undoubtedly attached to it, and it is called for by every rule of common sense. To hold otherwise would be to do violence to the plain legislative intent to be gathered from the whole act, and we should be controlled by a strict technical and narrow construction of the language of the last section, not at all necessary in this case, the effect of which would be to thwart instead of to carry out the legislative purpose. The counsel for the defendant cites many cases in the very learned brief he has submitted to us, in which it has been held that the legislature, in the particular acts in question, referred to periods subsequent to the times when the acts took effect, instead of subsequent to their passage. We think we should agree with the learned courts which decided them in most of the cases. This is because, we think, the legislative intent was thereby carried into effect. In this case we do but give a reasonable meaning and effect to the phrase contained in the eleventh section,

and in that way we carry out what we have not the slightest doubt was the legislative purpose. No other reasonable conclusion could be arrived at. We cannot impute an unreasonable or absurd purpose to the legislature.

The case in this court (*In re Howe*, 112 N. Y. 100, 19 N. E. 513) is not at all in conflict with the views we have herein expressed. The act there in question contained within its body no reason whatever for its earlier application, and it took effect by virtue of the general provisions of our statute as to the acts of the legislature. A death happening before it took effect, although after its passage, was held not to render the estate passing under the will of the decedent liable to the provisions of such act. By holding that the act in question took effect and was applicable to the clerk who came into office on the 1st of January, 1895, we necessarily hold that those provisions of the act which required action on the part of the board of supervisors before that date became operative in the fall of 1894. The board of supervisors should, therefore, have met and fixed the salary of the clerk before his election. It did not do so until after his election, but before the commencement of his term of office. In December, 1894, it fixed the salary, and otherwise provided for the number of deputies, etc., as mentioned in the act. The fixing of the salary, so far as defendant is concerned, by the board, is matter of the purest formality, for the statute itself provides what sum the board shall fix upon. Whether the board has or has not complied with the provisions of the act cannot, however, affect this court upon the question of the proper construction to be given to the act itself.

For the reasons stated, we think the orders of the courts below should be reversed, the demurrer of the relators sustained, and judgment ordered for them, granting a peremptory writ of mandamus as prayed for, with costs against defendant in all courts. It concur, except ANDREWS, C. J., not voting. Judgment accordingly.

(147 N. Y. 195)

GOMEZ et al. v. GOMEZ et al.

(Court of Appeals of New York. Oct. 8, 1895.)

TRUSTS—POWERS OF TRUSTEES—CHANCERY COURT—JURISDICTION—LEASE OF INFANTS' LANDS.

1. Where land deeded in trust to rent, and pay over the rents, and, on the happening of a certain event, to deed in fee, is subject to the right of another to a renewal of a lease thereon, the trustee may be compelled to execute the renewal lease.

2. Under a deed in trust to pay the rents of the premises to H., and to convey the premises to such persons as H. might by will appoint, or, in default of such appointment, to the issue of H., the trustees cannot provide in a lease for renewal thereof after the death of H. 31 N. Y. Supp. 206, affirmed.

3. Where land was conveyed in trust to pay the rent to H., and to convey the premises to such persons as H. might by will appoint, or, in

default of such appointment, to the issue of H., the court of chancery, under 2 Rev. St. 1829, p. 194, §§ 170, 175 (providing that an infant seised of land may apply for disposition of the property, and that, when it is for the interest of the infant, the court may order the lease of the land by a guardian), had power, in an action brought by H. against all her children and the trustee, to authorize the trustee, with the approbation of H., to lease the property for 21 years, with covenants of renewal for three successive terms of 21 years.

Appeal from supreme court, general term, First department.

Action by Edwin Gomez and others against Horatio Gomez, trustee of Hetty Gomez, deceased, Edward Tracy, and others. From a judgment of the general term (31 N. Y. Supp. 206) affirming a judgment of the special term sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Hector M. Hitchings, for appellants. Michael H. Cardozo and John A. Straley, for respondents.

HAIGHT, J. The demurrers interposed were upon the ground that the complaint did not state a cause of action. It, in substance, alleges that on the 2d day of May, in the year 1821, one Harmon Hendricks, being then the owner in fee of the lands in question, executed and delivered a deed of the same to Solom I. Isaacs, Uriah Hendricks, and Hetty Hendricks, upon the following trust: "To pay over into the hands of Hetty Hendricks, at such dates and times as she might fix for the payment thereof, all the rents, issues, and profits of the above bargained and described premises, and to convey the said premises by a full and sufficient conveyance in law to such persons as she, the said Hetty Hendricks, might in and by her last will and testament, or by appointment in nature thereof, nominate and appoint, and, in default of such last will and testament or appointment, then to all the lawful issue of said Hetty Hendricks then living, as tenants in common, and not as joint tenants." Hetty Hendricks subsequently married Aaron L. Gomez, and on the 17th day of May, 1831, they brought an action in the court of chancery of New York against their then living children, including the plaintiffs in this action and the trustees, in which it was adjudged and decreed that the trustees, or the survivor or survivors of them, and any trustee or trustees hereafter substituted, shall have full power, with the consent and approbation of the complainants or the survivor of them, to be expressed by their, his, or her legal execution and acknowledgment of the leases hereinafter mentioned, to make and execute valid leases of the premises, or any part thereof, for the term of 21 years, with covenants of renewal for several successive terms of 21 years, not exceeding three such additional terms, etc., with such other covenants and upon such conditions as the trustees in their discretion shall deem proper and shall consider most

advantageous to the interest of Hetty Gomez and her children. After the making of such decree, the trustees, acting upon the authority thereof, executed and delivered to one John R. Peters five leases of separate parcels of the lands in question for a period of 21 years each, with covenants for three renewals of 21 years each, with an annual rent reserved of 5 per cent. on the value of the property, to be determined by appraisal thereof at each renewal. On the 15th day of August, 1855, Hetty Gomez made her last will and testament, and in February thereafter died, leaving six children her surviving, her husband having in the meantime died. Her will was duly proved and admitted to probate by the surrogate of New York county as a will of real and personal property. In it she exercised the power of appointment given her by the deed of Harmon Hendricks, by directing a conveyance of the property described in the deed by the trustees therein named to Horatio Gomez, one of the defendants herein, and Hyman N. Hart, and the survivor of them, as joint tenants, and not as tenants in common, but in trust, to pay to her husband during his life all the rents, issues, and profits thereof, and then to pay the rents, issues, and profits of a one-sixth part thereof to each of her surviving children, and, upon the death of such child, to convey the fee simple absolute to the heir at law of such child. Horatio Gomez alone qualified as such trustee. There have been two renewals of the leases. The last expired on the 1st day of November, 1894. The defendants, Tracy and others, as the successors of Peters, demanded another renewal of the leases, which is the third and last provided for. This action is brought to obtain an adjudication that they are not entitled as matter of law to a further renewal of the leases, and that Horatio Gomez, as trustee, etc., be enjoined and restrained from executing to them a renewal of such leases.

It may not be important to determine whether Horatio Gomez, as trustee under the will of Hetty Gomez, has the power to execute a renewal of the leases, for if the tenants, Tracy and others, are entitled to such a renewal, this action cannot be maintained. Horatio Gomez is, however, as we have seen, the trustee appointed by the will of Hetty Gomez to carry out the trust therein created. That trust requires him to rent the property, and to pay over the rents, issues, and profits thereof to her children. The trust created by the deed terminated with her death, and with the termination of the trust the powers of the trustee became extinct, except to turn over and convey the trust property as in and by the deed they were required. Strictly speaking, Horatio Gomez may not be a survivor of or a substitute to the trustees appointed by the deed. He derives his power from the will. They derived theirs from the deed. His power commenced when theirs terminated. He takes title to the property in trust under the will, and has the control

and management thereof. He takes it, however, subject to the rights acquired of other parties; and if the defendants, Tracy and others, as tenants, are entitled to renewal leases, we see no reason why he may not be compelled to execute them.

The trust created by the deed, being for the life of Mrs. Gomez, terminated with her death, and with her death the powers of the trustees were, as we have seen, at an end, except in the particular mentioned. They, therefore, had no power under the deed to thereafter renew leases, or, in the leases executed by them, to provide for the renewal of leases after her decease. In *re McCaffrey*, 50 Hun, 371, 3 N. Y. Supp. 96. The whole question, therefore, turns upon the decree made by the court of chancery in 1831. That decree authorized the leases in question. Had that court jurisdiction of the parties and the power to make the decree? As we have seen, Mrs. Gomez and her husband were complainants. The trustees under the deed and all of her then living children were defendants. All of the persons then in being having any interest in the premises, either as trustees, life tenants, or remainder-men, were parties. The children were represented by a guardian ad litem. The case was referred to a master to determine whether the decree prayed for was for the benefit of the infants. So far as the proceedings are disclosed, they were regular and in due form; and, if the court had the power to make the decree, it must be held to be valid and binding upon them. Upon this question it becomes important to first ascertain the nature of the action or proceeding. The complaint alleges that it was instituted for an adjudication of the rights of the trustees to make leases and renewals of leases for long terms of years. If this allegation is to be taken as the nature and purport of the action, the door is open for a wide field of discussion as to the power and jurisdiction of the late court of chancery, but the complaint also alleges that the decree of the court of chancery is in writing, "dated and filed in the county clerk's office of New York county on the 31st day of October, 1831, a copy of which is hereto annexed, and plaintiffs hereby refer to the same as part of this allegation of their complaint, and as though the same was specifically and at large set out herein." This latter allegation, making the decree itself a part of the complaint, we think, must be deemed to modify and explain the former allegation alluded to; and, inasmuch as the petition or complaint is not before us, it becomes our duty to look into the decree for the purpose of determining the nature of the action. Upon referring to the decree, its purpose is quite apparent. It determines that the lease of the property was for the benefit of the infant defendants; that the trustees have leave to execute leases for the terms designated, upon such conditions as shall be approved by the father and mother of the infants,—in other words, it is a

decree granting leave to lease the real estate of infants, and nothing more. The power to mortgage, lease, or sell real estate of infants, or of any interest therein, at that time vested in the court of chancery, under the express provisions of the statute. "Any infant seized of any real estate, or entitled to any term for years in lands may by his next friend, or by his guardian, apply to the court of chancery for the sale or disposition of his property. * * * Whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, or of his interest in any term for years is necessary and proper either for the support and maintenance of such infant, or for his education, or that the interest of such infant requires, or will be substantially promoted by such disposition on account of any part of said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reason or circumstances, the court may order the letting for a term of years, the sale or other disposition of such real estate or interest to be made by such guardian or guardians so appointed in such manner and with such restrictions as shall be deemed expedient." 2 Rev. St. 1829, p. 194, §§ 170, 175. The court, doubtless, had the power to do by action that which it was authorized to do by proceeding. The court had the power to appoint a guardian to execute the leases, but, inasmuch as the trustees under the deed had the power to lease the premises during the lifetime of Mrs. Gomez, the court saw fit to empower them to execute the lease in the place of a guardian.

The plaintiffs alleged that great injustice will be done them by a renewal of the leases, but the renewal has to be upon the basis of an annual rental of 5 per cent. of the appraised value of the property. Possibly a better contract might now be made, but the amount of rent reserved is fair and reasonable. The defendants have erected substantial buildings upon the property, greatly improving it, and thereby largely increasing the rent to the lessors and the ultimate value of the property. These buildings were, doubtless, erected by the tenants upon the supposition and understanding that they were entitled to a renewal of the leases. The merits seem to be with them, and, as we construe the decree of the court of chancery, there can be no doubt as to its jurisdiction or power to grant the decree in question. Under the deed the infants were conditional remainder-men. They took the fee, subject to the power of appointment by Mrs. Gomez. They at that time had an interest which they, if adults, had the power to lease or convey. Being infants, the court could exercise that power for them. Upon the execution of the power of appointment by Mrs. Gomez, given by the deed, they were deprived of their interest as remainder-men, but they were given another and different interest in the premises. This, however, they take under her

will, and subject to all of the burdens and conditions imposed by her. She joined in the execution of the leases which became binding upon her and her estate. The provisions of the trust created by the deed were fully executed, and we discover nothing in the proceedings had that is any violation of the terms of the provisions of that trust. The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

(147 N. Y. 25)

PEOPLE v. AMERICAN STEAM-BOILER INS. CO. OF NEW YORK CITY.

(Court of Appeals of New York. Oct. 8, 1895.)

CASUALTY INSURANCE—DEPOSITS WITH INSURANCE SUPERINTENDENT—APPLICATION OF STATUTES—RIGHT TO INTEREST ON DEPOSITS.

1. Laws 1869, c. 902, authorizing certain life insurance companies to make special deposits with the insurance department for the protection of holders of registered policies and annuity bonds, does not apply to a company which was not incorporated under the act, and which never issued registered policies or annuity bonds.

2. Laws 1892, c. 690, § 73, providing for special deposits with the superintendent of insurance for the benefit of holders of registered policies and annuity bonds, and section 76, providing that, if "such depositing corporation" shall appear to the superintendent of insurance to be in a condition rendering the issuance of "additional policies and annuity bonds" injurious to the public, a receiver may be appointed, and that such receiver shall be entitled to such deposits, do not apply to a casualty insurance company.

3. Laws 1892, c. 690, § 14, providing that insurance companies that have deposited with the superintendent of insurance money to protect the holders of registered policies and annuity bonds may, as long as they remain solvent, collect the interest or dividends on such deposits, does not apply to a corporation which has been judicially dissolved. 33 N. Y. Supp. 834, reversed.

Appeal from supreme court, general term, First department.

Proceedings for the dissolution of the American Steam-Boiler Insurance Company of New York City. From an order of the general term (33 N. Y. Supp. 834) affirming an order directing the state superintendent of insurance to pay over to the receiver of said company interest collected by him on securities deposited by such company, the insurance department appeals. Reversed.

John W. Hogan, for appellant. J. O. O'Connor, for respondent.

HAIGHT, J. The American Steam-Boiler Insurance Company is a casualty company organized under the provisions of chapter 463 of the Laws of 1853. Pursuant to the provisions of that act, it had deposited with the superintendent of insurance the sum of \$100,000 in trust for the benefit of its policy holders. In November, 1893, a judgment was entered in this action dissolving the franchises of the company, forfeiting its corporate privileges, and appointing Henry

S. Ward as receiver. After the dissolution of the corporation the superintendent of insurance collected \$3,000 interest that matured upon the deposits made with him for the benefit of the policy holders. The receiver then demanded of the superintendent the transfer of such interest to him, which was refused, and thereupon an application was made to the court for an order compelling such transfer. This motion was denied at the special term, but the order was reversed in the general term, with leave to renew the motion. *People v. American Steam-Boiler Ins. Co.*, 81 Hun, 498, 31 N. Y. Supp. 155. Upon such renewal the motion was granted, and the same has been affirmed in the general term.

The right of the receiver to a transfer to him of the fund or security deposited with the superintendent of insurance depends upon the construction to be given to the provisions of chapter 690 of the Laws of 1892. Under the statute of 1853 it has been held that the superintendent holds the securities deposited by virtue of a statutory trust created for the benefit and protection of the policy holders, and that the receiver, when appointed, is not entitled to have the fund turned over to him until the rights of the policy holders have been settled. *Ruggles v. Chapman*, 59 N. Y. 163; *People v. Chapman*, 64 N. Y. 557; *Attorney General v. North America Life Ins. Co.*, 92 N. Y. 654; *In re Guardian Mut. Life Ins. Co.*, 13 Hun, 115, affirmed 74 N. Y. 617. By chapter 902 of the Laws of 1869 certain life insurance companies were authorized to make special deposits with the insurance department, in addition to the amount of deposits required by law, for the purpose of protecting the holders of registered policy and annuity bonds issued under the provisions of the act. In sections 7 and 8 of that act provisions were made for the conversion of the deposit into money by the superintendent and treasurer in case of insolvency, or, in case it should be found that the issuing of additional policy and annuity bonds was injurious to the public interest, pay the same over to the receiver, to be distributed under the directions of the court—First, to the payment of the registered policy and annuity bondholders of the company, and then apply the surplus, if any, with the other assets, to the payment of its just debts. Under this act it has been held that as to such companies the receiver was entitled to the deposit. *Attorney General v. North America Life Ins. Co.*, 80 N. Y. 152, 82 N. Y. 172, and 85 N. Y. 485; *Smyth v. Munroe*, 84 N. Y. 354-361. The American Steam-Boiler Insurance Company is not incorporated under the provisions of the latter act, has made no special deposit for the benefit of the holders of registered policy and annuity bonds, and has issued no such policies or bonds. It consequently is not subject to the provisions of that act. Such was the law as it existed up to the time of the

revision of 1892. Have the rights of the superintendent been changed in this regard? By section 70 of the act power is given to 13 or more persons to become a corporation for the purpose of making various kinds of insurance, enumerating them, in which life and casualty are each particularly specified. The next section pertains to the organization of such companies, and the next to the withdrawal of securities upon relinquishment of the business of the company. These sections are doubtless general, having reference to all of the various kinds of insurance authorized by the provisions of the act. Then follows section 73, which provides for special deposits with the superintendent in addition to the amount required by law for the benefit of the holders of registered policies and annuity bonds; and then sections 74 and 75, both pertaining to registered policies and annuity bonds. These sections unquestionably have reference only to that class of insurance, and do not apply to companies that do not issue registered policies or annuity bonds. We then come to section 76, which provides that "if at any time the affairs of any such depositing corporation shall, in the opinion of the superintendent of insurance, appear to be in such a condition as to render the issuing of additional policies and annuity bonds by the corporation injurious to public interest, such corporation shall be deemed insolvent, and the superintendent shall report the fact to the attorney-general, who shall bring such action or institute such proceedings as he may be authorized by law to be done against an insolvent insurance corporation. If in any such action or proceeding it shall appear to the satisfaction of the court that the assets and funds of the corporation are not sufficient to justify its further continuance of the business of insuring lives, granting annuities and incurring new obligations as authorized by its charter, it shall enjoin and restrain the corporation from the further transaction of its business and appoint a receiver of its assets and credits, who, upon filing his bond to the people of the state in an amount and with sureties approved by the court conditioned for the faithful performance of his duties, shall take possession of all such assets and credits, including the securities deposited in the insurance department." Here we have express statutory authority for the receiver to take possession of the deposits. But do the provisions of the section have reference to insurance companies generally, or are they limited to the companies issuing registered policies and annuity bonds? This section and the one that follows it are a substantial reproduction of sections 7 and 8 of chapter 902 of the Laws of 1869, which, as we have seen, have reference only to companies issuing registered policies and annuity bonds. They immediately succeed sections 73-75, which also pertain to the same class of insurance. Section 76 refers to them as

"such depositing corporations," and speaks of annuity bonds; thus, as we think, referring to that particular class of insurance, and not to insurance companies generally. If we are correct in this view, it follows that the provisions of section 76 have no application to casualty insurance companies, and that consequently there has been no change in the statutes affecting the right of the superintendent to retain the funds or securities deposited with him until the rights and equities of the policy holders are fully determined and adjusted.

We see no reason why the interest must not follow the principal. By section 14 of the act, the corporation, so long as it shall continue solvent and comply with the laws of the state, shall be permitted by the superintendent to collect the interest or dividends upon its deposits. This, doubtless, has reference to a solvent corporation still continuing active business. It has no application to a corporation that has ceased to exist, and has been dissolved by a judgment of the court. Thereafter the superintendent holds the deposits or securities under the trust created by the statute for the benefit of the policy holders, and, as such, is entitled to collect the interest thereafter accruing, and treat it as a part and parcel of the trust in his hands.

This motion does not conform to the provisions of section 72 of the act, and consequently it need not be here considered. The orders of the general and special terms should be reversed, and the motion denied, but without costs to either party. All concur.

Orders reversed.

(147 N. Y. 135)

PEGRAM et al. v. NEW YORK EL. R. CO.
et al.

(Court of Appeals of New York. Oct. 8, 1895.)

INJUNCTION—SALE PENDING SUIT—JURISDICTION—
EASEMENTS IN STREET—RESERVATION IN
DEED—PARTIES TO SUIT.

1. Where, pending an action to enjoin the operation of an elevated railroad in front of certain land, the land involved is sold, the court may retain jurisdiction, and award any relief to which plaintiff may be entitled. 23 N. Y. Supp. 592, affirmed.

2. The easements of a property owner in the street on which his property abuts are appurtenant to the land, and cannot, on sale of the property, be reserved to the vendor, so as to enable him to enjoin the commission of trespass thereon.

3. In an action to enjoin a railroad company from operating its road in front of plaintiff's premises, it appeared that plaintiff conveyed the property pending suit, and that the vendee was not made a party. *Held*, that since any decree which could be rendered in the action would not be effective against such vendee, the owner of the property, the court properly refused the injunction and a prayer for damages subsequent to the conveyance. 23 N. Y. Supp. 592, affirmed.

4. Defendant's right to a jury trial on an issue of damages for trespass to an easement in

a street is waived where no steps were taken to obtain it, and defendant allowed evidence to be taken by the court without objection.

Appeal from superior court of New York City, general term.

Action by John C. Pegram and others, trustees, against the New York Elevated Railroad Company and another, to restrain defendants from operating the road in front of plaintiffs' premises. From a judgment of the general term (28 N. Y. Supp. 592) affirming a judgment granting part of the relief asked, both parties appeal. Affirmed.

The plaintiffs brought this action in equity, to restrain the defendant railroad companies from maintaining and operating a railroad in front of the premises known as Nos. 202 and 204 Pearl street and No. 113 Maiden lane, in the city of New York; and they asked also for a judgment against the defendants for the damages sustained to the premises. When the cause first came on for trial, at an equity term of the superior court of the city of New York, it appears that the defendants put in evidence a deed, made by the plaintiffs after the commencement of their action, by which the premises in question were conveyed to one Schortemeier, and a motion was made to strike the case from the equity calendar. The trial judge so ordered, and, his order being affirmed at the general term, the plaintiffs appealed to this court therefrom. Upon the consent of the defendants, however, an order was made in this court reversing the order of the superior court. When the present trial came on at an equity term again, no objection was made by the defendants to its proceeding there, and nothing had been done before the commencement of the trial to obtain a trial by jury of the issues in the case. Upon the present trial the plaintiffs put in evidence the conveyance of the premises described in the complaint which had been made to Schortemeier. It contained the following provision: "Said parties of the first part reserving to themselves and their successors all damages and claims for damages now or hereafter caused said property or the present and future owners thereof against the Manhattan Railway Company and the New York Elevated Railroad Company and their successors on account of the construction and the present, past, and future maintenance and operation of the elevated railroad in Pearl street and Maiden lane, and the right to convey or release in the name of the said party of the second part or his assigns to said railway companies, or either of them, or their successors, the easements in said streets now occupied and invaded by said railway companies, or either of them, and also the right to use the name of the party of the second part and his assigns (upon indemnifying them against costs) in any suit now or hereafter commenced against said railway companies, on account of the maintenance and operation of said elevated railroad in said streets, as now constructed,

which right to use his and their names in such release, conveyance, or suit the party of the second part hereby contracts for himself and his assigns to allow to the parties of the first part." The trial proceeded, and, upon the conclusion of the plaintiffs' case, the defendants moved to dismiss the complaint, upon the ground that the plaintiffs had no interest in invoking the action of the court, inasmuch as they had no estate or right in the land, and would not be capable of taking any benefit by injunction, if granted. The motion was denied, and then the defendants gave their evidence in defense of the action. A judgment was ordered, which awarded to the plaintiffs the sum of \$736 a year for the period of six years before the commencement of the action, and until July 11, 1889, which was the date of the conveyance to Schortemeier, as the damage inflicted upon the rental value of the premises. The injunction asked for in the complaint was denied, as were any damages sustained to the premises subsequent to July 11, 1889. Both parties appealed to the general term, where the judgment entered upon the order of the trial judge was affirmed, and both parties now appeal to this court. The plaintiffs appeal because of the refusal of the trial court to grant their demand for an injunction against the maintenance and operation of the railroad, or any damages to the rental value of the premises from July 11, 1889. The defendants appeal from so much of the judgment as awarded any damages to the plaintiffs.

Roger Foster, for plaintiffs. Brainard Tolles, for defendants.

GRAY, J. (after stating the facts). So much has been written in this court in the course of the litigation which has grown out of the efforts of abutting property owners to obtain from the elevated railroad companies compensation for the deprivation of those easements of light, air, and access which were appurtenant to their property, that I deem it unnecessary in the present case to say more than what is needful in order to dispose of the questions which the cross appeals have raised. The general principles underlying these equitable actions have been elaborately discussed in many opinions, and the right of the court, after deciding the complainant to be entitled to relief by way of injunction, to proceed to assess the damages sustained in the past, is firmly settled. If the court, sitting in equity, has gained jurisdiction of an action wherein the main relief sought by the complainant is an injunction against the defendant, it will retain its control of the cause generally; and, if it has happened that the acts of the defendant which have been complained of, and which are sought to be restrained, have caused, and will continue to cause, damage, the court may proceed in its own way to assess the damages sustained, and to award judgment

for them, as incidental to its grant of equitable relief by way of injunction. The court, having the parties before it, and in order to prevent a multiplicity of suits and to settle up the whole matter in dispute, will so decree as to finally settle the whole controversy between them. When, as in the litigation connected with these elevated railroads, the court proceeds further, and fixes the amount of the damage sustained to the fee of the property, which the defendant companies may pay in order to obviate the injunction, it does that which is a matter, not of strict legal right, but of equitable procedure and remedy, and which is resorted to by the court that the corporation may acquire that legal right to maintain and operate its railroad in front of the complainant's property which it might have acquired had it proceeded in the beginning to condemn the property owner's rights under the law of eminent domain. The controlling idea in the assumption by a court of equity of the authority to make a complete decree in such cases which shall finally settle the respective rights and obligations of the parties is, plainly, that all the parties are before it, and that its decree will be effectual because operating upon all the parties who have any interest in the subject-matter of the litigation.

In the present case, when the plaintiffs commenced this action, their complaint set forth but a single cause of action, which was one purely for a court of equity, inasmuch as the main relief sought was an injunction against the defendants, restraining them from maintaining and operating their elevated railroad to the prejudice of the abutting property. Their demand for past damages, included in the prayer for judgment, did not affect or change the equitable nature of the action, for reasons which heretofore have been set forth in the *Lynch Case*, 129 N. Y. 274, 29 N. E. 315, and in subsequent cases following in the line of that decision. The action, when it reached the stage of a trial, was one which, on the pleadings, was cognizable by a court of equity; but when it appeared, by the proof of the plaintiffs' conveyance of the fee of the premises to a third party, that the legal title was no longer in the plaintiffs, or in any one before the court, a condition of things arose which deprived the plaintiffs of the right to insist upon any relief by way of injunction against the defendants, because, in fact, they had no rights which the defendants could injure, or which an injunction could protect, unless, as the plaintiffs claim, the reservation in the deed to Schortemeier had the effect to reserve to them the easements appurtenant to the premises, or in some way to give to them an equitable standing in court with respect to them, which would entitle plaintiffs to continue their action, and to insist upon their demand for equitable relief against the defendants.

The plaintiffs were not the owners of the fee of the land occupied by the street, and,

when they parted with the legal title to the property abutting upon the street, they parted with every legal estate or interest. In the reservation in the conveyance to Schortemeier, I find merely a right reserved to the plaintiffs to have all the damages which had been, or might thereafter be, caused to the property because of the construction, maintenance, and operation of the elevated railroad, with the right to use the grantee's name, either in the release of the easement in the street to the railroad companies, or in any suit against them. If it could be assumed that the language of the reservation in the deed was sufficient to assign easements appurtenant to the property, such assignment would be absolutely ineffectual. The easements of an abutting owner in the street, which are invaded by the construction, maintenance, and operation of an elevated railway, are appurtenant to his premises; and, as it was said in the *Kernochan Case*, 128 N. Y., at page 568, 29 N. E. 65, "in the nature of things, they are indissolubly annexed thereto until extinguished by a release or otherwise. They are incapable of a distinct and separate ownership." The right to enjoin the continuance of the trespass by the defendants upon those easements could not be reserved upon the sale of the property. The right could only be possessed and enforced by its owner. *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518. He is the person solely interested in the preservation of the estate in the abutting property in all its integrity, with all the incorporeal easements or rights and privileges appurtenant thereto; and he is the only person whom the law could regard as injured by a continuance of acts on the part of the defendants which affect property and prevent its full and fair enjoyment in those ways which would be possible if the street were used as originally intended.

Nor can we, as the plaintiffs urge, for the purposes of the suit, hold that equity will consider the transaction as if no conveyance had been made, and as though the title to the property still stood in the plaintiffs' name. The grant of the fee to Schortemeier was complete, and the reservation did not operate to lessen that grant, while purporting to reserve to the vendors rights against the defendants as trespassers upon the easements which were appurtenant to the property sold. The situation brought about by the plaintiffs' conveyance of the fee of their property to Schortemeier was that the legal title was not represented before the court, and could not be bound by any decree which the court might make. There was a third person, not a party to the suit, in whom were vested that legal title and the right to enforce or protect the easements appurtenant to the property. Those easements had never been conveyed, as the effect of the reservation in the conveyance. Nor had they been, in any sense, extinguished thereby. They remained, in all

their integrity, still appurtenant to the property. But, as between the plaintiffs and Schortemeier, the reservation in the conveyance would, upon its face, operate to retain in or confer upon the plaintiffs certain rights which Schortemeier could not or ought not to disregard. However strong the language of the reservation, or however effective might be deemed Schortemeier's testimony upon the trial to preclude him from thereafter claiming in derogation of the rights reserved to the plaintiffs in their conveyance to him, nevertheless, it is certainly apparent that a decree in an action to which he was not a party would not be conclusive upon him. There need be no question as to the right of the parties to agree to make such a reservation as this; but the effect of it, while certain in so far as it could not sever the easements from the land, was a question between them, in the disposition of which the concern of the defendants was that in any action relating to a damage to the property for invasion of its easements the legal owner should be bound by the result. The defendants, clearly, are entitled to have the holder of the legal title to the abutting property bound by a decree, which permits them, as a condition of being relieved from the injunction, to acquire the legal right of maintenance and operation by the payment of the sum of money fixed by the court as the due compensation to be made. If the plaintiffs had brought in Schortemeier as a party defendant in the action, the court would have been in a position to adjust the equities and rights of all the parties, and to render a complete decree, which would have been binding upon each. The equities created or arising between the plaintiffs and Schortemeier, through the reservation in the deed, can only be effectively adjusted by his presence as a party to an action which had that as one of its objects. Standing, as the holder of the legal title, outside of the action, if the reservation in the plaintiffs' conveyance to him is operative to any extent, it may be deemed to make him, as the holder of the legal title, a trustee for the plaintiffs with respect to any damages which might be recovered of the defendants for the injury occasioned to the rental and fee value of the property, through an action brought in his name, or wherein he was joined as a party. The trial court, therefore, in my judgment, committed no error in denying to the plaintiffs relief by way of injunction, and in refusing to award damages from the date of their conveyance to Schortemeier. The result in the trial court did not necessarily deprive the plaintiffs of whatever legal or equitable rights were conferred by the reservation in their deed, and, in a proper action, they remain to be enforced, unimpaired so far as the result of this action is concerned.

With respect to the appeal taken by the defendants, little need be said. In my judgment, they waived any right to the trial by jury of the question as to past damages. Had

they deemed such a trial necessary, or their legal right, they should have taken steps in that direction, either by way of supplemental pleadings or by way of some timely objection to proceeding with the trial in equity. Although knowing of the existence of the plaintiffs' conveyance for a period long before the present trial, they took no step, and they suffered the plaintiffs to proceed and to give evidence upon the trial without objection. Thereby they must be deemed to have waived the right to a jury trial; and it was too late to obviate the effect of that waiver by the motion to dismiss the complaint, or by the request for rulings of law at the conclusion of the trial. The superior court had jurisdiction both in law and equity, and it was competent for the trial judge sitting in equity, and without objection being made to the trial in that part of the court, to retain control of the action, and, within the rules of law and according to the proofs, to give the plaintiffs a judgment for the damages sustained in the past. Had the objection been raised in a proper way or at the proper time, I think the defendants could have insisted upon a trial upon the law side of the court, as to the damage which the plaintiffs had sustained up to the time of the conveyance of the property; but, not having done so, it was not error for the court to settle the litigation between the parties as far as it was entitled to do so, by the award of the rental damage sustained by the plaintiffs while holding the legal title to the premises.

With respect to the amount of damages which the trial court awarded to the plaintiffs, I think there is no occasion to interfere with the judgment below. There was evidence showing that the occupation of the street by the defendants had injured the fee and rental values of property, and there was evidence respecting the property in question, which justified the award made to the plaintiffs. It cannot be said that the facts and figures shown by the evidence furnished no ground for the inferences upon the question of damage sustained to the fee which the trial court drew, and which the general term has sustained. The determination of these questions is not without difficulty, and that it should be left undisturbed when made, without a gross violation or abuse of principle is the wise and settled rule. The judgment appealed from should be affirmed, but, under the circumstances, without costs to either party. All concur.

Judgment affirmed.

(147 N. Y. 150)

VAN CAMP v. ORLEANS COUNTY NAT. BANK et al.

(Court of Appeals of New York. Oct. 8, 1895.)

ATTACHMENT FOR CONVERSION AGAINST EXECUTOR
—LIENS—PRIORITY—WITHDRAWAL
OF EXECUTION.

1. Where an executor's accounts have been settled, and the balance of funds in his hands

ascertained, an action by attachment under Code Civ. Proc. § 635, for conversion of such balance, will lie against him if he fails to pay it over.

2. On the complaint of an administrator with will annexed against the executor for conversion of the balance of the estate found on settlement of his accounts, and proof that he had absconded, a writ of attachment was issued, and judgment rendered in the action for plaintiff. *Held*, that the attachment was valid as against creditors claiming under subsequent attachments, and attacking it for the first time after judgment.

3. The withdrawal from the sheriff of an execution, included with others in a notice of sale, prior to the day of sale, does not discharge the lien of the attachment on which the execution issued.

4. Nor is such withdrawal prejudicial to inferior liens included in the same notice of sale.

5. Where a sheriff advertises a sale on executions in his hands, and postpones it to a future date, to take place pursuant to the original notice, a judgment, execution on which was placed in his hands after the publication of the notice, not included in his announcement at the sale or the certificate of sale, cannot be paid out of the proceeds of the sale.

6. Where a sale of land on executions is made under a notice stating that it is of the interest which the debtor has therein on the date of the issuance of the first attachment, a judgment recovered prior to that date cannot be satisfied out of the proceeds of the sale.

Appeal from supreme court, general term, Fifth department.

Action by Joseph Van Camp against Edward P. Searle and others to determine the conflicting claims of defendants, as creditors of plaintiff, to a fund in the hands of the sheriff. From a judgment of the general term (29 N. Y. Supp. 757) affirming so much of a judgment of the special term as awarded judgments known as the "Brown" and "Kelsey" judgments, held by two of the defendants, priority over their judgments, defendants Sawyer and the Orleans County National Bank appeal. Affirmed as to Kelsey and reversed as to Brown judgment.

Appeal from parts of judgment of general term, Fifth department, affirming judgment of special term. The action was brought to determine the conflicting claims of creditors of Benjamin F. Van Camp to a fund of \$6,423.20, in the hands of the sheriff of Orleans county, proceeds of real estate of Van Camp sold by the sheriff upon execution on the 15th of February, 1889. In June, 1888, the debtor Van Camp absconded from the state, owing debts to a large amount. Upon the facts becoming known, various suits were commenced by creditors, in which attachments were obtained, on the ground that Van Camp, being a resident of the state, had departed therefrom with intent to cheat and defraud his creditors, and to avoid the service of summons, and were levied upon his real and personal property in the county of Orleans. Judgments were subsequently recovered in favor of the several plaintiffs in the attachment actions, and executions thereon issued to the sheriff of Orleans county, in the form prescribed by section 1370 of the Code of Civil Procedure. The sheriff col-

lected several thousand dollars out of the personal property of Van Camp, which has been distributed, and as to which no question arises on this appeal. The controversy is narrowed to two questions: First, as to the correctness of that part of the decree of the special term which awarded payment of the Brown judgment so called, out of the fund, in priority to the Orleans County Bank judgment and the judgment in favor of Sawyer; and, second, whether the special term correctly awarded priority of payment of the Kelsey judgment over the bank and Sawyer judgments. The general term affirmed the decree of the special term in both of these particulars, and from such affirmance the Orleans County Bank and Sawyer appeal. In general, it may be stated that the appellants claim that the sale of the real estate was not on the Brown judgment and execution, but was made subject thereto, and was not therefore entitled to be paid out of the fund. In respect to the Kelsey judgment the claim is that the bank and Sawyer judgments were prior in date, and that the Kelsey attachment, though first issued and levied, was ineffectual, because the action was not one in which an attachment is allowed.

The material facts may be briefly stated. The Brown judgment long antedated the absconding of Van Camp. It was recovered June 17, 1882, for \$418.25. In April, 1886, it was conditionally discharged by order of the court, the condition being that the lien of the plaintiff's attorneys thereon and the right to enforce it for their protection should not be prejudiced by the offset allowed. In November, 1888, the court, on application of the attorneys (Keeler & Salisbury), and on proof that the plaintiff in the judgment was a nonresident, and that the lien of the attorneys for legal services exceeded the amount of the judgment, made an order permitting execution to be issued thereon against Van Camp; and execution was issued and delivered to the sheriff December 1, 1888, and remained in his hands until after the sale of February 15, 1889. The Kelsey judgment for \$2,084.11 was entered December 7, 1888. An attachment in the action was issued June 11, 1888, and was levied on the real estate of Van Camp June 12, 1888. The first of the two judgments in favor of the Orleans County Bank and the judgment in favor of Sawyer were entered September 14, 1888, on suits commenced June 14, 1888, in which attachments were issued and levied on the same real estate on the same day. The first attachments against Van Camp were issued and levied June 11, 1888, in three separate suits, commenced, respectively, by Briggs, Buell and others, and Hallock; and judgments in these several actions were entered on or before September 13, 1888, these attachments being earlier in date than the Kelsey attachment and judgment, or the attachments and judgments in favor of the Orleans County Bank and Sawyer. The

Kelsey attachment was issued and levied before the attachments in favor of the bank and Sawyer, but the Kelsey judgment was subsequent to the bank and Sawyer judgments.

The plaintiff in this action claims, as assignee of the Kelsey judgment, priority of lien on the fund to the lien under the bank judgment and the judgment of Sawyer. The bank and Sawyer contest the plaintiff's alleged lien under the attachment in the Kelsey action on the ground above indicated. The judgment roll in the Kelsey action and the proceeding therein are contained in the record, and disclose the following facts: The action was brought by one Adason Kelsey, as administrator with the will annexed of Amos Kelsey, deceased, against Benjamin F. Van Camp. The complaint in the action alleged, in substance, that Van Camp had been the executor of the will of Amos Kelsey from October 24, 1881, to June 1, 1888; that on the 21st of December, 1888, he accounted before the surrogate of Orleans county, the county in which the will was proved, and his accounts up to that date were judicially settled, and a decree entered adjudging that he then had in his hands as executor, after payment of all expenses of the execution of the will up to said date, the sum of \$5,704.74, which sum he was directed by the decree to retain in his hands as executor during the life of the widow of the testator, or until the further order of the court, paying meanwhile the income to the widow; that the widow died February 15, 1887, and that no further order of the court had been made for the disposition of the fund; that the defendant Kelsey had, since the death of the widow, sold real and personal property of the estate, and converted the same into money, and had received as executor the sum of at least \$10,000; that the defendant was duly cited to render an account before the surrogate on June 11, 1888; that he failed and neglected to appear on the return day of the citation, although the citation had been duly served on him, or to render any account; that thereupon, on said 11th day of June, 1888, Van Camp was duly removed from his office as executor, and his letters were revoked, and letters of administration with the will annexed were issued to the plaintiff. The complaint further alleged that the defendant had wrongfully and unlawfully disposed of and converted the said property and moneys to his own use to the damage to the estate of \$10,000, for which sum judgment was directed, with interest. The complaint was verified, and was read on the application for an attachment. In addition, the affidavit of the plaintiff was presented, stating, among other things, that "a cause of action exists in favor of the plaintiff against the defendant above named, for the unlawful and wrongful disposing of and conversion of personal property of the estate of Amos Kelsey, deceased, of the amount of \$10,000, and that the busi-

ness of the estate was substantially closed a long time ago." The affidavits presented also set forth facts tending to show that the defendant had absconded from the state, with intent to defraud his creditors and to avoid the service of a summons. A warrant of attachment was therefore issued, and no question is made as to the validity of the attachment, except that there was no jurisdiction to issue an attachment for the cause of action stated in the complaint. The sale of Van Camp's real estate (which produced the fund in question) was made under the following circumstances: On the 29th day of October, 1888, the sheriff of Orleans county, who then held execution on the Briggs, Buell, and Hallock judgments, and also on the first judgment in favor of the Orleans County Bank and on the Sawyer judgment, duly advertised the real estate for sale on December 15, 1888. The notice recited that "by virtue of several executions issued out of the supreme court, and to me directed and delivered, against the property of Benjamin F. Van Camp, I have seized all the right, title, and interest which the said Benjamin F. Van Camp had in and to the following described real property, on the 11th day of June, 1888, or at any time thereafter, and I shall expose for sale," etc. On December 15, 1888, the sheriff duly postponed the sale, "pursuant to the above notice" (of October 29, 1888), to February 15, 1889. Other executions had come to the sheriff's hands after October 29, 1888, and prior to December 15, 1888, and, among others, executions on the Brown judgment, the Kelsey judgment, and a second judgment in favor of the Orleans County Bank. On the 18th day of December, 1888, a supplementary notice of sale for the 15th of February, 1889, on executions "in favor of the Orleans County Bank and Sawyer," was advertised by the sheriff. On February 15, 1889, the sale took place. The sheriff announced that the sale was to be made on the Briggs, Buell, Hallock, Orleans County Bank, and Sawyer judgments. The Kelsey execution was withdrawn immediately before the sale, and the execution on the Brown judgment, although held by the sheriff (issued after the publication of the original notice), was not one of the executions mentioned in the sheriff's announcement. The judgment below directed distribution of the fund after payment of costs, in payment of the judgments, in the following order: (1) Brown judgment; (2) Hallock judgment; (3) Briggs judgment; (4) Kelsey judgment; (5) bank and Sawyer judgments. This appeal calls in question alone the priority awarded to the Brown and Kelsey judgments and the bank and Sawyer judgments. Other facts are stated in the opinion.

George Bullard, for appellants. David N. Salisbury, for respondent.

ANDREWS, C. J. (after stating the facts). The lien of successive attachments on real

property attached under process issued in this state takes effect in the order in which the attachments are issued and levied, and the priority of lien is not dependent upon priority in date of the judgments obtained. This is the general understanding, and is a clear inference from statutory provisions. Code Civ. Proc. §§ 644, 697. It is also the general rule in other states, except where otherwise provided by statute, or where an exceptional rule has been established by the courts. *Drake, Attachm.* § 263; *Wade, Attachm.* § 217. The application of this rule as between the attachment issued in the Kelsey suit and the attachments in the suits of the Orleans County Bank and Sawyer entitles the Kelsey judgment to preferential payment out of the fund, unless for other reasons the preference must be denied. The Kelsey attachment was first issued and levied, although the judgment obtained was subsequent in date to the judgments in favor of the bank and Sawyer. There must, however, be a valid attachment to create a valid lien, and the appellants assail the attachment in the Kelsey suit on the ground that the cause of action sued upon was not one in which an attachment is authorized. It is not denied that in other respects a case was made by the affidavits presented to the judge, which justified the issuing of the process. It was held in respect of similar affidavits in the case of *Buell v. Van Camp*, 119 N. Y. 160, 23 N. E. 538, that they were sufficient to establish the ground that Van Camp had departed from the state with intent to defraud his creditors and to avoid the service of a summons.

The record in the Kelsey suit is embraced in the record in this action. The cause of action set out in the complaint in the Kelsey suit was unmistakably for the wrongful conversion of personal property. It may have been defective, and perhaps would not have stood the test of a demurrer. But it expressly alleged a wrongful conversion by Van Camp of money of the estate, and demanded damages thereof in an amount stated. It alleged no contract, express or implied, and a cause of action on contract was not in the mind of the pleader. The affidavit used on the application for the attachment asserted that the action was brought for a wrongful conversion, and this was the cause of action recited in the warrant. It must be assumed on this appeal that the Kelsey action was an action for conversion, and not an action for money had and received, or upon contract, express or implied; and upon this assumption the sufficiency of the cause of action set forth in the complaint to support the attachment as against the assault now made upon it must be determined. The defendants, whose attachments were subsequently levied, have the right to assail the Kelsey attachment, and, if invalid, to have the pretended lien vacated, and the proceeds of the attached property in the hands of the sheriff

applied upon their judgments. Code Civ. Proc. § 682. It, however, is fully established by authority that mere irregularities in attachment proceedings give no standing to subsequent attaching creditors to set aside a prior attachment. In the absence of fraud or collusion, only defects which are jurisdictional, and which so affect the proceedings as to make them a nullity, are available to a subsequent lienor who seeks to set aside a prior attachment. Irregularities may be waived by the party, and third persons cannot be heard to allege defects in the proceedings which do not concern the substance of the right. *Wade, Attachm.* §§ 219, 220, and cases cited.

The Kelsey action was in form an action for the conversion of personal property, and such an action is one in which an attachment may be granted. Code, § 635. The plaintiff complied with all the other conditions imposed by section 636 in making his application. He furnished affidavits stating that a cause of action existed in his favor against Van Camp for the wrongful conversion of personal property, and showing other facts necessary to be shown to entitle him to the writ. The primary objection taken by the appellants to the validity of the attachment is not that an attachment cannot issue in an action for the conversion of personal property, nor that there were no sufficient grounds shown for granting an attachment in such an action, but that, upon the facts alleged in the complaint, no cause of action against Van Camp for conversion in fact existed, but only a cause of action in equity for an accounting, and that a plaintiff whose real cause of action is one which cannot be enforced by attachment (*Thorington v. Merrick*, 101 N. Y. 5, 3 N. E. 794) cannot, by bringing an action as upon contract or for conversion, procure an attachment which will be valid as against subsequent attachments. It is undoubtedly the general doctrine that the remedy of the beneficiaries of a trust against a trustee where the trust is open and continuing, and the accounts of the trustee have not been settled and adjusted and a balance ascertained, is in an action for an accounting in equity, and that an action at law, either for money had and received or in any other form, will not lie in the first instance; but it is otherwise where the trust has been closed and settled and the balance ascertained. *Weston v. Barker*, 12 Johns. 276; *Johnson v. Johnson*, 120 Mass. 405; *McLaughlin v. Swann*, 18 How. 217; *Perry, Trusts*, § 843. But whether a plaintiff, having the right, has brought his action in the proper form, or pursued the appropriate remedy, is a question to be determined on the trial of the action upon an issue of law or fact in case a defense is interposed. The jurisdiction to grant an attachment does not, we think, involve a preliminary determination by the officer to whom application for the writ is made whether in law the case presented by the complaint will entitle the

plaintiff to the relief he asks. It is sufficient to authorize him to grant the writ that it appears that the action is brought for one of the causes where attachment may issue, and the other facts are shown which authorize the process to be issued. All the requisite facts, both as to the cause of action and as to the fraudulent absconding of Van Camp, were presented to the judge, and we think the warrant was not void for want of jurisdiction. No application was made to set aside or vacate the writ until the present application, which was after final judgment in the action of Kelsey had been recovered. If the judgment had been obtained by fraud or collusion between the parties thereto to defeat or prejudice subsequent attachment creditors, a different question would be presented. But this was not found, nor does the record show that fraud or collusion was claimed on the trial of this action. It does appear that after the trial of the Kelsey suit had proceeded, and a large amount of evidence had been taken before the referee, which tended to show that Van Camp had wasted the assets of the estate, he appeared in the action, and his attorney stipulated that judgment should be entered against him therein. The referee made his report in favor of the plaintiff, in which he found that the facts stated in the complaint were true; and upon the pleadings, the report of the referee, the notice of appearance by the defendant, and the stipulation, judgment was entered. When the suit was commenced, Van Camp had been removed as executor, and his letters had been revoked. His trust relation was terminated. It was his duty to turn over the estate in his hands to his successor in the trust. He had absconded, having, as may be inferred, wasted the assets. Whether, under the special circumstances, an action for conversion would lie against him in behalf of Kelsey, his successor in the administration, it is not important to determine. Such an action was brought, judgment found for the plaintiff, and the judgment stands unreversed and in full force. The judge granting the attachment had jurisdiction, and it was not invalid as to the present appellants.

The appellants further claim that the withdrawal of the Kelsey execution from the hands of the sheriff on the day of and before the sale of the land discharged the lien of the Kelsey attachment. We think this act in no way affected the lien. The land was sold on executions or judgments, some of which were paramount liens to that of Kelsey. Title under the sale would cut off the lien of the Kelsey attachment and judgment. By withdrawing the execution, Kelsey put himself in a position where he could redeem from the sale. But, if the sale brought a surplus over the prior liens, it would be applicable to the payment of his judgment; and, if sufficient to pay it, redemption by him would not be necessary. The appellants were not prejudiced by the withdrawal of the

Kelsey execution. The attachment liens were matter of record, and, if the land were worth more than the liens prior to their judgments, they could have protected themselves by bidding up to the value of the land.

The decision of the special and general terms declaring that the Brown judgment should be paid out of the fund cannot, we think, be sustained. The land was not sold on that judgment, but, in legal effect, was sold subject thereto. The execution on the Brown judgment was not issued until after the commencement of the publication of the notice of sale on the 29th of October, 1888. The notice was of a sale "upon executions [then] in the sheriff's hands." The postponement on the 15th of December, 1888, to the 15th of February, 1889, was of a sale "pursuant to the above notice." The Brown execution had been issued before the postponement. But the sheriff gave no notice that the sale was to be made on any execution other than those in his hands when the first publication was made. In the form of the notice of postponement was a distinct intimation that the sale was to be made in pursuance of the original notice, and not otherwise. Nor was the sale in fact made on the Brown execution. The sheriff announced at the sale that the sale was to be made on the judgments and executions of Briggs, Hallock, Buell, Orleans County Bank, and Sawyer, and the sale was made on these judgments alone. The Brown judgment and execution was excluded from the enumeration. The certificate of sale specifies the judgments and executions on which the sale was made, and conforming in that respect to the announcement. Moreover, the notice of sale was of the interest which Van Camp had in the land on the 11th day of June, 1888, the day when the first attachment was issued, and the Brown judgment was recovered June 17, 1882. It is shown beyond controversy that the Brown execution was not in the sheriff's hands when the publication of the notice of sale was commenced; that the sale was not advertised on that execution; that it was not made or intended to be made thereon. Although more than the requisite time of publication elapsed between the day of postponement and the sale, yet the postponement was by its terms a mere continuation of the original notice, and was not intended to refer to or include executions other than those held by the sheriff when the original publication was commenced. The case of *Mascraft v. Van Antwerp*, 3 Cow. 334, which, so far as we know, has never been questioned, and which is cited in the text-books, seems to be a decisive authority for the proposition that a sheriff, having advertised a sale, cannot sell under that notice on an execution subsequently received by him. See, also, *Husted v. Daken*, 17 Abb. Prac. 137; *Brewster v. Cropsey*, 4 How. Prac. 220.

Our conclusion is that the part of the judgment should be affirmed which awards priori-

ty of payment out of the fund to the holder of the Kelsey judgment, and that the part be reversed which awards payment out of the fund of the Brown judgment, without costs of this appeal to either party. All concur, except HAIGHT, J., not sitting. Judgment accordingly.

(147 N. Y. 104)

PEOPLE v. POWERS.

(Court of Appeals of New York. Oct. 8, 1895.)
BEQUEST TO CHARITABLE USE — CONSTRUCTION — VALIDITY.

1. A devise to a trustee to dispose of the property among "charitable and benevolent institutions or corporations in the city of Rochester, as he shall choose, and such sums and proportions as he shall deem proper," is void for uncertainty as to the beneficiaries. 29 N. Y. Supp. 950, reversed.

2. A bequest in trust for "charitable and benevolent institutions" in a certain city relates only to such institutions as are both charitable and benevolent.

Appeal from supreme court, special term, Monroe county.

Action by the people of the state of New York against Daniel W. Powers, to enforce a trust for charitable uses. From a judgment of the general term affirming an interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

George F. Danforth, for appellant. Theodore Bacon, for respondent.

HAIGHT, J. This action was brought to compel the defendant, Powers, to account for the estate of Martha Dunlap in his hands, and that he, as executor and trustee, be adjudged to pay over to the five defendant corporations, and to such others as may come in and duly establish their claims, all the estate which, upon such accounting, shall be found applicable thereto under the provisions of the will of Martha Dunlap, etc. Powers interposed a demurrer to the complaint, upon the grounds—First, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that there is a defect of parties, because it is not alleged that "all the charitable and benevolent institutions or corporations in the city of Rochester," referred to in the complaint, are plaintiffs or defendants in the action. It appears from the complaint that Martha Dunlap died on the 15th day of May, 1882, at the city of Rochester, leaving an estate of real and personal property amounting to \$100,000; that on the 22d day of March, 1882, preceding her death, she made her last will and testament, in and by which she bequeathed certain specific legacies to certain persons named, and created a trust for the benefit of her sisters, Mary Dunlap and Nancy Dunlap, during their lives, and then, by the twelfth clause of the will, provided as follows: "I give, bequeath, and devise unto Daniel W. Powers, of Rochester, N. Y., all the property given and devised by the 11th clause of this

will which shall remain after the execution and termination of the said trust at the death of the said Nancy and Mary Dunlap. This gift and devise is made upon the trust and confidence reposed in the said Daniel W. Powers, that he will dispose of the said property among the charitable and benevolent institutions or corporations in the city of Rochester as he shall choose, and such sums and proportions as he shall deem proper." Upon her death the will was duly admitted to probate by the surrogate of Monroe county as a will of real and personal property, and letters testamentary were issued to Powers. Mary Dunlap and Nancy Dunlap have since died. It is alleged that each of the five corporations are domestic corporations organized and incorporated under the laws of the state of New York for charitable and benevolent purposes, located in the city of Rochester; that Powers had neglected and refused to distribute the estate of Martha Dunlap or any part thereof among them; and that, notwithstanding such neglect and refusal, the defendant corporations have hitherto neglected or refused to institute any proceedings in the surrogate's court of Monroe county or elsewhere for the establishment and enforcement of the trust.

For the purposes of this case, we shall assume that the testatrix, in and by the twelfth clause of her will, undertook to create a trust, and that she had no intention of devising or bequeathing any part of her estate to Powers individually. The question is thus presented as to whether the trust is enforceable, or void for indefiniteness. In the consideration of this question certain general principles must be borne in mind. The provisions of the will must be considered as of the time of the testatrix's death, and under the law as it then existed. The law of 1893 (chapter 701) has no application, for it was not within the province or power of the legislature to change vested rights of persons or parties in property. *White v. Howard*, 46 N. Y. 144; *Dammert v. Osborn*, 140 N. Y. 43, 35 N. E. 407. Charitable uses are not exempt from the provisions of the statute abolishing uses and trusts except such as are authorized thereby. 1 Rev. St. p. 727, § 45. The system of charitable uses as recognised in England prior to the Revolution, together with the *cy pres* doctrine available to give effect to trusts for charitable uses without any definite beneficiary, has no application in the law of this state. *Bascom v. Albertson*, 34 N. Y. 584; *Holmes v. Mead*, 52 N. Y. 332; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 306; *Tilden v. Green*, 130 N. Y. 29-67, 28 N. E. 880; *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. 801. When a donee of a power has been given a discretion to exercise it for the benefit of others, he must exercise the discretion, and its execution cannot be delegated to others; and in case he, for any reason, fails to exercise the discretion, and the power falls upon the court for

execution, the court distributes equally among the whole class in which the donee was authorized to exercise his discretion. 1 Rev. St. p. 734, § 100; Hoey v. Kenny, 25 Barb. 396-399; Crooke v. Kings Co., 97 N. Y. 421-453. The fact that the trustee is competent and willing to execute the trust does not validate it, for the validity or invalidity of the trust cannot depend on the will of the trustee. And, in order to create a valid trust, there must be a beneficiary or beneficiaries designated. It may not be necessary to name him. It will be sufficient if he is so designated or described that he can be identified. But, where the gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree, the gift is void. *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305; *Holmes v. Mead*, 52 N. Y. 332; *Prichard v. Thompson*, 95 N. Y. 76; *Read v. Williams*, 125 N. Y. 560, 26 N. E. 780; *Levy v. Levy*, 33 N. Y. 97.

As we have seen, the trust is that Powers will dispose of the property among "the charitable and benevolent institutions or corporations in the city of Rochester as he shall choose, and such sums and proportions as he shall deem proper." Charity means one thing; benevolence, quite another. Benevolence includes all acts or gifts prompted by good will or kind feelings, and may be entirely independent of any thought or intention of charity. The recipient or beneficiary may be well to do and in no need of charity. In England, under the law of charitable uses, bequests for charity have been sustained, while benevolent gifts without a designated beneficiary have been held to be too indefinite, and therefore void. *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. 307. It is urged, however, that the word "benevolent," as used in this will, is coupled with that of "charity," and that the institution or institutions intended as beneficiaries must be both charitable and benevolent; in other words, that "benevolent," as here used, was intended to mean "charitable." This view we think, we may properly adopt. Powers was, then, required to dispose of the property among the charitable institutions or corporations in the city of Rochester, either or both, or exercise his discretion in selecting from them. We think we may take judicial notice that in the prominent cities of our state there are numerous organized charities that are not incorporated, as well as those that are incorporated. What are they? City hospitals, homes for the friendless, industrial schools, orphan asylums, aged female societies, and children's homes are common names in every city, with which we are familiar. Again, we have charities connected with nearly every religious denomination and church. Many schools are supported by charity. Then come the social societies, the Masons, the Odd Fellows, the Knights of Pythias, and numerous others, all incorporated and maintaining institutions of charity. Then

there are the benevolent associations, the Ancient Order of United Workmen, Supreme Tent of the Knights of the Maccabees of the World, the Benevolent and Protective Order of Elks, and numerous others of like character, organized for the purpose of affording relief to a member or his family under certain contingencies, charitable in nature. Then, if we leave the list of corporations, and enter the field of unincorporated institutions, we will find the King's Daughters, the Willing Workers, and the sewing societies in nearly every circle and society. It will thus readily be seen that the including of all of the charitable institutions of a large city, both corporate and unincorporated, as the beneficiaries of the fund, was probably never contemplated or intended by the testatrix, and devolves duties upon the court which could only be discharged with the greatest difficulty, if capable of execution at all.

The special and general terms appear to have considered the case of *Power v. Cassidy*, 79 N. Y. 602, as controlling in the support of the trust. In that case the bequest was: "I give to my executors, to be divided by them among such Roman Catholic charities, institutions schools, or churches in the city of New York as a majority of my executrix and executors shall decide, and in such proportion as they may think proper." It does not appear to us that the two cases are parallel, or that the decision in one should control the other. The beneficiaries in each case are limited in locality to a single city. In this respect only are the cases parallel. The Roman Catholic is a well-known religious denomination, whose societies cover a goodly portion of the civilized part of the globe. The territory is divided into dioceses. It maintains churches, schools, institutions, and charities in each diocese which are under the control and management of a bishop. The Catholic charitable institutions, schools, and churches in a city are therefore substantially under the charge and management of one man. They constitute a limited and well-defined class by themselves, as distinguished from all other religious or denominational societies, easily known and readily ascertained. It was upon this ground and for this reason the bequest in that case was sustained. That case was considered to be upon the border line, and in sustaining the bequest the court felt that it was going to the extreme limit of the rule, and on several occasions since, it has taken the opportunity to say that the rule would not be extended beyond the facts of that case. In the will under consideration very different facts are presented. There is no limitation by class or kind; the only limitation, as we have seen, is as to locality. Roman Catholic charities, institutions, schools, etc., are included with like institutions of every other denomination. Neither are the beneficiaries limited to religious denominations, for all kinds and classes of charities, religious or otherwise, are included.

In the *Levy Case*, *supra*, a testator devised a farm, together with the residue of his real and personal property, to the people of the United States, or such persons as congress should appoint to receive it, in trust for the purpose of establishing and maintaining on the farm so devised an agricultural school for the purpose of educating children of warrant officers of the United States navy, whose fathers were dead, as practical farmers; that, if the United States refused to accept the bequest, he devised the same to the people of the state of Virginia for a like purpose; and, if the legislature of Virginia declined to accept the trust, he then gave it to certain Hebrew societies, naming them, in New York, Philadelphia, and Richmond, with directions for them to carry out the trust for the benefit of the children of such societies, who were between the ages of 12 and 16 years, whose fathers were dead, etc. It was held that the bequest was too indefinite to be valid. Wright, J., in delivering the opinion of the court, says with regard to the trust to the Hebrew societies: "It is so utterly vague and indefinite that it could not be executed in the English chancery without invoking its *cy pres* power,—a power in case of charity, as has been held by this court, having no existence in the jurisprudence of this state."

In *Holmes v. Mead*, *supra*, a certain parcel of land was devised to Mead and others, to have and to hold the same during the lifetime of two persons, naming them, and the survivor of them, upon a trust that the same should be used as a place of public worship for the performance of religious offices according to the doctrine and discipline of the Protestant Episcopal Church in the United States of America, and, upon the death of the longest liver of the two persons named, then to convey the same to any trustee who may be authorized by any act of the legislature of the state to take and hold such church and premises as a place of public worship, and, in case no such act of the legislature is then in force, to convey the same to the rector, wardens, and vestrymen of St. Mary's Church, Beachwood, if such church shall be incorporated under any act of the legislature, and, if there be no such incorporation, then the said premises to go to his heirs. Five thousand dollars was also bequeathed to the trustees to be invested, and the income thereof paid annually for the support of the rector for the time being of St. Mary's Church, or for the support of the clergyman of the Protestant Episcopal Church employed as a missionary or otherwise, and who shall officiate therein, with the principal and income to be paid and transferred or disposed of in like manner as the lot of land devised to the trustees is directed to be conveyed or disposed of. It was held that the trust was invalid and could not be executed.

In *Prichard v. Thompson*, 95 N. Y. 76, the testator bequeathed to his executors the sum

of \$150,000, upon the trust that they shall distribute and apply the same "to such charitable and educational uses and in such manner as shall be specified and directed in a codicil." He then declared that it was his purpose to prepare a codicil without unnecessary delay, and provided that, in case a codicil should not be executed, then the bequest was "upon trust to distribute the sum of \$150,000 to and among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trust for charitable and educational uses, as my said executors, the survivor or survivors of them, shall select for that purpose, and in such several sums, not exceeding in any case the amount that such incorporated body is empowered by law to take and hold upon the use aforesaid, as they, my executors, the survivor or survivors of them, shall determine." He died without making a codicil. It was held that the gift was too indefinite to be capable of being executed by a judicial decree; that where a bequest embraces unknown beneficiaries to an unlimited extent, so as to render it almost impossible to ascertain their number or character, it cannot be carried into effect. Miller, J., in delivering the opinion of the court, speaking of the executors, says: "If they are unable, or for any reason fail, to perform, it is difficult to see how a court of equity could enforce a performance. It could not well control their discretion or exercise the power conferred in their place and stead, or of the survivors or survivor of either of them. If they refuse to execute it, or the power remains unexecuted, it is not apparent how the court could make a selection, from the extensive range of societies referred to, of those that should receive the bequest, or of the proportion in which it should be divided. Neither could the court select individuals to perform a duty devolving upon the trustees, who are selected no doubt by reason of personal confidence in their judgment, and their capacity for the task imposed. Another difficulty presents itself as an obstacle in carrying out the trust in question. The beneficiaries referred to, consisting of every corporation within two states of the character named in the will, would be almost innumerable, and none of them could claim that any specific portion of the bequest belonged to them. Until selected by the trustees, they would have no such interest as would give them a standing to compel an enforcement of the bequest. It is a well-settled and established rule that, where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree, the representative of the donor must prevail over the charity." Again, he says: "Here no class is designated, and as we have already intimated, if a court of equity should be called upon or assume to take upon itself the responsibility of carrying into effect the bequest of the testator, it would be obliged to bestow upon every charitable and educational

institution within the two states named a portion of the fund in question. This would be a matter of great difficulty if not impracticability, and would inevitably lead to serious embarrassment in the discharge of the duty of disposing of the fund in question. In such a contingency it would seem to be reasonable that the fund should be equally divided among all the institutions named, and thus the right of selection which was intrusted in the judgment, good sense, and kindly feelings of the executors as a matter of personal confidence would be of no avail."

In *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 805, the bequest was to executors in trust to be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of the soul of the testator and the souls of his family, and also the souls of all others who may be in purgatory. It was held that the trust attempted to be created was invalid; that there was no beneficiary in existence who could demand the execution of the trust.

In *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, the bequest was to such charitable institutions and in such proportions as the executors, by and with the advice of the testatrix's friend, Rev. John Hall, D. D., shall choose and designate. After the death of the testatrix, the executors, with the advice of Hall, made a written designation of certain incorporated charitable institutions to take the bequest. It was held that, under the language used, the charitable institutions of the whole world capable of taking by devise or bequest were eligible, and that it was not such a trust as could be carried into execution by the court, and it was therefore void.

In *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. 801, the bequest was to the town to keep as a fund for the support of the poor of the town. It was held that the bequest was indefinite and invalid for want of an ascertained beneficiary, the poor of the town being too general.

In the *Tilden Case*, 130 N. Y. 29, 23 N. E. 880, the bequest was to executors in trust, authorizing them, upon the organization of the Tilden Trust, to convey or apply to the use of the same his residuary estate, or so much thereof as they may deem expedient, but in case such institution should not be incorporated, or if for any cause or reason the executors shall deem it inexpedient to convey the residuary estate or any part thereof, or to apply the same or any part thereof, to such institution, he authorized his executors and trustees to apply the rest, residue, and remainder to such charitable, educational, and scientific purposes as in the judgment of the executors and trustees will render the rest, residue, and remainder of his property most widely and substantially beneficial to the interests of mankind. It was held that no property had been devised or bequeathed to the Tilden Trust; that the payment of any sum to it was left discretionary with the executors and trustees; that

it was connected with and could not be separated from the concluding clause, directing them to dispose of the estate to such charitable, educational, and scientific purposes as in their judgment would most widely and substantially benefit the interests of mankind; and that the provision was too vague and indefinite to be capable of execution.

Applying the rule of these cases to that under consideration, it appears to us that the conclusion is inevitable that the trust attempted to be created is unenforceable, for the reason of a failure to designate a beneficiary, or to designate or describe a class or kind of beneficiaries to whom distribution is practicable, or that can with reasonable certainty be identified and ascertained.

Upon the argument it was contended that the attorney general or the people had no standing in court to enforce a trust for the benefit of others, but the view taken by us with reference to the validity of the trust renders it unnecessary to consider this question.

The interlocutory judgment should be reversed and the demurrer sustained, with costs. All concur. Judgment accordingly.

(147 N. Y. 31)

PEOPLE ex rel. HECKER-JONES-JEWELL MILLING CO. v. BARKER
et al., Tax Commissioners.

(Court of Appeals of New York. Oct. 8, 1895.)
TAXATION—FOREIGN CORPORATIONS—DEDUCTING DEBTS—REVIEW OF ASSESSMENT.

1. The assessment made on a foreign corporation under Laws 1855, c. 37, will not be disturbed on review where the corporation's claim that its indebtedness exceeded its assets appeared, from its own disclosure, to be improbable, and there was evidence to sustain the valuation assessed.

2. A promise to pay at a future day is not a "sum invested" within the meaning of Laws 1855, c. 37, providing that nonresidents doing business in the state "shall be assessed and taxed on all sums invested in any manner in said business." *People ex rel. Thurber-Whyland Co. v. Barker*, 35 N. E. 1073, 141 N. Y. 118, distinguished.

Appeal from supreme court, general term, First department.

Certiorari by the Hecker-Jones-Jewell Milling Company against Edward P. Barker and others, commissioners of taxes, to review assessment of relator's personal property. The order of the special term dismissing the writ was affirmed by the general term (33 N. Y. Supp. 221), and the relator appeals. Modified.

John M. Bowers, for appellant. D. J. Dean, for respondents.

PECKHAM, J. The above relator obtained two writs of certiorari under chapter 269 of the Laws of 1880, for the purpose of reviewing the action of the above defendants in assessing the relator for all sums invested in its business in this state in the years 1893 and 1894, a separate writ having issued.

for each assessment. The defendants were commissioners of taxes, and composed the board of taxes and assessments of the city and county of New York, and they made an assessment in each of the above years against the relator, which is a foreign corporation having money invested in this state; such assessment being based upon the provisions of the act, chapter 37 of the Laws of 1855, one section of which reads as follows: "All persons and associations doing business in the state of New York as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong." The relator disputes the validity of each assessment. The defendants, in 1893, assessed the relator at a certain sum, after deducting that portion of its indebtedness which they decided had been incurred in this state in the purchase of property herein; and in 1894 they made an assessment without deducting any of the indebtedness of the relator whatever. The relator claims that the defendants, in 1893, did not deduct all its indebtedness which had been incurred in the purchase of property within this state, and that, if they had done so, there would have been no assessment made against it here. It also claims that the assessment of 1894 was void because of the refusal of the defendants to make any deduction whatever for any indebtedness. The reason for the difference in the two assessments is based by the defendants upon the decision of this court in *People ex rel. Thurber-Whyland Co. v. Barker*, reported in 141 N. Y. 118, 35 N. E. 1073. That case was decided here subsequent to the assessment of 1893 and prior to that of 1894. The defendants were of opinion that the decision in question covered this case, and obliged them to assess the relator without making any deduction for any indebtedness whatever, even though such indebtedness, or some portion thereof, were incurred in the purchase of the assets in this state, for which the assessment of 1894 was made.

Prior to the time for finally making the assessment for each of the two years 1893 and 1894, respectively, the relator rendered to the defendants a verified written statement of the condition of the company as of the second Monday of January in each of such years. The statement of 1893 shows that the total gross assets in all parts of the world then belonging to the relator amounted to \$4,615,326.07, and from that sum it was claimed should be deducted the amount assessed against it for its real estate, being \$451,300, and the sum of \$2,500,000 for bonds issued by it, and also \$2,567,000 for further indebtedness incurred by it in the

course of its business, thus claiming a total of deduction for indebtedness (including the assessment for real estate) of \$5,518,300, or almost \$1,000,000 of debts over assets, and reducing the assessment, of course, to nothing. It does not appear that any receiver of the company has been appointed or applied for, or that any proceedings have been taken or were contemplated for the winding up of what by these statements would appear to be a hopelessly insolvent concern. The president of the company was examined in regard to the assessment of 1893, before the commissioners; and he testified that the company was organized August 27, 1892, less than seven months prior to the making of this statement. The president further testified that the nominal capital was \$5,000,000, \$2,000,000 of preferred and \$3,000,000 of common stock; that \$2,000 in cash were paid into the treasury for 20 shares of its capital stock at par, and that sum was paid out for corporation expenses. He was unable to state whether, in issuing the stock at the time the company was organized, it acquired anything beyond the tangible assets of the firm or parties whose property was purchased. The first meeting of the directors was held August 27, 1892; and at that meeting its bonds, secured by mortgage, were issued, and 820 of them, of \$1,000 each, were sold for cash at par, and the money brought into New York, and deposited in the bank with which the company did business, and was subsequently used for the purchase of merchandise used by the company. The question was then asked of him, "And the rest of the capital stock and the balance of the bonds were issued in exchange for real and personal property?" and he answered, "Yes."

From this statement of 1893, and from the examination of the president of the company, it appears that all but \$2,000 of its capital stock of \$5,000,000, and the \$2,500,000 of its bonds, had been issued in exchange for property, real and personal, between the 27th day of August, 1893, and the second Monday of January, 1894, the cash for the \$820,000 of bonds issued having been used for the purchase of merchandise. Further than this, it appears that \$2,567,000 of further indebtedness had been incurred upon its notes for borrowed money, loans to it on collateral, and on bills for merchandise. This would make about \$10,000,000 invested by the relator within this short period, and yet it makes a statement that its total gross assets existing on the second Monday of January, 1893, amounted to but \$4,615,326.07. No explanation is vouchsafed for these seemingly most unfortunate investments. It might, perhaps, be thought there was a mistake in the record from which I have quoted, and that the stock had in fact never been issued to any such amount. The statement for 1894 would seem to show there was no mistake of that nature, for it is there stated that the entire share capital, except the 20 shares already

spoken of, and the entire issue of bonds, except the 820 sold for cash, were exchanged for property,—\$10,000,000 of investments in five months, and at the end thereof less than \$5,000,000 left. In January, 1895, its relative condition was about the same. Its gross assets had shrunk from \$4,615,326.07 to \$3,486,919, being considerably over \$1,000,000, but its indebtedness was less by \$1,046,500. And yet this (seemingly) insolvent corporation is paying interest on its bonded indebtedness and dividends upon its stock. These facts call for explanation. There is no doubt that the astute and able counsel for the city would have made the effort to obtain it had not the defendants proceeded upon the theory as to the tax of 1894 that the amount of indebtedness was in any aspect immaterial, and the amount of assets in this state was sufficient for an assessment for 1894, which would be fair if no deduction for indebtedness were allowed. As to the assessment for 1893, in which there was some allowance for indebtedness, the relator claims that the entire face value of three of the items entering into that assessment, viz. for machinery and tools, office furniture, and horses and trucks, making a total of over \$800,000, should have been deducted in addition to the amount already allowed by the defendants for indebtedness incurred for the purchase of assets in this state. The decision of the defendants in this regard as to what amount of indebtedness was actually incurred in the purchase of the assets in this state in 1893 was made upon a question of fact in regard to which the evidence on the part of the relator was by no means of that clear and convincing character which could leave no doubt as to the fact. The assessment itself depended also upon the different kinds of property making up the assets of the relator in this state, and it was not made at all plain as to what the real and true value of such assets was. We do not feel called upon to review and reverse the determination of the defendants as to the true amount for which the relator should be assessed for the year 1893. There was some evidence to support their determination, and that is sufficient for us. It is not plain that any erroneous theory of assessment was adopted. The orders of the special and general terms will therefore, as to that assessment, be affirmed.

We are now brought to the consideration of the assessment for 1894, founded upon the *Thurber-Whyland Co. Case*, above referred to. We think an erroneous use has been made of the decision of this court in that case, and that the assessment now before us for 1894 must be set aside. Upon another examination of the question, carried on by the defendants (commissioners), a more thorough investigation may be made, so far as it shall appear necessary, for an accurate assessment against the relator for all sums invested by it in this state.

The question is as to the true construction

to be given those words of the statute which provide that all persons, nonresidents of the state, and doing business herein, "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state," etc. The *Case of Thurber-Whyland Co.* held that a foreign company having assets in a foreign state could not invest some of its capital here, and rightfully claim a deduction from such sum invested of all its indebtedness. That company admitted an investment here of at least \$750,000, and its total indebtedness was over \$1,200,000, consisting of open accounts and of bills payable. There was no claim set up as to the right specially to deduct the specific indebtedness arising upon the purchase of the very assets in New York in regard to which the assessment had been made. Very possibly, language was used in that case in the course of the opinion which might be capable of a construction broader than was called for by the facts appearing in that record. If so, it would be but another illustration of the truth and importance of the principle which makes it necessary to construe the language used in judicial opinions strictly with reference to the facts which exist in the case which is decided. It was stated in that case that the court was of opinion that the act did not contemplate the deduction of debts from the sum invested in this state by nonresidents. As then applied, the language was appropriate, although it might well have been more definite and precise. That company had assets at its home office enough to permit a deduction of all indebtedness asserted, and there was no claim that was argued that any of it had been incurred in the purchase of property in this state which formed the basis of the assessment. Under such circumstances, we held, and, as we think, properly held, that the place for the deduction of general indebtedness was the residence of the person or corporation, and that the sum invested here should not be diminished by a deduction of any part of such general indebtedness. The question we are now to decide is, what is the sum invested in this state by a foreign corporation which purchases property here, and pays cash for a portion of it, and promises to pay the balance at some future day?

This relator is engaged in the business of milling in this state. Suppose it brought \$100,000 into this state, and bought \$200,000 worth of wheat to be manufactured into flour, and paid for it with the \$100,000 in cash, and gave its notes for the balance, the ownership of the wheat passes to the relator by the purchase, and in that sense it can be said it owns wheat to the amount or value of \$200,000. Has it, however, under this statute, invested in this state any sum beyond the \$100,000 which it paid in cash for the wheat? Is its promise or liability to pay the other \$100,000 a sum invested in this state by it, and is it the same as cash for the

purpose of taxation? Is the fact that the company has in its possession, as ostensible owner, the \$200,000 in value of wheat, conclusive evidence that the company has invested that sum in its business in this state, when in truth it has paid a sum amounting to but half its value, and has promised to pay the balance at some future time? It seems to us there can be but one answer to these questions. The sum invested is the sum paid, and not the sum which is promised to be paid on a future occasion. It is true the purchaser has in its possession wheat to the value of \$200,000, but it cannot be said to have invested \$200,000 in the purchase of the wheat as long as it has in fact paid but one-half that sum, and has simply promised to pay the other half at a future day. No part of the value of the wheat is lost to taxation by this holding; neither is the sum which was brought into the state by the relator and invested in the wheat. The vendor of the wheat is taxed for the \$100,000 he has received as part payment for the same, and he is also taxed for the \$100,000 of notes he has received from the purchaser of the wheat on account of the balance due for the purchase money; and the relator is taxed the \$100,000 cash it has brought into the state, and invested in this wheat; and there is thus an assessment of \$300,000 made between these two, the vendor and the vendee of the wheat, and that is all the property that is then subject to taxation. To tax the full value of the wheat in the hands of the purchaser is in reality to tax the purchaser on its own indebtedness. Its promise to pay in the future the other \$100,000 is not a sum invested by it here until it has redeemed its promise and paid its notes. The transaction is in truth substantially the same whether the payment has been secured by a chattel mortgage on the wheat or not, although, if the payment have been thus secured, the purchaser has not even obtained an unincumbered title to the wheat until the payment is made. And, so long as the property purchased has not been paid for in full, then the amount still due upon it ought to be deducted, as not representing any sum invested by the purchaser in this state. Otherwise, it is to say that the relator has invested a sum in this state by merely promising to do so at some future day. If, after the purchase, the wheat should appreciate, the whole of such appreciation would, of course, go towards swelling the amount invested by the relator in this state, and the contrary would be the case if it should depreciate. The indebtedness being a fixed quantity in both cases, it would not be altered or affected by either event. The same thing would happen in case the relator purchased the wheat and paid nothing for it, but gave its notes, even without a mortgage, for the whole amount. In such case the relator could not be said to have invested any sum in its business, assuming, of course, that the wheat was worth

no more than its purchase price. Instead of paying, it had simply promised to pay for it. The vendor in such case would be assessed on the notes he took for the price of the wheat, instead of for the wheat itself, and the relator would not be assessed at all. This would be right because no more property had been created by the sale than existed before its consummation, and there would be an assessment levied for the full amount that had been levied before, or which would have been levied if no sale had been made. The relator would not have invested any sum in its business until it paid something on its notes, or until the property purchased had appreciated beyond the purchase price thereof. A gift of the property would be different. In that case, while the relator would not have actually taken money or brought it into the state for investment and invested it in the property, yet it would have received the property as absolute owner, with no outstanding liabilities to pay for it, and, being in such case the owner of the property, it would answer the description of a sum invested in its business, and thus be liable to assessment under the act.

This treatment of the question is not in fact to be regarded in the light of a strict deduction of debts from assets. It is construing the meaning of the statute, and determining what in reality is the sum invested by a nonresident individual or corporation, under these circumstances, in the business in which he or it is engaged in this state. It is not adjusting the equities as spoken of in the *Thurber-Whyland Co. Case*, which we then held should be done at the place where the corporation was a resident. It is a different thing from ascertaining the general and gross assets of a nonresident to be found within the state, and from that sum deducting all its debts whenever and upon whatever cause incurred. The nonresident corporation investing a sum of money in this state is to be assessed for the full sum it invests here, although it may owe debts enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result is no part of the sum it has invested in such purchase, and no assessment can be made which includes the amount of that indebtedness. But the stock which a corporation issues in payment for property is not a debt incurred by it. The scrip for the stock is merely a certificate to the holder to certify as to his interest in the property of the corporation, which interest is his share of the property that remains to it after the payment of all its debts.

Construing the statute as we do, it follows that the assessment of 1894 cannot stand. Upon a rehearing of the case by the assessors, it will be most appropriate to endeavor to learn what kind of property was obtained in exchange for the stock, bonds, and notes of the company, amounting to \$10,000,000,

where it is situated, how much it is in fact worth, or what has become of it, and how it has to the extent claimed disappeared or shrunk in value. It is a case which, indeed, calls for rigid examination and investigation, to learn, if possible, how a corporation seemingly, by its prepared statements, insolvent, can go on and pay interest on its mortgage debt, dividends on its stock, and keep clear of all hostile steps from its other creditors. Our conclusion is that the orders of the general and special terms in relation to the assessment of 1893 must be affirmed, with costs, and those in regard to the assessment of 1894 must be reversed, and the defendants directed to make a new assessment in conformity to the facts and to the views set forth in this opinion. All concur. Ordered accordingly.

(147 N. Y. 117)

In re GARVEY.

In re BARRY et al.

(Court of Appeals of New York. Oct. 8, 1895.)

VOTERS—RESIDENT—SEMINARY OF LEARNING.

1. Under Const. art. 2, § 3, providing that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary, the intent to change the legal residence must be shown by acts independent of a person's presence as a student to entitle him to vote in the new locality.

2. Evidence that one going to a seminary town as a student notified the registrar of his former residence to strike his name from the voting list, as he had changed his legal residence, and the authorities of the seminary that he had become a resident of the seminary town, shows his intent to change his legal residence by acts independent of his presence as a student, as required by Const. art. 2, § 3.

3. Evidence that a person had a legal residence in a place prior to becoming a student at a seminary in the place, and that he intends to remain there after his course of study is completed, does not bring him within the provisions of Const. art. 2, § 3, that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary.

4. Under Const. art. 2, § 3, providing that no person can gain or lose his residence as a voter by reason of his presence or absence as a student at a seminary, evidence that a person went to a seminary as a student: that he engaged in the business of bookselling, and was also lay reader in a church; that he was not obliged, and did not intend, to leave the seminary after his course of study is ended,—is insufficient to show a legal residence in the seminary town.

5. Under Const. art. 2, § 3, providing that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary, evidence that a person went to a place as a student at a seminary therein, and also as a teacher, and intends to establish his residence at the seminary after his course of study is ended, is insufficient to show a legal residence in the seminary town.

Appeal from supreme court, general term, First department.

Application by Peter J. Garvey against John Neilson Barry and others to have defendants' names stricken from a registry list. From an order of the general term (32 N. Y. Supp. 689) affirming an order of the

special term striking the names of Barry and certain others of the defendants, they appeal. Reversed in part.

George F. Canfield, for appellants. Franklin Bien, for respondent.

BARTLETT, J. This is an appeal from an order of the general term, First department, affirming an order of the special term, made on the 23d day of November, 1894, striking from the registry list of voters in the city of New York the names, among others, of the appellants, John Neilson Barry, Henry Mesler, George Gunnell, Jr., and Thomas Henry Yardley. The question as to where students of any seminary of learning in the city of New York are entitled to vote has given rise to much litigation, and, not unfrequently, led to unseemly proceedings on the days of registration and election. Before considering the cases of the present appellants, it is proper to call attention to the rule laid down by this court in *Re Goodman*, 146 N. Y. 284, 40 N. E. 769, where Judge Finch wrote the opinion. In that case it was conceded that Bainton, the appellant, was a resident of the state and of the county, and entitled to vote in the city of New York, but it was denied that he acquired any right to vote in the election district in which the seminary which he entered and in which he took rooms was situated. It was admitted that he could have registered in another district, which was his residence prior to his removal to the seminary, and would have been a qualified voter there, and, as Judge Finch puts it, "the precise contention being that he did not lose his residence there by removing to the seminary, nor gain a new residence in the seminary district by his presence in it as a student." This contention was upheld, and the order affirmed, declaring the appellant to be a voter in the district where he last resided prior to his removal to the seminary. Judge Finch, in his opinion, further says: "We do not mean to say that a voter may not change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, but the facts to establish such a change must be wholly independent and outside of his presence in the new district as a student, and should be very clear and convincing to overcome the natural presumption. In the present case there were no such facts. Presumably rooms in the seminary, rented to students, are to be occupied only during the prescribed period of study, and not permanently as a residence, and there was nothing before the court to show any change of residence beyond the temporary presence at the institution for the prescribed period of study. This construction obeys literally the constitutional mandate, and does not necessarily disfranchise a single citizen. It merely recognizes and applies the admitted truth, acted upon at every election, that the voting resi-

dence may be in one place and the actual abode in another. Usually, perhaps always, the voting residence remains unchanged until a new residence is actually acquired, but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else beyond that fact, and wholly independent of it, must occur to effect the change. The intention to change is not alone sufficient. It must exist, but must concur with, and be manifested by, resultant acts which are independent of the presence as a student in the new locality." In the light of this rule we will consider separately the cases of these appellants, as each presents its own peculiar facts.

Article 2, § 3, of the constitution of this state, as it existed in November, 1894, and exists now, reads as follows in regard to the question under examination, viz.: "For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States, * * * nor while a student of any seminary of learning." It will be observed that the constitution explicitly provides that residence cannot be gained or lost by reason of presence or absence of a student of any seminary of learning. It is therefore in harmony with this provision to require that the intent to change the legal residence must be manifested by acts which are independent of the alleged voter's presence as a student in the new locality.

The appellant John Neilson Barry made affidavit on the 16th day of November, 1894, that two years before that time he moved to the city of New York with the intent and purpose of making that place his permanent residence; that he went at once to No. 175 Ninth avenue, where he took up his residence, it being a part of the property of the General Theological Seminary of the Episcopal Church, and entered upon his course as a student. Barry went to the city of New York from the state of Virginia, where he had resided and voted, and on the 19th of November, 1892, he addressed to the registrar of Warrenton, Va., a letter, in which he notified him that he had changed his residence to the city of New York, and that his name should no longer remain on the list of registered voters, and requested him to take it off. On the same day he addressed a letter to Bishop Henry C. Potter, of the city of New York, in which he said: "It is not my intention to resume my legal residence there [Warrenton], or at any other place in Virginia. On the contrary, my intention is to reside and vote in New York. Clearly my legal residence is not at Warrenton, Virginia. As to my 'actual residence,' if the term as used in the canon has any different meaning from the term 'legal residence,' I consider that I am in point of fact an actual resident of New York City. My ecclesiastical residence is here, my legal residence is

here, and I am actually living here, without any present intention of assuming a residence legal, ecclesiastical, or actual anywhere else. * * * Hoping that this statement of facts will satisfy you as to my being a resident of this diocese, and that you will receive me as a postulant, I am," etc. It will be observed that these letters were written immediately after the general election of 1892, and relate to the ecclesiastical status of Barry, and his right to be received as a postulant by reason of his residence in the diocese of New York. We think Barry's case clearly discloses the intent to change his legal residence by acts which were independent of his presence as a student in the seminary. There was a full compliance with the rule laid down in the Goodman Case, and it follows that Barry's name was improperly stricken from the registry list.

The appellant Henry Mesler made an affidavit which disclosed the following facts, among others, viz.: He had resided in the city of New York since October, 1899, and from November, 1892, to May, 1893, he lived in a boarding house at No. 52 West Twenty-First street in the city of New York. In the summer of 1893 he spent his vacation on Long Island, and the following September he entered the General Theological Seminary as a student, and took a room in the seminary building, No. 175 Ninth avenue, and entered at once upon his studies. Mesler swears that his intention to remain in New York is not conditioned upon or limited to the duration of the seminary course which he is pursuing, nor is he required to give up his residence at the seminary at the termination of such course, but that he can occupy his room indefinitely, so long as he finds it convenient to pursue the study of theology. Under the rule laid down in the Goodman Case, Mesler did not lose his residence at No. 52 West Twenty-First street, his last place of residence before entering the seminary; and he has at all times been legally entitled to register and vote in the election district in which that house is situated. The order appealed from in his case must be affirmed.

The appellant George Gunnell, Jr., places before us the following material facts, viz.: He was a resident of Pennsylvania, but in 1887 he came to this state to attend Hobart College at Geneva. In 1891 he settled in the town of Sodus Centre, in this state, with the purpose and intent of becoming a resident of that town. In September, 1892, he entered the General Theological Seminary in the city of New York as a student, and occupied a room at No. 175 Ninth avenue. While a student he engaged in the business of bookselling, and was a lay reader in the Church of the Heavenly Rest. He is not obliged to give up his room at the seminary at the termination of his present course of study, and it is his intent to take up his residence in the seminary. We do not think these facts are sufficient, in connection with the sworn intent, to

establish a change of residence from the town of Sodus Centre to the seminary building in the city of New York. The facts that Gunnell sold books and was a lay reader are incidental to his course as a theological student. No acts independent of his presence in the seminary as a student are disclosed. We think Gunnell, during his course as a student at the seminary, remains a resident of the town of Sodus Centre, and is entitled to vote there precisely as if he was employed in the military service of the United States and stationed at some frontier post. The order appealed from in his case must be affirmed.

The appellant Thomas Henry Yardley relies upon the following material facts, viz.: He was living with his mother in Rhode Island in 1888, when he went to college first in Connecticut, then in Massachusetts, and again in Connecticut, where he remained until the year 1892. In the fall of 1892 he entered the General Theological Seminary in the city of New York as a student, occupying a room at No. 175 Ninth avenue, in the seminary building. His occupation is student and teacher, and he can keep his room so long as he shall find it convenient to remain there for the purpose of studying theology. His intent is to establish his residence at the seminary. We do not think there are facts disclosed, independent of Yardley's presence as a student at the seminary, which establish his legal residence there. During his entire college and theological course he has remained, in contemplation of law, a resident of Rhode Island at his mother's home. The order appealed from in his case must be affirmed.

We have to say in conclusion that unless the rule laid down in the Goodman Case, and followed in the case at bar, is rigidly enforced, the constitutional provision now construed will be nullified. It may be urged that the enforcement of this rule will render it well-nigh impossible for a student to establish a residence in a seminary of learning, but the very obvious answer is that the letter and spirit of the constitution contemplate such a result. The sojourn of the student is assumed to be temporary, and the law preserves to him his former residence, notwithstanding his absence therefrom.

The order appealed from is reversed as to John Neilson Barry, with costs, and affirmed as to Henry Mesier, George Gunnell, Jr., and Thomas Henry Yardley, with costs. All concur. Ordered accordingly.

(53 Ohio St. 245)

**SCHLOENBACH et al. v. STATE ex rel.
PROSECUTING ATTORNEY OF
HARDIN COUNTY.**

(Supreme Court of Ohio. Oct. 1, 1895.)

**COUNTY COMMISSIONERS—PUBLICATION OF ANNUAL
REPORT.**

The law does not authorize county commissioners to publish the annual report required

to be made to the court of common pleas in a German newspaper.

(Syllabus by the Court.)

Error to circuit court, Hardin county.

Action by the state, on the relation of the prosecuting attorney of Hardin county, against Schloenbach and others, for an injunction. Judgment for complainant, and defendants bring error. Affirmed.

F. C. & J. W. Dougherty and John H. Smick, for plaintiffs in error. George E. Crane and C. D. Kelley, for defendant in error.

PER CURIAM. The action below was brought by the defendant in error against the commissioners, auditor, and treasurer of Hardin county, to perpetually enjoin the allowance and payment of a bill presented by the plaintiff in error for publishing in the *Kenton Wochenblatt*, a German newspaper, the detailed report made to the court of common pleas, by the commissioners, of their financial transactions for the year preceding the third Monday of September, 1892, together with the report of the examining committee thereon. An injunction was allowed in the common pleas, and upon trial on appeal in the circuit court a like order of injunction was made perpetual. To reverse this judgment the present proceeding is prosecuted.

We perceive no error in the judgment of the circuit court. The duty of the commissioners in regard to publishing their report is governed wholly by section 917 of the Revised Statutes, and that section does not afford authority for either ordering such report published in a German newspaper, or paying for the same. See *City of Cincinnati v. Bickett*, 26 Ohio St. 49. Judgment affirmed.

(164 Mass. 319)

**WHITTENTON MANUF'G CO. v.
STAPLES.**

(Supreme Judicial Court of Massachusetts.
Bristol. Oct. 4, 1895.)

**CONVEYANCE OF MILL PRIVILEGE—CONSTRUCTION
OF DEED—DAMAGES FOR FLOWAGE—
CHARGE OF PRIVILEGE.**

1. The owner of several mill privileges on a stream, who maintained on land, not a part of any privilege, a reservoir dam, essential to the reasonable enjoyment of each privilege, conveyed one of the privileges, with all water rights and privileges thereto belonging, the grantee agreeing to pay one-fifth of the damage for the overflow of lands caused by the reservoir dam. *Held*, that the deed conveyed, as part of the privilege, the right to the use and benefit of the dam.

2. The owner of several mill privileges on a stream, who maintained on land, not part of any privilege, a reservoir dam, conveyed in 1833 the third privilege to defendant's grantor, who agreed to pay one-fifth of the damage for flowage of land caused by the dam, and in 1835 the first privilege to plaintiff's grantor, with an agreement that damages for flowage were to be apportioned among the owners of the several privileges by parties agreed on by them. In

1838 the owners of privileges other than the third agreed, in writing, to appoint referees for the apportionment of damages for flowage, "it being understood that the third mill is chargeable with one-fifth of the expenses." In 1852 the owners of all the privileges formed a voluntary company to operate the dam for the benefit of all, and appointed the owner of the first privilege their agent to collect and pay damages for flowage. When, in 1889, defendant became the owner of the third privilege, the mill was not in use, because the dam had been carried away. Since 1833 all of defendant's predecessors in interest have paid the one-fifth of the damages, and since 1852 have paid one-fifth part of the cost of repairs and expense of drawing water from the dam, assessed as part of the flowage damages to plaintiff's grantor under the agreement of 1852. Defendant did not, when he accepted his deed, have actual knowledge of an award made therein for damages under that agreement. *Held*, that the one-fifth part of annual damages for flowage, repairs, and drawing of water was, by prescription, a charge in plaintiff's favor, against the third-mill privilege. Field, C. J., and Holmes and Lathrop, J.J., dissenting.

Case reserved from superior court, Bristol county.

Action by the Whittenton Manufacturing Company against Herbert M. Staples to compel defendant to pay his alleged proportional part of damages for flowage of land by a dam used in the operation of plaintiff's and defendant's mills, for cost of repairs, and of drawing water from the same. Decree for plaintiff.

A. M. Alger, for plaintiff. G. E. Williams, for defendant.

ALLEN, J. The parties have agreed upon all the facts deemed to be material. The Taunton Manufacturing Company built the reservoir dam on land owned by it in 1832, at a time when it was the owner of five mill privileges on the stream below, all of which were then in operation. This dam was for the sole use of the mills upon said mill privileges, and was essential to the reasonable enjoyment of all of the water powers, as the natural flow of the stream during much of the year would be inadequate for furnishing power. Under this state of things, the corporation, in the first place, on August 12, 1833, conveyed to the Bristol Print-Works Company the two lowest mills, the land being described by metes and bounds, "together with all the buildings thereon, and all the rights, privileges, easements, and appurtenances to the said land in any wise appertaining or belonging, and all the streams and water rights and power thereof, also the dam and force of water." On September 6, 1833, the corporation conveyed the next lowest mill to Charles Richmond, under whom, through mesne conveyances, the defendant claims. This deed conveyed the land and buildings "and the water power, dam, and all the appurtenances and privileges thereto belonging," and contained further provisions as follows: "First. This conveyance is made subject to the right and privilege granted by said Taunton Manufacturing Company to the

Bristol Print-Works Company, their successors and assigns, to draw water from a reservoir of said Taunton Manufacturing Company through the premises herein described and conveyed, and to enter on said premises for the purpose of relaying and repairing the aqueduct and pipes leading through the same. Secondly. The said Richmond, his heirs and assigns, grantees of these premises, shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one-fifth part of all sums which they may be held or agreed to pay for flowage or damages to the proprietors of any lands by reason of any dam made, or which may be made, by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills. * * * Fourthly. This conveyance is made subject to the reservations and privileges granted to the Bristol Print Works by the Taunton Manufacturing Company. Fifthly. * * * The said Taunton Manufacturing Company intending hereby to alien and assign unto the said Charles Richmond, his heirs and assigns, all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power, and privileges, and head and fall of water (excepting as above excepted), for the considerations above mentioned and set forth. To have and to hold the lands, buildings, waters, and works aforesaid, with all and singular the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith, unto him, the said Charles Richmond, his heirs and assigns, forever, except as above excepted." The defendant contends that the above deed conveyed no right in the reservoir, and that the clause requiring Richmond and his heirs and assigns to pay one-fifth of the damages for flowing is not binding on subsequent owners; and these are the principal questions which have been argued in the case. It is not disputed that the title and rights of the Taunton Manufacturing Company to the upper mill and privilege have come through mesne conveyances to the plaintiff.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution. *Reynolds v. Rubber Co.*, 160 Mass. 240, 35 N. E. 677, and cases there cited. Until recently, the parties in interest have assumed and have acted on the theory that Richmond and his heirs and assigns had an interest in the additional water power created by the reservoir, and were bound to pay one-fifth of the damages for flowing. This is shown by the following facts: On July 15, 1835, the Taunton Manufacturing Company

conveyed to James K. Mills and others the upper mill and privilege on the stream, "with the dams and water privileges thereon, together with all the right which said Taunton Manufacturing Company have to flow the land between the premises hereby conveyed and the bridge where the old road to Boston crosses Canoe river; the dams, water privileges, and rights of flowage hereby intended to be granted and reserved being fully set forth in and subject to an agreement by and between the grantor and grantees, bearing even date with, and to be referred to always as a part of these presents." The said agreement provided, among other things, as follows: "First. The reservoir dam at White's bridge above Whittenton shall not be altered in any mode without the consent of the parties therein interested, or a majority of them: provided, however, that the proprietors of the Whittenton mill shall always cause to be let down from said reservoir a quantity of water sufficient to propel the present machinery of the Hopewell mills [the Hopewell mills were next below the Whittenton mill] until the water in said reservoir shall be drawn down to the level of the present Whittenton dam; and the proprietors of the Whittenton mill shall be entitled to a fair compensation from all the parties interested in the said reservoir for the time and labor of drawing the water as aforesaid. Second. The water between said reservoir dam and Whittenton mills shall be used hereafter as has been heretofore customary; that is to say, the Whittenton proprietors shall do no act to prevent the natural flow of water over their premises by raising their dam above its present height. * * * Fourth. The damages accruing from time to time for flowage shall be apportioned between the proprietors of the Whittenton mills and the mills now and formerly belonging to the Taunton Manufacturing Company by the award of judicious persons," etc.

The defendant derived his title as follows: The title of Richmond passed to Galen Hicks, under the foreclosure of a mortgage dated October 4, 1833, in which reference was made to the deed of the Taunton Manufacturing Company to Richmond. On March 1, 1848, Hicks conveyed to Dean & Morse with a similar reference; and they, in like manner, on April 1, 1849, conveyed to the Dean Cotton & Machine Company, which in its turn, on November 28, 1874, conveyed to the Taunton Cotton & Machine Company the land and water privileges, "together with all the rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the reservoir and flowage company [this company will be hereinafter described], and subject to all the liability on account of such rights; and, in relation thereto, reference may be made to an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, and to the award," etc.

On June 1, 1880, the Taunton Cotton & Machine Company conveyed the property to Park Mills, a corporation, with this provision: "This conveyance shall also include whatsoever rights, title, and interest, with the liabilities thereon, said corporation has in the Taunton Reservoir & Flowage Co." On July 19, 1889, the Park Mills conveyed to Staples, the defendant, with a similar provision. On the same day, the Taunton Cotton & Machine Company also executed a deed of the same premises to the defendant, "together with all rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir & Flowage Co., and subject to all the liabilities on account of such rights. And, in relation thereto, reference may be made to three papers; namely, first, an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, together with the award," etc.

The reservoir and flowage company referred to in some of the above deeds was established as follows: In 1852, the owners of the several mills, all being corporations, associated together as a voluntary association, under the name of the Taunton Reservoir & Flowage Company, "for the purpose of aiding in the supplying themselves with water by the reservoir dam," and appointed Willard Lovering, one of the owners of the Whittenton mills, their agent, from time to time, as the damages for flowing should become due, to collect their proportions thereof, and to pay the same to the owners of lands flowed. The annual damages for flowing were in the same year fixed by agreements at \$1,842.89, and have not since been changed. These damages are fair and reasonable. From that time to the present, Lovering (who died in 1875) and the successive owners of the Whittenton mills have continued without objection, in behalf of the owners, from time to time, of the several mills, under the name of the Taunton Reservoir & Flowage Company, to collect from said mill owners and to pay out said damages for flowing, and to repair the reservoir dam, and to draw water from the reservoir, and to collect from the several mill owners their respective shares of the expense thereof. The defendant, however, without assenting thereto or dissenting therefrom, otherwise than is herein stated, refused from time to time, as said charges accrued, to pay any part thereof, on the ground that he had not used the water. Bills for the annual expense of maintaining the reservoir dam as rendered to the several mill owners were usually made out under the general statement "To Flowage," without setting forth items for repairs or for drawing the water; but sometimes the bills were itemized. In 1885, the reservoir dam having been injured by a freshet, it was repaired at an expense of \$812.12, and the owners of all of said mills paid their proportional shares of such ex-

pense. From the time of the execution of the above agreement to the present, the use of the reservoir dam, except as herein stated, has been in accordance with the terms of the agreement, and no person has objected thereto or made any claim inconsistent therewith; and all the mills, when operated, have had the enjoyment of the head of water created by said reservoir dam, and of the reserve waters thereby stored, and no person other than the owners, from time to time, has used the same, or had any interest therein. The water rights belonging to the two lower-mill privileges have been legally extinguished by abandonment. The defendant's mill buildings are standing; the water wheels are in position; but the dam at his mill was carried away by a flood a few months before the conveyance to him; and he has not operated the mill or used the water power, but he has not abandoned the same.

The defendant contends that the above agreement, whereby the Taunton Reservoir & Flowage Company was formed, was for a partnership, and was one which the corporations were not authorized to make, under the decision in *Whittenton Mills v. Upton*, 10 Gray, 582. We have no occasion to consider that question. This agreement is referred to for the purpose of showing the practical construction put upon the grant to Richmond, and for this purpose it may be looked at, whether valid or invalid. The right of the plaintiff to maintain the bill in equity does not depend upon that agreement. The owners of the defendant's mill, from the time of the conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one-fifth of the damages for flowing caused by the reservoir dam, and one-fifth of the expense of repairing the same, and one-fifth of the compensation for drawing the water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed. But since 1890 the defendant has refused to make such contribution. The owners of the two lowest privileges contributed in like manner their proportion as fixed by the award referred to, down to the time of the extinguishment of their water privileges; and the owners of the two upper privileges have also paid their respective proportions according to the award.

Such being the facts, we come now to consider the question of the defendant's right and liability. The reservoir would naturally be of some benefit to the lower-mill privileges, without any express grant. But upon the construction of the deed to Richmond, taken by itself alone, and without reference to what followed, there would be strong reason for holding that some right, the extent

of which is not defined, in the water power created by the reservoir dam, was intended to be included in the grant. This water power was in actual use at the time of the grant, and was essential to the reasonable enjoyment of what was in terms granted. Moreover, the reference in the deed to the rights of the Bristol Print-Works Company under the deed (then recent) of the grant or to that company shows clearly that it was understood that some right in the water power created by the reservoir was included in that deed. The provision binding Richmond and his heirs and assigns to pay one-fifth part of the damages caused by the flowing to some extent implies that a similar right was intended to be granted to Richmond and his heirs and assigns. The conveyance includes, in broad terms, "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power, and privileges, and head and fall of water, 'with all' the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith." It would seem, therefore, even upon the deed alone, when construed in view of the facts then existing, that some right in the power created by the reservoir dam was by implication included. The plaintiff has cited several cases to show that there is an implied grant of whatever within the grantor's power is necessary to the beneficial enjoyment of the thing granted; and others may be found collected in *Case v. Minot*, 158 Mass. 577, 585, 33 N. E. 700. In this respect the deed to Richmond is not like the deeds which were under consideration in *Brace v. Yale*, 4 Allen, 393, and *Whitney v. Cotton Mills*, 151 Mass. 396, 24 N. E. 774, cited by the defendant. But this construction of the deed, if otherwise doubtful, is made very clear by the subsequent acts of the parties. The whole plan was to treat the reservoir as existing for the common benefit of all the mill privileges which have been mentioned. This is shown especially by the agreement in 1835, and by the voluntary association formed by the owners of the several mills in 1852, under the name of the Taunton Reservoir & Flowage Company. The deed of 1874, in the defendant's chain of title, refers to both of these. The two deeds to the defendant himself, in 1889, both contain a like reference. The action of all the defendant's predecessors in title, and of the owners of the other privileges, has from the beginning been in accordance with this view as to the title. We find nothing tending in any degree to show that any other view was ever taken till after the defendant's purchase, in 1889. Looking, therefore, at the deed itself under which the defendant's title is derived, and at the subsequent acts of the parties in interest, we are of opinion that a right to have the use and benefit of the reservoir was included in

the grant to Richmond and his heirs and assigns, and that such right has descended to the defendant. The extent of this right, and the manner of defining and enforcing it, we need not now consider.

The question, then, arises whether a court of equity should enforce against the present owner of the premises the stipulation in the deed that Richmond and his heirs and assigns should pay one-fifth part of the sums paid for flowing or damages to the proprietors of lands above the reservoir dam. In England it seems to be the tendency or recent decisions to hold that the burden of a covenant, unless possibly one which amounts to a grant, never at law runs with the land, except as between landlord and tenant; and that in equity the court will not, as against assigns, enforce covenants calling for the payment of money, but only covenants which are merely restrictive as to the use of the land. *Haywood v. Building Soc.*, 8 Q. B. Div. 403; *Austerberry v. Corporation*, 29 Ch. Div. 750; *Clegg v. Hands*, 44 Ch. Div. 504; *Gale, Easem.* (6th Ed.) 61, 62; *Godd. Easem.* (4th Ed.) 24. This doctrine has not usually been accepted in the United States. It has been held in many decisions in this commonwealth and elsewhere that at law the burden of a covenant may run with the land. *Savage v. Mason*, 3 Cush. 500; *Bronson v. Coffin*, 108 Mass. 175; *Richardson v. Tobey*, 121 Mass. 457; *King v. Wight*, 155 Mass. 444, 29 N. E. 644; *Joy v. St. Louis*, 138 U. S. 1, 34, 11 Sup. Ct. 243; *Fitch v. Johnson*, 104 Ill. 111; *Hazlett v. Sinclair*, 76 Ind. 489; *Norfeet v. Cromwell*, 64 N. C. 1; 3 Pom. Eq. Jur. § 1295. It has also often been held elsewhere that a provision like that contained in the deed to Richmond is itself a covenant binding upon the grantee and his heirs and assigns; that it will run with the land; that it is valid in law; and that the relief granted by a court of equity is not to be limited to those covenants which are merely restrictive, but will be extended to covenants to do positive acts involving the expenditure of money. *Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276; *Dock Co. v. Leavitt*, 54 N. Y. 35; *Bowen v. Peck*, 94 N. Y. 86; *Finley v. Simpson*, 22 N. J. Law, 311; *Sparkman v. Gove*, 44 N. J. Law, 252; *Maynard v. Moore*, 76 N. C. 158; *Railroad Co. v. Reeves*, 64 Ga. 492; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Maxon v. Lane*, 102 Ind. 364, 1 N. E. 796. See, also, *Rawle, Cov.* § 272, note. In this commonwealth, however, it has been held that such a provision in a deed poll does not constitute a technical covenant. *Parish v. Whitney*, 3 Gray, 516; *Maine v. Cumston*, 98 Mass. 317; *Martin v. Drinan*, 128 Mass. 516. In *Kennedy v. Owen*, 136 Mass. 199, the court followed the earlier decisions in saying that such a provision is not technically a covenant running with the land, because the grantee sealed nothing, but that it is rather

"a mere personal obligation, imposed upon and assumed by the grantee, and binding upon him and his legal representatives as an implied contract entered into with the grantor,"—"an obligation which, if enforceable at all against the purchasers, is to be enforced against them by a court of equity alone." That case did not call for the determination of the question whether such equitable remedy existed or not. The present case, however, raises that question. An ordinary easement binding the granted premises may be created in favor of the grantor, his heirs and assigns, by words contained in a deed poll. *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 462; *Bowen v. Conner*, 6 Cush. 132, 135. The grantee's acceptance of the deed subjects the granted estate, both in his own hands and in the hands of all others who may come in under him, to the easement reserved. And we see no good reason why, under circumstances like those existing in the present case, an easement or servitude calling for the performance of positive acts may not also be created in like manner. This seems to be implied by the language of the court in *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 403. See, also, *Maine v. Cumston*, 98 Mass. 317; *Schworer v. Association*, 99 Mass. 285, 297, 298; *Woburn v. Henshaw*, 101 Mass. 193. It is binding upon the original grantee, and his assigns with notice are bound in like manner, at least to the extent that the performance of the duty may be charged upon the land to which they succeed. The general doctrine of the equitable enforcement of agreements concerning the occupation and mode of use of real estate is explained in the familiar cases of *Whitney v. Railway Co.*, 11 Gray, 359, and *Parker v. Nightingale*, 6 Allen, 341. We are brought, therefore, to the conclusion that the obligation imposed by the deed to Richmond may be enforced as an obligation in the nature of a servitude upon the estate of the defendant, though not as a personal obligation of the defendant.

The final question which we have to determine is whether the plaintiff is entitled to recover one-fifth part of the cost of repairs upon the reservoir dam and of the plaintiff's compensation for drawing the water, as well as one-fifth part of the sum paid for flowing. The deed to Richmond does not in terms include such cost of repairs. The language is that Richmond and his heirs and assigns "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one-fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills." This language does not admit of a construc-

tion which will bind Richmond and his heirs and assigns to pay for repairs of the dam. It is limited to sums paid for flowing to the proprietors of other lands. Independently of this provision, the relation of the parties growing out of the conveyance of the mill privilege and water power would not bind the grantees to pay any part of the cost of such repairs. The right which was granted in respect to the reservoir was not any interest in the dam, but merely some right in respect to the flow of water in addition to that which the grantee would take as riparian owner. The ownership and immediate control of the dam remained with the grantor. The duty of exercising due care to make it safe rested with the grantor alone. The grantor and grantees did not become joint owners of the dam, and would not be jointly liable for damages in case of its giving way, by reason of negligent construction. A right to have a quantity of water, in addition to the natural flow of the stream, sent down from the reservoir, does not carry with it an ownership in the reservoir dam. The agreement between the Taunton Manufacturing Company and James K. Mills and others, which was made a part of the deed from the former to the latter in 1835, is significant as showing the mode in which it was then understood that the water was to be used; but Richmond was not a party to it, nor does the agreement contain anything to show that it was understood that he was to bear a part of the cost of making repairs. The agreement entered into by the various mill corporations in 1852, under the name of the Taunton Reservoir & Flowage Company, contained nothing in respect to the cost of repairs, so far as is shown by the agreed statement of facts.

No distinct agreement or stipulation being shown calling for the payment of one-fifth of the cost of maintaining the dam, we have to consider whether a servitude has been imposed on the defendant's land by prescription, requiring such contribution. It is agreed that the owners of the defendant's property, "from the time of its conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one-fifth of the flowage damages caused by the reservoir dam, and one-fifth of the expense of repairing the same, and one-fifth of the compensation for drawing the water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir." After describing the agreement of 1852 between the various mill corporations, the statement of facts recites that, from that time down to the present, Lovering and the successive owners of Whittenton mills have continued without objection to collect from the owners of the several mills "the flowage damages, and repair the reservoir dam, and

draw water from the reservoir, and collect from the several mill owners their respective shares of the expense thereof." The one party collected the money as a right; the other paid it as a duty. It would seem that the evidence is sufficient to establish such a servitude by prescription, if in law such a servitude can be so created.

The duty is of the same character as that which is created by the provision in the deed to Richmond, binding him and his assigns to pay one-fifth of the sum paid for flowing. Its connection with the state and rights granted is equally close. A covenant to make the payments would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane v. Badger*, 12 Mass. 65, it was recognized, though not expressly decided, that, where the owner of a close had an ancient right to take water from a well and pump situated on another close, he might be bound by prescription to keep the well and pump in repair. It is well established that there may be a prescriptive duty to maintain fences (*Bronson v. Coffin*, 108 Mass. 175, 185, and cases cited); also, ways (*Middlefield v. Knitting Co.*, 160 Mass. 267, 35 N. E. 780). See, also, *Mayor of Lynn v. Turner*, Cowp. 86; *Anon.*, Loft, 556, where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest. The duty of paying one-fifth of the reasonable compensation for drawing water rests on the same grounds. For these reasons, in the opinion of a majority of the court, the payment of the whole sum claimed may be enforced against the land of the defendant. Decree for the plaintiff.

FIELD, C. J. (dissenting). I am unable to agree to the opinion of a majority of the court. That opinion, in effect, is that there has been acquired by prescription an easement or servitude in the land of the defendant, being the "Brick Mill," so called, and its appurtenances, whereby that land is bound to contribute one-fifth part of the annual flowage damages caused by the reservoir dam as erected by the Taunton Manufacturing Company in 1832, and one-fifth part of the reasonable expenses incurred in repairing that dam, and one-fifth part of a reasonable compensation for the time and labor expended in drawing water from the reservoir, in accordance with the requirements of the agreement of 1835. The case was submitted upon an agreed statement of facts. The defendant acquired his title to the brick mill

and its appurtenances by two deeds, each dated July 12, 1889. At that time the dam on the estate conveyed to the defendant had been carried away, and had not been rebuilt, but the mill buildings were standing and the water wheels were in position, and this condition of things has remained to the present time. The defendant has never operated the mills or used the water power, although he has not abandoned any rights he may have in the water power or in the reservoir.

It is agreed, among other things, as follows: "The defendant, at the time he accepted his deeds, did not have actual knowledge of the contents of the award alleged therein to have been delivered to him, or of any of the agreements herein mentioned; but the said award and agreements, and the books of the Taunton Reservoir & Flowage Company, running back for more than forty years, were then, and ever since have been, in the possession of the plaintiff, and, upon inquiry, the defendant could at any time have ascertained all facts which are herein stated, although he had no actual knowledge of the existence of the said books or agreements. This statement shall not, however, be so construed as to exclude a finding on the facts stated of constructive knowledge." Neither the defendant nor any of his predecessors in title, while owners or occupiers of the estate, were parties to any of these agreements or to the award.

There is much discussion in the opinion of the majority of the court upon the effect of the deed of the defendant's premises from the Taunton Manufacturing Company to Charles Richmond, dated September 6, 1833, and of the mesne conveyances under which the defendant claims title, as well as of the two deeds to the defendant, although this discussion seems not absolutely necessary to the decision. In the deed to Richmond it is stipulated that the grantee, his heirs and assigns, "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one-fifth part of all sums which they may be held or agreed to pay for flowage or damages to the proprietors of any lands by reason of any dam made, or which may be made, by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any streams or waters flowing to their mills." This provision is referred to in subsequent deeds. It covers, however, only one-fifth part of the damages for flowage, and does not include any part of the expenses of repairs of the reservoir dam or of drawing off the water of the reservoir.

It is conceded by the majority of the court that, under our decisions, these stipulations on the part of the grantees in the several deeds do not constitute technical covenants on their part, because they are deeds poll. The decision of a majority of the court does

not proceed on the ground of any promise, express or to be implied, on the part of the defendant to perform the stipulations on the part of the grantee in the deed to Richmond, or the stipulations on the part of the grantees in any of the subsequent deeds which constitute the defendant's chain of title. The decree is not against the defendant personally, but it is a decree against his land; and it establishes a charge against this land, not only for one-fifth of the damages caused by flowage, but also for one-fifth of the expenses of the repairs of the reservoir dam and of drawing off the water. The decree proceeds on the ground of a right acquired by prescription more comprehensive than anything contained in any of the deeds under which the defendant claims title, which is in the nature of an easement or servitude inherent in the land, but which does not involve any personal obligation upon the owner of the land. To establish this easement or servitude, the majority of the court rely upon the following statement of the agreed statement of facts: "The owners of the Brick mill, from the time of its conveyance to Charles Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one-fifth of the flowage damages caused by the reservoir dam, and one-fifth of the expense of repairing the same, and one-fifth of the compensation for drawing the water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed." The effect of the decision seems to be that when any one buys a mill privilege on a stream which at the time of the purchase is unused, because the dam on the privilege has been carried away, if the stream has on it a reservoir dam belonging to other persons some distance above, and if, as a fact, his predecessors in title have maintained the dam on the mill privilege, and used the mill, and have also contributed to the maintenance of the reservoir for more than 20 years continuously, an easement or servitude is acquired by prescription in the land which constitutes the mill privilege, for the benefit of the owners of the reservoir, or as appurtenant to the reservoir, to have this contribution continued payable out of the land, even although the purchaser, at the time of the conveyance of the mill privilege to him, knew nothing of any such contribution, and the registry of deeds contained no information on the subject.

With, perhaps, one or two exceptions, easements in land are passive in their character, and, when acquired by prescription, consist in the right to use the servient tenement in a certain manner defined by an adverse user continued for the requisite period of time,

and they are acquired by notorious acts done on the land under a claim of right. Payments of varying sums of money from year to year by an owner of a mill privilege to the owners of a reservoir situated on the stream some distance above the privilege are not in their nature notorious acts done on the mill privilege. It is said that there may be a prescriptive duty to maintain fences and ways; and *Bronson v. Coffin*, 108 Mass. 175, and *Middlefield v. Knitting Co.*, 160 Mass. 267, 35 N. E. 780, are cited. The actual decision in *Bronson v. Coffin* was upon the effect of a covenant of the grantor in a deed. *Middlefield v. Knitting Co.* was decided upon a demurrer to the declaration, and it was said that the duty of the defendant to maintain the highway was "sufficiently alleged for the purposes of the case at bar." The manner in which that duty originated did not appear in the declaration. But if it be conceded, without expressing any opinion on the subject, that a duty to maintain fences and repair ways can be established by prescription or by covenant, these are confessedly exceptions to the general rule that an active duty can be attached to land. To deduce from these exceptions the rule that an active duty can be attached to land by prescription to pay money from time to time for the maintenance of an artificial reservoir of water belonging to other persons, miles away from the premises, which is a permanent easement in the land, whether the water is used or not, is, so far as I know, attaching unusual incidents to land, for which there is no precedent. Secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, certainly ought not to be extended. As the decision of the majority of the court rests upon the doctrine of prescription, I do not consider whether such incidents as are attached to the land of the defendant by the decision can be attached to land by covenants in a deed, or whether, in the present case, from the stipulations in the deed poll which concern the duty of the grantees, a promise can be implied against the present defendant to perform these stipulations, as a continuing promise, to whosoever maintains the reservoir, or whether the deeds can be construed as deeds upon the condition that these stipulations shall be performed. Neither do I consider whether a court of equity in this commonwealth will enforce stipulations for the payment of money contained in a deed poll against the assigns of the grantee. I dissent from the doctrine that, on the facts agreed in the present case, an easement in the defendant's land, of the kind described in the opinion of the majority of the court, has been established by prescription.

HOLMES and LATHROP, JJ., concur in this dissent.

(145 Ind. 314)

JENNEY ELECTRIC CO. v. BRANHAM.¹

(Supreme Court of Indiana. Sept. 24, 1895.)
ASSUMPSIT—CONTRACT—COMMISSIONS FOR SALE OF
PROPERTY—INSTRUCTIONS—EVIDENCE.

1. In an action on the quantum meruit for services in effecting a sale, an agreement allowing plaintiff "the usual commission of from 10 to 15 per cent." is admissible to prove the value of the services.

2. Where the admission of evidence is not error on the ground urged by the appellant, it cannot be held error because the ground for its admission given by the appellee is incorrect.

3. In an action on the quantum meruit for commission in effecting a sale, an instruction requiring the jury to assess the commission according to the preponderance of the evidence if they find for plaintiff is proper, though the evidence shows a sale to a different vendee than the one alleged in the complaint.

4. It is proper to instruct a jury to take into account their experience among men in determining the credibility of witnesses.

5. Where, in an action for commission, plaintiff is allowed on direct examination, over defendant's objection that on the quantum meruit a contract as evidence of the value of services is inadmissible, to testify that the commission was agreed on after the contract of employment, and on cross-examination, without objection, testifies that it was agreed on when the contract was made, failure of defendant to move to strike out plaintiff's direct evidence or have the objection passed on in light of plaintiff's evidence on cross-examination will preclude him from urging the objection on appeal.

6. A nonexpert shown to be familiar with the extent and character of the particular service may testify what it would be worth to effect a sale of an electric plant.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by George E. Branham against the Jenney Electric Company for commission in effecting a sale for defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller, Winter & Elam, for appellant.
Hawkins & Smith, for appellee.

HACKNEY, J. The appellee sued the appellant for the reasonable value of services, rendered by agreement, in effecting a sale of electrical machinery. Upon the trial, the appellee, as a witness in his own behalf, was permitted, over the appellant's objection, to testify that the appellant's president had stated to him that the company "paid from ten to fifteen per cent. for that kind of work." There was, upon the entire evidence of the appellee, a conflict as to whether the alleged statement was a part of the conversation constituting the employment or in a subsequent conversation. However, the appellee now insists, and the cross-examination confirms his view, that the alleged statement was a part of the conversation constituting the employment. A further part of the conversation, as testified by the appellee, is as follows: "I said to Mr. Rorison: 'I have a party who is going into the electric light business. It is a pretty big thing, and I want to know whether you people would take hold of a thing of that kind.' I gave him some

¹ Rehearing denied.

idea of what the plant would be, and I told him that I knew the people were able to handle it if they would go into it. He said, 'Yes;' they were in for anything. 'Now,' I said, 'Mr. Rorison, if this thing is a success, I want the usual commission; that is what I am after.' He said, 'All right.' I went on and told him where the plant was," etc. Thus, it will be seen that the evidence tended to support a contract, not only for the performance of the service and the payment of "the usual commission," but also specifying the rate of that commission as at "from ten to fifteen per cent."

The appellant insists that the action, being for the quantum meruit, permitted no evidence of a contract as to the value of the services rendered. The appellee's contention is that the evidence was admissible to prove the knowledge of the witness as to the rate of commissions paid for such services, and as qualifying him to testify as to the value of such services. If the evidence was not objectionable for the reason urged against it, we are not at liberty to hold its admission to have been erroneous, though the reason for its admission given by the appellee may be incorrect. While the rule that one may plead the common count, and recover notwithstanding the evidence discloses a special contract, would, upon first impression, seem to be at variance with the ordinary rules of pleading and practice; yet it has been repeatedly held that, under our Code, such recovery may be had. *Scott v. Congdon*, 106 Ind. 268, 6 N. E. 625; *Shilling v. Templeton*, 66 Ind. 585; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199. In *Scott v. Congdon* it was held that evidence of an agreement that, for the work done, the plaintiff should receive a sum stated, was "clearly competent, as tending to show the value of the work and labor done." Upon the theory of that holding, it was certainly proper to admit the appellant's statements of the commissions usually paid by it, as evidence of the value of the appellee's services for which, as he testified, he was to receive the "usual commission." However, we think that the question of the admissibility of the evidence as a part of the contract is not presented. At the time the court passed upon the objection of the appellant, the witness had testified that the conversation with reference to the usual commission paid by the company was subsequent to the conversation in which the employment was made. It was upon cross-examination that the witness stated the time as that of the making of the employment. No motion to strike out the evidence so objected to followed, and the court was not asked to pass upon the question in the light in which the cross-examination placed it. In our opinion, the evidence was not objectionable for the reason pointed out to the trial court, and repeated in this court.

It is further complained that, while the appellee was a witness in his own behalf, he

was permitted, over the objection and exception of the appellant, to testify as to his opinion of the value of his services in the matter of said sale. It was claimed by appellant's learned counsel in the trial court, as it is in this court, that the services for which recovery was sought were of a professional character, and so far involved special training and skill that their value should be proven only by witnesses who might be shown to possess such training and skill as to enable them to testify as experts, or to have possessed particular acquaintance with the usage of those engaged in performing or employing that special line of service, as to the commissions paid and received. It was not shown that the appellee had an acquaintance with that usage, but he had testified as to all that he did in connection with said sale, and as to the conclusion of the negotiations in which he participated. It is conceded by counsel for appellee that the value of such service necessarily called for opinion evidence, but it is denied that such opinions should, necessarily, have been those of experts, or those familiar with the custom or usage in the matter of commissions in that special line of service. While we have no doubt that the value of such service was the subject of proof by expert testimony, yet we are equally well satisfied that nonexperts who are shown to be familiar with the extent and character of the particular service may properly give their opinion of the value of that service. *Railway Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1; *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364; *Bennett v. Meehan*, 83 Ind. 566; *Smith v. Railroad Co.*, 80 Ind. 233; *Colee v. State*, 75 Ind. 511; *Holten v. Board of Com'rs*, 55 Ind. 104; *City of Indianapolis v. Huffer*, 30 Ind. 235; *Doe v. Reagan*, 5 Blackf. 217. These cases do not include the long line of decisions in this state holding that where mental capacity is in issue, and though involving a question of the highest order of skill and learning, nonexperts who have shown an acquaintance with the person under inquiry may give their opinions as to capacity. As illustrated in many of the cases, the value of an opinion, whether expert or nonexpert, must depend upon extent of knowledge and the degree of skill of the witness; but the question of the value of the opinion is not one of law for the court, but is one of fact for the jury in giving weight to the evidence. In *City of Indianapolis v. Huffer*, supra, it was said: "The action of the court below in allowing witnesses, not experts, to give their opinion as to the capacity of the sewer, is questioned. The rule is that any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts upon which he bases that opinion." The rule so stated has been quoted with approval in most of the great variety of cases we have cited. In *Bennett v. Mee-*

han, supra, it was said that "it has long been the rule in the state that a witness who is familiar with the facts, and who states them to the jury, may express an opinion, although he is not an expert, if the case is one in which it is proper to express an opinion." Though never having engaged in a like service, the appellee was shown to be a man of extended business experience; that he was employed for this special service by the appellant, and performed the service for which he was so employed.

Another witness called in behalf of the appellee testified that for two years he had engaged in selling electric lighting apparatus for the establishment of electric lighting plants in cities and towns, and that he was acquainted with the value of services such as the appellee had performed. Several of the questions eliciting such testimony were answered over the objection and exception of the appellant, and, following such testimony, the witness testified, without objection or exception, in answer to a question by appellee's counsel, that the value of such service was 10 per cent. It is now insisted for the appellant "that his examination fell far short of showing that he was competent to express an opinion as to the value of plaintiff's services." No objections are here urged to the rulings upon the preliminary questions eliciting the testimony of the qualifications of the witness to testify as an expert to the value of appellee's services. It will be seen, therefore, that no question as to the evidence of this witness is before the court. However, it may be said that the question as to the qualification of a witness to testify as an expert is for the trial court, in the exercise of a sound discretion, and that when there is some evidence of that qualification, and the trial court has not abused that discretion, this court will not review the action. *Davis v. State*, 35 Ind. 496; *Forgey v. Bank*, 66 Ind. 123; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743.

The third of the court's charges to the jury was that, if they should find from a preponderance of the evidence in favor of the plaintiff, they should assess such reasonable compensation as they should determine from a preponderance of the evidence he should receive for the services performed. It is complained that the charge was not applicable to the evidence; that the complaint alleged a sale to Sutter, and the evidence showed a sale to another. The charge does not assume that the contingency claimed did not exist, but it directed the assessment of damages in the event of a finding for the plaintiff.

The fourth charge was as follows: "If you find, from a fair preponderance of the evidence, that the defendant Brainard Rorison was agent of the defendant the Jenney Electric Company, and within the line and scope of his agency and employment he

made a contract of employment with the plaintiff to introduce the parties to the Jenney Electric Company, to the end that they might sell to said parties, described in the plaintiff's complaint, certain machinery and appliances for an electric light plant, and, in pursuance of said employment, he did introduce said parties to the said Jenney Electric Company, and, as a result of the plaintiff's service, in pursuance of said contract, the Jenney Electric Company sold said electric plant, as described in the complaint, then your finding should be for the plaintiff; but if you find, from a fair preponderance of the evidence, that such contract was made between the defendant Brainard Rorison and the plaintiff, if said Rorison was not the authorized agent of said company, and was not at said time acting within the line and scope of his authority as such agent, the Jenney Electric Company would not be bound by any contract made by him in the premises, unless the same was confirmed and accepted afterwards, when knowledge of said contract came to them, or, without formal acceptance of the same when full knowledge of the same came to them, they acted upon it, and accepted it, and accepted the benefits under it." The objection urged against this instruction is that it was not responsive to any issue raised by the pleadings or the evidence. Though this objection may be true, it is manifest that the substantial rights of the appellant were not impaired by the charge, since its only effect would be to require that the plaintiff should discharge a burden not resting upon him, and in no way essential to his recovery. No phase of the charge required more from the defense to defeat the plaintiff's cause of action or to diminish the amount of recovery, and certainly it was not calculated to prejudice the jury against the appellant or its defense.

The fifth charge was as follows: "You are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the evidence, as far as may be in your power, upon the theory that each witness has sworn to the truth. When this cannot be done, you may consider the conduct of the witnesses upon the stand, the nature of the evidence given by them, how far they are corroborated or contradicted by other testimony, their interest, if any, in the cause, their relation to the parties, and such other facts appearing in the evidence as will, in your judgment, aid you in determining whom you will believe, and you may also, in considering whom you will or will not believe, take into account your experience and relations among men." The objection to this charge is confined to the last direction thereof, that which we have italicized. By this it is claimed that the jurors were advised that it was proper for them to employ any of their particular experiences and relations

among men out of court, in determining the rights of the parties. It is argued that such a rule would permit the disposition of a cause upon the whims of jurors, rather than upon the law and the evidence as they were learned in the trial. Jurors should be, and, as a rule, are, selected because of their extensive experiences among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. The value of experience is not to be given up when the man becomes a juror, and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon. While, as we understand the charge, it did not tell the jurors that they should employ it, they were told that it was proper to employ it; not, as counsel for appellant contend, as allowing a juror to bring forward some special experience or some special business transaction within his observation, bearing some similarity to the question on trial, and which had miscarried, and to conclude, therefore, that some phase of the present case should miscarry. The instruction was confined to the tests of credit and the weight of the evidence of the witnesses, and the clause in question was to be construed with reference alone to its bearing upon those tests. The case of *Densmore v. State*, 67 Ind. 306, is not in conflict with this charge. There the court, after suggesting the tests known to the law, said: "That which is commonly called 'common sense' is, perhaps, the juror's best guide in these particulars." Judge Worden said: "Now, while common sense is a very desirable and admirable quality in man, and exceedingly useful in all the practical affairs of life, including the duties of jurors, we do not see how it can be a better guide to them in the discharge of those duties than the rules of law." It will be seen that the instruction was regarded as directing the employment of common sense, not only as a better guide than the rules of law, but as a substitute for such rules. In our opinion, there was no error in the charge.

Finally, it is insisted that the verdict was not sustained by the evidence. There was evidence which, if uncontradicted, would have supported the verdict. The weight and effect of the contradictions and the evidence

upon conflicting theories of the case were questions for the jury, and are not subject to review. The judgment is affirmed.

(142 Ind. 226)

UNITED STATES SAVING FUND & INVESTMENT CO. v. HARRIS et al.

(Supreme Court of Indiana. Oct. 10, 1895.)

MORTGAGE BY MARRIED INFANT—DISAFFIRMANCE—DEMURRER.

1. Burns' Rev. St. 1894, § 3364 (Rev. St. 1881, § 2944), provides that an infant feme covert cannot disaffirm a conveyance of land in which her husband has joined, he being of full age, without restoring the consideration. *Held* that, though such infant cannot disaffirm a mortgage given for borrowed money, she can disaffirm the note secured thereby, so as to escape personal liability.

2. A complaint is sufficient to withstand a demurrer if the facts stated therein show that plaintiff is entitled to any of the relief demanded.

On rehearing. Overruled.

For former opinion, see 40 N. E. 1072.

Cofer & Hadley, Hogate & Clark, and W. M. Taylor, for appellant. Chas. Foley, for appellees.

McCABE, J. The appellees have filed a petition for a rehearing, on the sole ground that we erred in unintentionally holding, in effect, that the appellee Lottie B. Harris could not disaffirm the note or bond secured by the mortgage. That is a separate contract from the mortgage. The mortgage contains an agreement to pay the debt separate and apart from the note or bond. We only intended to hold that she could not disaffirm the mortgage without restoring the consideration, and did not intend to hold that she could not disaffirm the note or bond secured thereby without such restoration. In case she disaffirms the note or bond, the remedy of the mortgage must be confined to the real estate mortgaged. Burns' Rev. St. 1894, §§ 1100, 1110 (Rev. St. 1881, §§ 1087, 1096). Where there is a separate contract to pay the money secured by the mortgage, a personal judgment may be rendered against the mortgagor, to be levied of his general property in case the mortgaged land proves insufficient to pay the debt. Burns' Rev. St. 1894, § 1111 (Rev. St. 1881, § 1097). The statute in question only took away the right to disaffirm such mortgage without restoring the consideration. It left her right to disaffirm the contract, whether evidenced by the bond or note, or by a promise expressed in the mortgage, just as it was at common law; and by that law she had a right to disaffirm that contract, and thus avoid a personal judgment collectible outside of the mortgage. The answer of Lottie B. Harris, setting up her infancy as a full defense to both note and mortgage, was not good on demurrer, because it purported to be a full defense to both note and mortgage, whereas it was only a defense to a part of the cause of action; namely, the note or bond. Her counter-

claim or cross complaint counted on and set up the same facts as those stated in her answer, and asked a judgment or decree canceling or declaring void both note and mortgage. This pleading was in the nature of a complaint, and must be tested by different principles than those governing an answer. The facts stated in the answer must be sufficient to bar the whole cause of action if it is pleaded in bar of the whole. On the other hand, a complaint is sufficient to withstand a demurrer if the facts stated therein show that the plaintiff is entitled [to] any of the relief demanded. The appellant's answer to this counterclaim was that the note and mortgage were given for borrowed money which she had not restored, and that her husband was of full age at the time. This, as we before held, was a good answer to a part of the cross complaint, but not all. It was a good answer to that part of the counterclaim seeking a cancellation of the mortgage, but was not a good answer to that part seeking the cancellation of the note or bond. Therefore, the mandate is modified to read as follows: "The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the separate answer of Lottie B. Harris, to overrule her demurrer to appellant's reply to her separate answer, and grant leave to amend the answer of the appellant to the separate counterclaim of said Lottie B. Harris so as to make it a partial answer or an answer to so much of her counterclaim as seeks to avoid and cancel only the mortgage; in case it be so amended, the demurrer thereto should be overruled; and for further proceedings not inconsistent with this opinion." The petition for a rehearing is overruled.

(142 Ind. 210)

WEST CREEK TP. et al. v. MILLER et al.
(Supreme Court of Indiana. Oct. 9, 1895.)

DRAINAGE — REPORT OF COMMISSIONERS — REMONSTRANCE.

1. Under Rev. St. 1894, § 5625, providing that on the filing of a remonstrance to the report of drainage commissioners, if it is found that the report is not according to law, the court may direct the commissioners to amend it, or may set it aside, and refer the matter back to the commissioners for a new report, and that, when such new report is made, any person whose lands are affected thereby may remonstrate within a time equal to that allowed for remonstrance against the first report, where the matter is so referred back, and a new report is made, the first remonstrance will not stand against the second report, though such report made no change in the assessments, and the new matter contained therein was mere additional specifications.

2. Where, on remonstrance by a landowner to the report of drainage commissioners, the matter is referred back to the commissioners for further report without objection by such landowner and in pursuance to the remonstrance, he cannot assert that the reference was illegal.

3. Where the report of drainage commissioners failed to report the grades, courses, and distances as required by the drainage act (Rev. St. 1894, § 5623), such report is "not according

to law." within section 5625, providing that in such case the court may refer the matter back to the commissioners for a new report.

4. Where, on remonstrance to the report of drainage commissioners, the matter is referred back to the commissioners, and a new report is made, and no remonstrance is made to such report, the fact that a witness is sworn in the case by direction of the court does not amount to an admission by the petitioners that the first remonstrance is valid as against the second report.

Appeal from circuit court, Lake county; J. B. Peterson, Special Judge.

Proceeding by the West Creek township and others to establish a public drain. Peter Miller and others filed a remonstrance to the report of the drainage commissioners, and, from a judgment in favor of the commissioners, appeal. Affirmed.

Thos. J. Wood, for appellants. F. S. Fancher, for appellees.

HOWARD, C. J. This was a proceeding under the act of April 6, 1885 (Acts 1885, p. 129; Rev. St. 1894, § 5622, and following sections), for the construction of a public drain in Lake county. The bill of exceptions shows that the appellants filed remonstrances, containing the statutory grounds, against the report of the commissioners of drainage; and that thereupon the court referred the report back to the commissioners, with orders to file a new report on the first day of the next term, November 19, 1894. The court did not set aside the first report, and there was no hearing when the same was referred back; but the commissioners were directed to re-examine the proposed ditch after meeting at a designated time and place, and make further report, which was done. The new report was in fact the old report refiled, with the addition of a statement by the engineer giving the levels of the ditch, its courses and distances, and specifications showing how it should be constructed. There was also a statement added of a resurvey of a part of the ditch. The report was resworn to. It is stated also in the bill of exceptions that neither the appellants nor their attorneys had any knowledge, or notice of the filing of the new report on November 19, 1894. On the day of the trial, December 18, 1894, the appellants moved the court to allow their original remonstrances against the assessment of benefits as made in the first report to stand against the new report, on the ground that there was no change made in any of the assessments. This motion was overruled, and the rulings excepted to. It is further shown that the appellants also moved the court to allow said remonstrances to stand to the new report, on the ground that the petitioners had moved to strike out said remonstrances, for the reason that the causes therein were not well stated. On this motion the court made no ruling, to which failure to rule upon said motion appellants also excepted. It appears, in addition, that the court directed that one of the appellant trustees be sworn on the

trial, and that, when said trustee was interrogated as to the question of benefits and damages in case said ditch should be dug, the petitioner objected to his testimony, and the objection was sustained, on the ground that there was no remonstrance on file calling the assessments in question. The rulings complained of are all brought up as reserved questions of law under provisions of section 642, Rev. St. 1894 (section 630, Rev. St. 1881), and are properly before us by bill of exceptions.

One question only is presented by the rulings complained of: Did the remonstrances filed to the original report stand good, without refile, as against the new report of the drainage commissioners? Under the provisions of the drainage statute, we think they did not. It is provided in section 4 of that act, *supra* (section 5625, Rev. St. 1894), that on the filing of the remonstrance, if the first cause of remonstrance is held to be true, namely, that the report is not according to law, the court may direct the commissioners to amend and perfect their report; "or the court may in its discretion set aside said report, refer the matter back anew to said commissioner for a new report." The latter course substantially was taken in this case, although there was not a formal setting aside of the first report, but a new report was in fact filed. The same section of the statute provides that, in such case, "when said new report is made and filed any person whose lands are reported as affected may remonstrate within the same time therefrom and for the same causes as it is hereby allowed to remonstrate against the first report." It is not claimed that any remonstrance was in this case filed to the last report; but it is argued that the remonstrances to the first report stood good also to the last. We do not think the statute contemplates such a procedure. On the contrary, the statute evidently assumes that the new report will be, in some essential respects, different from the original, and provides expressly for filing remonstrances anew. It may well be that the new report will obviate the objections to the old one, and that no remonstrance will therefore be necessary or available. As a reason, apparently, for not filing a remonstrance to the new report in the case before us, it is shown that appellants had no knowledge or notice of its filing. This, however, could be no excuse. The remonstrants, both by the original notice given to them and by their appearance to the first report, were in court for all the purposes of the case.

Neither is it true that by moving to strike out the original remonstrances, appellees thereby recognized such remonstrances, and so made them good. The remonstrances, by force of the statute, did not exist as against the new report. The last report stood as the revised act of the commissioners; and, in the absence of further remonstrance, must be presumed correct.

It is further urged by counsel that since the only reason given in the statute why the original report may be referred back to the commissioners is that the report "is not according to law," whereas the additional statements in the new report as filed are matters of fact, and not of law,—namely, the giving of the levels of the ditch, its courses and distances, and the specifications showing how it should be constructed,—therefore the report should not have been referred back in the first instance. We do not think appellants are in position to make this objection to the action of the court. Not only was the report referred back without objection from the appellants, but the action taken was in apparent compliance with their remonstrance. The additional matters, besides, which are found in the new report as to the grades, courses, and distances of the ditch, are such as, by section 3 of the drainage act, *supra* (section 5624, Rev. St. 1894), are required to be stated in the report of the commissioners. As these matters were omitted in the first report, that report was certainly "not according to law," and was therefore properly referred back to the commissioners for revision.

Nor does it follow, because a witness was sworn in the case by direction of the court, that it was thereby admitted by the petitioners that issues were made up, in such sense that the remonstrance to the original report was good also against the new report. The witness might be sworn for the information of the court or for other reasons. As soon, however, as he was asked to give evidence such as might be admissible under the remonstrance, his testimony was objected to. The remonstrance, as we think, was not before the court, either in fact or by the admission of the petitioner. The judgment is affirmed.

(43 Ind. 185)

SAUNDERS, County Treasurer, v. MONTGOMERY.¹

(Supreme Court of Indiana. Oct. 9, 1895.)

APPEAL — PRACTION — JOINT ASSIGNMENT OF ERROR.

A joint assignment of error to several rulings of the court is insufficient, if any one of such rulings is correct.

Appeal from superior court, Vanderburg county; Peter Maier, Judge.

Action by Alma H. Montgomery against James F. Saunders, treasurer, to restrain the collection of taxes. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Ireland, for appellant. Iglehart & Taylor and S. R. Hornbrook, for appellee.

MONKS, J. This action was brought by appellee to enjoin appellant, as county treasurer, from collecting certain taxes assessed upon the real estate described in the complaint. The cause was tried by the court, and by request of appellee the court made a special finding of facts and stated six conclu-

¹ Rehearing denied.

sions of law thereon, to which, as a whole, appellant excepted at the time. Judgment was rendered in favor of appellee. The only error assigned and not waived is that "the court erred in its conclusions of law stated upon the special finding of facts." The conclusions of law stated by the court were six in number, one to six, inclusive, and the assignment of errors does not call in question each of said conclusions separately, but all of them jointly. Appellee earnestly insists that, if any one of the conclusions of law is correct, the assignment of errors fails. We concur in this contention of appellee. It is a general rule in this state that, when there are several rulings, each must be separately challenged, and the exception must be taken to each. Where the objection or exception in the court below, or assignment of error in this court, is joint to several rulings or acts of the court, the same will fail unless valid to all of such rulings or acts. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258; *Ketcham v. Barbour*, 102 Ind. 576, 26 N. E. 127; *Trammel v. Chipman*, 74 Ind. 474; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, and 86 N. E. 353; *Black v. Thompson*, 136 Ind. 611, 36 N. E. 643; *Railway Co. v. Smoot*, 135 Ind. 220, 33 N. E. 905, and 34 N. E. 1002; *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905; *Railroad Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *Popljoy v. Miller*, 133 Ind. 19, 32 N. E. 713; *Florer v. State*, 133 Ind. 453, 32 N. E. 829; *Lawrence v. Van Buskirk* (Ind. Sup.) 40 N. E. 54; *Carger v. Fee* (Ind. Sup.) 39 N. E. 93; *Eddingfield v. State* (Ind. App.) 39 N. E. 1057; *McCullough v. Martin* (Ind. App.) 39 N. E. 905; *Williamson v. Branderberg*, 6 Ind. App. 97, 32 N. E. 1022; *Rees v. Blackwell*, 6 Ind. App. 506, 33 N. E. 988; 2 *Elliott, Gen. Prac.* §§ 981, 1051, 1053; *Elliott, App. Proc.* § 793. The rule is thus stated in *Elliott, App. Proc.* § 793: "It is now well settled that the proper mode of questioning the correctness of the conclusions of law stated by the court upon the special finding of the facts is by excepting to each of the conclusions of law." In 2 *Elliott, Gen. Prac.* § 981, it is said: "It is sufficient to except to each conclusion of law stated." It follows from these authorities that, if the exceptions are taken to the conclusions of law as a whole, the same will not be available if any conclusion of law stated is correct. It is not insisted by appellant that all conclusions of law stated are erroneous, and we assume, therefore, that those to which no objections have been pointed out are correct. A part of the conclusions of law being correct, the assignment of error fails. Judgment affirmed.

(143 Ind. 667)

LEE v. MAZINGO et al.¹

(Supreme Court of Indiana. Oct. 10, 1895.)

AMENDING ASSIGNMENTS OF ERROR — PARTIES ON APPEAL.

1. Under Sup. Ct. Rule 3, providing that leave to amend an assignment of errors shall

¹ Rehearing denied.

not be granted unless it appears that due care and diligence were exercised in the first instance to make the assignment complete, it is not a sufficient excuse for making a defective assignment that the party was in doubt about how it ought to be made.

2. Rev. St. 1894, § 647 (Rev. St. 1881, § 635), provides that "a part of several coparties may appeal, but in such case they must serve notice of the appeal on all other coparties, and * * * unless they appear and decline to join they shall be regarded as having joined." *Held*, that one of several defendants cannot appeal without making the other defendants coparties, though the others have defaulted, and it is not sufficient that all of said defendants were joined as appellees, or that some of them have appeared and declined to join as coparties.

Appeal from circuit court, Hamilton county; W. J. Kane, Special Judge.

Action by Elizabeth Mazingo against Stephen Lee and others to have a deed declared a mortgage, and to foreclose the same. Plaintiff had judgment, and defendant Stephen Lee appeals. Dismissed.

F. M. Butler, for appellant. J. F. Neal, for appellees.

McCABE, J. The appellee Elizabeth Mazingo sued the appellant, Stephen Lee, and the appellees William R. Fox, Eliza Fox, his wife, Isalah Lee, and Margaret Lee, to have a deed executed by said Fox and wife, purporting to convey certain lands in Hamilton county to said Mazingo, declared a mortgage, and to foreclose the same. It appears from the complaint that the land belonged to Fox, and that he and his wife had mortgaged it to one Joseph Billhmer to secure a note of \$500 and coupon or interest notes thereon, all of which had been assigned to said Isalah Lee, who had foreclosed the same and bought in the land on his foreclosure decree; that said Stephen Lee had a junior mortgage on the same land executed by the same mortgagors; that the said Isalah Lee was the son of Stephen Lee, and was the nominal holder and owner only of the first-mentioned notes and mortgage, his father Stephen Lee having furnished the money to buy it with. Just before the expiration of the year for redemption Fox borrowed the money of Mazingo to redeem from Isalah Lee's sale, and did redeem therefrom with said money. Said Fox represented to Mazingo that there was no other lien on said real estate than said foreclosure decree and sale. To secure the money thus borrowed, Fox and wife executed the deed before mentioned to Mazingo. She made defendants to her complaint William R. Fox, Eliza E. Fox, Stephen Lee, Isalah Lee, and Margaret Lee. The complaint, in addition to seeking to have the deed declared a mortgage, and a foreclosure of the same as a mortgage, also sought to subrogate Mazingo to the rights of Isalah Lee in the decree of foreclosure, and have the satisfaction thereof set aside because it was, as alleged, the intention of said William R. Fox and Mazingo, at the time she loaned the money as aforesaid, that the lien of said decree should

be continued and kept alive in her favor. All the defendants in the complaint above named except Stephen Lee were defaulted. He answered, leading to issues of fact the trial of which resulted in a special finding of facts on which conclusions of law were stated by the court. Pursuant to such conclusions, the court rendered a judgment and decree in accordance with the prayer of the complaint, and foreclosing the equity of redemption of all of the defendants in and to said real estate. Stephen Lee, one of the defendants below, alone appeals, and makes the plaintiff and all his codefendants in the circuit court appellees, and none of them coappellants. The appellee Mazingo filed a motion to dismiss the appeal on January 8, 1895, for failure to make all the coparties to the judgment below coappellants to this appeal. The transcript and assignment of errors were filed on February 12, 1894, and the cause was submitted on April 18, 1894. On January 14, 1895, appellant filed a motion asking leave of this court to so amend his assignment of errors as to make all coparties to the judgment below coappellants in this court. That motion was overruled by this court on February 21, 1895, because no excuse was stated in the application why the proper assignment had not been made before the submission, except that "said appellant says that he is now, and was at the time said assignment of errors was filed, in doubt as to whether any other persons should be made parties to this appeal except himself and Mazingo, and also whether Mazingo should be sole appellee and the rest of said persons be joined as appellants." Rule 3 of this court provides, among other things, as follows: "Nor shall leave be granted, unless it appear that due care and diligence were exercised in the first instance to make the assignment complete." Under this rule, it is not a sufficient excuse for making a defective or insufficient assignment of errors that the party was in doubt about how it ought to be made. On January 28, 1895, the appellant filed in this court a paper duly sworn to by Isaiah Lee and Margaret Lee, parties to the judgment below, who thereby entered their appearance as coappellants in this cause, waiving all irregularities in the taking of this appeal, and therein and thereby declined to join as coappellants in this appeal, and asked that their names be stricken from the record as coappellants. This paper and the relief therein sought falls exactly within the principle declared in *Holloran v. Railway Co.*, 129 Ind. 274, 28 N. E. 549. That is against the appellant and his proposed amendment of the assignment of errors.

But if it were otherwise, and the appearance of Isaiah and Margaret Lee, and their waiver of the defect in leaving them out of the assignment of errors as coappellants, had the effect to put them in the assignment of errors, it would be fatally defective for want of the presence of the principal defendants

below, the mortgagors, William R. Fox and Eliza E. Fox, his wife, unless a defaulted defendant has no right to appeal until his default is set aside. All the defendants below, including Fox and wife, except Stephen Lee, were defaulted, as before observed. It is contended by the appellant that it was not necessary to make a defaulted defendant below, even though judgment be rendered against him, a party to the appeal, because it is contended that such defaulted defendant cannot raise any question in this court on appeal without first moving to set aside the default; and as all the defendants below except the appellant were defaulted, and took no steps to get rid of the default, they have no right to raise any question on appeal, and hence no right to appeal, therefore it was not necessary to make them coappellants with the appellant. But it has been settled by this court that a defaulted defendant has a right to appeal without seeking to set aside the default, and may on such appeal raise at least two questions, namely, the sufficiency of the facts stated in the complaint to constitute a cause of action against him, and the jurisdiction of the court. *Cochnowar v. Cochnowar*, 27 Ind. 253; *Monroe v. Strader*, 33 Ind. 111; *Searle v. Whipperman*, 79 Ind. 424; *Wilcox v. Monday*, 83 Ind. 335. *Bell v. Corbin*, 136 Ind. 269, 36 N. E. 23, cited by appellant, is not in point, because it was only held there that the defaulted defendant below could not except to conclusions of law on motion for a new trial. The failure to make the coparties to the judgment below all coappellants with the appellant was a failure to comply with the requirements of the statute in such cases. *Burns' Rev. St. 1894*, § 647 (*Rev. St. 1881*, § 635).¹ We have recently held that making them appellees is no better than not making them parties at all. *Gregory v. Smith* (Ind. Sup.) 88 N. E. 895. As all parties affected by the judgment have a right to appeal, and as there can be but one appeal from the same judgment, the failure to make all persons against whom the judgment is rendered parties to the appeal as coappellants is a failure to place the case within the jurisdiction of this court. *Hutts v. Martin*, 131 Ind. 1, 30 N. E. 698; *Gregory v. Smith*, supra; *Vordermark v. Wilkinson* (Ind. Sup.) 89 N. E. 441. The motion to dismiss the appeal for want of jurisdiction must be sustained. The appeal is therefore dismissed.

¹ *Rev. St. 1894*, § 647 (*Rev. St. 1881*, § 635), reads as follows: "A part of several coparties may appeal; but in such case they must serve notice of the appeal upon all the other coparties, and file the proof thereof with the clerk of the supreme court. Unless they appear and decline to join they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be struck out on motion; and they shall not take an appeal afterward nor shall they derive any benefit from the appeal unless from the necessity of the case, except persons under legal disabilities."

(142 Ind. 214)

RUND v. TOWN OF FOWLER.

(Supreme Court of Indiana. Oct. 9, 1895.)

SLAUGHTERHOUSES—INHIBITING LOCATION WITHIN TOWN LIMITS—ESTOPPEL.

1. Under Rev. St. 1894, § 4357 (Rev. St. 1881, § 3333), empowering towns "to declare what shall constitute a nuisance, and to prevent * * * the same; * * * to direct the location of slaughterhouses,"—a town may declare a slaughterhouse within its limits a nuisance, and inhibit the maintenance or operation thereof.

2. Power having been given a town to inhibit maintenance of slaughterhouses within its limits, courts cannot question the wisdom or reasonableness of it or its exercise, it not infringing on any constitutional provision.

3. A town is not estopped to inhibit maintenance of a slaughterhouse within its limits by reason of previous direction and consent of its trustees as to location thereof within its limits; at least, unless such direction and consent was by corporate action regularly taken.

Appeal from circuit court, Benton county; U. Z. Wiley, Judge.

Action by the town of Fowler against Henry Rund. Judgment for plaintiff. Defendant appeals. Affirmed.

Fraser & Isham, for appellant. Brown & Hall, for appellee.

HACKNEY, J. This is an appeal from the judgment of the lower court assessing a penalty against the appellant for the violation of an ordinance of said town. The appellant insists that the ordinance is invalid—First, because the appellee had no power to pass it; and, second, because its provisions are arbitrary and unreasonable. The first section declares that slaughterhouses within the corporate limits of the town shall be deemed public nuisances. The second section, with the violation of which the appellant was charged, provides that "it shall be unlawful for any person or persons or corporation to maintain or operate any slaughterhouse within the corporate limits of said town." Section 3 prescribes the penalties for violating said second section. The statute defining the powers of town corporations (section 4357, Rev. St. 1894; section 3333, Rev. St. 1881) provides that the board of trustees shall have power: "Fourth. To declare what shall constitute a nuisance, and to prevent, abate and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary. * * * Eighth. * * * To direct the location of slaughterhouses." Upon the question of the express power of the appellee to adopt and enforce the ordinance before us, the appellant's counsel confine their argument to the last-quoted provision of the statute, insisting that the power to direct the location does not include the power to exclude from the corporate limits or to declare the maintenance of slaughterhouses to constitute a nuisance. If this provision stood alone, we should not incline to the view that

the ordinance in question exceeded the power given. Its effect is certainly to provide that slaughterhouses shall not be located within the corporate limits, and that a violation of this direction shall bring the penalty prescribed. The ordinance finds support as the exercise of a police power, and has for its object the preservation of the public health. This power is given by the provision of the statute first quoted: "To declare what shall constitute a nuisance, and to prevent * * * the same." The ordinance in question declares that a slaughterhouse within the corporate limits of the town shall be deemed a public nuisance, and the penalty prescribed is intended to prevent the establishment or maintenance of such nuisance. The general grant of power following that just quoted is of great scope, and manifests the intention of the legislature to intrust to the municipality large discretion in the enactment of "measures for the preservation of the public health." It is possibly true, as counsel insist, that a slaughterhouse is not per se a nuisance, and that it is possible for the municipality to exceed its power by declaring, arbitrarily, that to be a nuisance which neither from its character, nor the manner in which it is controlled or conducted, is a nuisance. However, a slaughterhouse erected or conducted in violation of the ordinance becomes a nuisance, though it may not have been such in the absence of such ordinance. Nor can it be said that this appeal may be maintained because the ordinance, so far as it declares a slaughterhouse within the town limits to be a nuisance, is an arbitrary declaration against a business not otherwise a nuisance. The penalty from which the appeal is prosecuted is for maintaining a slaughterhouse within the town limits. As we have said, the right to direct the location of such houses is given by the letter of the legislative grant, and the penalty is assessed for the failure to obey the direction that such houses shall not be located within the corporate limits. The power given had been exercised by excluding them from a particular locality. This is but the equivalent of a direction that they shall be located without the corporate limits. Where power exists to pass and enforce an ordinance, as we hold that it does in this case, there can be no inquiry by the courts into the wisdom or reasonableness of the power, or its exercise, unless it infringe some provision of the constitution. *Steffy v. Town of Monroe City*, 135 Ind. 466, 35 N. E. 121, and authorities there cited.

The answer of the appellant that the slaughterhouse was given its location by the direction and with the consent of the town trustees is not available as an estoppel without allegations that such direction or consent was by corporate action taken in some method recognized by law, if, indeed, an order regularly entered of record by the board in session would estop the corporation to take

subsequent action to the contrary. See *Barth v. City of New Orleans*, 24 Fed. 563.

Finding no error in the record, the judgment of the circuit court is affirmed.

(144 Ind. 533)

BOARD OF COM'RS OF HUNTINGTON COUNTY v. HEASTON.¹

(Supreme Court of Indiana. Oct. 10, 1895.)

COUNTY COMMISSIONERS—ALLOWANCE OF CLAIMS—RES JUDICATA—VOLUNTARY PAYMENT.

1. A board of county commissioners, in auditing and allowing a claim against the county, is the representative of the county, and its decision is therefore not the judgment of a court, so as to bring it within the rule of *res judicata*.

2. Such decision is not binding against the county under the rule of *res judicata* for the further reason that it has not that effect against the one presenting the claim, he being allowed, instead of appealing from it, to institute an independent action against the county on his claim.

3. A board of county commissioners, though acting as the representative of the county in allowing a claim, does not bind the county by allowing and ordering paid a claim not legally chargeable to it, or the allowance of which is prohibited by statute.

4. Where a claim not legally allowable against a county is presented to the county commissioners, and allowed by them, and on their order paid by the county treasurer, it may be recovered by the county, not being a voluntary payment within the rule preventing recovery of such a payment.

Appeal from circuit court, Huntington county; J. W. Adair, Judge.

Action by the board of commissioners of Huntington county against Israel H. Heaston. A demurrer to the answer was overruled, and plaintiff appeals. **Reversed.**

Elcott & Elliott and Milligan, Cook & Whitlock, for appellant. Kenner & Lesh, for appellee.

JORDAN, J. This was an action against the appellee by the appellant, the board of commissioners of Huntington county, to recover of the former the sum of \$7,221.90, alleged to have been allowed him as auditor of said county by its commissioners, in violation of the statutes. Upon a trial had there was a judgment rendered, in effect that the appellant take nothing by the action, and that appellee recover his cost, and to reverse this judgment appellant prosecutes this appeal. The complaint alleges substantially the following facts: That the appellee, Heaston, was elected and served as auditor of Huntington county from the 1st day of November, 1887, to November 1, 1891. That he was paid and received for said term as such officer all salary and compensation allowed by law. That during his term, notwithstanding the fact that he had been paid, and received from the county all of his salary and compensation allowed him by law, he, under the color of said office, illegally taxed up fees, and in violation of law demanded, extorted, and received payment of the same in his official ca-

capacity from the county; the said fees not being allowable under the statutes of the state. Here follows a particular itemized list of fees so taxed and received by appellee from the county, amounting in the aggregate to \$7,221.90, for which judgment is demanded. This schedule, filed as an exhibit, and made a part of the complaint, shows, among other things, certain sums of money received by the appellee from the county arising out of fees taxed and charged by him in highway cases, gravel-road matters, and ditch proceedings before the board of commissioners, and for filing papers in his office, etc. A demurrer being overruled to the complaint, appellee then filed an answer in two paragraphs, the first of which was a denial. By the second paragraph he admitted that he had received the sums of money as charged in the complaint, but averred the facts that he presented the claims in an itemized and verified account as due and owing to him by the county to its board of commissioners while in legal session for the transaction of business, and that the said board allowed the same against the county, and by an order of record directed that the money be paid out of the county treasury, and that it was so paid to him upon a warrant drawn upon the treasurer thereof. He further alleged therein that the claims were allowed and the money paid to him in good faith, and that the orders of the board allowing the same were not appealed from, and are in full force and effect, and that the sums of money so allowed and paid to him are the identical ones and upon the same accounts described in the complaint, and for which a recovery is sought; and that said orders or judgments so made and entered by the board of commissioners were a full, final, and complete adjudication of all the matters alleged in the complaint between the same identical parties herein, and that plaintiff is thereby estopped from recovering anything in this action. A demurrer to this paragraph for insufficiency of facts as a defense to the action was overruled and excepted to, and the plaintiff was ruled to reply.

The action of the court in overruling the demurrer to this paragraph of the answer is the first error assigned and presented by the appellant, and is virtually treated as the chief question for the consideration of this court. The contentions of the learned attorneys for appellant are, in the main, that these allowances were made by the county commissioners in defiance of law; that the latter were guilty of a crime in so doing; that appellee received the county's money and converted the same to his own use without authority of law; and that the county is not bound by this unauthorized or forbidden act, nor precluded from recovering the money back from the appellee; and among their citations they refer to sections 2105, Rev. St. 1894 (section 2018, Rev. St. 1881), and sections 6543, 6544, 6548, 6549, Rev. St. 1894, the latter being sec-

¹ Rehearing denied, 43 N. E. 651.

tions 2, 3, 7, and 8 of an act in force June 5, 1883 (Acts 1883, p. 48); also section 7853, Rev. St. 1894 (section 5766, Rev. St. 1881). They further insist that, conceding that the commissioners allowed the claims to appellee, as he alleges, however, in doing so, they acted in their administrative or ministerial capacity, and not as a court, and that the principle of *res adjudicata* does not apply, and the county is not estopped to inquire into the illegality of these allowances. They further contend that, conceding that they acted in the matter as a court, the claims allowed were forbidden by law, and hence there was an absence of jurisdiction; while upon the side of appellee his learned counsel contend that in allowing these claims in the manner and form as shown by this paragraph of the answer the board of commissioners of Huntington county acted as a court, and in passing upon, and allowing these claims in favor of appellee it exercised its judicial powers, and that it had jurisdiction in the premises, and that its judgments rendered under the alleged facts are valid, and a complete bar and estoppel against the county. They also insist that, the board having the power to judicially act and decide in the matter, its judgments, right or wrong, are binding upon the county, and cannot be collaterally called in question. The contentions and argument of appellee's counsel from their standpoint are to some extent supported by authorities cited, among which are decisions of this court. The manifest theory of the cause of defense as outlined by the facts alleged in this answer is that of *res judicata*. It is a confession of appellant's cause of action, but seeks to avoid it upon the ground that the claims mentioned in the complaint have been adjudicated between the parties in the commissioners' court, and that appellant is thereby estopped from contradicting in this action the verity and binding force of the alleged judgment rendered. The trial court, in overruling the demurrer to this answer, in effect adjudged that the facts therein averred were sufficient to constitute this defense.

Boards of commissioners, under the law, in the discharge of their duties have, at least, a dual character. In some respects they act judicially, and the law regards them as a court, and from their decision an appeal lies in this state, under section 5772, Rev. St. 1881 (section 7859, Rev. St. 1894), by a party aggrieved, to a higher court. In other respects they act in an administrative capacity, as the representative of the county. See section 197, Elliott's Gen. Prac., and cases there cited. When they rightfully exercise their powers as a court, it is settled by the authorities that they are to be treated as such, and their judgments rendered or orders made cannot be collaterally impeached, and the principles of former adjudication are applicable thereto. But if, upon the contrary, the commissioners of Huntington county did not, under the law, in allowing the claims of ap-

pellee, act as a court, but were simply in the discharge of administrative duties, and the orders so made can be said to be but quasi judicial, then, we think, it must follow as a legal consequence that the appellee cannot, by virtue of his defense alleged, shield himself from liability as against appellant's right to recover the money which he, as it is averred, has extorted and received in defiance of law.

The next inquiry is: In what character did the commissioners act, and what functions were they discharging, when they allowed the claims or demands of appellee, in controversy? By section 7815, Rev. St. 1894 (section 5731, Rev. St. 1881), the board of commissioners seems to be created, in the first place, for "transacting county business." However, it is well settled that these boards have such other powers and duties, judicial and otherwise, as may be lodged in them by the legislature. Section 7830, Rev. St. 1894 (section 5745, Rev. St. 1881), prescribes their duties, among which are: "(2) To allow all accounts chargeable against such county." "(4) To perform all other duties that may be enjoined on them by any law of this state." It is true, as we have said, that under this last provision, in the discharge of duties enjoined upon them by statute, the commissioners, in many cases not necessary here to mention, act as a court, and their decisions are regarded as judgments, from which an appeal will lie under section 5772, Rev. St. 1881 (section 7859, Rev. St. 1894), which grants appeals generally to the circuit court. It is likewise true that, when administrative duties are enjoined upon these boards by law, from their action thereon no appeal can be taken, unless especially authorized by statute. *Board v. Davis*, 136 Ind. 503, 36 N. E. 141. The statutes relative to the collection or allowance of claims against a county have in later years undergone some changes, and such a construction has been placed upon this procedure by the courts of the state that indicate a holding to the effect that, at least as the law now stands, the commissioners, in hearing the claims of a creditor of the county, do not act in their judicial capacity. By an act of 1879 provisions were made for the filing and allowance of claims. The first section of that act, which is section 7845, Rev. St. 1894 (section 5758, Rev. St. 1881), provides: "That any person or corporation having a 'legal claim' against any county, shall file it with the auditor to be presented by him to the board." Section 2 (section 7846, Rev. St. 1894; section 5759, Rev. St. 1881) requires the commissioners to examine into the merits of all claims so presented, and they may, in their discretion, allow the same in whole or in part. Section 3 (section 7856, Rev. St. 1894; section 5769, Rev. St. 1881) provides for an appeal to the circuit court, and section 4 (section 7847, Rev. St. 1894; section 5760, Rev. St. 1881) provided that no court should have original jurisdiction of any

claim against a county except in the manner provided in the act. By an act of 1885 (Acts 1885, p. 80) section 3 of the act of 1879 was amended, and now exists as section 7856, Rev. St. 1894 (section 5769, Rev. St. 1881).

In the case of *Bass Foundry & Machine Works v. Board of Com'rs of Parke Co.*, 115 Ind. 234, 17 N. E. 593, this legislation was reviewed, and it was there held, in effect, by this court, that under the law as it stood subsequent to the amendment of 1885 the presentation of the claim to the commissioners in the first instance was but a condition precedent to the claimant's right to institute a suit upon it in the circuit or superior court. Mitchell, J., speaking for the court in that case, on page 239 (115 Ind., and page 595, 17 N. E.), of the opinion, said: "After a good deal of hesitation, we are constrained to the conclusion that the purpose of the act as it now stands was to require claims against counties to be first presented to the respective boards of commissioners before bringing suit. This is to the end that a county shall not be involved in litigation which might be avoided by affording it the opportunity to discharge its legal obligations without the expense of a suit." In the case of *Board v. Stock* (Ind. App.) 36 N. E. 928, the question as to the requirements of the law in regard to collecting claims against a county was considered by the appellate court of this state. It was there said by that court: "The presentation of the claim before the board is a condition precedent to the right to maintain a suit upon the claim. * * * The filing of the claim with the board is in the nature of a demand upon such board to pay the claim." In *Board v. Nichols* (Ind. App.) 40 N. E. 277, the matter was again considered by this latter court. In the case last cited there was an attempt to plead a former adjudication of the claim before the board of commissioners. In considering this point the court said: "The object of the present statutes in requiring a claim against a county to be first filed and presented to the board of commissioners for allowance before bringing suit thereon is to give it an opportunity to discharge its legal obligations without the expense of a lawsuit; citing *Bass Foundry & Machine Works v. Board of Com'rs of Parke Co.*, supra. "The board, in hearing such claim, acts merely in the capacity of an auditing committee. Its action is ministerial, and not judicial. Any order made by it in allowing or refusing the claim does not rise to the dignity of a judicial determination or judgment." We cannot agree with appellee that, under the statutes as they existed when the allowance in question was made, presenting his claims to the commissioners was, in effect, the institution of a suit by appellee against the county for the recovery of the money demanded, and that the order made allowing the same is a judgment of a court, which, under the rule of former recovery, cannot be collaterally assailed. If it was a

suit against the county for the recovery of money in the sense urged by counsel, then the claimant was the plaintiff, and the county the defendant, and the commissioners were in the discharge of a double duty, acting as a court and also as the representative of the defendant, or otherwise the county could not be said to be in court. Such a construction as contended for apparently leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case.

We have seen that by section 7830, Rev. St. 1894 (section 5745, Rev. St. 188), the board is the agency of the county for the transaction of its business. A portion of this business is the auditing and allowing of "legal claims." We are of the opinion, and are constrained to hold, that when the board examined into and allowed the claims presented to them by appellee, it stood, in the eye of the law, as the representative of its county, and thereby acted in its administrative capacity, and not in the character of a court; that while its order so made might be termed "quasi judicial," yet it did not attain to the rank of a judicial determination or judgment, so as to bring it under the protection of the rule of *res judicata*. The fact that the statute pertaining to the auditing of claims grants an appeal to the circuit court at the option of the claimant lends no force to the contention that the board acts as a court in allowing the same. The right of appeal from the action of boards in their administrative character is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court, that it may be determined judicially. It may be said, however, that, in view of the fact that at the time of the enactment of the statute in regard to filing claims there existed a general right of appeal from all judicial decisions of the board under the section to which we have referred, but notwithstanding this fact the legislature did especially authorize an appeal from an order disallowing a claim in whole or in part, that fact might be accepted at least as evidence tending to show a legislative recognition that the act of the board, in the matter of allowing claims, was not judicial, and that, therefore, an appeal would not lie therefrom under the section authorizing appeals in general. This latter statute applies to decisions of the board which are of a judicial character, and is not applicable to those made in matters pertaining to its administrative or ministerial duties, and we must presume that the legislature recognized that fact. *Bunnell v. Board*, 124 Ind. 1, 24 N. E. 370. It is held by the following decisions that the allowance of a claim by a board of commissioners is not conclusive, but only *prima facie* evidence

of its correctness, and, in effect, not res adjudicata. *Commissioners v. Keller*, 6 Kan. 510, *Board v. Catlett's Ex'rs*, 86 Va. 158, 9 S. E. 999; *Abernathy v. Phifer*, 84 N. C. 711. As bearing upon the question, see, also, *Hunt v. State*, 93 Ind. 311; *Wolfe v. State*, 90 Ind. 16; *Bunnell v. Board*, supra; and *State v. Board of Com'rs of Warren Co.*, 136 Ind. 207, 35 N. E. 1100. Again, if we consider the question from another standpoint, we must reach the conclusion that the county is not estopped or precluded from calling in question the order of the board allowing the claims, for the reason that there is an absence of mutuality. One of the essential elements of an estoppel by judgment is that both litigants must be alike concluded by the judgment, or it cannot be set up as conclusive upon either. *Freem. Judgm.* § 159; *Hunt v. State*, 93 Ind., at page 322 of the opinion.

Under the act of 1885, had the claim of appellee been disallowed in whole or in part, he had the option to either appeal or institute an independent action against the county in the circuit court. In that event the decision of the board disallowing his claim could not have been pleaded against him as res judicata in his action in that court. If the order did not bind the appellee, then it can be said that mutuality was wanting, and under the rule just stated it could not bind the county. In any view, we think it must be held that appellee cannot successfully interpose the defense set up in his answer to the alleged cause of action, and the court erred in overruling the demurrer thereto. Acting, then, as the representative or agency of the county in allowing the claim in controversy, did the board bind the former by their action in awarding the appellee the money thereon, as charged, without warrant of law, and in defiance thereof? In their administrative capacity the commissioners exercise their powers as public or special agents, and cannot exceed the authority conferred upon them by law. Within legal limits, or scope of their authority, their action in auditing, determining, and allowing the amount due to a creditor of the county, in the absence of fraud, or perhaps mistake, binds the latter. But they cannot bind the county by allowing and ordering a claim to be paid, not legally chargeable to it, or the allowance of which is prohibited by statute. They have not unlimited choice as to the objects to which the money of the public shall be applied. *Harney v. Railroad Co.*, 32 Ind. 244. See, also, *Shirk v. Pulaski Co.*, 4 Dill. 209, Fed. Cas. No. 12,794; *People v. Supervisors, etc.*, of Blackman, 14 Mich. 386; *Board v. Ellis*, 59 N. Y. 620, and cases there cited. 4 Am. & Eng. Enc. Law, p. 389. In *Harney v. Railroad Co.*, supra, this court, per Worden, J., on page 246 of the opinion, said: "The counties are corporations created for the purpose of convenient local municipal government, and possess only such

powers as are conferred upon them by law. They act by a board of commissioners, whose authority is defined by statute. One of the powers conferred is to collect taxes levied upon the people and property within the county. In the disposition of the money thus collected into its general treasury, the board has not unlimited discretionary choice as to the objects upon which it shall be expended. It can only be applied to certain specified objects; and the building of railroads is not one of these objects, or necessary to carry into effect any of the purposes for which such corporations were created." A board of commissioners cannot illegally make an allowance under the guise of making the same for services voluntarily rendered or things voluntarily furnished. *Gemmill v. Arthur*, 125 Ind. 253, 25 N. E. 283. The case of *Board v. Ellis*, supra, was an action by Richmond county, in the state of New York, to recover of the defendant money allowed to him by the board of supervisors upon accounts not legally chargeable to that county, and it was there held that the action could be successfully maintained. The rule preventing the recovery of money voluntarily paid has no application under the facts in this case. As charged in the complaint, the claims were allowed and the money paid without any legal authority for so doing. In view of the alleged facts, these claims were not only allowed in violation of law, but they were presented by the appellee, and the money of the county unlawfully received by him, and he is chargeable with knowledge of the illegal acts. It was no payment by the county. The latter, as the principal, had no part in the payment. It could not, as a public corporation, be held to consent to the payment of or expenditure of the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was, in a legal sense, equivalent to an unlawful appropriation of the county's money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority, and therefore did not bind the county. *Board v. Ellis*, supra; *Lee v. Board*, 124 Ind. 214, 24 N. E. 986.

Independent of the right given by section 6549, Rev. St. 1894, to recover back the money upon the part of appellant, which statute the appellee mildly insists has no application to an action under the facts in this case, we are of the opinion, however, that a right of action exists in favor of appellant. If the appellee has received and has the money of the county, under such circumstances that in equity and good conscience he ought not to retain the same, and which ex æquo et bono belongs to the county, an action for its recovery will lie in favor of the latter. *McFadden v. Wilson*, 96 Ind. 253, 257, and authorities there cited; *Lemans v.*

Wiley, 92 Ind. 436. If, under the facts in the case at bar, we should place the construction on the law as contended for by appellee, then a way would be paved by which it would be rendered easy for any person, under the guise of a legal claimant against a county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully obtain and appropriate to his own use the public money, and, when called upon in a court of justice to account for the same, deny the right of the county's recovery upon the ground of *res adjudicata*. Such, in reason, is not the law. It is not essential in this appeal that we should examine the various claims alleged to have been unlawfully allowed to appellee in order to determine their validity. Without deciding, we may here, however, suggest that we recognize certain items in the claims allowed that were not legally chargeable to the county, and, as the judgment must be reversed, we must presume that upon another trial the lower court, under the issues and the law, will properly adjudge whether a part or the whole of the claims in controversy were illegally allowed and paid to appellee, and award judgment accordingly.

As we have held that the orders of the commissioners allowing the claims are, at least, *prima facie* evidence of their correctness, and the appellant, by its action, having, in effect, assailed the same, the burden is cast upon it to overthrow them by showing that the claims in controversy were not legal charges against it for the reason that there was no law which authorized them to be allowed in favor of appellee. The case of *Snelson v. State*, 16 Ind. 29, and other similar decisions of this court, which appellee insists are controlling of the point involved herein, in view of the present law relative to the allowing of claims against counties, as construed by the later decisions, must be deemed to be modified as to the broad doctrine therein enunciated, and under the facts and circumstances in this case we cannot accept them as authority on the particular question involved. For the error in overruling the demurrer to the second paragraph of the answer the judgment is reversed, with instructions to the lower court to sustain the demurrer to said paragraph, and for further proceedings in accordance with this opinion.

(144 Ind. 231)

STATE ex rel. WILSON v. WELLS.¹
(Supreme Court of Indiana. Oct. 10, 1895.)

TOWNSHIP TRUSTEES—TERMS OF OFFICE.

Const. art. 15, § 2, prohibits the legislature from creating any office the tenure of which shall be longer than four years, and Const. art. 15, § 3, declares that, where it is provided that any officer shall hold his office for a given term, such provision shall be construed to mean until his successor is elected and qualified. Acts 1889, p. 344 (Rev. St. 1894, §

6293), requires township trustees to enter upon the duties of their office on the first Monday in August following the April general election. By Acts 1893, p. 192 (Rev. St. 1894, § 6290), the April election was abolished, and it was provided that township trustees should be elected at the November general election. *Held*, that a township trustee elected at the November, 1894, election is entitled to the immediate possession of the office where the previous incumbent was elected at the April, 1890, election.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Information by the state upon the relation of Daniel E. Wilson against James M. Wells to inquire into respondent's right to hold the office of township trustee. A demurrer to the information was sustained, and the relator appeals. Reversed.

Elllott & Elliott, for appellant. St. Johns & Charles and Brownlee & Paulus, for appellee.

HOWARD, C. J. At the township election held in April, 1890, the appellee was elected township trustee of Center township, Grant county; and at the general election held in November, 1894, the appellant's relator was elected the successor of the appellee in said office. On November 14, 1894, the relator, having duly qualified, filed his bond as such township trustee and made demand on appellee for possession of said office, but was refused, the appellee claiming to be entitled to continue in the office until the first Monday of August, 1895. Thereupon the relator brought this action by way of information, setting up all the facts and praying that he be placed in possession of the office. To this information the court sustained a demurrer.

The statutes relating to the election and terms of office of township trustees, and necessary to be considered in the case before us, are as follows: By sections 57 and 59 of an act approved April 21, 1881 (Acts 1881, p. 482; Rev. St. 1881, §§ 4735, 4737), it was provided that the election of the township trustee should take place on the first Monday of April, 1882, and every second year thereafter; and that his certificate of election should entitle him to qualify and enter upon the duties of his office at the expiration of 10 days after his election. By an act approved March 9, 1889 (Acts 1889, p. 344; Rev. St. 1894, § 6293), the foregoing provisions were so far modified as to require that the township trustee should enter upon the duties of his office on the first Monday of August following such election. By an act approved March 11, 1889 (Acts 1889, p. 425; Rev. St. 1894, §§ 8066, 8067), it was provided that, on the first Monday of April, 1890, and every fourth year thereafter, a township trustee should be elected in each township, to hold his office for four years and until his successor should be elected and qualified; and also that thereafter no such trustee should be eligible to said office more than four years in any period of eight years. By

¹ Rehearing denied, 43 N. E. 133.

an act approved March 2, 1893 (Acts 1893, p. 192; Rev. St. 1894, § 6290), the April election was abolished, and it was provided that the township trustee and other township officers should be chosen at the general election to be held in November, 1894, and every four years thereafter, and that the election of township officers should be conducted under the provisions of the law governing said general election. One of the provisions relating to the general election in November is that at such election "all existing vacancies in offices and all offices the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law." Acts 1881, p. 482; Rev. St. 1894, § 6190; Rev. St. 1881, § 4678. The constitution in article 15, § 2, prohibits the legislature from creating any office the tenure of which shall be longer than four years; and in section 3 of the same article it is declared that, when it is provided in that instrument, or in a statute thereunder, that any officer, other than a member of the general assembly, shall hold his office for a given term, such provision shall be construed to mean that the officer shall hold his office for such term and until his successor is elected and qualified. From the foregoing provisions of law it is evident that when appellee was elected township trustee, in April, 1890, he was elected for a term of four years and no more; that his term of office was to begin on the first Monday of August, 1890, and end on the day before the first Monday of August, 1894; and that, on and after said first Monday of August, 1894, there would have been a vacancy in said office, but that, under the constitutional provision above recited, the appellee was entitled to continue in the possession of said office until his successor should be elected and qualified. As the term for which the appellee had been elected would, under the constitutional provision, expire before the next general election following the election in November, 1894, it is clear, also, that such office should be filled by the vote of the people, it not being "otherwise provided by law." The conclusion seems inevitable that the relator, having been duly elected to fill the office, and having qualified and given bond, was entitled to it.

Counsel for appellee do not controvert the proposition that the term for which appellee had been elected had expired, and that the relator was duly elected to fill such office; but they contend that, by force of the act of March 2, 1893, supra, taken in connection with the act of March 9, 1889, supra, the relator's term of four years was to begin on the first Monday of August, 1895, that being "the first Monday of August following such election." When we turn to the act of March 9, 1889, we find that "such election," as there referred to, was the election which took place "on the first Monday of April, 1882, and every second year there-

after"; that is, the trustee should take his office on the first Monday of August after each April election. When the term was made four years, instead of two, by the act of March 11, 1889, supra, the beginning of the term remained, as before, the first Monday of August after the April election. The term, therefore, which began on the first Monday of August, 1890, ended on the day before the first Monday of August, 1894. The act of 1893 made no reference to the beginning or ending of the term, nor to its length. It left that just as it was. The sole purpose of the act of 1893, so far as relates to the office of township trustee, was to change the election from April to November. Certainly, a change in the date of an election cannot affect the term of the office to be filled. If the office becomes vacant by the change of the date of filling it, the constitution makes ample provision therefor, by continuing the old incumbent in office until his successor is elected and qualified. It will not be said that the legislature may do indirectly or by implication what it may not do directly and by an express act. Yet, if the position taken by counsel for appellee is tenable, the legislature, by simply postponing the time when an officer elect shall take his office, might, in effect, lengthen the time during which the incumbent could hold the office beyond the time of the general election, and beyond the end of the longest term permitted by the constitution. The claim is made that the power of the legislature to fix the time when an officer elect shall take his office cannot be abridged. This can be true only within the limits prescribed by the constitution. The legislature may, perhaps, extend the term of an incumbent of an elective office to any time not beyond the time of the next general election, and within the four-year limit. It may also, perhaps, for the better conduct of public business, prescribe a reasonable time after election at which an officer shall enter upon the duties of his office. But the legislature has no power, directly or indirectly, to fill an office elective by the people, unless this be done within some such narrow bounds as indicated. But if the legislature could, in effect, extend the term of the incumbent one year beyond the constitutional limit, and beyond the time of the next general election, by merely postponing the time when his successor should take the office, why could not the legislature, in like manner, extend the incumbent's term two or more years by providing that his successor should not take the office until the expiration of any given number of years, and after the time of any given number of general elections? The only safe rule, within the requirements of the constitution, is, as we think, that all vacancies in elective offices shall be filled at the election first ensuing after the occurrence of the vacancy, and at which provision is made for election to such office. Otherwise, the door is thrown open

for the usurpation by the legislature of the people's right to the election of their own officers. We think it may be true, as suggested, that if the legislature thought well to do so, it might have provided that the regular terms of township trustees should begin on the first Monday of August, 1895, and every four years thereafter; and to accomplish this result might have provided for a short term to begin the first Monday of August, 1894, and end the first Monday of August, 1895. But the legislature could not fill even that short term by providing that the incumbent should hold office one year longer than authorized by the constitution, and beyond the time of an election at which the people could fill the office themselves. But the statutes under consideration do not expressly, nor, as we think, indirectly or by implication, provide that the township trustees elected at the general election in November, 1894, should take their office only on the first Monday of August, 1895. On the contrary, it is plain that the acts of March 9 and 11, 1889, supra, fix upon the first Monday of August, 1890, and every fourth year thereafter, as the date when the terms of office of the successive township trustees should begin. The term of an office is a definite time, relating to the office and not to the officer, and will not be enlarged or varied by changing the date when a person shall be elected to fill such office. We think these conclusions are fully supported by the numerous authorities adduced in the able brief of counsel for the relator. *State v. Harrison*, 116 Ind. 300, 19 N. E. 146; *Parmater v. State*, 102 Ind. 90, 3 N. E. 382; *Baker v. Kirk*, 33 Ind. 517; *De Armond v. State*, 40 Ind. 469; *State v. Barlow*, 103 Ind. 563, 3 N. E. 245. We do not think that any of the cases cited in the earnest and eloquent argument of counsel for appellee are in point as to an elective officer. In the case of *State v. Bogard*, 128 Ind. 480, 27 N. E. 1113, so much relied on, the relator was an appointee of the board of county commissioners. Here he is an officer elected by the people. No good purpose would be served by extending this opinion in the discussion of these cases. The case at bar seems to us a very plain one, in the light of the constitution and of the statutes. The judgment is reversed, with instructions to overrule the demurrer to the information.

(13 Ind. App. 379)

LINCK v. DRISCOLL.

(Appellate Court of Indiana. Oct. 9, 1895.)

SLANDER—PUBLICATION.

Using defamatory language to and of a wife in the presence of her husband constitutes a publication of the slander.

Appeal from circuit court, Delaware county; George H. Koons, Judge.

Action by Mary A. Driscoll against Charles Linck for slander. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. N. Templer and Ed. R. Templer, for appellant. Ryan & Thompson, for appellee.

DAVIS, J. This was an action by appellee against appellant for damages for the speaking of slanderous words alleged to have been falsely spoken by appellant of and concerning appellee. Only one question is presented for our consideration, and that is whether the speaking of the defamatory words of and to the wife in the presence of the husband only constitutes a publication. The proposition is conceded that, to constitute slander, the defamatory words must have been spoken within the presence and hearing of some third person. It appears that the slanderous words were spoken to and of appellee by appellant, that they were so spoken in the presence and hearing of her husband, Warren Driscoll, and that no other persons were present. The charge, in substance, was that appellee was stealing eggs belonging to appellant. Counsel for appellant contend that such charge, made against appellee in the presence of her husband only, does not constitute a publication. We do not so understand the law. Under the common law without any reference to the enlarged rights of married women under modern legislation, defamatory language spoken of and to the wife in the presence of the husband constituted a publication. *Wenman v. Ash*, 76 E. C. L. 836; *Newell, Defam.* 237; *Odgers, Sland. & L.*, side pp. 152, 153; *Flood, Libel*, 45. See, also, section 6976, Rev. St. 1894 (section 5131, Rev. St. 1881); *Logan v. Logan*, 77 Ind. 558; *Holmes v. Holmes*, 133 Ind. 388, 32 N. E. 932. It is also insisted that appellee's husband must have known that the statement that appellee had stolen appellant's eggs was untrue, but it does not appear that the husband was present when the alleged larceny should have been committed. It is not shown that the husband knew the transaction referred to in the charge, and that the transaction did not constitute the crime named by appellant. *Carmichael v. Shiel*, 21 Ind. 69; *Berry v. Massey*, 104 Ind. 486, 3 N. E. 942. So far as our attention has been directed to the record, we find no error in the rulings of the trial court. Judgment affirmed.

LOTZ, J., did not participate in this decision.

(13 Ind. App. 378)

WEIL et al. v. MORRIS.

(Appellate Court of Indiana. Oct. 9, 1895.)

REVIEW ON APPEAL.

After approval of a verdict by the lower court, the objection that it is against the weight of the evidence will not be considered, where there is no showing of an entire absence of evidence to support it on any essential point.

Appeal from circuit court, Allen county; H. O'Rourke, Judge.

Action by Joseph Morris against Abram Weil and others for purchase price of goods.

From a judgment for plaintiff, defendants appeal. Affirmed.

Morris, Bell, Barrett & Morris, for appellants. Colerick & France, for appellees.

REINHARD, C. J. This action was instituted by the appellee against the appellants to recover for a quantity of rags alleged to have been sold and delivered to the appellants by the appellee. The appellants answered by way of recoupment, averring that the rags were sold under a contract, contained in a postal card, requiring them to be of a certain grade, and that they were inferior in quality. They allege that they had sustained damages, which they ask to recoup. It is urged "that the verdict is against the overwhelming weight of the evidence." This, however, is no cause for a reversal. It is not insisted that there was an entire absence of evidence upon any essential point. The trial judge who heard the evidence and saw the witnesses sanctioned the verdict by his approval, and we have neither the inclination nor the power to interfere with it. Some complaint is made of the ruling of the trial court in permitting appellee's counsel to ask certain questions of one of appellant's witnesses on cross-examination. We have examined the question presented, and our conclusion is there was no reversible error in overruling the objection to the testimony. Judgment affirmed, with 5 per cent. damages.

(13 Ind. App. 195)

**SCHOOL CITY OF NOBLESVILLE v.
KEINZMANN et al.**

(Appellate Court of Indiana. Sept. 26, 1895.)

DEMURRER—SUFFICIENCY—NEW TRIAL.

1. A demurrer reading, "Comes now the cross complainant, and demurs to the second paragraph of answer to cross complaint, and says that said paragraph does not contain facts sufficient to constitute a cause of action," is insufficient in form, and does not test the sufficiency of the facts alleged in the answer to constitute a defense to the cause of action set out in the cross complaint.

2. By moving in arrest of judgment a party waives his right to ask for a new trial.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by George W. Keinzmann and others against the school city of Noblesville to recover a balance alleged to be due on a building contract. From a judgment for plaintiffs, defendant appeals. Affirmed.

Shirts & Kilbourne, for appellant. Blackledge, Shirley & Moon and Beauchamp & Mount, for appellees.

ROSS, J. The appellees sued and recovered judgment against the appellant for a balance alleged to be due them upon a contract for the building of a schoolhouse in the

city of Noblesville, Ind. Two specifications of error have been assigned by appellant, as follows: (1) "The court below erred in overruling the motion for a new trial." (2) "The court erred in overruling the demurrer to the second paragraph of the answer to appellant's cross complaint." These specifications of error will be taken up and considered in the inverse order of their assignment. The cross complaint filed by appellant declared upon a bond given pursuant to the terms of the contract sued on to secure the faithful performance by appellees of their part thereof, alleging a breach, and asking damages therefor as provided in said contract. To this cross complaint the appellees answered in two paragraphs,—First, a general denial; and, second, specially alleging facts to show not only that the delay alleged in the cross complaint was caused by the acts of appellant, but that, subsequent to the making of the contract, that part thereof upon which the appellant sought a recovery in its cross complaint had by agreement been changed, etc. The appellees insist that the court below did not err in overruling the demurrer to this answer. In support of this contention it is urged that the paper filed, and denominated a "demurrer," is insufficient to raise any question as to the sufficiency of the answer to constitute a defense to the cause of action alleged in the cross complaint. The demurrer, omitting the caption, reads as follows: "Comes now the cross complainant, and demurs to the second paragraph of answer to cross complaint, and says that said paragraph does not contain facts sufficient to constitute a cause of action." That the demurrer is insufficient in form, and does not test the sufficiency of the facts alleged in the answer to constitute a defense to the cause of action alleged in the cross complaint, we think is well settled by the decisions of this court. *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623; *Angaletos v. Bank*, 4 Ind. App. 573, 31 N. E. 368; *Wade v. Huber* (Ind. App.) 38 N. E. 351. The facts alleged in the answer, so far as any objection has been pointed out, or a careful reading discloses, states a good defense to the cause of action alleged in the cross complaint. The record shows that prior to the filing of the motion for a new trial the appellant moved in arrest of judgment. The motion was overruled by the court, and an exception saved by appellant to the ruling. It is now urged by the appellees that the appellant, by moving in arrest of judgment, waived its right to ask for a new trial. This seems to be the rule of practice in this state. *Eckert v. Binkley*, 134 Ind. 414, 33 N. E. 619, and authorities cited. Judgment affirmed.

DAVIS, J., took no part in the decision of this case.

(13 Ind. App. 275)

LAKE ERIE & W. R. CO. v. WALTERS.

(Appellate Court of Indiana. Oct. 8, 1895.)

ASSESSMENTS FOR PUBLIC IMPROVEMENTS—ATTORNEY'S FEES—SUBSTANTIAL COMPLETION.

1. Acts 1891, p. 323, § 2, providing for the recovery of a reasonable attorney's fee in actions to foreclose assessment liens for street improvements, is constitutional. *Dowell v. Paving Co.* (Ind. Sup.) 38 N. E. 389, followed.

2. Where full completion of a contract for a street improvement is prevented by the building of railroad tracks on the street with the consent of the city, but the work is performed as far as possible, the contractor may recover from the property owner, under Rev. St. 1894, § 4298, providing that recovery may be had when "the work has been done in whole or in part according to the contract."

3. Where a city contracts for a street improvement, to be made in accordance with a certain ordinance, the city has the power to waive a strict compliance with such ordinance.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Morris B. Walters against the Lake Erie & Western Railroad Company, on an assessment for street improvement. Judgment for plaintiff, and defendant appeals. Affirmed.

Bell & Purdum, John B. Cockrum, and W. E. Hackedom, for appellant. Moon & Wolf and Morrison & McReynolds, for appellee.

DAVIS, J. The constitutionality of the clause in the statute¹ authorizing the recovery of a reasonable attorney's fee in actions to foreclose assessment liens for street improvements was settled adversely to appellant in *Dowell v. Paving Co.* (Ind. Sup.) 38 N. E. 389.

In this case a contract was entered into between the city of Kokomo and appellee for the improvement of a certain street, in accordance with the provisions of an ordinance. The work was completed by him "in part according to the contract," and an estimate was properly made on the work. The improvement was not entirely made, in accordance with the provisions of the ordinance, for the reason that, after the contract was entered into, another railroad company, with the consent of the city, constructed a switch in and along one side of the street, thereby rendering it impossible for appellee to complete that part of the work. It clearly appears that the construction of said side track made it impossible to complete the improvement of the street in literal compliance with the provisions of the ordinance without removing the side track. The provision in the statute that the contractor may recover when "the work has been done in whole or in part according to the contract" seems to be applicable in this case. Rev. St. 1894, § 4298.

We see no reason, under the circumstances, why the city had not the right and the power to waive a strict compliance with the ordi-

nance. *Elliott, Roads & S. 400.* Moreover, the work as done by appellee was in due and regular manner accepted by the city as completed. Furthermore, the court reduced the assessment against appellant in the amount required to complete the work, had it been possible to do so, and rendered judgment for the residue. We fail to find any reversible error in the record. Judgment affirmed.

(13 Ind. App. 182)

J. A. COATS & SONS, Limited, v. HUFFINE.

(Appellate Court of Indiana. Sept. 25, 1895.)

SALE—ACTION FOR PRICE—DELIVERY—ACCEPTANCE—QUESTIONS FOR JURY.

1. In an action for the price of 5,000 cards of needles ordered by defendant, there was evidence that the exact number of cards were delivered to the carrier; that they remained in the freight house at defendant's town more than nine months, when defendant paid the freight, and took them to another building for the purpose of ascertaining whether the packages contained the full amount; that the carrier's agent could not say that they were in the same condition when taken away as when they arrived; that the cards were packed in paper boxes, each of which was wrapped with cord, and all were packed in two wooden boxes, neither of which bore any marks of having been opened; that one of the paper boxes was found open, and its contents scattered among the others; and that the lot, when opened, was 46 cards short. *Held*, that whether 5,000 cards were shipped by plaintiff, and whether defendant accepted any portion of them, were questions for the jury.

2. As a purchaser of goods cannot be required to accept a less or other quantity than specified in the contract, where the seller, in an action for the price, relies on the contract, he must prove that he performed the whole of it, by delivering the exact quantity.

Appeal from circuit court, Clinton county; Charles G. Guenther, Special Judge.

Action by J. A. Coats & Sons, Limited, against William A. Huffine, for goods sold and delivered by plaintiff to defendant. From a judgment for defendant, plaintiff appeals. Affirmed.

Strawn & Gray, for appellant. Brumbaugh & Combs, for appellee.

REINHARD, C. J. The appellant sued the appellee to recover the price of 5,000 patent Helix needle cards, at 3 cents per card, amounting to \$150. The complaint is in three paragraphs, the first declaring on an open account; the second, on a written order for the goods; and the third, on a written contract, consisting of a soliciting letter sent by the appellant to the appellee, and an alleged written acceptance of the same sent to the appellant by the appellee. The appellee answered the general denial. The cause was twice tried before a jury, each trial resulting in a verdict for the appellee, the defendant below. The first verdict was set aside on appellant's motion. The refusal of the court to grant the appellant a second new trial constitutes the only error assigned and relied upon. The appellant urges the insufficiency

¹Acts 1891, p. 323, § 2.

of the evidence to sustain the verdict. The evidence shows, without material conflict, that, in response to a circular letter inclosing a blank order, the appellee filled out, and sent to the appellant, by mail, such order, of which the following is a copy:

"Aug. 21, 1893.

"J. A. Coats & Sons, Limited, Department A, Needle Manufacturers, New York City: Please put up for us, and ship by the cheapest way, 5 M. patent Helix needle cards, with our advertisement printed in space below the goods for that purpose, on each card, in the following sizes:

"Sharp, $\bar{5}$, $\bar{6}$, $\bar{7}$, $\frac{1}{8}$, $\frac{1}{16}$, $\frac{1}{32}$. Between, $\frac{8}{16}$.

"Please write advertisement in this space:

W. A. Huffine, Dealer in Dry Goods, Groceries, Boots, Shoes, Hard- ware, &c. Kirklin, Ind.
--

"Terms: 3 days from date of bill; 10% ten days.

"(Sig. of Firm) W. A. Huffine,
"(Town) Kirklin,
"(State) Ind."

Appellant, on the receipt of the order, shipped a consignment of goods, such as were ordered, by way of Merchants' Despatch Transportation Company, on September 6, 1893, addressed to W. A. Huffine, Kirklin, Ind., and sent to appellee, by mail, a bill for 5,000 patent Helix needle cards, at 3 cents per card, which was received by appellee in due course of mail. On the same day as the receipt of the bill, Huffine wrote a letter to appellant, of which the following is a copy:

"Kirklin, Ind., Sept. 11, 1893.

"Messrs. J. A. Coats & Sons, Gentlemen: Your bill for needles received to-day, and I see that some one has made a terrible mistake. I can never use 5,000 papers, in the world. My intention was to order 5 M. needles, 40 papers in an M., and the order would amount to \$8. For Heaven's sake, do not send me 5,000 papers, as I am here in a small place, and can never dispose of them, or pay for them. Please do not send them. If it is my mistake, I will pay you for your trouble, and let you keep them.

"Yours, &c. [Sig.] W. A. Huffine."

Four or five days after writing and sending this letter, Huffine received notice that the goods were at the depot at Kirklin; but he did not take them out, or receive them for any purpose, until some time after the commencement of this action, and after the first trial, when he paid the freight, and had the goods taken to a private warehouse, for the sole purpose, as he says, of examining them to ascertain whether the packages contained the full number of needle cards contained in the order, to wit, 5,000. Upon examination

it was found that the packages contained 48 cards less than 5,000. The railroad agent at Kirklin testified that the boxes containing the goods marked from J. A. Coats & Sons to W. A. Huffine, Kirklin, Ind., arrived at Kirklin on September 14, 1893, and that he promptly notified Huffine of their arrival on the same day; that the boxes remained at the depot till June 21, 1894, at which time they were delivered to Huffine; that, so far as he knew, the goods remained in the freight house all the time they were in the railroad company's care, but were not under his constant observation; and that he could not say that they were in the same condition when taken away as when they arrived. A number of witnesses testified, on behalf of appellant, that the exact number of cards called for in the order (5,000) was shipped in the consignment to Huffine, by being placed in boxes and delivered to the Merchants' Despatch Transportation Company, which was the cheapest and best route for such shipment. The evidence shows that the needle cards were packed in a number of paper boxes, each of which was wrapped with cord, and these were packed in two wooden boxes, which were addressed to Huffine; that the wooden boxes did not bear any marks of having been opened or tampered with, when taken from the depot, but that one of the paper boxes within one of the wooden ones was open, and its contents were scattered among the other paper boxes, which were all securely closed and wrapped.

It is the contention of appellee's counsel that, conceding that appellee contracted for the goods as claimed by the appellant, the contract was an entirety, and that appellee was not bound to accept a smaller or other quantity of goods than that called for by the order, and that, if appellant relies upon the contract, it must prove that it performed the whole of it, by shipping to the appellee the exact quantity ordered by him. *Smith v. Lewis*, 40 Ind. 98; *Hausman v. Nye*, 62 Ind. 485. We regard the rule to be as contended for by appellee, if appellant relied upon the express contract. The evidence on the one hand, to the effect that the goods were shipped in the quantities and sizes ordered, and the evidence on the other hand, that they were short upon arrival, or at least when opened, made it a case peculiarly within the province of the jury to determine whether in fact the goods had been shipped by the appellant in the quantities ordered by the appellee. It is true that the placing of the goods on board the cars in New York was all the appellant was required to do. This was a complete delivery to the appellee, and vested the title of the property in him. *Rechtin v. McGary*, 117 Ind. 139, 19 N. E. 731; *Sohn v. Jerbis*, 101 Ind. 578; *Bartlett v. Jewett*, 98 Ind. 200. That the goods were short 48 cards when the boxes were opened, and that the latter did not have the appearance of having been tampered with, were circum-

stances the jury had a right to consider, in determining whether the full quantity of the goods ordered had been shipped. The jury having determined that question in favor of the appellee, and that determination having received the approval of the trial court, we cannot disturb the verdict or judgment on that ground.

Of course, if the appellee accepted any portion of the goods, he is liable for them, and appellant could have recovered for the same, under the issues joined. But we cannot say, as a matter of law, that the taking of the goods, under the circumstances shown, was or was not an acceptance of the same. This was likewise a question for the jury, and their verdict for the defendant was a finding that it was not such an acceptance. One of the instructions requested by the appellant informed the jury that if the appellee accepted any portion of the goods, by paying the freight, and taking them out of the freight office and into his possession, by directing what should be done with them, he thereby waived any defect as to the number and quantity, and was liable for that portion of the goods so accepted by him. The court modified this instruction by adding to the condition the further one, that, if appellee exercised acts of ownership over such goods, he would be liable for them. We find nothing improper in this modification. Whether the acts of the appellee were or were not acts of ownership over the goods was for the jury to determine. Another instruction was similarly modified, and for similar reasons the ruling must be upheld.

Many other reasons are presented in the motion for a new trial, but the foregoing are the only ones discussed in appellants' brief, and are consequently all the appellants are entitled to have considered. Judgment affirmed.

(13 Ind. App. 176)

LEFFLER v. WATSON et al.

(Appellate Court of Indiana. Sept. 26, 1895.)

REHEARING—REVIEW.

Errors not presented in the original hearing on appeal are waived, and cannot be raised for the first time on petition for rehearing.

Petition for rehearing. Overruled.

For former report, see 40 N. E. 1107.

GAVIN, J. Counsel for appellant, in vigorous and acuminous language, ask a rehearing. It is asserted most positively that the statement of facts made by the court is incorrect, and without support from the evidence in various particulars: First. In stating that one barrel was to be shipped immediately, and the other four about March 25th, provided the first gave satisfaction. Yet not only is there evidence clearly sustaining the statement, but in their own original brief appears the following, after referring to certain evidence: "This, we think, clearly shows that he

sold these goods to L. W. Simonds & Co. on the contract as stated; that one barrel was to be shipped at once, and the other four barrels about March 25th, with but this one condition, namely, that the first barrel so shipped gave satisfaction." In the light of the counsel's own statement, it is difficult to perceive the inaccuracy in ours.

Complaint is also made that we said: "Prior to this, Simonds & Co. had written and mailed a letter directing them not to send the fourth barrel." In discussing this, as also other points, counsel fall into the error of viewing that part of the evidence most favorable to themselves, and of ignoring or disregarding that to which we are bound to give effect, namely, the evidence most favorable to appellees. Romaine testified that this letter was written and mailed at 10 a. m. a day or so before the receipt of the goods, while George T. Simonds says it was written the day before the bill of lading was received. Considering the distance from the point of shipment, the jury might well have found that this letter was written prior to the shipment, although the particular time, whether just before or after the shipment, is wholly immaterial in the view of the case taken by the court, which was that the rescission of the sale was a completed transaction, through the letters written by each to the other. Whether there were one or two each way is immaterial.

Counsel assert that they find "no evidence at all of the words used by the court" as to the contents of the letter written by Watsons to Simonds, and yet in the record we find the evidence substantially and almost literally as set forth in the opinion. It is said that the admission of certain evidence of E. H. Watson was "the baldest kind of an error; it was an outrage." Yet counsel in their original brief did not see fit to refer to it.

So, likewise, the fourth cause for rehearing depends upon alleged error in the introduction of evidence as to which no complaint was made. Any errors not presented in the original hearing are thereby waived, and cannot be raised for the first time on petition for rehearing. Elliott, App. Proc. § 557.

We have given to the petition careful consideration, and to the record a thorough re-examination, and are satisfied with all the material statements, both of law and fact, contained in the original opinion. We are strongly impressed with the belief that counsel's care in examination of the record has not been equal to their zeal for their client's cause. Petition overruled.

(13 Ind. App. 190)

MILLER v. MICHEL et al.

(Appellate Court of Indiana. Sept. 24, 1895.)

LANDLORD AND TENANT—ABANDONMENT BY TENANT.

While plaintiffs were in possession of a farm under a lease, the landlord, without their consent, leased the premises to a third

person, who immediately entered, occupied one of the farmhouses, and began plowing. *Held*, that plaintiffs might treat this as an eviction, and abandon the whole premises.

Appeal from superior court, Vanderburgh county; John H. Foster, Judge.

Action by Johann Michel and another against David L. Miller for the recovery of money paid under a lease. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jas. W. Davis and Elmer Gockyear, for appellant. Peter Maler, Geo. Palmer, and L. J. Herman, for appellees.

GAVIN, J. Appellant leased a farm to appellees, Michel and Engelman, for five years, at \$700 per year. They paid the first year's rent, and \$300 on the last year, which was really paid in lieu of security. At the end of the first year, appellees left the farm, and sued to recover the \$300, alleging an eviction by appellant, who answered by denial, and also filed a counterclaim, averring that appellees had abandoned the land, and he had been compelled to re-rent to another tenant at a less price. For the difference between that and the contract price he asked to recover.

Appellant questions the sufficiency of the evidence to sustain the verdict against him. He earnestly argues that there is no evidence of eviction. There is testimony that without the consent of appellees, and before the expiration of the first year, appellant put another into a house upon the place, and he began to plow for wheat, having rented the farm from appellant for a term of five years. These acts constituted more than a mere fleeting trespass. They were of such a serious and permanent character as to indicate an intention upon the part of appellant to deprive appellees of the enjoyment of the land. These acts were done, as the jury might well infer from his own testimony, under an assertion of right; he deeming he was entitled to do them by reason of appellees' having told him they would not keep the farm, and, as his son testifies, with the express consent of one of the appellees as to part of the acts. The evidence, while conflicting, was such as to authorize the jury to find that there was an eviction from part of the land, and an abandonment by appellees of the entire land for the remainder of the term. Under the authorities, when thus ousted by their landlord from a material part, they had a legal right to abandon the whole. *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123; *Rice v. Dudley*, 65 Ala. 68; *Hayner v. Smith*, 63 Ill. 430; *Upton v. Greenlees*, 17 O. B. 51-67; *Mayor, etc., v. Mable*, 13 N. Y. 151; *Skally v. Shute*, 132 Mass. 367. In the 102 Ind. (2 N. E.) case it is said that the entry by the landlord must be under an assumption of title, although it is intimated that on the trial this might be inferred. In the last two cases above cited it is decided that the acts themselves may be of such a character as to be assertive of title.

Tayl. Landl. & Ten. § 315, says: "It is also implied that the tenant shall have the free use of the whole of the premises; and, if he is ousted from any material part thereof, he may treat it as an eviction from the whole premises, and throw up the lease." It is true, as asserted by counsel, that if appellees had desired they might have treated appellant's new lessee as a trespasser, and ejected him; but they were not bound, and did not choose, to so do. Appellant opened the door that they might step out. The mere fact that they really desired to do that which he thus gave them an opportunity to do does not deprive them of their legal right to take advantage of his wrong to free themselves from a bad bargain.

An offer was made to prove the difference between the actual value of the unexpired lease and the contract price promised by appellees. It is sufficient to say that this was not the issue tendered by appellant's sixth paragraph of counterclaim. The loss is alleged to have accrued, not by reason of the term's being really worth less, but by reason of his having been compelled to rent it for less. What he rented it for does not appear, either by way of proof or offer. So far as the record discloses, the new lease may have been on exactly the same terms as the old.

The written document approved by appellant was not inadmissible for the want of his signature. It was not in the nature of a writing signed by him, and thus to be received as executed by him; but as a memorandum, the contents of which had been made known to and approved by him, it was properly used in connection with the parol testimony accompanying it. *Cook v. Anderson*, 20 Ind. 15; *Miner v. Lorman*, 66 Mich. 530, 33 N. W. 866. Judgment affirmed.

(14 Ind. App. 472)

STATE ex rel. McKINNEY v. SOUDER
et al.¹

(Appellate Court of Indiana. Sept. 25, 1895.)

CLERK OF COURT—ILLEGAL FEES—RECOVERY.

Act March 31, 1879, § 37, providing for the recovery of five times the amount of fees illegally charged by an official, in an action in circuit court on his official bond, as amended by Act 1883 (Rev. St. 1894, § 6549), which provides that the amount paid may be recovered in an action preceded by demand, in any of the courts of the county, together with from \$10 to \$30 as damages, does not authorize an action in the superior court, on the official bond, to recover the illegal fees and damages.

Appeal from circuit court, Allen county; C. M. Dawson, Judge.

Action by the state, upon the relation of Daniel McKinney, against Daniel W. Souder and his sureties, to recover fees alleged to have been illegally taken by him while clerk of court. There was judgment for defendants, from which plaintiff appeals. Affirmed.

E. V. Harris and A. A. Chapin, for appellant. Breen & Morris, for appellees.

¹ Rehearing denied.

DAVIS, J. This action was brought on the 24th day of November, 1894, in the name of the state of Indiana, upon the relation of Daniel McKinney, as provided in section 253, Rev. St. 1894 (section 253, Rev. St. 1881), against Daniel W. Souder and the sureties on his official bond as clerk of the Allen circuit court, to recover fees alleged to have been illegally taken and received from said McKinney by the said Souder, while clerk; also, to recover the penalty provided by section 8 of the act approved February 28, 1883, for taking and receiving such illegal fees. Acts 1883, p. 48. As Souder was elected clerk in 1890, we need not consider the fee and salary acts of 1891 and 1893. The superior court of Allen county was established in 1877.

The only question involved in this appeal is whether there is any statute of this state authorizing such action in the superior court of Allen county, on the official bond of the clerk, to recover such illegal fees and the penalty provided by the act of 1883. Section 37 of the act of March 31, 1879, is as follows: "Any officer who shall charge, demand or take any fee for an official act done or performed under the provisions of this act other than is herein allowed and provided for, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, and shall be liable on his official bond to the party injured for five times the illegal fees charged, demanded or taken, and the same may be recovered with costs in the circuit court; provided, no officer shall be liable for any unlawful sum charged or taken by his deputy unless he knew of and failed to correct the same, and such deputy shall be liable as an officer to prosecution for such unlawful charge or taking." Under this section the clerk was liable, in an action on his official bond, in the circuit court, to the party injured, for five times the illegal fees, and also to a fine, in a criminal prosecution, in any sum not exceeding \$100. Section 8 of the act of 1883, supplemental to the act of 1879, is as follows: "If any county, township, or other public officer of the state shall violate or disregard this act or any part thereof, and shall thereby obtain any fee or sum of money denied him by this act, the person or persons from whom he received such money shall have his right of civil action in any of the courts of the county for the recovery of such money, and he shall in connection therewith recover a sum of not less than ten dollars damages and not more than thirty dollars damages, but such suit shall be preceded by demand." Acts 1883, p. 48. Under this section the clerk, in a civil action in any of the courts of the county, is personally liable to the person from whom he received illegal fees, for such fees, and, in addition thereto, a sum not less than \$10 and not more than \$30. Under section 37 of the act of 1879, the superior court has no jurisdiction of an action on the official bond of the clerk. Section

8 of the act of 1883 gives no right of action upon an officer's bond. It simply provides that the person from whom excessive fees have been collected may recover the amount of illegal fees taken, with a certain penalty, in case they are not paid upon demand, which must previously be made therefor. Appellant's counsel admit, we believe, that the law of 1883 does not give a right of action upon official bonds; but they claim that section 8 of this law is to be combined with section 37 of the act of 1879 (Burns' Rev. St. 1894, § 6549), and that these two sections, combined, do give such right of action. They seem to admit that section 8 of the act of 1883 repeals, by implication, so much of section 37 of the act of 1879 as fixes the penalty that individuals may recover, and the court in which the action may be brought. They contend, however, if we understand their argument, that an individual still has a right of action upon an officer's bond, as provided by section 37 of the act of 1879, to recover the penalty provided in section 8 of the act of 1883. In other words, the contention of counsel for appellant is that the only repugnancy existing in section 37 of the act of 1879 and section 8 of the act of 1883 is with reference to the civil liability of an officer demanding, taking, and receiving illegal fees for his services, and that such matters in the former as are not repugnant to like provisions in the latter statute are left standing, and are not repealed by the latter. Counsel for appellant insist that section 8 of the act of 1883 revises the whole subject-matter of section 37 of the act of 1879, and that it was intended by the legislature as a substitute therefor. *Koons v. Cluggish*, 8 Ind. App. 282, 34 N. E. 651; *Allen v. Town of Salem* (Ind. App.) 38 N. E. 425; *Telegraph Co. v. Brown*, 108 Ind. 533, 8 N. E. 171. Assuming, however, without deciding, that section 37 of the act of 1879 is still in force, it should then be remembered that this action was instituted in the superior court of Allen county, on the official bond of the clerk, under the provisions of said section 37, to recover the illegal fees and penalty as provided in section 8 of the act of 1883. Section 37 created a right of action on the official bond, and named the court in which such right should be enforced. This action is manifestly founded on the act of 1883, on the theory that such action may be maintained on the official bond in the superior court. Therefore, whether section 7543, Rev. St. 1894 (section 5528, Rev. St. 1881), gives, of itself, a right of action upon the official bond of the clerk for the recovery of illegal fees, we need not determine. This action, as we have seen, is to recover fees alleged to have been illegally taken and received by the clerk, and also to recover the penalty provided by section 8 of the act of 1883 for taking and receiving such illegal fees. The action having been prosecuted on the theory that sections 8 and 37, *supra*, authorized a recovery of such fees and penalty

on the official bond in the superior court, appellant must stand or fall by that theory in this court. It follows, therefore, that if appellant could have brought his action against appellees under section 7543, *supra*, he has, by his election to bring his action under the act of 1883, to recover a penalty not given in section 7543, no right to recover under the latter section in this action. Whatever view may be taken of the other questions involved in this appeal, it seems clear to us that an action cannot be maintained on the official bond of the clerk, in the superior court, to recover the damages prescribed in section 8 of the act of 1883. If section 37 of the act of 1879 is in force, the action on the bond should have been instituted in the circuit court. If the right and the remedy provided in section 8 of the act of 1883 have taken the place of the right and the remedy provided in section 37 of the act of 1879, this action cannot be maintained. In any event, there is no right of action in the superior court upon an officer's bond, as provided by section 37 of the act of 1879, to recover the penalty prescribed in section 8 of the act of 1883. Judgment affirmed.

(13 Ind. App. 600)

LAKE ERIE & W. R. CO. v. ROOKER.¹

(Appellate Court of Indiana. Sept. 27, 1895.)

RAILROAD COMPANIES—LIABILITY FOR KILLING ANIMALS—FENCES—TRIAL—ADMISSIONS BY COUNSEL.

1. Under Rev. St. 1894, § 5323, making a railroad company liable for stock killed by its trains on its right of way, which entered thereon by reason of insecure fencing, the fact that the place where the stock entered could not be fenced is matter of defense.

2. The fact that the right of way of a railroad company is parallel to and overlaps a public highway will not excuse it from securely fencing its right of way as required by law, if there is room between the tracks and the highway for the fence.

3. Where, in an action against a railroad company for stock killed, the complaint alleges the killing of the stock by defendant's train, and there is evidence that another company also runs trains over the road, to support a verdict against defendant it must be shown that the stock was killed by one of defendant's trains.

4. The incidental statement of counsel in opening the case, of a fact as he expected to prove it, is not an admission of such fact, so as to relieve the opposite party of the burden of proof if that fact is relied on by him.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by James I. Rooker against the Lake Erie & Western Railroad Company for killing plaintiff's horse on its right of way. From a judgment for plaintiff, defendant appeals. Reversed.

Miller, Winter & Elam, for appellant. W. V. Rooker, for appellee.

GAVIN, J. Appellee recovered judgment against appellant under Rev. St. 1894, § 5323, for killing his horse, which had entered upon its road where it was not fenced. The aver-

ment that the road should have been fenced at the point of entrance was unnecessary, and should have been omitted, since the law imposes upon the defendant in such cases the burden of showing that the road could not there be lawfully or properly fenced. *Railway Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. 790; *Railroad Co. v. Fly*, 8 Ind. App. 602, 36 N. E. 215. The statute, by its terms, imposes upon railroad companies a liability to pay for all stock killed by its locomotives or cars when the animal entered upon the road by reason of its not having been securely fenced. In order, however, that the road be "securely fenced," it is not essential that it be fenced at every point along the line. There are many places, such as at stations, sidings, etc., where it is not practicable nor necessary to build fences along the road. Where the fence cannot be built without obstructing a public highway, the company is neither permitted nor required to fence in the road. *Railroad Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 299; *Railroad Co. v. Harbold*, 99 Ind. 91; *Railroad Co. v. Francis*, 58 Ind. 389. Counsel contend that, because the company's right of way overlapped (how much does not appear) a highway running parallel to the railroad, it is, upon the principle above stated, relieved from fencing at that place. If, however, there is sufficient space between the railroad and the highway for the company to fence in its railroad, it must do so if otherwise proper, even if it be compelled to locate the fence on part of its reservation for a right of way. *Railroad Co. v. Tipton*, 101 Ind. 197; *Banister v. Pennsylvania Co.*, 98 Ind. 220; *Railroad Co. v. Shanklin*, 94 Ind. 297; *Railroad Co. v. Forshoe*, 77 Ind. 158. The statement, both of law and facts, made in the case last cited, fit the one in hand quite closely. "On applying the foregoing rules to the evidence in this cause, it appears that the fence in the railway, at the place in controversy, would not interfere with any public or private right in reference to the highway. The highway runs parallel to the railroad, and near it, but the track is not upon the highway. There was some parol testimony that the right of way claimed by the company encroached upon the highway,—to what extent does not appear; but there was evidently room enough between the track and the highway for a fence. A fence had been maintained there. There being room enough, the fact that the company would have to put the fence on part of its reservation for a right of way would be no excuse for not building the fence."

The evidence is that the appellant operated and (possibly) owned the railroad, but that the Panhandle Company also operated and ran its trains over the road by some unknown arrangement. The complaint charges that the horse was killed by a locomotive owned and operated by appellant. Under the decision of the supreme court in *Railroad Co. v. Wood*, 82 Ind. 593, this averment is a

¹ Rehearing denied.

vital one, and is not sustained by proof that the horse was killed by a train owned and operated by another company, even though it was appellant's lessee. If it is sought to hold the owner of the road liable for its lessee's act, the relation between the roads must be pleaded, with the appropriate facts necessary to create the liability. There is an utter failure of evidence to show whether the horse was killed by appellant's train or that of the Panhandle. Both companies are shown to have been running trains over the road, and, in the absence of any facts to indicate by whose train it was killed, the verdict cannot be sustained. Were there no evidence concerning the Panhandle trains, then the presumption might exist that the harm was occasioned by appellant's train, as in *Railroad Co. v. Carson*, 4 Ind. App. 185, 30 N. E. 432.

We do not regard the incidental remark of appellant's counsel, made in his opening statement, relative to the fact as he expected to prove it, as being binding upon appellant, so as to supply appellee's lack of evidence. It does not appear to have been made pursuant to any agreement relative to the facts, nor as a formal admission intended to obviate proof upon the point. We are of opinion that the rule is well expressed by Lord Ellenborough in *Young v. Wright*, 1 Camp. 139: "If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission." The law is thus stated in 1 Greenl. Ev. § 186: "The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed 'solemn,' admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial." The principle governing in *Oscanyan v. Arms Co.*, 103 U. S. 261, cannot be deemed controlling, by reason of the wide difference between the circumstances of that case and those here involved. Here the general denial was pleaded. It devolved upon appellee to make out his case. There is nothing to indicate that appellant's counsel intended to relieve appellee from that burden, or make any admission for the purpose of obviating the necessity of proof upon any material point. Judgment reversed, with instruction to sustain the motion for new trial.

(12 Ind. App. 538)

KEELEY BREWING CO. v. PARNIN.¹

(Appellate Court of Indiana. Sept. 27, 1895.)

NEGLIGENCE—PLEADING—NEGATING CONTRIBUTORY NEGLIGENCE—SPECIAL VERDICT.

1. In an action for injury sustained by the running away of plaintiff's horse from being frightened by one of defendant's servants

throwing a keg into the street, an averment that the injury was caused "without any fault or negligence on the part of plaintiff" sufficiently negatives contributory negligence by plaintiff.

2. A complaint for injury sustained by the running away of plaintiff's horse from being frightened by a negligent act of defendant must aver that such act was one that would naturally frighten a roadworthy horse.

3. A complaint for injury sustained by the running away of plaintiff's horse from being frightened by the defendant negligently throwing a keg into the street alleged that the act "was well calculated to and did frighten said horse." In answer to the special interrogatory whether the keg and the manner in which it was thrown were "naturally calculated" to frighten the horse, the jury answered, "No; but they did." *Held*, that a general verdict for plaintiff was inconsistent with the special findings.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by Adolph Parnin against the Keeley Brewing Company for injury sustained by the running away of plaintiff's horse, frightened by negligence of a servant of defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Breen & Morris, for appellant. W. G. Colerick and Wm. E. Colerick, for appellee.

LOTZ, J. The appellee, plaintiff below, while traveling upon a highway in Allen county, was thrown from the vehicle in which he was riding, and sustained injuries to his person. The injuries were caused by his horse becoming frightened at a beer keg thrown upon the highway by the appellant's servant. This action was brought to recover damages for the injuries sustained, alleging negligence on the part of the appellant. The cause was tried by a jury, which returned a general verdict for appellee in the sum of \$2,500, on which judgment was rendered.

The first assignment of error calls in question the sufficiency of the complaint to withstand appellant's demurrer for want of facts. The substantial averments of the complaint are that on the 9th day of August, 1893, the plaintiff was traveling on and along a public highway in a buggy drawn by a horse; that on said day the defendant was engaged in vending and delivering beer and other malt liquors; that, situated along the highway, and within about 50 feet thereof, was a building used by the defendant in its business as a saloon; that when the plaintiff reached a point in the highway opposite the building, the defendant, by one of its servants, who was in the building, "carelessly and negligently threw from the cellar of said building into and upon said highway in front of said horse an empty beer keg, which frightened said horse, and caused it to become unmanageable, and run away, upsetting said buggy, and hurling therefrom the plaintiff to and on the ground and against a fence, which resulted in inflicting upon his person many serious injuries, as hereinafter stated; that said injuries were caused by the carelessness and negligence of said serv-

¹ Rehearing denied.

ant, who then was in the employment of the defendant, and in the performance of his duties as such servant, and without any fault or negligence on the part of the plaintiff; that said beer keg so thrown, and as thrown, was well calculated to and did frighten said horse." The appellant assails this complaint with much vigor, asserting that it does not appear from the averments that the defendant owed the plaintiff any duty which the defendant failed to perform; that it nowhere appears from the averments that the horse which the plaintiff was driving was a roadworthy horse, or one of ordinary gentleness. The principal and primary purpose of the ordinary highways is to afford the people of the state a means of intercommunication, and of passing from place to place. They are specially designed for passage and travel. But this is not the sole and exclusive purpose for which they may be used. They may be lawfully used for many other purposes, provided such uses do not materially interfere with the primary purpose. The right of the public to the use of the highways is subject to reasonable and necessary limitations. The improvement of the highways themselves, the improvement of abutting lots by digging cellars and the erection of buildings, their use for the carriage and delivery of grain, fuel, and other goods, the loading and unloading of the same thereon, are legitimate uses of the highways, although such uses may result in a temporary obstruction to the travel. *Beach, Pub. Corp. § 1230; Dill, Mun. Corp. § 730.* The defendant had the right to use the highway for the purpose of loading and unloading its beer kegs. But the plaintiff's right to travel thereon was the superior right. Neither will he be permitted to abuse the privilege which the law gives. It is the duty of a traveler upon a highway to take into consideration the rights of his fellow travelers, and the right of others to use it for purposes other than for travel, and to conform to those usages and customs which have grown up with that stage of civilization and commerce of the country through which they are constructed. The person using a highway for other purposes than travel is in duty bound to conform to the rights of the traveling public. A violation of these duties may constitute negligence, and lead to legal liability. There is no rule of law that forbids a person from traveling on a highway with a skittish or ill-broken horse, but if he do so he may be liable for the injuries resulting therefrom. Nor is there any fixed rule as to what objects a person may bring upon, or what acts he may do upon, a highway. But there are objects and acts which have a tendency to frighten horses. The frightening of horses is governed by no fixed rule. A gentle horse will sometimes become frightened at a very insignificant object or act, which a skittish horse may pass unnoticed. It is, however, a well-known fact that there are objects, acts, and sounds that have a

natural tendency to frighten all horses, the gentle as well as the skittish. If a person bring such an object upon or do such an act on a highway, he will violate a duty he owes to the traveling public, and be guilty of negligence. It does not follow that because he is negligent he is liable. The person injured may also be in fault. If the latter be traveling with a skittish or untrustworthy horse, there are instances in which he will be deemed to have assumed the risk or contributed to his own injury; for, although the object or act done may have had a tendency or was likely to frighten any kind of a horse, and although both a gentle horse and a skittish horse might have passed the object or act without becoming frightened, still there is much more probability that a skittish horse would become frightened than a gentle and well-trained one. It is for these reasons that, in order to make the complaint good, it should aver, either specially or in equivalent general terms, that the object or act done had a tendency to or was likely to frighten a horse of ordinary gentleness. In other words, the complaint must aver negligence on the part of the defendant and negative contributory negligence on the part of the plaintiff. *Town of Rushville v. Adams, 107 Ind. 475, 8 N. E. 292; Elliott, Roads & S. pp. 448, 449; Piolet v. Simmers, 106 Pa. St. 95; Railway Co. v. Taylor, 104 Pa. St. 306.* If the obstruction or act be one that a person have no right to do or make at all, then there may be a liability, even though the horse be not one of ordinary gentleness. *Railway Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64.* But no question of that kind is presented here. The complaint before us does charge negligence on the part of the defendant, but it does not aver in direct terms that the horse the plaintiff was driving was an ordinarily gentle horse. It does charge, however, that the injury was caused "without any fault or negligence on the part of the plaintiff." It has often been decided that contributory negligence may be negated by a general averment. *Railroad Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396; Railroad Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 323.* There was no error in overruling the demurrer to the complaint.

The jury, with their general verdict, returned answers to interrogatories. The appellant moved for a judgment in its favor on these answers. This motion was overruled. This ruling is one of the errors assigned. The interrogatories and answers essential for the consideration of this assignment are as follows: "(1) Was not the plaintiff injured on the 9th day of August, 1893, in the manner and by reason of the causes stated in his complaint in this action? Ans. Yes. (2) Were not the injuries which the plaintiff received caused by the negligence of a servant of the defendant, as stated in the complaint in this action? Ans. Yes. (3) Were not the plaintiff's injuries received by him without any

fault or negligence on his part? Ans. Yes; not his fault. (4) Was not the horse that plaintiff was driving at the time he received the injuries of which he complains of ordinary gentleness? Ans. Yes, he was. (5) Were not the kegs which frightened the plaintiff's horse and the manner in which they were thrown, naturally calculated to frighten said horse? Ans. No, but they did." The undisputed evidence shows that two kegs were thrown, both of which frightened the horse; the second one causing it to run away. It is settled by many decisions that a general verdict of necessity covers the whole case. It includes the facts proved and the law as applied to them. It determines every material fact against the unsuccessful party. Answers to proper interrogatories only determine special questions of fact. One of the purposes of interrogatories is to test the correctness of the general verdict; to determine whether or not the jury have correctly applied the law to the facts proved. If the general verdict be for the plaintiff, and the existence of a certain fact be essential to the right of action, and should the jury, in answer to interrogatories, find that the fact does not exist, then it is apparent that there is an irreconcilable conflict. It is clear, under such conditions, that the general verdict is wrong. It is overthrown and destroyed by the special finding. In determining whether or not there is an irreconcilable conflict, certain rules of construction must be borne in mind. The general verdict must be liberally construed, and every reasonable and fair intendment indulged to uphold it; while answers to interrogatories must be strictly construed, and unaided by intendment. Improper interrogatories should not be submitted, but, if they should be, the answers cannot be considered for any purpose. Thus, if an interrogatory ask for an immaterial fact, or for a matter of law, its answer will have no weight in overthrowing the general verdict. If the answers should be inconsistent with each other, or contradictory and uncertain in their meaning, they may neutralize and destroy each other, but they will not be permitted to control the general verdict. In one case it is held that the answers will not control unless they constitute an insurmountable barrier to a recovery, and are so antagonistic as to preclude reconciliation. *Railway Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64. In another it is said: "They override the general verdict only when both cannot stand together, the antagonism being such upon the face of the record as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the case." In another case it is held that the general verdict must stand unless the facts found in answer to the interrogatories are utterly destructive of it. *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139. This court, in *Railroad Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183,

said: "It is only when the answers to the interrogatories are absolutely irreconcilable with the general verdict that the general verdict will be controlled by them." And in *Railroad Co. v. Marohn*, 6 Ind. App. 646, 34 N. E. 27, this language is used: "Before the general verdict will yield to the special findings, they must so antagonize each other that by no reasonable hypothesis can they be reconciled. It is then, and then only, that the findings control." See, also, *Shuck v. State*, 136 Ind. 71, 35 N. E. 993; *Bedford v. Spillman* (Ind. App.) 39 N. E. 427. The appellee's learned counsel invoke the above rules, and vigorously insist upon their enforcement in this case. It is contended that it is possible to reconcile the answers to the interrogatories with the general verdict, and that such reconciliation is based upon a reasonable hypothesis. Interrogatory numbered 1 is somewhat general in its character. If the "causes" referred to be construed to mean the breach of duty which the appellant owed the appellee, or the negligence charged, then the interrogatory was improper, and its answer cannot be considered. But if the word "causes" be construed to mean the throwing of the beer keg, the fright of the horse, and the hurling of the plaintiff to the ground and against the fence, then it was proper, and its answer is not in conflict, but in harmony, with the general verdict. We are inclined to give it the latter construction. Interrogatories 2 and 3 ask for the opinion of the jury upon matters of law. They are improper, and should not have been given. Their answers cannot be considered either for the purpose of sustaining or overthrowing the general verdict. *Railroad Co. v. Pedigo*, 108 Ind. 451, 8 N. E. 627. Interrogatory 4 asked for a pertinent and material fact, and its answer tends to support the general verdict, for the character of the horse was a material element in plaintiff's case. Interrogatory 5 was also pertinent and proper, for, whether or not the beer keg, and the manner in which it was thrown, were likely to frighten the plaintiff's horse were important facts in the case. By this interrogatory and answer it is disclosed that, although the beer keg, and the manner in which it was thrown, did frighten plaintiff's horse, they were not naturally calculated to have that effect. If it was necessary to aver that the keg, and the manner in which it was thrown, were apt to, or naturally liable to, or were intended or calculated to, frighten a horse of ordinary gentleness, it was also necessary to prove it. It is averred in the complaint that the "beer keg so thrown and as thrown was well calculated to and did frighten said horse." The interrogatory asks whether or not the beer kegs, and the manner in which they were thrown, were calculated to frighten the horse. The word "calculated" is used in both the complaint and the interrogatory. Being used by the same party, on the same occasion, and

in reference to the same matter, the presumption would be that it was used in the same sense, and that the jury attached the same meaning to the word in the interrogatory as that applied to it in the complaint. The use of the word "calculated," in the sense of "likely," "apt," or "liable" to, is perhaps permissible under the precedents, but such use is not to be commended. "Calculate" primarily means to "compute mathematically." It implies the power to think, to study, and to reason. It is usually applied to sentient beings,—those having the faculty of sensation, the power to perceive, reason, and think. As a provincialism it is sometimes used in the sense of "to intend," "to design," "to plan," or "to purpose." Whenever a thing or object is so constituted by nature as to be likely to produce a given effect, it may be said to have an aptitude or inclination to that end. And this is the condition the law required the appellant to guard against. In whatever sense the word was used in the complaint, it was, we think, used in the same sense in the interrogatory. If it means "to intend," "to design," "to plan," or "to purpose" in the complaint, it means the same in the interrogatory. If it means "having an aptitude or inclination" in the complaint, it means the same in the interrogatory. If it was not necessary to aver that an object or thing had a natural tendency to frighten a roadworthy horse, then the answer to the interrogatory would not conflict with the general verdict, for the jury would not necessarily give it any meaning in the complaint. Was it necessary to make such averments? In *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 202, in speaking of the sufficiency of the complaint, this language is used: "In order to render the corporation [the defendant] liable in such cases, it must in some way be made to appear that the object or obstruction was one naturally calculated to frighten horses of ordinary gentleness, and that the horse frightened was one of such a character." In *Railway Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, it is said: "It is not, therefore, a subject to be pleaded and proved whether a box car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury, as applied to all the facts of the particular case before them." This language was used by the learned judge who wrote the opinion, not on a question of the sufficiency of the complaint, but on a question of the admissibility of evidence. Nor was there anything in the question under consideration that required such statement. The sufficiency of a pleading was not the point in judgment. The language quoted was not necessary to be used in deciding the questions before the court in that case. This language was mere *ebiter dictum*, and cannot be controlling here. It is possible that the statement quot-

ed states the law correctly as applied to the facts of that case. If there be a permanent obstruction of a highway, such as to constitute a nuisance, it may be that there is a liability irrespective of its character or of the character of the horse frightened. But in the case in hearing the appellant was doing an act upon the highway—loading beer kegs—which it might lawfully do. It was only required to do it in a careful manner. We think the weight of authority is to the effect that in a case like the one at bar a person who brings an object upon or does an act upon the highway that is likely to frighten a horse of ordinary gentleness, is guilty of negligence; and that, if a person bring an object upon or do an act upon the highway, with the design, intention, or purpose of frightening horses, he is guilty of a positive and aggressive wrong, and liable for the injury resulting, no matter what the character of the horse may be. In either case it is necessary to aver the breach of duty generally or specially. If the word "calculated," as used in the complaint and interrogatory, be considered in the sense of "likely" or "apt," there is a fatal conflict between the answer and the general verdict. If it be considered in the sense of "designed" or "purposed," there is also a fatal conflict. It is true, as appellee's counsel urge, that it is possible to reconcile the answer to this interrogatory with the general verdict by saying that the word "calculated" was used in the sense of "likely" or "apt" in the complaint, and in the sense of "intended" or "purposed" in the interrogatory; but such a reconciliation would not be a reasonable one. It was necessary that the jury give the word a meaning in arriving at their general verdict and necessary to give it a meaning in the answer to the interrogatory. To say that the jury gave it one meaning in the complaint and another and entirely different meaning in the interrogatory, when they both related to the same thing, and the word was apparently used in the same sense, would be trifling with the forms of justice. By the answer to the interrogatory it is apparent that an essential fact is wanting to establish the appellee's right of action. In view of the character of the evidence upon this proposition, we do not feel justified in ordering judgment on the answer to this interrogatory, but believe that the ends of justice will be subserved by directing a new trial. Judgment reversed, with instructions to grant a new trial to the appellee if asked for within 90 days; otherwise to render judgment on the answer to the interrogatory.

DAVIS, J. In my opinion, so far as the pleading is concerned, it was not necessary to allege that the negligent act which is charged as the proximate cause of the injury was calculated to cause the injury. Under the circumstances disclosed by the complaint, when it is made to appear that the injuries

sustained were the proximate result of the negligent act of the defendant, the complaint on that question is sufficient. When one violates a duty he owes to another, he is liable for all the probable results of his negligent act; and therefore, where it clearly appears that the result was one that was improbable, the circumstances may be such as to defeat the action.

(13 Ind. App. 239)

BIDDLE v. PIERCE et al.

(Appellate Court of Indiana. Oct. 8, 1895.)

COMPROMISE—VALIDITY—COLLATERAL ATTACK—FINDINGS BY COURT.

1. Where, on suit by part of the children of a deceased father against the rest for their distributive share of his estate, the plaintiffs ask to have advancements canceled by the father revived, and deeds executed by him to each when he canceled the advancements declared void, on the ground that at the time he was of unsound mind, an agreement that the advancements should be revived and the suit withdrawn on payment of a certain sum by defendants is a valid compromise of the suit.

2. A compromise judgment is, on collateral attack, binding against a party to the action represented by counsel who assents thereto, though such party was not present in person when the compromise was made, and the assent of counsel was unauthorized.

3. On a suit for distributive shares of an estate, the court need not, in its conclusions of law, state the exact amount due each party, but it is sufficient if data are given from which the exact amount can be calculated.

Appeal from circuit court, Montgomery ty; J. F. Harney, Judge.

Action by Martha Biddle against William R. Pierce and others for her share of the balance of an estate. From a judgment for defendants, plaintiff appeals. Affirmed.

Billings & Son and L. J. Cappage, for appellant. Paul & Bruner and Crane & Anderson, for appellees.

REINHARD, C. J. The controversy in this case is over the partition of certain funds in the hands of Crane & Anderson, trustees, of which appellant and appellees are the owners, as the heirs of one Basil Tracy, late of Montgomery county, deceased. Tracy was a large property owner in said county, the father of eight children, some of whom had died when he himself departed this life, each leaving a child or children surviving. Before January, 1891, Tracy had from time to time made various advancements to his children and grandchildren, some of whom had received more than the others, such advancements consisting of land, money, and other property in various amounts, and for all of which he took receipts. In January, 1891, Tracy, being old and infirm, and with the apparent intention of making a general settlement with his children and grandchildren, in which he intended to equalize or adjust the former advancements as he believed to be proper and right, made and delivered deeds of conveyance to various tracts of lands to such as he deemed not already advanced, at

the same time surrendering to each of his children and grandchildren all receipts and other evidences of advancements, and stating that it was for the purpose of a final settlement between them. He afterwards made a will in which he directed that the remainder of his estate, consisting of 570 acres of land, be sold, and the proceeds divided among his living children and the descendants of those who were deceased, each child or its representatives taking an equal share. Subsequently he destroyed the will, however, and sold the land to Thomas J. Mills, husband of his daughter Elizabeth, taking for the purchase money eight equal notes, of \$1,800 each, and one other note of \$1,000. Some time in the year 1891, and subsequently to the sale just mentioned, the parties to the present action instituted a suit in the Montgomery circuit court to have said Basil Tracy declared of unsound mind and incapable of managing his estate, intending, if successful, to take further steps to have all his transactions, back to and including the business done by him in January, 1891, declared void on account of his mental unsoundness. After said suit was commenced, Tracy made an assignment of all the notes received for said 570 acres of land, and the mortgage securing the same, to two other of his children, to wit, Lydia Pierce and Thomas Tracy. In February, 1891, and while said suit was yet pending, Basil Tracy died, intestate, leaving no real estate undisposed of, and less than \$100 worth of personal property. Some time in 1892 an action was instituted in the Montgomery circuit court in which William R. Pierce, Absolam A. Howk, Annie E. Brodie, Sarah O. Howk, Martha Biddle, and Malinda Grenard were plaintiffs, and Thomas J. Mills, Elizabeth Mills, Lydia Pierce, Sarah Grenard, Thomas Tracy, Basil L. Merrill, John B. Merrill, William B. Merrill, Lydia J. Biddle, Elizabeth Shipman, and John J. Birdsell were defendants; and in the complaint it was alleged that the deeds for lands executed by Basil Tracy in January, 1891, and all deeds executed by him subsequently thereto, and all receipts and notes delivered up by him to their makers or to his heirs, and all assignments of notes and mortgages made by him, should be declared fraudulent and void, and set aside, on account of fraud and undue influence and want of capacity of Basil Tracy to manage his business. Said suit was removed by change of venue to the Clinton circuit court, where it was pending till 1893, when an agreement of compromise was made between the parties, and approved and adopted by the court in its decree, and judgment rendered accordingly. In the agreement it was stipulated, among other things, that the title of Thomas J. Mills and Elizabeth Mills, his wife, in and to the 570 acres of real estate, be quieted by the decree of the court; that the defendants in said action release all errors and waive their right to a new trial as of right; that judgment be entered in said

cause against the plaintiffs therein, and declaring said Basil Tracy to have been a person of sound mind at the time of the execution by him of the several deeds to plaintiffs and defendants in said action; that defendants should pay within a given time, into the hands of Crane & Anderson, attorneys, the sum of \$7,600, out of which sum the latter were to pay to one set of grandchildren, the Merrills, the sum of \$600; the remainder of said \$7,600 to be first applied by said Crane & Anderson to the payment of their fees, costs, and expenses in the preparation and trial of said cause, and the balance then remaining to be distributed among the plaintiffs in said action according to their respective interests therein, upon a fair and equitable distribution of the same, taking into account advancements theretofore made by said Basil Tracy to them or their respective mothers, daughters of said Basil Tracy. Judgment was duly entered in accordance with said agreement, and the said amount of \$7,600 was paid, as provided in the contract, to said Crane & Anderson, who paid Britton & Moffett, attorneys for the Merrill children, the sum of \$600. They retained their fees, and paid costs and expenses, after which they still had in their hands for distribution the sum of \$5,743.93.

Martha Biddle, the appellant herein, brought this action against Crane & Anderson and the other appellees to recover her portion of said balance, claiming that she was entitled to one-fourth thereof. Upon issues joined, the cause was tried by the court, and a special finding of the facts and conclusions of law thereon were made as requested by the appellees. By the ruling of the trial court, it was determined that the agreement entered into between the parties to said former suit and the judgment rendered thereon were in force; and, according to the terms thereof, the advancements made to the different heirs by Basil Tracy, but which he had canceled and converted into gifts to said heirs at the time of or shortly before the sale of said 570 acres of land, should be counted and charged against them respectively, which would bring the distributive share of the appellant down to \$118 instead of about \$1,500, if distributed according to the appellant's claim. The appellant's contention was and is that the court should have disregarded the compromise entered into between the parties to the said former action, or at least so much of it as related to said advancements, for the reason that after Basil Tracy had made a final adjustment among his heirs, in which he had surrendered up to them all evidences of former advancements, thus converting the same into gifts, they were no longer the subjects of compromise or settlement between them; that, prior to the death of Tracy, his heirs had no such interest in his property as could form the subject of adjustment or distribution among them; and that, therefore, any disposition by which the former advance-

ments were to be revived was null and void; that if the compromise is to stand, however, then it must be considered that the "advancements" therein spoken of could not have referred to such advancements as had been canceled and rendered nugatory by the acts of Tracy, as these were no longer advancements, but that the same must have had reference to other advancements made by Tracy to his children and grandchildren after he had surrendered up the evidence of such former advancements.

After careful consideration, we have come to the conclusion that the merits of the controversy were correctly determined by the trial court. Conceding that the appellant's learned counsel is correct in his position as to the law governing such cases, viz. that the heirs of Basil Tracy could not, at their mere volition, during his lifetime, revive the advancements made but subsequently changed into absolute gifts by him, the conclusion sought to be deduced from this proposition does not necessarily follow. When the compromise relied upon was entered into, Basil Tracy had departed this life, and his property had descended to his heirs. That they could partition this property among themselves according to agreement cannot be doubted. The suit then pending was not against Basil Tracy, and he was no longer concerned in its result, for he was then deceased, but the suit was by a number of his heirs against the remaining heirs, its object being to set aside certain deeds made by Tracy in January, 1891, and to declare void the execution of all receipts and the delivery of all notes delivered up by him to their maker or to his heirs, and all assignments of notes or mortgages made or executed by him, on account of alleged fraud or undue influence. The presumption is conclusive that the compromise of this suit upon the terms mentioned in the agreement, and the judgment rendered in pursuance thereof, rested upon a valid and sufficient consideration, and that the same are entitled to full force and credit. Whatever were the terms of such compromise and the provisions of the judgment, they are binding upon the parties, and not subject to collateral attack as long as they stand. This being so, the legal principles sought to be invoked by appellant's counsel are not applicable. We do not take issue with counsel that the parent, after having made an advancement to one or more of his children, may change the character of the gift so as not to have it charged as an advancement. But, while this is so, we know of no rule which prevents the child, in a suit concerning its distributive share, instituted subsequently to the death of the parent, from compromising the matters involved in the litigation, by an agreement to revive the original advancements, though these may have been treated as extinguished by the parent, and though the suit may have been instituted by the child itself, or by it and other children, against still other children or heirs

of the decedent. This, in effect, was what was done in the case in hearing, and nothing has been shown to convince us that the compromise made is not entitled to have its full force and validity. To say that the word "advancements," in the agreement of compromise, could not have had reference to advancements which had been extinguished by the acts of the decedent, would be to render said word in the instrument wholly meaningless, for the reason that no other advancements could, from the very nature of the transaction, have been considered by the parties. The court evidently gave the compromise this construction; and we think, in the light of the history of the transaction, considered in connection with the stipulations of the agreement, such construction was proper and right.

Nor are we able to agree with counsel that appellant is not bound by the compromise because she was not personally present when it was entered into. The appellant was a party plaintiff to the suit compromised, and was represented by attorneys, who must be presumed to have had full power to bind her in an amicable settlement of the matters in controversy until the contrary is made to appear. If the attorneys had no authority to bind the appellant by agreeing to such a judgment, she should have taken steps to set it aside. As long as the judgment stands, it cannot be attacked thus collaterally. *Van Fleet, Col. Attack, p. 420.*

The facts heretofore stated in this opinion were found specially by the court, and conclusions of law were stated therefrom. To the conclusions the appellant excepted. From what we have said it must be apparent that we regard the court's conclusions as proper.

Some objection is made also to the form of the conclusion, but we do not regard such objection as tenable. The court was not bound to state the exact amount coming to each party. If it gave the basis of the same in such a manner that, by a mere calculation, the amount could be readily found, we think it was sufficient. This is what was done by the court. The judgment following the conclusions specifically sets forth the several amounts coming to the respective parties as ascertained from the findings and conclusions of law. *Sanders v. Scott, 68 Ind. 130; Dawson v. Shirk, 102 Ind. 184, 1 N. E. 292; Chambers v. Butcher, 82 Ind. 508.*

Appellant's counsel also call in question the sufficiency of the evidence to support the finding. We have examined the evidence, and do not well see how the court could have found otherwise upon the main issues involved. The evidence fully sustains the finding.

Other questions, of minor importance, are presented by counsel, but we do not deem them of sufficient consequence to give them further consideration. We think the merits of the case were correctly determined, and that the court committed no reversible error in any of its rulings. Judgment affirmed.

(13 Ind. App. 277)

CANNELTON WATER CO. et al. v. BURKETT.

(Appellate Court of Indiana. Oct. 9, 1895.)

APPEAL—RULINGS ON INSTRUCTIONS—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERRORS.

1. The proper way to present for review on appeal the action of the trial court in giving or refusing instructions is by motion for a new trial.

2. Where several parties join in an appeal, the assignment of errors must apply to rulings affecting all joining therein, or they cannot be considered.

Appeal from circuit court, Perry county; Edward Gough, Judge.

Action by James A. Burkett against Cannelton Water Company and others for work and labor done and materials furnished. Plaintiff had judgment, and defendants appeal. Affirmed.

Wm. Henning, for appellants. W. A. Land, for appellee.

ROSS, J. Appellee sued and recovered judgment in the court below in the sum of \$120, upon an account for work and labor done and materials furnished.

The third and fifth specifications of error assigned in this court are intended to call in review the actions of the court below in giving to the jury certain instructions. No questions are presented by the specifications. The proper way to present for review in this court the action of the trial court in giving or in refusing to give instructions is by a motion for a new trial.

The appellants jointly assign errors in this court, the first and second of which are predicated upon rulings of the court below upon the separate motions of the Cannelton Water Company, and the fourth upon a ruling upon the separate motion of the appellant William W. Taylor. The rule is well settled in this court that the assignment of errors is the appellant's complaint, and that the specifications of error must apply to rulings affecting all joining therein, or they cannot be considered. *Town of Ladoga v. Linn, 9 Ind. App. 15, 36 N. E. 159.* Under this rule, no questions are presented for review under either the first, second, or fourth specifications of the assignment of errors.

The record before us is imperfect in this: that it has no marginal notes, as required by rule 30 of this court (27 N. E. vii.); and, were there any questions properly raised under the assignment of errors, they would not be considered. Judgment affirmed.

(15 Ind. App. 515)

MASTERSON v. CAUBLE et al.¹

(Appellate Court of Indiana. Oct. 8, 1895.)

DECEDENTS' ESTATES—PAYMENT OF CLAIMS.

Rev. St. 1894, § 2534 (Rev. St. 1881, § 2378), designates the order in which claims against an estate are to be paid. Section 2541 (2385), directs the administrator to pay off

¹ Rehearing denied, 44 N. E. 877.

claims allowed, giving preference as provided in the section above. *Held*, that payment by an administrator of debts in an order different from that provided is not a breach of his bond, unless a creditor of the estate or the estate has suffered by reason of such payment.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by James H. Masterson, administrator, against Peter C. Cauble and sureties on his bond as prior administrator, for breach of his bond. From a judgment for defendants, plaintiff appeals. Affirmed.

Alsbaugh & Lawler, for appellant. Mitchell & Mitchell, for appellees.

ROSS, J. The appellant, James H. Masterson, as administrator de bonis non of the estate of Henry Robertson, deceased, brought this action upon the bond of appellee Peter C. Cauble, who had been appointed and had qualified and acted as administrator of said estate. The appellees demurred to the complaint. The demurrer was sustained, and, the appellant refusing to amend, judgment was rendered in favor of the appellees.

The complaint, omitting the caption, reads as follows: "The plaintiff in the above-entitled cause alleges: That the defendant Peter C. Cauble was on the 14th day of December, 1891, duly appointed by the circuit court within and for said county administrator of the estate of Henry Robertson, who died intestate, at said county, on the 8th day of December, 1891. That on said day, viz. the 14th day of December, 1891, the said Peter C. Cauble gave a bond as such administrator for the faithful performance of his duties as such administrator in the penal sum of ten thousand dollars, with the said defendants William B. Cauble and Samuel M. Cauble as securities on said bond, which bond was in all things approved by the said court; and the said Peter C. Cauble was duly sworn and qualified as such administrator, and then and there assumed and took upon himself the duties of administrator of said estate, and a copy of said bond is filed herewith, marked 'A.' and made a part of this complaint. That during the time the said Peter C. Cauble was acting administrator of said estate there came into his hands and custody as such administrator, to be administered, of the moneys, goods, chattels, and personalty belonging to the estate of said decedent, the sum of about five thousand dollars (\$5,000). The costs of administration, expenses of last sickness, and funeral expenses of the deceased, and the taxes due and assessed against the property of the deceased at the time of his death, together with the claim of his widow, Martha A. Robertson, for her statutory allowance of \$500, amounting in the aggregate to \$1,040, have been allowed and paid by said administrator. That the foregoing items embraced all the preferred claims against said estate, excepting one note for three thousand dollars, exe-

cuted by said decedent to Mary J. Bowman, on the 17th day of September, 1888, and secured by a mortgage on the real estate of said deceased, in which mortgage the wife of said deceased joined. That said note is due and unpaid, and was due at the death of the said Henry Robertson. That said note was filed against said estate, and admitted by the defendant Peter C. Cauble, as administrator, on the 27th day of May, 1893, in the sum of \$3,130.20. That there were other claims and pretended claims against said estate, none of which were secured by mortgage on the real or personal property belonging to said deceased, or in any way preferred, amounting in the aggregate to about the sum of \$3,500. That said Peter C. Cauble, in disregard of his duties as such administrator, committed the following breaches of said bond, while acting in his capacity as such administrator, namely: (1) He misappropriated and misapplied the funds in his hands belonging to said estate to the amount of three thousand five hundred dollars (\$3,500), by paying the same out on claims and pretended claims against said estate which were not preferred claims, and which belonged to the class denominated by the statutes as 'general debts,' thereby exhausting the funds of said estate in his hands, and leaving unpaid and refusing to pay the said claim of the said Mary J. Bowman, which was and is secured by a mortgage on the real estate of the said deceased, in which mortgage the said Martha A. Robertson joined her said husband, unpaid and unsatisfied, when he had money in his hands applicable to that purpose, more than sufficient to pay the same, and the said estate was then and there clearly solvent. That there is now due and unpaid the said claim to the said Mary J. Bowman, the sum of \$3,130. (2) The said Peter C. Cauble failed and refused to pay the said claim of the said Mary J. Bowman, which claim was and is a lien on the real estate of the deceased, and a lien on the interest of the widow of the deceased therein; but applied the moneys in his hands belonging to said estate to the payment of the 'general debts' owing by said estate, many of which never were filed as claims against said estate, in violation of his duties as such administrator; thus keeping the said Mary J. Bowman out of her money, and jeopardizing the interest of the said Martha A. Robertson, widow, as aforesaid, in said real estate, when the said estate was clearly solvent. (3) The said defendant Peter C. Cauble, while acting as such administrator, misapplied and misappropriated the moneys belonging to said estate by paying the same out to persons on pretended claims against said estate, which had not been filed, nor allowed against said estate, which alleged payments amounted to the sum of three thousand dollars. That after the commission of the breaches of duty above set out the said Peter C. Cauble, administrator as aforesaid,

applied to this court for an order to sell the lands of said decedent so mortgaged as aforesaid to said Mary J. Bowman to pay debts, and obtained the same, and has since offered the said lands for sale twice, and has obtained no bids therefor; and afterwards the said Peter C. Cauble resigned his trust, whereupon one John Stratton was appointed to succeed the said Cauble, and the said Stratton resigned, and this plaintiff was appointed to succeed the said Stratton, and he now brings this action, and prays judgment against the defendants on the bond aforesaid for the money so misappropriated and misapplied by the said Peter C. Cauble, to wit, three thousand dollars, together with ten per centum thereon as damages, and costs of this action; and for all other proper relief." As an exhibit to the complaint a copy of the bond sued on was filed.

It will be observed that the complaint does not charge the appellee Peter C. Cauble with having converted the assets in his hands to his own use, or with failing to account therefor; neither does it charge fraud, or any intent to defraud; but the charges are that in the payment of the debts of the estate he failed to pay them in the order designated by the statute, and, as appellant claims, left unpaid the claim of Mary J. Bowman, which was a preferred claim. Upon the facts stated, although it is not charged that the estate was injured, appellant contends that the appellee Peter C. Cauble did not faithfully discharge his duties as administrator; hence is liable on his bond, under section 2385, Rev. St. 1881 (section 2541, Rev. St. 1894). The decedents' act (section 2378, Rev. St. 1881; section 2534, Rev. St. 1894) designates the order in which claims against estates shall be paid, giving them preference in the order named, to wit: First, the expenses of administration; second, the funeral expenses; third, the expenses of last sickness; fourth, taxes accrued upon the real and personal estate of deceased at his death, and taxes assessed upon the personal estate during the administration of the estate; fifth, debts secured by liens upon the personal and real estate of the decedent; sixth, a sum not exceeding \$50 for wages due any employe for work and labor performed for decedent within two months of his death; seventh, general debts; eighth, legacies. And section 2385 (2541), supra, provides that the administrator shall, if the estate is solvent, pay off the claims allowed as fast as money belonging to the estate comes into his hands, giving preference as provided in section 2378 (2534), supra. It also provides that: "If any executor or administrator fail or refuse to pay any claim when he has moneys in his hands applicable to that purpose, he shall be chargeable with the interest on such claim for such time as payment thereof shall have been wrongfully delayed, and shall also be liable in a suit on his bond, for the amount of the claim and ten per cent. damage thereon." If

an estate is solvent, and all the debts are paid, or there is ample to pay all, the administrator is not guilty of a breach of his trust simply because he does not pay such debts in the order designated by the statute. It is only when some debt remains unpaid which has a preference over one paid that the question of the order of payment arises. The purpose of the statute is to secure the payment of the debts in the order named; those of the latter classes having no right to demand payment until those of the preceding classes have been paid. The preference given to debts secured by liens as enumerated in the fifth class was not to afford them greater security, but for the purpose of preserving the estate for the benefit of the heirs and the creditors enumerated under the succeeding classes. Until some claim, by reason of the misapplication of the funds of the estate by the administrator, cannot be paid, no injury has resulted to the estate. True, the debts secured by liens are not confined to collection out of the property against which the lien exists, but stand on an equality with the other general debts of the estate, and share with them in that part of the estate left after the payment of the preceding classes. That an administrator has no right to pay claims except in the order designated by the statute requires no adjudication, for that is the express declaration of the statute; and any deviation therefrom, resulting in injury to the estate, or those holding just claims against it, must be at his peril. The order of priority having been fixed by statute, it cannot be changed, even by the court. We cannot concur in the views of counsel for appellant that an administrator is liable on his bond for a failure to pay the debts of the estate in the order specified by the statute, although such failure harms neither the estate nor the creditors. On the contrary, we think the purpose of the statute is to punish the administrator, and reimburse the estate, if, on account of his maladministration, a debt which it was his duty and he had the funds with which to pay had been lost. To say that an administrator cannot pay a claim of the third class until those of the first and second have been paid, although he has ample funds to pay not only all enumerated in those classes, but also those in the succeeding classes, and that, if he did so, notwithstanding no injury resulted, he would be liable under section 2385 (2541), supra, would, we think, be giving a meaning to that statute not intended by the legislature. Of the many authorities cited by counsel, both for the appellant and appellee, we have found none decisive of the question before us. We are thoroughly impressed with the idea that the intention of the lawmaking power was to create a liability only for a wrong resulting in injury. In the complaint under consideration no facts are alleged to show either that a creditor of one class has lost his debt by reason of a preference given by the ad-

ministrator in the payment of a debt of another class, or that the estate has in any way been made to suffer by his acts. Without some injury resulted from his acts, the law does not contemplate that he be mulcted in damages. Judgment affirmed.

(13 Ind. App. 225)

CLEVELAND, C., C. & ST. L. RY. CO. v.
MOLINE PLOW CO. et al.

(Appellate Court of Indiana. Oct. 8, 1895.)

CARRIERS OF GOODS — LIABILITY AS TO DELIVERY
— RIGHTS OF OWNER — BILL OF LADING — PAROL
EVIDENCE — POWER OF AGENT — PLEADINGS.

1. In an action against a carrier for failure to carry and deliver goods as agreed in the bill of lading, it is a good defense that defendant delivered such goods to the rightful owner.

2. Since a carrier is bound at its peril to deliver goods consigned to it to the rightful owner, it is not liable to the shipper for failure to deliver to another person as provided in the bill of lading.

3. In an action against a carrier for breach of a contract to carry and deliver goods, the answer admitted receipt of the goods from plaintiff, but alleged that they were not plaintiff's property, and that defendant had delivered them to the rightful owner, from whom plaintiff had wrongfully obtained possession. *Held*, that a reply that such alleged owner had originally procured the goods from plaintiff's agent by fraud and false representations was sufficient on demurrer.

4. A bill of lading, in so far as it is a mere receipt for goods, may be explained or contradicted by parol.

5. Where facts are pleaded showing that some other person than the one named in the bill of lading as consignee is the real owner of the goods, the presumption that the person so named is owner does not control.

6. In an action against a carrier on a contract to carry and deliver goods, where plaintiff proved that both the consignor and consignee were its agents, and showed that defendant delivered the goods to a stranger, and defendant's answer alleged that it delivered the goods to the rightful owner thereof, the burden is on defendant to show such ownership.

7. In such action, under a general denial of the allegations of the answer, plaintiff may show that it was the owner of the goods.

8. An agent merely for the storage and shipment of goods has no authority to sell them.

9. Where it is not shown that an agent in possession of goods of his principal had authority to sell the same without an order from the principal, the principal is not estopped to deny the title of a purchaser from the agent selling without such authority, on the ground that the agent possessed all the indicia of title.

10. The rightful owner of goods may seize them wherever found, provided he does not commit a breach of the peace or violation of law.

11. Relief not sought in the pleadings is properly denied.

Appeal from circuit court, Hendricks county; J. V. Hadley, Judge.

Action by the Moline Plow Company and others against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company on a contract for the shipment of goods. Judgment for plaintiffs, and defendant appeals. Affirmed.

Elliott & Elliott, for appellant. Thos. J. Cofer and C. C. Hadley, for appellees.

LOTZ, J. The appellee the Moline Plow Company brought this action against the appellant to recover damage for the alleged breach of conditions in a bill of lading. The complaint alleges that the defendant, a common carrier, undertook for hire to carry certain goods belonging to plaintiff from the town of Brownsburg, Ind., to the city of Indianapolis; that a written contract or bill of lading was executed, in which one J. C. Smalley was named as the consignor, and the Union Transfer & Storage Company of Indianapolis was named as the consignee; that both the consignor and consignee were merely the agents of the plaintiff, and that the title and ownership of the goods were in the plaintiff, of which facts the defendant had knowledge at the time the bill was issued. The breach alleged is that the defendant did not safely carry and deliver the goods to the plaintiff or its agent, or any one for it, and did not carry them at all, but delivered them to a stranger. The appellant filed an answer to the plaintiff's complaint in three paragraphs. The first being the general denial. In the second paragraph the appellant admitted having received the property mentioned in the complaint, and that it had issued a bill of lading therefor, but averred that the property was not the property of the plow company; that it was the property of one John A. Faulkner; that the plow company had wrongfully and unlawfully obtained possession of said property before delivering it to the appellant; that, after the property was delivered to the appellant, John R. Jones, the assignee of said Faulkner, demanded possession of the property, and seized and carried it away; that the said Jones had full right to the possession of the said property at the time he seized and carried the same away. The third paragraph of the appellant's answer admits that the appellant received the property and issued a bill of lading therefor, but contains the averments that on the 25th day of July, 1893, John A. Faulkner was the owner and in possession of said property; that on said day the said Faulkner made an assignment to John R. Jones for the benefit of his (the said Faulkner's) creditors; that the deed of assignment covered the property involved in this action; that the said Jones, as such assignee, took possession of the said property; that afterwards, without the consent of the said Jones or the said Faulkner, the appellee plow company entered the warehouse where the said goods were stored, and wrongfully and unlawfully carried the same, together with other goods, away, and delivered them to the appellant; that the appellant issued a bill of lading for said goods, but before they were shipped, and while they were on appellant's platform, ready for shipment, Jones, the assignee of Faulkner, took possession of the goods, and carried them away, without the consent or permission of the appellant. To the second and third paragraphs of answer the plow

company filed a reply in two paragraphs, the first being the general denial. The second paragraph of reply alleges, in substance, that prior to the taking possession of the goods by Jones, and prior to the issuing of the bill of lading, Faulkner was insolvent; that the Union Transfer & Storage Company of Indianapolis was the plaintiff's agent for the storage, transfer, and shipment of plaintiff's goods; that the transfer and storage company had in its possession large quantities of plaintiff's goods for shipment, to plaintiff's customers; that Faulkner, being aware of this fact, falsely and fraudulently represented to the transfer and storage company that he had a contract with the plaintiff for the purchase and shipment of goods, and that he wanted certain articles, and wanted them shipped immediately, to supply the wants of one of his customers; that the transfer and storage company, relying upon such representations, and believing them to be true, shipped the goods described in the bill of lading to Faulkner, at Brownstown, Ind.; that, on the same day that Faulkner received the goods, he made an assignment to Jones for the benefit of his creditors; that the statement and representations of Faulkner to the Union Transfer & Storage Company were false and fraudulent, in this, to wit: that Faulkner had no contract with the plaintiff for the purchase and shipment of the goods, but, on the contrary, the plaintiff had refused to enter into a contract with him; that Faulkner had no orders or purchasers for the goods, but, on the contrary, his sole purpose in obtaining an early shipment of the goods was to prevent the transfer and storage company from communicating with the plaintiff and ascertaining that Faulkner had no contract for the purchase of the goods, and to enable him to get possession of said goods in anticipation of a sale or an assignment, and to defraud the plaintiff out of the value of the goods. It is further alleged that the plaintiff's agent demanded the goods of Faulkner; that Faulkner gave possession to plaintiff's agent, who delivered them to appellant for shipment. A demurrer for want of facts was overruled to this paragraph. The ruling on this demurrer presents the first error assigned.

It may be stated generally that a common carrier of goods for hire is a bailee, and, as such, is an insurer against loss or injury from whatever cause arising, except only inevitable accident and the public enemy. *Railway Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296. The carrier is bound to account for the goods and their safe delivery. It is familiar rule that in ordinary cases the bailee can no more dispute the bailor's title than a tenant can dispute that of his landlord. But to this general rule there are exceptions. He may always show, and it is a good defense, that he has in good faith or by legal process yielded the possession to the rightful owner, the person having the lawful right to the

possession, the holder of a superior or paramount title to that of the bailor. It is a good defense even though the goods were taken by force and against his consent, if the taking was by the lawful owner and the person entitled to the possession. Surrendering to the rightful owner is in legal effect an accounting, and that is what the bailor himself was in law required to do. It would be unjust and against conscience to allow the shipper or bailor, under the circumstances above indicated, to recover for the value of the goods. The bailee or carrier is bound at his peril to deliver the goods to the rightful owner. He is also bound to the shipper or bailor, under the contract, to carry the goods. If he discharges the first it would be the height of injustice to hold him liable on the last obligation also. The above propositions are sustained by abundant authority. 4 *Lawson, Rights, Rem. & Prac.* p. 2914; *Hutch. Carr.* § 404; *King v. Richards*, 6 *Whart.* 418; *The Idaho*, 93 U. S. 575; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Transportation Co. v. Barber*, 56 N. Y. 544; *Bates v. Stanton*, 1 *Duer*, 79; *Stephens v. Vaughan*, 4 *J. J. Marsh.* 206; *Biddle v. Bond*, 6 *Best & S.* 225; *Sheridan v. New Quay Co.*, 4 *O. B. (N. S.)* 92, 98 *E. C. L.* 618.

The appellant, by the second and third paragraphs of its answer, undertook to show that it had yielded or surrendered the possession of the property to the rightful owner. In filing these answers, it is presumed that it had scanned the whole title, and willingly assumed the burden of showing that the rightful ownership was in some other person than the plaintiff, the person to whom it surrendered the possession. Ordinarily, when a sale of goods on credit is sought to be set aside on the ground of the insolvency of the purchaser, it must be made to appear that the purchaser concealed his insolvency from the vendor, and that he had no intention to pay for them at the time the purchase was made. But the fraud alleged in the second paragraph of the reply is that Faulkner falsely represented to the plow company's agent that he had a contract with it for the purchase of goods. It is the false representation concerning this contract that constitutes the gravamen of the fraud. It is sufficient to withstand the demurrer.

On request of the appellant, the court made the following special findings of fact: "(1) In July, 1893, the plaintiff was a manufacturer of agricultural implements in the state of Illinois, and the Union Transfer and Storage Company of Indianapolis was the duly constituted agent of the plaintiff to distribute the plaintiff's products throughout Indiana, but had no authority to sell or deliver goods except upon orders of the plaintiff. (2) On the 24th of July, 1893, the said Union Transfer and Storage Company, without order or authority from the plaintiff, shipped from its warehouse in Indianapolis, to one John A. Faulkner, at Brownstown, Ind., upon his or-

der, of the plaintiff's goods, three sulky plows, six breaking plows, and three steel harrows, all of the value of \$206.96. (3) Said Faulkner, when he received said goods, on the 24th day of July, 1893, knew that he was insolvent, and was at the time considering an assignment for the benefit of his creditors, and at 7 o'clock on the next morning [July 25th] duly executed and delivered to the defendant John R. Jones a deed of assignment, conveying to said Jones all his property for the benefit of all his creditors, consisting chiefly of a stock of hardware and agricultural implements. Jones, upon the delivery of the deed, accepted the trust, and took possession of the assigned property, and placed the assignor in temporary charge. Within an hour after the execution of said agreement, one Smalley, an agent of the plaintiff, called upon said Faulkner, and demanded possession of the said goods that had been shipped to him the day before by the Union Transfer and Storage Company. Faulkner referred Smalley to his assignee, Jones. Smalley made a like demand upon said assignee, Jones, which was refused. In the afternoon of the same day, the door of the warehouse where said goods were stored being open, Smalley, acting for the plaintiff, without authority from said Faulkner or Jones, entered, and carried away the goods above described. Smalley also took away from said place, at the same time, other goods the plaintiff had some weeks before sold to Faulkner, and which were unpaid for, to wit, one hay rake and twenty-four plowshares, all of the value of \$34.74. Smalley, about 3 o'clock p. m. of same day [July 25th], delivered all of said goods to the defendant railway company, as a common carrier of freight, at the station in Brownsburg, Ind.; and said railway company then and there executed and delivered to Smalley a contract whereby said railway company undertook to transport and deliver said goods to the Union Transfer and Storage Company, at Indianapolis, Ind., for storage. That the defendant railway company did not transport and deliver said goods to the said Union Transfer and Storage Company. That the plaintiff notified the defendant railway company of its nondelivery of said goods within thirty days after the same were delivered to it at Brownsburg, and after notice, and within thirty days said defendant denied liability for such default. That said station at Brownsburg was established by the defendant railway company as a regular station for the stopping of all local freight trains, and as a place whereat to receive freights for transportation. That the defendant railway company had a regular local freight train that carried freights similar to the goods above described to Indianapolis, passing said station at Brownsburg going to Indianapolis about 4 o'clock each morning. That said goods remained at said Brownsburg station, unshipped, until about 9 o'clock

in the forenoon of July 27th, at which time the defendant John R. Jones, as assignee of John A. Faulkner, demanded of said railway company the possession of said goods, as the property of his said trust, which demand was refused; and said Jones thereupon, without legal process or other authority, seized upon and removed all of said goods out of the possession of said railway company, and, upon a general order of court, advertised and sold all of said goods, in November following, as the property of his said trust. (4) That the plaintiff made no further demand of said Jones for the possession of said goods, and has filed no claim therefor against the estate of said Faulkner."

On the above finding of facts, the court stated the following conclusions of law: "(1) That the plaintiff, on the 25th day of July, 1893, at the time it delivered the same to the defendant C., C., C. & St. L. Ry. Co., for transportation and delivery to the Union Transfer and Storage Company of Indianapolis, Ind., as found in No. 3 of the foregoing finding of facts, was the owner and entitled to the possession of the three sulky plows, six breaking plows, and three steel harrows, described in No. 2 of the foregoing finding of facts, and of the value of \$206.96. (2) That the plaintiff, on the 25th day of July, 1893, at the time it delivered the same to the defendant the said C., C., C. & St. L. Ry. Co., for transportation and delivery to the Union Transfer and Storage Company, of Indianapolis, Ind., as found in No. 3 of the foregoing finding of facts, was not the owner nor entitled to the possession of the one hayrake and 24 plowshares, all of the value of \$34.74, described and set forth in said finding No. 3, and that the defendant John R. Jones, as assignee of John A. Faulkner, was the owner and entitled to the possession thereof. (3) That the plaintiff is entitled to recover of the defendant C., C., C. & St. L. Ry. Co. the sum of \$209.96 and costs. (4) That, upon payment of said judgment to the plaintiff, the defendant C., C., C. & St. L. Ry. Co. is entitled to have its claim for the amount of principal of said judgment paid by it allowed against the estate of the said John A. Faulkner, if paid within the period of six months from this date."

The appellant excepted to the conclusions of law, and moved for judgment in its favor on the findings. The court overruled the exceptions and the motion. These rulings are assigned as error, and, as they both present the same questions, may be considered together. Various objections are made to sufficiency of the findings to support the conclusions drawn by the court and to the judgment rendered.

It is insisted that the findings show that the Moline Plow Company was not the real party in interest; that in the bill of lading, which is the foundation of the cause of action, Smalley is named as the consignor, and the Union Transfer and Storage Company the consignee;

that the Moline Plow Company is a stranger to the contract, the bill of lading; that the law presumes the consignee therein named to be the owner of the goods; and that its terms cannot be varied or contradicted by parol. A bill of lading is both a receipt and a contract. In so far as it is a receipt, it may be modified, explained, or contradicted by parol; but in so far as it is a contract, and when free from ambiguity, and in the absence of fraud, concealment, or mistake, it cannot be explained, modified, contradicted, or added to by parol. *Railway Co. v. Wilson*, 119 Ind. 352, 21 N. E. 341. It is also true that the law presumes the consignee to be the owner of the goods and the real party in interest, but this presumption is not conclusive. If facts be pleaded showing that some other person is the real party in interest, this presumption will not prevail. *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253. In the light of this presumption, the ownership would be deemed to be in the consignee. But the ownership, even if it had been expressly stated in the bill, would have been but a mere recital. It would have formed no part of the contractual obligations, and might, under proper averments, have been varied by parol. The complaint here does aver the true ownership, and the finding is that both Smalley and the Union Transfer & Storage Company were the agents of the plow company in the shipment of the goods.

The appellant further contends that the proper legal inference to be drawn from the facts found is that Faulkner or his assignee, Jones, was the rightful owner of the property, and that, as it surrendered the possession to the lawful owner, it is not liable, under the rules above stated. In support of this contention, appellant's learned counsel assume that the burden of establishing the fraud of Faulkner in the purchase of the goods, and that the sale made by the plow company's agent was in excess of the agent's authority, rested upon the appellee the plow company. It must be borne in mind that this action is based upon the breach of the conditions of a written contract,—the bill of lading. It was an undisputed fact—and the court so found—that the consignor and the consignee both were merely the agents of the plow company. When the plaintiff made this appear, and introduced the contract in evidence, showed the breach thereof and the damages resulting, it had established its right to recover. To defeat this right, the burden rested upon the appellant to establish its affirmative answers. The appellant introduced into this action the controversy concerning the title. The burden of showing that the person to whom it yielded the possession was the rightful owner rested upon it. When the title to personal property is involved, the general rule is that the party asserting title must stand or fall upon the strength of the title asserted, and not depend upon the weakness of the title of his adversary. As a sequence, the party disputing the

title asserted may show property in himself or in some third person, for in each instance it is sufficient to overthrow the title asserted, and such proof may be made under the general denial without special plea. It is true that there are some affirmative defenses and affirmative matters in avoidance, which may be given under the general denial, in which the burden rests upon the party asserting them. Appellant makes a vigorous assault upon the special findings, asserting that the burden of establishing the fraud pleaded in the reply rests upon the plow company, and that the ultimate fact of fraud is not found. The general rule is that, when fraud is relied on, it must be specially pleaded, and proved as alleged. Whether or not defenses to actions which involve title to property form an exception to this rule, and whether the burden of proving fraud rested upon the plow company, or the burden of proving the absence of fraud rested upon the appellant, we need not decide, in the view we take of this case.

We have the finding that the Union Transfer & Storage Company was the agent of the plaintiff to distribute its products throughout Indiana, but had no authority to sell or deliver its goods except on the order of the plaintiff; that the transfer and storage company, without order or authority from the plaintiff, shipped the goods to Faulkner. The appellant asserted that Jones, the assignee of Faulkner, was the rightful owner, and that it yielded the possession to him. The plow company had the right, under its general denial, to prove that it was the owner. It might have shown that the goods were stolen from it, or that Jones took them by force and against its consent. It might also show that its agent for storage sold them without authority to do so. We have here a sale made by an agent who had no authority for that purpose. An agent for one purpose only cannot lawfully do another act, and bind his principal. An agent for the storage and transfer of goods cannot lawfully sell the same. *Mechem*, Ag. §§ 823, 361; *Jeffrey v. Hursh*, 49 Mich. 33, 12 N. W. 898; *Wood v. Goodridge*, 6 Cush. 117; *Switzer v. Wilvers*, 24 Kan. 884.

The appellant, however, contends that the sale was valid, because made by a person having the indicia of title,—the possession and the right to ship. This contention is based upon an estoppel in pais. The general rule is that an estoppel must be pleaded in order to be available. But the reply is the end of pleading under our Code. It is clear that the appellant might have availed itself of an estoppel by pleading it in an answer. Whether or not it can avail itself of an estoppel in order to defeat a reply we need not determine, for the finding here falls far short of an estoppel. The vital principle of an equitable estoppel is that of fraud. He who by his language or conduct leads another to do what he otherwise would not have done will not be permitted to subject such person to

loss or injury by disappointing the expectations upon which he acted. The doctrine has no application where everything is equally known to all the parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was not influenced by the acts asserted in estoppel. There is nothing in the findings to show that it was customary for the Union Transfer & Storage Company to ship goods without an order from the plow company, or that either Faulkner, his assignee, or the appellant, was misled or deceived by its conduct. The finding shows that the plow company, by its agent, entered the warehouse of the assignee, Jones, and, without any authority from him, seized and carried away the property which had been shipped by the transfer and storage company, and, in so doing, also seized and carried away other property belonging to the assignee, Jones.

Appellant's counsel assert that the plow company had no right to seize its own property forcibly, but that, if it be conceded that it might lawfully do so, if, in the exercise of such right, it seized property which did not belong to it, it became a trespasser ab initio,—a wrongdoer,—not only as to the goods to which it had a right, but as to all the goods it seized, and its whole proceeding was illegal. We are of the opinion that the rightful owner of goods may seize them and take them into his possession wherever he finds them, provided he does not commit a breach of the peace or violate any other law. It is true that he cannot abuse this privilege, and, if he seize goods which do not belong to him, he will be deemed a trespasser ab initio,—a wrongdoer,—and liable to the person whose goods were wrongfully taken; but we fail to see what application this rule has to the case in hand. The ownership of the property was not changed by the seizure made either by the plow company's agent or by the assignee. The plow company did not recover in this proceeding for the goods which its agent unlawfully took.

John R. Jones, the assignee of Faulkner, was made a party defendant, upon the application of the appellant. Jones filed answers to the complaint; but the appellant filed no cross complaint against Jones. The appellant moved the court for a judgment in its favor against Jones, and to make the judgment a preferred claim against the assets in his hands. This motion was overruled. This ruling is one of the errors assigned. This motion asked for something not within the issues, and there was no error in overruling it.

The appellant also filed a motion to modify the judgment so as to provide that the appellant's claim, in case it paid the amount of the judgment of the plow company, should be a preferred claim against the assets in the hands of Jones, and should be paid prior

to the distribution of the assets of the estate to the general creditors. This motion was overruled. This ruling constitutes the last assignment of error discussed by counsel. We can conceive of conditions where the assets of an insolvent's estate might be charged with a preferred claim to the extent of moneys realized from property which did not belong to it, but there is nothing in the finding here to show how much the insolvent's estate realized from the property, nor was there any relief of the kind asked for contained in the pleadings. The motion was properly overruled. Judgment affirmed.

(164 Mass. 354)

RAND et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 16, 1895.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT —LIABILITY TO ABUTTING OWNER.

Under St. 1890, c. 428, § 5, and St. 1891, c. 123, § 1, providing that all damages sustained by any person in his property by the taking of land for or by the alteration of the grade of a public way shall previously be paid by the city or town, one cannot recover for injury to his property by the building of an embankment and bridge by a city on land taken from another, located on the opposite side of the street from his own. Knowlton and Morton, JJ., dissenting.

Report from superior court, Suffolk county; John Hopkins, Judge.

Action by Arnold A. Rand and others, trustees, against the city of Boston, for damages occasioned by taking and use of another's land. A verdict was directed for defendant, and case reported to this court. Judgment on verdict.

R. M. Morse, F. Burke, and J. Duff, for petitioners. T. M. Babson, for defendant.

HOLMES, J. The only question argued in this case is whether damages can be recovered under St. 1890, c. 428, and St. 1891, c. 123, for diminishing the market value of the plaintiffs' land, obstructing its light and air, and occasioning dust to be blown upon it, by building an embankment and bridge upon land taken from a third person, on the opposite side of the street from the plaintiffs' land.

It will be observed that, if any other owner of the land had done the acts complained of, he would have had a perfect right to do them, and would not have been liable for any of the harm suffered by plaintiffs in consequence. The same thing would be true as to the city, if it had owned the land before, and had not taken it under the powers conferred by the statute. If the city has greater liabilities in respect of land taken under the statute, they must be imposed by statute. Whether they are imposed, or not, is a question of the construction of the particular words used, not of general principles.

So far as there is any general tendency or principle of construction to be gathered from the decisions, while damages which the common law would not allow have been held in some cases to be given by general words which probably would have been construed more narrowly in England (*Woodbury v. Inhabitants of Beverly*, 153 Mass. 245, 26 N. E. 851; see *Stanwood v. City of Malden*, 157 Mass. 17, 32 N. E. 702), still, here as well as in England, the tendency is well settled to deny damages like the present unless some land of the plaintiff is taken. *Presbrey v. Railroad*, 103 Mass. 1; *Walker v. Railroad*, Id. 10, 14; *Fay v. Aqueduct Co.*, 111 Mass. 27, 28; *Johnson v. Boston*, 130 Mass. 452, 454; *Sawyer v. Davis*, 136 Mass. 239, 242; *Wellington v. Railroad*, 158 Mass. 185, 189, 33 N. E. 393; *Taft v. Com.*, 158 Mass. 526, 548, 33 N. E. 1046; *Titus v. City of Boston*, 161 Mass. 200, 210, 36 N. E. 793; *In re Stockport, T. & A. Ry. Co.*, 33 Law J. Q. B. 251; *Essex v. Board*, 14 App. Cas. 153. See, also, *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 260, 23 N. E. 846. It is true that when land is taken such damages sometimes can be recovered, to a certain extent. The grounds for the exception are discussed in *Lincoln v. Com.* (decided this day) 41 N. E. 489. But the difficulty, if there is one, is to justify the exception, in the form which it has taken, rather than the rule; and it seems to us putting the cart before the horse to start from the exception, and to argue that if such damages are allowed to any extent, under any circumstances, they ought to be allowed to their full extent, and always.

The language of the statute before us, so far as material, is, "All damages sustained by any person in his property by the taking of land for, or by the alteration of the grade of, a public way * * * shall primarily be paid by the city or town." St. 1890, c. 428, § 5; St. 1891, c. 123, § 1. These are the words which fix the damages to be paid. The later provision for a trial in the superior court "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town," refers to the mode of ascertaining the damage already given, and does not enlarge the express statement of what is to be paid for. It is not argued that there has been an alteration of grade, within the meaning of the act; so that the plaintiffs' case stands on the words, "All damages sustained by the taking of land for a public way." In *Bacon v. City of Boston*, 154 Mass. 100, 104, 28 N. E. 9, the words, "Said city shall make compensation to the owners for such lands as it shall take," in St. 1881, c. 303, § 3, were held not to give damages to any one whose land was not taken. In that statute, as in this, there was a reference to the proceedings upon the taking of land for highways. A majority of the court are of opinion that the statute before us has

no broader meaning. Cases like *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796, under statutes providing expressly, as in Pub. St. c. 49, § 16, that "regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner," do not apply. We repeat that the question is simply one of construction. The operative words here are narrower than those just quoted from the Public Statutes, as to ways and sewers, or even those as to railroads ("all damages occasioned by laying out, making, and maintaining its road." Pub. St. c. 112, § 95), although, as will have been noticed, the two leading cases which we have cited from 103 Mass. arose under the railroad acts. How the line is to be drawn between those and other decisions under similar statutes, we have no occasion to consider further at this time.

Judgment on the verdict.

KNOWLTON, J. (dissenting). I regret that in this case I am unable to agree with the majority of the court. The dwelling houses and building lots of the petitioners have been very greatly diminished in value by the taking of a strip of land along the line of the street on the opposite side, and the location upon it of a way which crosses over the railroad on a bridge. The petitioners' property, which was situated at a convenient grade upon a pleasant street, is now left far below the line of travel, and its light and air and outlook are cut off by a high embankment in front of it. According to the recitals in the petition, these damages are assessed at \$10,000 by the street commissioners of Boston. The change was made under St. 1890, c. 428, and St. 1891, c. 123, which provide for the abolition of grade crossings. Such changes are being made, and are likely to be made, in great numbers, throughout the commonwealth. By the terms of the statute the damages are to be paid in part by the city or town, in part by the railroad company, and in part by the commonwealth. "All damages sustained by any person in his property by the taking of land for or by the alteration of the grade of a public way" are to be determined "in the same manner, and under like rules of law, as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town." St. 1891, c. 123, § 1. The language of the statute seems to me plainly to show that the principles on which the assessment is to be made are not less favorable to persons claiming damage than those applicable to assessment when land is taken for the laying out of any other public street or way. The language defining the damage, as well as the language in regard to the mode of assessing it, is substantially the same as in the Public Statutes. The case of *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9, was decided under a statute which requires

the city only to "make compensation to owners for such lands as it shall take under this act."

In my view of the case, the question is whether one who has suffered substantial damages in his property by the taking of land for a public way is entitled to damages if no part of his land is taken. Pub. St. c. 49, § 16, provides that "In estimating the damage sustained by laying out * * * the highway * * * regard shall be had to all the damages done to a party whether by taking his property or injuring it in any manner." The provision in regard to damages for laying out, making, and maintaining a railroad, although in different language, is in substance the same. Id. c. 112, § 95. The statute giving damages for a change of grade or other work done in making repairs upon a way differs from these in limiting the compensation to owners of land adjoining the way. Id. c. 52, § 15. The right taken under these statutes is only an easement, but the nature of the easement is such that the damage is usually the same as if the fee were taken. There were different ways in which the legislature might have dealt with this subject. They might have said that the constitution requires compensation only for the land itself which is taken, and no provision shall be made for damages occasioned by the use to which it is appropriated, however great they may be. In this view, even if such a use would constitute a nuisance if made by a private owner, it could not be a ground of compensation, and damages to a person whose land is taken could never exceed the value of the land, and no damages could ever be allowed to any one from whom no land was taken. This would be an extreme view, which, so far as I know, has never been adopted by any court or legislature. Another view, less extreme, would allow damages only when the use, as affecting the adjacent land, would constitute a nuisance at common law if it were not authorized by the statute, but, when there was injury to that extent, would allow any person, whether any part of his land was taken or not, such damages as, if caused by a private owner, would be the subject of an action at the common law. A more liberal provision would give compensation to every person suffering special and peculiar damages in his property from the use to which the land is appropriated, whether any part of his own land is taken or not, and without reference to the question whether the land might have been used in a similar way by an individual owner. Such a provision is not inequitable, for, even if no greater damage is done than might have been done by the owner of the fee without liability, there is usually little probability that an individual proprietor would ever put his property to such a use; and, if it is appropriated by the public for the general good, it is not unjust that the public should compensate the individual for

the loss which it causes him. *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796.

Our statutes upon this subject were enacted many years ago, and their language seems to me to show that the legislature intended to make this last liberal provision for land-owners. These acts received a very early interpretation. Whenever they have been discussed by this court, they have been treated as designed to give compensation to every one whose property is materially diminished in value by any special and peculiar damage resulting from the taking of land. It has been held, without exception, in a long line of cases, that if a strip, however narrow, of the petitioner's land, along his boundary line, is taken, damages are to be awarded for the injury done by the location and construction of the highway or the railroad to all the adjacent land. *First Church in Boston v. City of Boston*, 14 Gray, 214; *Geraghty v. Boston*, 120 Mass. 416; *Murphy v. City of Boston*, Id. 419; *Brady v. Fall River*, 121 Mass. 262-264; *Lane v. Boston*, 125 Mass. 519; *Slisson v. New Bedford*, 137 Mass. 255. It often happens that a lot from which land is taken is left of such size and shape as to be worth less proportionally than it was as a whole, and this diminution in value is often treated as one kind of damage from the taking. It would be more accurate to consider it, not as damage from the taking to that which is left, but as a part of the value of the land taken, which is to be paid for in making compensation, not at its value considered by itself alone, but at its value as a part of the whole lot, with reference to the use to which it could be put in connection with that from which it is cut off. This kind of damage, if it is to be called damage, can only exist when a part of the petitioner's land has been taken. But most kinds of damage resulting from the use to which the land is put may exist as well when the location of the highway or railroad is along the side of the petitioner's land, two inches away from his boundary line, as when a strip two inches wide is taken from him. If a deep cut or a high embankment is made along a location, there is no good reason why large damages should be awarded in one of these cases, and nothing in the other.

The authorities seem to me to forbid such an unjust discrimination. In *Dodge v. County Com'rs*, 3 Metc. (Mass.) 380, the plaintiff owned a lot of land, no part of which was taken by the railroad company; but it was held that he was entitled to damages under the statute for injury to a building upon the lot, done by blasting a ledge of rocks in the construction of the railroad. In *Ashby v. Railroad Co.*, 5 Metc. (Mass.) 368, it is said "that parties interested in land not taken for a railroad, but so near as necessarily to be damaged by it, are entitled to damages." In *Parker v. Railroad*, 3 Cush. 107, it was held that under this statute the railroad was liable for the draining of a well on land ad-

joining the railroad, but not crossed by it, when an individual owner of the land taken would not have been liable if he had so used the land as to drain the well. Chief Justice Shaw says: "This is a remedial provision, and is to be construed liberally to advance the remedy. It is made in the spirit of the declaration of rights, giving compensation to persons sustaining damages for the public benefit. * * * The terms of the section must include damages which are caused by something else besides taking land and materials, because damages of that kind are distinguished from the former by the word 'or.' So the word 'occasioned' points to any damage which may be directly or indirectly caused by the railroad. We are of opinion, therefore, that the party who sustained an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damage." In *Curtis v. Railroad Co.*, 14 Allen, 55, the same doctrine is fully set forth by Mr. Justice Hoar, who says: "There are damages to land which may be occasioned by the construction or maintenance of a railroad where the land is not taken, and yet where the acts done are justifiable, and necessarily incident to the grant of authority to build and maintain the road. For such acts the railroad company are not answerable as wrongdoers, but the remedy of the party injured is by a petition for the assessment of his damages in the mode provided by the statute." In *Babcock v. Railroad Co.*, 9 Metc. (Mass.) 553-555, Chief Justice Shaw, referring to Rev. St. c. 39, §§ 45, 54, 56, says, "Upon this principle, it has been decided that all persons—not merely those whose land is taken for laying out the road and for supplying materials, under sections 54, 55, but, by section 56, all persons who sustain damage by the laying out, making, or maintaining their road—shall have a remedy against the corporation." The same doctrine is repeated with elaboration in *Proprietors of Locks & Canals v. Nashua & L. R. Corp.*, 10 Cush. 385. In *Marsden v. Cambridge*, 114 Mass. 490, it was held that where a street was laid out under Gen. St. c. 43, §§ 14-16, a person could recover damages under the statute for the loss of support and of shelter to a part of a building owned by him, because the other part of the building, and the land under it, were taken by the city. No part of the petitioner's land or building was taken. The opinion, without assuming to determine what might be the rights of the petitioner against the owner of the adjacent premises, rests the decision entirely upon the principles laid down in *Ashby v. Railroad Co.* and *Parker v. Railroad*, *ubi supra*. In *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796, the doctrine is reaffirmed, with a citation of the authorities, and applied to an assessment of damages under the statute authorizing the construction of sewers. In this case no part of the petitioner's land was taken for the sew-

er, nor entered upon; nor used in the construction of the sewer; nor did any part of it abut upon any portion of the sewer, nor upon any land taken or used for the construction thereof. None of these cases are treated as exceptions to the general rule, but all are dealt with as illustrations of it. In *Collins v. City of Waltham*, 151 Mass. 190-198, 24 N. E. 327, Mr. Justice Holmes says: "The right to compensation, under Pub. St. c. 49, §§ 68, 79, is not confined, in terms, to owners of land adjoining the highway, as it is in chapter 52, § 15. It would be going pretty far to deny compensation for damage which could be recovered for if caused by a private person, but we shall not undertake to construe the statute until we find it necessary to do so, beyond saying that it has been intimated that compensation might be recovered under it for damage of this character, and, so far as we know, it never has been decided that the right, whatever it may be, depended upon the lot's touching the highway."

The rule of damages to be applied in these and similar cases was stated by Chief Justice Shaw, in *Proprietors of Locks & Canals v. Nashua & L. R. Corp.*, 10 Cush. 385, 391, in these words: "All direct damage to real estate by passing over it or part of it, or which affects the estate directly, though it does not pass over it, as by a deep cut or high embankment so near lands or buildings as to prevent or diminish the use of them, by endangering the fall of buildings, the caving in of earth, the draining of wells, the diversion of water courses, so far as these are necessary results of suitable and proper works to accomplish the enterprise and secure the public easement which is the object of the charter; also, as being of like character, the necessary blasting of a ledge of rocks so near the houses or buildings as to cause damage; running a track so near them as to cause imminent and appreciable danger from fire, by obliterating or obstructing private ways leading to houses or buildings. These, and perhaps many others of like kinds, which particular circumstances may present, we think, are proper subjects for the assessment of damages, but that no damage can be assessed for losses arising directly or indirectly from the diversion of travel,—the loss of custom to turnpikes, canals, bridges, and taverns, coach companies, and the like, nor for the inconveniences which the community may suffer in common from a somewhat less convenient and beneficial use of public and private ways, arising from the usual and ordinary action of railroad trains, and other natural incidents." The damages which are excluded from consideration are—First, those that are remote and consequential; and, secondly, those that affect the public generally, as distinguished from those that are direct, special, and peculiar. Damages for discontinuing a way are allowed under the statute which provides damages for laying out a way. Pub. St. c. 49, §§ 14-16. But damages are not allowed if

the land does not abut on the portion of the way discontinued, if there is access by any public way, because in such a case the damage suffered is only from loss of the enjoyment of a public right, which is also suffered in greater or less degree by every member of the community. *Hammond v. County Com'rs*, 154 Mass. 509, 28 N. E. 902; *Davis v. County Com'rs*, 153 Mass. 218, 26 N. E. 848. So, in setting off benefits, only those that are direct and special, as distinguished from those that are general, are allowed. *Allen v. Charlestown*, 109 Mass. 243-246; *Cross v. Plymouth Co.*, 125 Mass. 557; *Parks v. Hampden*, 120 Mass. 395. Under the betterment act, benefits are assessed upon estates, no part of which is taken for the improvement for which the assessments are made. Pub. St. c. 51, § 1.

It seems to me that no one reading the cases above cited can doubt that at the time of the decision in *Walker v. Railroad Co.*, 103 Mass. 10, it was the settled law of this commonwealth that direct and special damages to land from the location or construction of a railroad or highway might be allowed as well when no part of the petitioner's property was taken as when the land damaged was the remainder of a lot from which a part had been cut off by the location. If it were not for certain dicta found in that case, and in two or three recent cases which have adopted the same language, I think no one would question that this is the law of Massachusetts today. The adjudication in this case was clearly correct, for the testimony admitted under exception, and the instruction of the sheriff, allowed the jury to include in their assessment damages which were general, and not direct or special. But the statement of the learned judge that, if no part of the petitioner's land had been taken, he would have had no right to recover the particular damages claimed, was purely obiter. He was dealing with a claim for damages from noise, dust, and smoke by one from whom land had been taken, and it seems to me that he fell into an error on account of the nature of the damages claimed. He recognized the rule that, in addition to the value of the land taken, a petitioner is entitled to recover his damages growing out of the use for which the land is taken. See, also, *Presbrey v. Railroad Co.*, Id. 1. But a part of the annoyances for which compensation was asked were suffered, not in the occupation or use of the property, but in going and coming over the public streets, in tarrying and visiting in the neighborhood, and in other ways in which they were common to the whole community, although the petitioner suffered them in greater degree than those who lived further off. It is clear that such damages are not a subject for compensation. That the judge had these in mind appears not only from the language of the opinion in this case, but from that in *Presbrey v. Railroad Co.*, 103 Mass. 1-6. Damage suffered directly in the

occupation and use of the petitioner's property is of a different kind. The statement of the judge, taken in its broadest meaning, would allow a railroad company to establish a freight yard under the windows of a valuable dwelling house, if it took no part of the owner's land, and, by switching and making up trains at all hours of the night, to create a nuisance tenfold greater than the ringing of the factory bell which was enjoined in *Davis v. Sawyer*, 133 Mass. 289. The injury, although of a similar kind, might be far greater than that for which recovery was had at the common law in *Wesson v. Iron Co.*, 13 Allen, 95. For all this, destructive of his property though it might be, the petitioner would be remediless, because the legislature had authorized it under a statute which gave him no compensation. In the same opinion the judge stated a rule for assessing such damages to a person from whom land is taken. He said that depreciation of value from such causes should be considered so far as it is due to proximity secured by means of taking a part of the petitioner's land, and would not have resulted but for such taking. This has been understood to mean that, instead of assessing the whole of a petitioner's damages, the court should allow him his actual damages, less the amount which he would have suffered if the location of the railroad were just outside of his boundary. If the petitioner's land is a large parallelogram, and a railroad is located exactly in the middle of it, he is to be allowed, under this rule, for noise and dust and smoke, his actual damages, diminished by what his damages would have been if the railroad ran along the line of his land, outside of it. His land on one side may be of such a character that he would suffer no damage if the railroad ran just outside of it, while on the other side it may be such that he would suffer as much from a railroad just outside of it as from one in the middle of the tract. To which side shall the jury go for their subtrahend? If they take the hypothetical damages from one side, there will be little or nothing to subtract, and he will receive all his actual damages. If they take them from the other, the amount to be deducted equals the minuend, and he will get nothing. I can see nothing reasonable in a rule which makes the amount of the damages to be allowed to a claimant depend upon the question whether he would have suffered much or little if the location had been in one place or another just outside of his farm or lot. It seems to me that the amount to be disallowed should be the general damages which he suffers as one of the community, who happens to be much in that vicinity, as distinguished from those that he suffers directly in the use and occupation of his property. The nature of the damages claimed has no relation to the question whether the location runs an inch upon the petitioner's land, or is an inch away from it. In attempting to meet the difficulty in his

mind, the judge stated a distinction which made the rights of a petitioner depend upon whether any of his land was taken; and afterwards, for one from whom land had been taken, he stated another distinction, which made his rights depend upon the nature and condition of his property at a distance from the railroad along his boundary line. I do not think that either of these propositions has ever been adjudicated by this court, and I do not know of but one or two decisions in which it can reasonably be contended that either of them was involved. There are cases in which they have been assumed in the opinion to be correct, and have been repeated, but never with any discussion of the earlier authorities. I do not think the court, in *Walker v. Railroad Co.*, intended to overrule the former decisions without referring to them. That there was no such intention seems certain when we notice that the judge who wrote the opinion in that case wrote also the opinion in the later case of *Marsden v. Cambridge*, ubi supra, reaffirming the earlier decisions. Nor do I think that there has been any such repetition of these dicta as should be held to have changed the policy of the commonwealth in regard to the assessment of damages in such cases. I prefer to hold that these equitable principles, applied and fully reaffirmed in the late case of *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796, are still the law that should govern us.

As I understand the fundamental principles, the taking of land for a highway or a railroad involves—First, the acquisition of the title; and, secondly, the appropriation to a use. Damages caused by the taking, considered merely as the acquisition of a title, concern only those whose land is taken. Damages caused by an appropriation to a use concern everybody to whose property a direct and special detriment is caused by the use. Damages of the first class include, not only the value of the land, considered by itself alone, but, as I have already pointed out, its value for use in connection with that from which it is taken, as affecting its size and shape. Damages caused by the use to which the land is to be put are entirely apart from the mere change of title. They are allowed because the use causes detriment to property owners in the vicinity. Of course, only those owning land near the road can be so affected in their property, but if one is so affected he should receive compensation. In this particular, one who has parted with a title to land, and been fully paid for it, is no more deserving than one from whom no land has been taken. It is important to decide cases, so far as possible, upon principles of general application. It would be possible to hold in these cases that no damages are ever to be allowed that are caused by such a use as might lawfully be made by an individual proprietor. But it has never been so held in this commonwealth, and there are many cases to the contrary. It might be held that damages

from the use should always be allowed to persons who are also paid for a title, and not to any others. But this would be an arbitrary and unjust rule, which is in conflict with our decisions. It might be held that certain kinds of damage shall be allowed, whether the petitioner's land is taken or not, and that damage of certain other kinds, although direct and special, and greater in amount, shall never be allowed. But I know no warrant in law or justice for such a rule, and, among the classes of special and peculiar damages which are real and substantial, I know not what should receive favor, and what should be rejected. I think it can make no difference, in law, whether the effect of an injury is felt above or below the surface of the ground; whether it comes from blasting a ledge of rocks, as in *Dodge v. County Com'rs*, or from draining a well, as in *Parker v. Railroad*. If a foot in width of the petitioners' land had been taken, and a high embankment had been built along the front of their houses and lots, there is no doubt, under all of the authorities, that the damage to their property caused by the embankment would be allowed them, although an adjacent individual owner might have built it upon his land without liability. If the embankment had been built upon the street, without taking any land, full damages would have been allowed for the change of grade. Pub. St. c. 52, § 15. I know no good reason why the distance of a few feet between the property of the petitioners and the embankment should affect their rights otherwise than to diminish the amount that should be allowed them.

I am authorized to state that Mr. Justice MORTON concurs in this opinion.

(164 Mass. 368)

LINCOLN v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 16, 1895.)

LAND TAKEN FOR SEWER—REMEDY OF OWNER—
MEASURE OF DAMAGES—SEPARATE TRACTS—
EVIDENCE—EXPERT KNOWLEDGE.

1. The fact that injury complained of by a landowner for the taking of land for a sewer would be a nuisance but for the statute authorizing the construction of the sewer, does not preclude the owner from proceeding under the statute to obtain his damages.

2. Injury to land, arising from the proximity of a sewer, so far as it is due to proximity secured by the taking of part of the land, and would not have resulted but for such taking, may be considered in determining the owner's damages for the taking, though similar injury would not be paid for if no land had been taken.

3. St. 1889, c. 489, § 4, relating to the Metropolitan sewer, and requiring the commonwealth to pay all damages sustained by reason of the taking of land for sewer purposes, does not limit the rule that depreciation in value of land, arising from the proximity of a sewer, so far as it is due to proximity secured by taking part of the land, and would not have resulted but for such taking, may be considered in determining the owner's damages for the taking.

4. The fact that the proximity of a sewer has a detrimental effect on land, part of which

was taken for the construction of the sewer, so far as the injury is due to proximity secured by the taking of such part, and would not have resulted but for such taking, should not, in determining the owner's damages for the taking, be excluded as harm merely anticipated from the future use of the sewer.

5. On an issue, in condemnation proceedings, whether the construction of an overflow on land taken for the Metropolitan sewer was necessary or reasonably probable, it was proper to admit an item for sand sump and overflow in the estimate of cost of the sewer by the engineer in his report attached to the report of the state board of health, which was adopted by the act under which the proceeding was taken.

6. The mere intervention of a way, legally established, but not visible on the surface of the ground, over a tract of land, does not prevent the tract's being considered as a whole in determining the damages arising from the taking of part to the remainder thereof.

7. An owner whose land was taken by the commonwealth was qualified to testify as to the value of the land, without proof of expert knowledge on his part.

Exceptions from superior court, Suffolk county.

Action by Charles S. Lincoln, executor of Orray A. Taft, against the commonwealth, for the assessment of damages for the taking of land by the board of metropolitan sewerage commissioners for the construction of a sewer. There was a verdict for petitioner, and respondent excepts. Exceptions overruled.

Charles S. Lincoln and Elder, Wait & Whitman, for petitioner. John D. Long and Wm. D. Turner, for the Commonwealth.

HOLMES, J. This case brings before us once more the question of the rule of damages to be applied when land is taken, and the purpose for which it is taken is such that adjoining land of the same owners is made less in value. The matter was discussed in the former decision of this case (33 N. E. 1046), but we will state our views once more, in the hope of making them somewhat clearer.

When the legislature authorizes something to be done in the neighborhood of a plaintiff's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the plaintiff cannot claim any under the constitution, because what is done does not amount to a taking. And even if the thing authorized would be actionable at common law, and a nuisance, but for the statute, still it is not necessarily a taking; and, unless it does amount to that, no compensation can be recovered if the statute does not give it. *Titus v. City of Boston*, 161 Mass. 209, 36 N. E. 793. See *Bacon v. City of Boston*, 154 Mass. 100, 102, 28 N. E. 9; *Railway Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229, 235; *Ricket v. Railway Co.*, L. R. 2 H. L. 175, 187. If what is done does amount to a taking, of course, if the statute gives no compensation, an action can be

maintained, since the legislature cannot authorize property to be taken without being paid for.

The question what the statute gives compensation for is a matter of construction. But, as the phraseology is likely to be somewhat general, it is desirable that a general rule should be applied. Such a rule exists in England, but under our decisions there are difficulties, which are mentioned in *Stanwood v. City of Malden*, 157 Mass. 17, 32 N. E. 702, and *Taft v. Com.*, 158 Mass. 526, 547, 548, 33 N. E. 1046. In the former of these cases the English rule is stated a little too broadly. 157 Mass. 18, 32 N. E. 702. One thing seems pretty clear, however, and that is that, if the damages complained of would be a nuisance but for the statute, a court should be more ready to find a remedy under the act than in a case of *damnum absque injuria* at common law. We mention this because the contrary assumption seems to be made in the third and sixth requests of the respondent, the former of which was given by the court. If the nuisance, instead of being a necessary consequence of what the act allows, is a result of mismanagement, the case is different. *Badger v. City of Boston*, 130 Mass. 170.

Statutes like the present, which contemplate a taking of land, generally do not provide for compensation unless there is a taking; and therefore, in proceedings under the act, some of the plaintiff's land must have been taken, in order to give him a standing in court. Whether this is just or not, so long as it is within the limits of the constitution, is not for us to consider. It is enough for us that this condition generally is found in the words of the act. See *Rand v. City of Boston* (decided this day) 41 N. E. 484. If, however, a part of the plaintiff's land has been taken, his locus standi is established, and the question of construction just referred to arises,—as to what, if any, damages shall be allowed for the harm to his adjoining land. Assuming that none of the damages claimed could be recovered under the act, but for the taking, one naturally asks, why should the taking of adjoining land make a difference? The question has been asked a great many times, and the difficulty will be found forcibly stated by Lord Esher in *Reg. v. Essex*. 17 Q. B. Div. 447, 452. If such a difference is to be made, the foundation for it must be found in the words of the statute. It may be said, to be sure, that the plaintiff gets no more than justice, even if others get less (see *Blesch v. Railway Co.*, 48 Wis. 168, 189, 2 N. W. 113; *Essex v. Board*, 14 App. Cas. 153, 177); and that when he is compelled to sell the land, we ought to consider all that he naturally would consider in fixing the price for a voluntary sale. A suggestion has been made that the injurious affecting of the plaintiff's land by the use of the land taken, as distinguished from the

construction of the works, is a particular injury, different in kind from that which is suffered by the rest of the world. *Id.* 153, 161, 162. But the distinction remains a somewhat arbitrary one. The case in which it was laid down under the English statutes (*In re Stockport, T. & A. Ry. Co.*, 33 *Law J. Q. B.* 251) was criticised often before it finally was accepted, although there is no doubt that now it is settled law (*Reg. v. Essex*, 17 *Q. B. Div.* 447; *Id.*, sub nom. *Essex v. Board*, 14 *App. Cas.* 153, 162, 164, 169, 173, 178). And it is to be noticed that Lord Westbury, Lord Bramwell, and some other judges, vainly insisted, with a good deal of energy, that the language of the statutes allowed similar compensation when no land was taken, even if at common law there would have been no right of action. *Ricket v. Railway Co.*, *L. R.* 2 *H. L.* 175, 202; *Essex v. Board*, 14 *App. Cas.* 153, 170, 17 *Q. B. Div.* 477, 450; *Buccleuch v. Board*, *L. R.* 5 *H. L.* 418, 461; *Railway Co. v. Brand*, *L. R.* 4 *H. L.* 171, 215, et seq.

Some damages are allowed by our decisions which could not be suffered except by reason of the taking. The lot from which a part is taken is considered as one whole, as it is in England. *Maynard v. City of Northampton*, 157 *Mass.* 218, 31 *N. E.* 1062. A disadvantageous change in the shape or size of what remains, clearly, is a matter for compensation. And the principle which warrants such allowances was held, logically enough, in *Walker v. Railroad Co.*, 103 *Mass.* 10, 15, to extend to considering depreciation of value arising from the proximity of a railroad and the running of trains, "so far as it is due to proximity secured by means of taking a part of the petitioner's land, and would not have resulted but for such taking," although it is settled that similar depreciation would not be paid for if no land had been taken. *Presbrey v. Railway Co.*, 103 *Mass.* 1; *Fay v. Aqueduct Co.*, 111 *Mass.* 27; *Sawyer v. Davis*, 136 *Mass.* 239, 242; *Taft v. Com.*, 158 *Mass.* 528, 547, 33 *N. E.* 1046; *Rand v. City of Boston*, *ubi supra*. This rule is narrower than that laid down in the Wisconsin and English cases, and if it is open to the objection that it is hard to apply, and too refined for practical purposes, at least it has the advantage of cutting down, and, in theory, of doing away with, the anomaly which those cases recognize. To that extent the damage could not have been suffered but for the taking of the plaintiff's land, whereas, for similar works just outside the plaintiff's land, he could not have recovered, in the case supposed, either at common law or by the constitution. The rule laid down gives the damages, but only the damages due to the taking of the plaintiff's land. It is true that the works might not have been constructed at all, if they had not been put where they were; but this consideration is met by the fact that if they had been

constructed just outside his land the plaintiff would have suffered no wrong under the constitution, or at common law, if no statute had been passed, and would have had no remedy under the statute. At all events, the Massachusetts rule has been in force too long now to be questioned. It has been repeated in many cases, and recently was acted on in the former decision of the case at bar. *Taft v. Com.*, 158 *Mass.* 528, 548, 33 *N. E.* 1046; *Drury v. Railroad Co.*, 127 *Mass.* 571, 583, 584; *Johnson v. Boston*, 130 *Mass.* 452, 454; *Pierce v. Drew*, 136 *Mass.* 75, 85; *Cassidy v. Railroad Co.*, 141 *Mass.* 174, 178, 5 *N. E.* 142; *Wellington v. Railroad Co.*, 158 *Mass.* 185, 189, 33 *N. E.* 393; *Titus v. City of Boston*, 161 *Mass.* 209, 212, 36 *N. E.* 793.

The statute under which these proceedings took place requires the commonwealth to pay "all damages that shall be sustained by any person or corporation by reason of such taking." *St.* 1889, c. 439, § 4 (amended, after the present taking, by *St.* 1890, c. 270). It is enough to say that these words certainly do not look to any diminution of the liability for taking, as it was construed by the decisions rendered before the passage of the act. The commonwealth had nothing to complain of in the general tenor of the instructions to the jury.

The respondent suggests that harm anticipated from the future use of the sewer cannot be allowed for under the head of damages caused by the taking. Some of the difficulties hinted at in our former decision (158 *Mass.* 549, 33 *N. E.* 1049) are stated more at length by the lord chancellor in *Essex v. Board*, 14 *App. Cas.* 153; but the discussion there brings out plainly what any one who considers the matter must see,—that it is impossible to draw a sharp line between the present and anticipations of the future. All values are anticipations of the future. If a jury is of opinion that the proximity of a sewer has a detrimental effect, similar to that of the proximity of the railroad in *Walker v. Railroad Co.*, it may allow for it, within the limits stated, on the same grounds as in *Walker's Case*. It is true that a jury ought not to speculate on the mere possibility that land may be put to disagreeable uses. But when land is taken, and must be used for a particular purpose, the reasonably probable consequences of a lawful use for that purpose must be taken into consideration. See *First Parish in Woburn v. Middlesex Co.*, 7 *Gray*, 106, 109; *In re London, T. & S. Railway Co.*, 24 *Q. B. Div.* 326, 330, 331; *Essex v. Board*, 14 *App. Cas.* 153, 178.

The foregoing general considerations meet a part of the argument addressed to us on behalf of the commonwealth. It remains for us to deal with the exceptions specifically, so far as they need mention. The first ruling requested was that there was no evidence that the construction of an overflow on the land taken was necessary, or reasonably prob-

able. In connection with this may be mentioned an exception to the admission of the item for "sand sump and overflow, Shirley gut," in the estimate of cost of the North Metropolitan Sewerage System by the engineer, Mr. Carson, in his report attached to the report of the state board of health, which latter is adopted and made the foundation of the act of 1889, under which these proceedings take place (St. 1889, c. 439, § 3). The report approves the estimate of Mr. Carson, and appends his report. We see no reason why the document was not admissible. But the testimony was uncontradicted that the plan had been changed in this particular, and the truth of this testimony, practically, was assumed by the judge in his charge. If the jury were to find that the possibility of an overflow on the land taken was an element to be considered, they hardly could have done so except on the ground that in their opinion it was a probable or not improbable consequence of the general scheme as presented to them by the evidence and their view, whatever the engineers might say. They had a right to form their own opinion upon the matter, and if that was their opinion they had a right to act upon it, even if every expert assured them that nothing of the kind was to be expected, since such a use of the land was within the rights taken by the commonwealth.

Nothing further needs to be said as to the second, third, fourth, fifth, and sixth requests. We do not see anything in the case calling for the seventh ruling asked,—that there was no evidence that the uses for which the land was taken were inconsistent with the laying out of a way over the same "by the proper authorities." No doubt, the legislature could authorize such a way. The request did not require any more exact proposition. We perceive no advantage which the commonwealth would have gained from having that statement made.

The eighth ruling asked was that the land on the opposite side of the public street could not be considered as part of the remaining land of the petitioner, for damages to which he could recover in this proceeding. No doubt, there are many cases in which the court is able to see, from the way in which they are divided and used, that different parcels of land, even if they adjoin one another, are to be regarded as distinct. *Wellington v. Railroad Co.*, 158 Mass. 185, 33 N. E. 393; *Todd v. Railroad Co.*, 78 Ill. 530. But the question is a practical one, and the mere intervention of a way legally established, but not visible on the surface of the ground, is not conclusive. If, as here, the whole estate was practically one, the plaintiff is entitled to have the damage to the whole of it considered. As was said by Dixon, C. J., we are to look at the land, and not at the map, to ascertain the plaintiff's damages. *Welch v. Railway Co.*, 27 Wis. 108, 112; *Railroad Co. v. Owen*, 25 Kan. 419, 421; *Ham v.*

Railway Co., 61 Iowa, 716, 17 N. W. 157; *Railroad Co. v. Murphy*, 19 Minn. 500 (Gil. 433); *Essex v. Board*, 14 App. Cas. 153, 162, 167; *Whitney v. City of Boston*, 98 Mass. 312, 316.

Nothing needs to be added concerning the ninth request, in view of the instructions given. The only other exception was to the admission of the owner's (Taft's) testimony as to the fair rental value of the property. As an owner, he was qualified to testify as to the value. *Blaney v. City of Salem*, 160 Mass. 303, 35 N. E. 858. And the rental value may be stated as a reason for or as a means of arriving at the value of the land.

Exceptions overruled.

KNOWLTON and MORTON, JJ., agree to the result in this case, but dissent from some parts of the reasoning, for reasons that appear in the dissenting opinion in *Rand v. City of Boston* (decided this day) 41 N. E. 434.

(147 N. Y. 215)

McCLURE v. LEVY.

(Court of Appeals of New York. Oct. 8, 1895.)

CORPORATIONS—APPROPRIATION OF ASSETS BY OFFICER.

The president purchased of a corporation its nonnegotiable notes, with knowledge that the consideration therefor had failed, and that the corporation was insolvent. Afterwards he procured the adoption by the board of directors of a resolution authorizing the payment of such notes, and on obtaining a check he resigned the presidency. *Held*, that he was liable for the amount so received, as having obtained it by fraud.

Appeal from supreme court, general term, First department.

Action by Davis McClure, as temporary receiver of the Life Union, against Louis P. Levy. From a judgment of the general term (29 N. Y. Supp. 352) affirming a judgment entered on a verdict directed in favor of plaintiff, defendant appeals. Affirmed.

Edward Browne, for appellant. Frederick Geller, for respondent.

BARTLETT, J. This is an appeal from a judgment and order of the general term, First department, affirming judgment on a directed verdict for plaintiff, and affirming order denying motion for a new trial. The plaintiff, as receiver of the Life Union, an insolvent insurance company conducted on the assessment plan, sued to recover of defendant the sum of \$10,141.06 of the funds of the company, alleged to have been embezzled and converted by him while its president. At the close of the evidence each party asked for a directed verdict, so that the facts most favorable to the plaintiff must be taken as proved.

It appears that early in 1891 the affairs of the Life Union were in an unsatisfactory condition, the membership was falling off, and it was deemed essential that something

should be done to enlarge and extend its business. A special meeting of the directors was called for April 10, 1891, at which it was resolved, after reciting that an opportunity presented "of securing the Flour City Life Association, of Rochester, N. Y., for the sum of \$40,000," that such purchase should be made, and to effect it the Life Union should execute its notes for \$35,000, at 6 per cent., in amounts not less than \$1,000 each, payable on or before 24 months after date, in form as follows: "New York, April 13th, 1891. \$1,000.00. On or before twenty-four months after date, the Life Union promises to pay to the order of — one thousand dollars, at its office in the city of New York, from such portion of the income of said the Life Union as may be properly applicable thereto, with interest. Value received." Eleven of these notes were subscribed for by directors, the proceeds placed in hands of J. T. Baldwin, then the president of the Life Union, as trustee for the note-holders, who paid same to one Charles F. Underhill, president of the Flour City Life Association, who surrendered to Baldwin a power of attorney and proxies from the members of his board of directors, which transaction was supposed or pretended would, by reason of resignations of officers and directors, and the election of others, give full control of the Flour City Life Association to the Life Union, and transfer to the latter the membership, property, and business of the former. Soon after this attempted transfer, which was neither consolidation nor re-insurance, the insurance department instituted judicial proceedings against the Flour City Life Association, which resulted in its dissolution. The effect of this transaction by the directors of the Life Union can be best described by quoting from a circular issued by the executive committee of the Life Union, dated February 27, 1892, and read in evidence. The circular states: "The \$35,000 notes given by the Life Union were specially printed contract notes, payable out of the expense funds derived from the transferred membership of the Flour City. No such transfer took place. Therefore, the consideration having failed, the notes are worthless. The directors have lost \$11,000. The company has lost nothing." It thus appears that there was a complete failure of consideration, as to the notes in question, and that they were payable out of a fund to be derived from the transferred membership of the Flour City Life Association, which transfer never took place. The statement that the loss had fallen upon the directors, and not the company, proves to have been inaccurate.

This brings us to the consideration of defendant's connection with the case. Soon after the circular referred to was issued, and about May, 1892, the defendant became the president of the Life Union. William H. Law, who was defendant's predecessor as president, was sworn at the trial; and his

evidence stands uncontradicted by the defendant, who failed to take the stand in his own behalf. Law swears that between February and April, 1892, defendant received the 11 notes in question from him, or his associate, and paid for the same \$12,000, being their face value, and a compromise on the balance of interest, which was not figured. He was unable to give the month of the transfer, and could not tell what portion was paid in cash and what amount in check, but thought the greater part was paid in bills. It may be remarked, in passing, as somewhat peculiar, that defendant should have paid considerably more interest than had accrued on the notes. Law calls this transaction a compromise as to the interest. When pressed, on cross-examination, Law would not admit, in terms, that it was agreed between him and defendant, who was not then president of the Life Union, that the payment of the \$12,000 was in consideration, not only of the transfer of the notes, but of his resignation as president and director, in order to let defendant assume these positions. He was then asked this question: "Did you not know the agreement provided for the payment of fourteen thousand dollars to Moody upon the resignation of certain directors, including yourself, and the turning over of the absolute control of the company to Levy [this defendant]?" To this he made answer, in part, as follows, viz.: "I cannot say I did. I will not say I did not. * * * So far as I am aware, Mr. Levy never would have paid for the notes, if it had not been coupled with the resignation. He would not have got the resignation without paying for the notes. * * * I represented to him the status of those notes, and good money had been paid for them on behalf of the Life Union. I neither represented to him they were good or bad. I stated the circumstances of the issue of them, and it was for him to determine whether they were good or bad." The defendant is thus shown to have taken the notes with full knowledge of the circumstances surrounding their issue, and he is also placed in the peculiar position of buying the paper of a company manifesting signs of financial trouble, and paying more than its face value, with interest, in order to gain control of its affairs. After acquiring the notes the defendant was made president of the company, about May, 1892, as stated; and the next material event brings us to the 27th day of December, 1892, a few days before this unfortunate corporation passed into the hands of a receiver, on January 12, 1893. A meeting of the board of directors was held after the hour of noon, December 27, 1892, at which the following resolution was passed, viz.: "Resolved, it being apparent from notes presented, that Mr. Louis P. Levy has taken up notes to the amount of eleven thousand (\$11,000) dollars, drawn by the company, we hereby authorize our officers to draw upon

our reserve fund to pay such notes, with interest." Between 10 and 12 o'clock in the forenoon of the day when this resolution was passed, and before the directors' meeting was held, the defendant, then being president of the company, directed the secretary to draw a check for the sum of \$10,141.06 on the National Park Bank of New York, payable to the order of cash, for all the reserve fund in that bank. The check was drawn, handed to defendant, and duly certified that same day, and afterwards deposited, indorsed by defendant, and paid to him. The secretary swears he asked how to charge the matter in the cash book, and was told by defendant he would tell him later, which he never did. So that at the time the resolution was passed the defendant was in actual possession of the check. This check was signed by defendant as president.

In view of the situation disclosed, the question presents itself, whether the defendant was authorized to withdraw from the funds of the Life Union the amount represented by this check. It is too clear for argument that the proposed scheme for the Life Union to "purchase" the Flour City Life Association was neither consolidation nor reinsurance, was illegal and ultra vires, and the notes given to carry out the arrangement by the officers of the Life Union were without authority of law, and absolutely void. It also appears, from the facts already commented upon, that the defendant is not a bona fide holder of these notes, but took the same with the full knowledge of all the circumstances surrounding their issue, and stands in no better position than the original payees. In addition to this, the defendant was given full notice by the face of the notes that they were not negotiable paper under the law merchant, being payable from such portion of the income of the Life Union as might be properly applicable thereto. The circular in evidence, and already referred to, shows that the notes were payable out of a fund to be derived from the transferred membership of the Flour City Life Association,—a transfer that was never consummated, and a fund which never existed. The resolution authorizing the payment of these notes directed the officers to draw upon the reserve fund. It was a matter of dispute at the trial whether the funds in the National Park Bank were reserve funds, or not. It does appear that a portion of the moneys in this bank were a part of the reserve fund. This question of the reserve fund, however, is not necessarily controlling. While we think the evidence warrants the conclusion that there was an unauthorized interference with the reserve fund, which the law provides shall be held for the benefit and protection of members (Laws 1892, c. 690, § 205), we are also of opinion that payment of the check in question out of the general funds of the company was equally unauthorized, under the circumstances. It is impos-

sible to escape the conviction that the defendant fraudulently obtained possession of this money on the eve of his resignation as president, and with a full knowledge of the worthlessness of the notes, and that the Life Union could no longer continue in business, being hopelessly insolvent.

The appellant's counsel points out various rulings at the trial as constituting legal error, but, after a careful examination, we think the learned trial justice made a proper disposition of the case. The judgment and order appealed from should be affirmed, with costs. All concur. Judgment and order affirmed.

(147 N. Y. 210)

PEOPLE v. KERRIGAN.

(Court of Appeals of New York. Oct. 8, 1895.)

MURDER—PREMEDITATION—EVIDENCE.

On a trial for murder, there was sufficient evidence of premeditation to sustain a conviction of murder in the first degree, where it appeared that the parties quarreled, and decedent applied opprobrious epithets to defendant, and struck him in the face; that defendant then went away, and returned between 5 and 15 minutes later with a pistol, and shot deceased,—the time between the quarrel and the shooting being sufficient for defendant's passions to cool.

Appeal from court of oyer and terminer, New York county.

Thomas Kerrigan was convicted of murder in the first degree, and appeals. Affirmed.

Andrew D. Parker, for appellant. John D. Lindsay, for the People.

O'BRIEN, J. The defendant was convicted of the murder of one Aaron Alexander, in a saloon in Rivington street, in the city of New York, on the night of April 3, 1894. That the deceased died from the effects of a pistol shot fired by the defendant at the time and place above mentioned is not disputed, the only question being whether the other elements—of intent, deliberation, and premeditation—necessary to constitute the crime were sufficiently established. It appeared from the testimony that the deceased was a strong, powerful man, who was disposed to be quarrelsome, and who actually had some quarrel or dispute with the defendant about a week before the homicide. The particulars of this difficulty do not distinctly appear, and they are material only so far as they tend to show that on the night of the homicide the deceased and the defendant met in the saloon under the influence of those feelings and passions which had been incited by a previous quarrel or serious disagreement. It appears that the deceased, the defendant, and several other persons who associated more or less with them, were in the habit of meeting at this saloon in the evening for the purpose of drinking and card playing, and, on the evening of the homicide, were all together in the early part of the evening. The immediate cause of the diffi-

culty which preceded the shooting was what the deceased evidently took to be a slight offered him by the defendant. It appears that the deceased, the defendant, and five other persons were in the barroom of the saloon on the night in question, and the defendant asked the five other persons to drink beer with him, ignoring the deceased, who immediately took offense, and called the defendant offensive and vulgar names, and finally struck him in the face and upon the nose, causing the blood to flow. There is some conflict in the testimony of the witnesses as to what actually took place and was said by both parties at this stage of the quarrel. They all agree, however, substantially, that the defendant received from the deceased one or more severe blows in the face with the fist, or, as some of them say, with a beer glass which was held in the hand, and that after this occurred the defendant went into a closet adjoining the barroom, washed the blood from his face, and then passed through the barroom out into the street, through the door. After the lapse of a period of time which is variously described by the witnesses as from 5 to 15 minutes, he returned, found the deceased still in the barroom, and, pointing a pistol at him, fired while the deceased was attempting to escape from him behind the bar. The bullet entered the body of the deceased near the right hip, passed through the pelvis, and came out in front, inflicting a wound from which he died soon after. One of the police officers, who had the defendant in charge after the shooting, testified, in substance, that the defendant confessed to him that after the quarrel in the saloon, and after the defendant had washed the blood from his face, he went directly to his house, which was about two blocks distant, and there procured the revolver, and then returned to the saloon and fired the fatal shot at the deceased. The defendant was the principal witness in his own behalf. He denied that he made any such admissions to the police. Swore that he found the pistol in the street in the month of October previous, and that he carried it constantly from that time, and had it in his pocket when the altercation took place in the saloon resulting in the blow from the deceased; that, upon entering the saloon the second time, he took it from his pocket, intending only to frighten the deceased; that, one of the bystanders having seized him by the wrist, the pistol was accidentally discharged, and in that way the wound was inflicted which produced the death of the deceased, without any intent to kill on the part of the defendant.

The case was submitted to the jury upon the evidence, under a careful charge, and the verdict of conviction must be taken as conclusively establishing the facts against the defendant's contention. The defendant's version of the transaction, which, upon its face, was extremely improbable, was discredited

and wholly rejected by the jury, and that given by the witnesses for the people has been adopted. While this court has the power, in a capital case, to review the facts, and to grant a new trial when satisfied that the accused has not had a fair trial, or when injustice has been done, it must observe the rules and principles which apply to all tribunals exercising appellate jurisdiction. It is the province of the jury to determine questions of fact depending upon evidence in any degree conflicting, and to declare by their verdict what the truth is; and when once determined, upon evidence which is sufficient, even though capable of diverse or opposing inferences, this court has no more right than the trial court to substitute its own judgment in the place of that of the jury, or to usurp its legitimate functions. The jury must be satisfied of the guilt of the accused beyond a reasonable doubt, and, where a conviction has been had in a capital case upon conflicting evidence, this court may undoubtedly grant a new trial when convinced, upon a review of the whole evidence, that the conclusion of the jury was not reasonably possible, or that the proof does not come up to the required standard, or, for any other reason, injustice has been done. *People v. Cignarale*, 110 N. Y. 23, 17 N. E. 185. According to the settled rules adopted and followed by this court for the review of cases of this character, nothing appears on the record that would justify us in interfering with the finding of the jury. The learned counsel for the defendant does not rest the appeal upon the ground that the shooting was the result of accident. That was the theory of the defendant himself when on the witness stand. It would be manifestly impossible for any appellate court to give any weight to a theory so improbable, after it had been discredited by the verdict of the jury. The argument now submitted for the defendant suggests that the homicide was not committed with the deliberation and premeditation which is an essential element of the crime of murder in the first degree. It is quite possible that if the defendant had fired the fatal shot while resisting the assault upon him by the deceased, or at the moment that he had received the blow in the face, the degree of criminal responsibility would be changed. But the jury have found that, whoever was the aggressor originally; the quarrel had ended, the parties had separated, that the defendant had no cause to apprehend further danger, and that when he returned, after the lapse of sufficient time for the passions to cool, and, without any new provocation, fired at the deceased, there existed in his mind a deliberate and premeditated design to effect his death. If it be conceded that the original quarrel was provoked by the deceased, and that the defendant was abused and assaulted as claimed, still the shooting was wholly unjustifiable. There being no longer any reason for the defendant to ap-

prehend any bodily injury, his act in killing the deceased in the manner described by the witnesses for the people was murder, within all the cases; and it was clearly a question of fact, for the determination of the jury, whether sufficient time had elapsed for the excited passions of the defendant to cool. *Shorter v. People*, 2 N. Y. 193; *People v. Sullivan*, 7 N. Y. 396; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *People v. Carlton*, 115 N. Y. 618, 22 N. E. 257. It may be true that the defendant left the saloon, procured the pistol, returned and fired the fatal shot while smarting and angered by reason of the insults and blows of the deceased; but these facts constitute, in law, no excuse or justification for the killing. So long as there was time and opportunity for reason to assume its sway and the passions to cool, the law holds the defendant responsible for his acts. It may be that the language and conduct of the deceased provoked the original quarrel in the saloon, but after that difficulty had terminated the defendant returned to renew it, and instead of avoiding further trouble, as was his duty, deliberately sought out the deceased and shot him, as the jury found, from motives of revenge. It is not now within the province of the court to disturb the verdict of the jury on the ground that the deceased was the aggressor in the beginning. The courts, in the administration of criminal justice, are bound by settled legal rules. If their effect and operation should be mitigated in a particular case by reason of special facts or circumstances, that power rests with the executive department of the government, and not with the judicial tribunals. There are some features of this case that deserve, and doubtless will receive, careful consideration in that department.

There are no other questions disclosed by the record that call for further discussion, or that would justify a new trial, and the judgment of conviction must therefore be affirmed. All concur. Judgment affirmed.

(147 N. Y. 223)

STOKES v. MACKAY et al.

(Court of Appeals of New York. Oct. 8, 1895.)

CONTRACTS—ACTION ON—PART PERFORMANCE.

1. In an action on a contract by which plaintiff agreed, in consideration of a certain payment to him by defendant, to surrender bonds in which plaintiff had an interest with defendant, a motion to direct a verdict in favor of defendant on the ground that there had been no delivery and no tender, and no excuse for nondelivery, of some of the bonds, but that such bonds had been pledged by plaintiff, does not raise the objection that plaintiff was unable to perform by a delivery of the bonds at the time, when he offered to tender them and the tender was refused.

2. An express repudiation of a contract by a party is a complete breach, and dispenses with the necessity of a tender of performance by the other party as a condition precedent to the maintenance of an action by him for the breach.

Appeal from supreme court, general term, First department.

Action by Edward S. Stokes against John W. Mackay and another. From a judgment of the general term (31 N. Y. Supp. 706) affirming a judgment entered on a verdict in favor of plaintiff for \$94,006.53, defendants appeal. Affirmed.

Joseph Larocque, for appellants. Esek Cowen and Joseph H. Choate, for respondent.

GRAY, J. When this case was reviewed by us upon the prior appeal (140 N. Y. 640, 35 N. E. 786), it was decided that there were certain questions of fact, upon the evidence, which should have been submitted to the jury; and because the trial judge had refused to do so, and had directed a verdict for the plaintiff, the judgment recovered was reversed, and a new trial was ordered. There was a sharp difference in opinion as to the effect of the evidence. It was thought by some of the members of the court that the proof was such as to establish a complete adoption by Mackay of the contract which De Castro, as his representative or agent, had made for him with Stokes, and which provided for the sale and transfer by the latter to Mackay of the bonds and stocks of the United Lines Telegraph Company held by him, or to which he might be entitled, in consideration of the payment of \$100,000, and the cancellation of an existing indebtedness. A general outline of the facts may be briefly given. The telegraph interests and properties had been acquired and created by Stokes, as the result of a joint venture with Mackay, undertaken in 1884, with moneys furnished by the latter. It had commenced with the acquisition by Stokes of the Bankers' & Merchants' Telegraph Company's properties and franchises, at a receiver's sale thereof. He reorganized the same into the United Lines Telegraph Company, became its president, received \$2,380,000 of the \$3,000,000 of capital stock, and held or controlled the \$1,200,000 of first mortgage bonds, and added to the company's property by building or purchasing additional telegraph lines. It was the purpose, eventually, when the scheme was ripe, to consolidate this company with the Postal Telegraph Company, of which Mackay was practically the owner, and for the benefit of which the other properties had been acquired and developed. Either in the securities of the new company to be so formed, or in the profits of the joint enterprise (it was a question which), Stokes had an interest. Meanwhile, everything stood in Stokes' name, and was in his possession and control. After about four years, Mackay desired to obtain these telegraph bonds and stocks, and instructed his agent, De Castro, to procure their transfer by Stokes. Stokes was not unwilling to turn them over, but insisted upon some agreement being made which should recognize and provide for his interest in the

telegraph properties, or in the profits of the enterprise. The contract in question was then made and signed by Stokes and De Castro on December 24, 1888; Stokes delivering to Ingersoll, as a condition of De Castro's signature, a large number of the bonds of the United Lines Company, to be held until Mackay was heard from in approval, or otherwise, of what his agent had done. The day when the contract was so made, De Castro sent a telegram to Mackay, stating that Stokes had "turned over to Ingersoll \$985,000 of bonds and other securities," and had "signed also an agreement, which is forwarded, and which leaves him out," and that "Ingersoll will turn over to E. C. Platt these securities for custody. This is the only way it could be done, and I hope it will be satisfactory." Platt, the representative of the Nevada Bank, and the financial agent of Mackay here, also, on the same day, telegraphed to him about Stokes' having deposited the bonds with Ingersoll, and that "\$1,600,000 stock will be assigned, and all judgments turned over, on your order, as soon as agreement forwarded to-day is signed by you." Mackay did not wait to see the contract, but immediately telegraphed to De Castro: "All right and satisfactory. I want you to tell Ingersoll to do nothing in this case except what he knows to be correct and legal, as I do not want trouble for what has been done in the past, nor in the future." And to Platt he also at once telegraphed: "All right. You take whatever securities Ingersoll gives you, as Ingersoll understands this matter fully." Stokes had not been shown the telegram sent by De Castro on December 24th, but was only told by him that he had telegraphed Mackay about the arrangement. On December 26th, upon De Castro's informing him of Mackay's telegram that it was "all right and satisfactory," Stokes went to the company's office, and made a transfer in blank of the 23,800 shares of stock which he held, and delivered the same to Townsend, for Mackay. The same day, De Castro receipted upon the contract as for the bonds previously delivered to and held by Ingersoll. The latter then wrote Mackay a letter, on December 26th, informing him of the delivery by Stokes of the bonds and the stock, and inclosing the contract. To this letter Mackay answered to the effect that, "on looking over the agreement, he saw no necessity for signing it. Some portions of it are wrong"; that the claim against Read & Co. (Stokes' firm) "had nothing whatever to do with the telegraph business"; and that "there is no necessity to make any change at present, except to place the securities with Mr. Platt, for safe-keeping." Subsequently, there were two significant occurrences: In the first place, the certificate for the 23,800 shares of stock was filled up with Mackay's name, thus making the transfer of the stock absolute. Then a loan of \$25,000, secured by Stokes from a bank upon the collateral security of \$100,000

of the United Lines bonds, was paid off by money obtained from Mackay, and the bonds were taken up and delivered to Platt for Mackay. With this sum of \$25,000 Stokes has credited Mackay, as in part payment of the \$100,000 mentioned in the contract. In March, 1889, Mackay arrived in New York from California, and had interviews with Stokes, in which he refused to recognize, or to be bound by, the contract of December, and repudiated the transaction, demanding that plaintiff account to him with respect to their past financial transactions. But, instead of restoring the securities which Stokes had turned over upon the faith of the contract of December, he insisted upon his right to them, and that Ingersoll should deliver to him what he held. Mackay claimed that an arrangement was made by which Stokes agreed that the securities might be turned over, that he would account to him as to their past financial transactions, and that he would rely upon Mackay's generosity as to the compensation for his interest in the telegraph properties. That was the position taken by Mackay, while it was claimed by Stokes that a contract had been entered into by Mackay in December, which was binding upon the latter, and which had been mostly executed on his part, by a delivery of the bonds and of the controlling interest in the capital stock. In brief, Stokes occupied the position of Mackay's having become obligated to him under the December contract, either by reason of the telegrams sent in response to the communications of his agents in relation to the arrangement with Stokes, or by force of his subsequent conduct in adoption of that arrangement, by the retention and ultimate acceptance of its benefits. The proof is that Stokes had turned over practically all of the great property in his possession, and that Mackay had received it; and the verdict establishes that it was in pursuance of the agreement between them which obligated the latter to pay a certain consideration, and canceled the existing indebtedness referred to.

The evidence upon the last trial does not, essentially, differ from that given upon the first trial, and the jury have now decided in plaintiff's favor all the questions of fact which were deemed, in the prevailing opinion rendered in this court, to arise upon the evidence. They were, in substance, whether the meaning of Mackay's telegram was that he would be bound by the December contract; whether he had ratified and adopted it; whether Stokes had agreed to abandon it, and to rely solely upon Mackay's generosity for his compensation. It was said in the former opinion, "The ultimate issue to be determined is whether Mackay became bound as a party to the agreement signed by Stokes and De Castro by ratification, adoption, or estoppel, and all the evidence bearing upon that issue should be fairly submitted to the jury, for their determination." In view of

the opinion of this court, and of the decisive character of the verdict of the jury, in settling the questions upon which the parties were in conflict, the controversy should be considered as having ended with the result of the trial, and the error must be both serious and plain, which should influence us to reverse the judgment which the plaintiff has again recovered, and to direct a further trial of the issues.

The appellants insist that several errors were committed in rulings made by the learned trial judge upon questions of evidence, and in his instructions to the jury. We think it only necessary to refer to the contention that the plaintiff failed to make any tender of certain of the United Lines Company's bonds prior to the commencement of his action, and that he did not show that he was able actually to deliver them to Mackay, had the latter been willing to accept a delivery. These propositions have reference to the fact that Stokes had pledged some of the bonds to secure loans of moneys, and the argument is, assuming that the evidence justified the jury in believing their tender to have been waived, nevertheless that it was incumbent upon Stokes affirmatively to establish the fact that he was in a position to redeem the bonds, and able actually to deliver them to Mackay, upon the latter's paying the balance of \$75,000 claimed by Stokes as due upon the contract. This phase of the contention between the parties is claimed to have been made to appear by the motion of the defendants to dismiss the complaint and to direct a verdict. The motion to dismiss was made upon the general ground that the plaintiff had failed to establish his alleged cause of action, and it did not specify, or call to the attention of the court, that or any other particular point. It was therefore an insufficient basis upon which to predicate error with respect to some feature of the trial not necessarily suggested by the language used. The motion to direct a verdict was based upon three grounds, two only of which have relation to the present point. They were that there had been no delivery and no tender, and no sufficient evidence of a waiver of a tender of the \$115,000 of United Lines Telegraph bonds which were shown to have been pledged with the Chemical Bank; that those bonds, as appeared by the evidence, had, to a considerable amount, been subjected by the plaintiff to further and different liabilities, and, by the plaintiff's voluntary act, passed from his control. "Third. Upon the ground that there had been no delivery and no tender, and no excuse for nondelivery, of the bonds which had been, according to the testimony, in the Madison Square Bank. On the contrary, it appeared from the evidence that, after the time it is alleged that the contract sued upon was made, the plaintiff himself was borrowing money and creating a burden upon these bonds for the payment of his own obligations, and that if any tender

had been, in point of fact, made or proposed, the same had not been kept good as required by law." While the effect of the motion was to raise the question of tender, and of the sufficiency of the evidence to justify a finding that a tender had been waived, it does not suggest the point that the plaintiff was unable to perform by a delivery at the time when tender was offered to be made, and when the same was waived. The fact that the bonds were pledged to secure liabilities of the plaintiff was in no wise inconsistent with plaintiff's ability to redeem, or to procure them for delivery to the defendants. If the defendants believed, and intended to make the point, that the plaintiff was actually incapable of delivering the small balance remaining of the bonds, it should have been distinctly stated. The plaintiff having given evidence of his willingness to turn over the remaining bonds if defendants would pay the \$75,000 due by the contract, and that their formal tender was waived, he had *prima facie* established the breach by the defendants of the contract relied upon, and that it was owing, not to some default on his part, but to Mackay's refusal to be bound by the terms of the contract, or to recognize that any rights had accrued to the plaintiff by reason of the transactions between them. Manifestly, in that attitude of the parties, the plaintiff was not called upon to establish the fact that had the defendants not waived a tender, and a tender had been necessary, he possessed ways and means to produce and present the bonds for acceptance or refusal. Whatever was the real condition of his finances, there was nothing to warrant the inference of an inability to redeem the bonds; and, if presumptions were to be indulged in, the presumption of plaintiff's ability to perform his agreement, and to have the means to do so, obtained until overcome by evidence to the contrary. It is very clear, under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which they wholly failed to establish, that the plaintiff was incapable of redeeming the bonds for delivery. It is equally clear that they did not entertain a notion which was not suggested upon the trial, either by motion, or by a request for an instruction to the jury, or in any other manner.

The only point suggested by the motion to direct a verdict was that there had been no tender of the bonds, and that defendants had not waived a tender; and, as bearing upon the efficacy of the tender to relieve the plaintiff of the duty resting upon him, it was stated that the bonds were pledged to secure liabilities of the plaintiff, and had thus passed from his control. The defendants claim that there were \$165,000, par value, of those bonds, which, at the time of the commencement of the action, had not been delivered by the plaintiff. According to the plaintiff's evidence, between the time when

he was given to understand that Mackay approved of his agent's negotiation and contract, in December, 1888, and when, in March, 1889, Mackay came on to New York, all the telegraph properties had been turned over which were in his possession, except \$115,000 of the bonds. Fifty thousand dollars of the bonds had been loaned to De Castro, and he had pledged them in October, 1888, to the Madison Square Bank, to secure a loan to himself. On December 26, 1888, Stokes gave De Castro an order on the bank to deliver the bonds to him (De Castro) when his loan was paid. As one of the vendees named in the contract of December 24, 1888, and as the agent or intermediary of Mackay, this was a sufficient, and the only possible, delivery, and divested Stokes' title to the bonds, in favor of De Castro, as Mackay's agent. As to the \$115,000 of bonds, they were under pledge to secure a loan to Stokes from the Chemical Bank, and Mackay's position towards Stokes, and his declarations to him after his arrival in New York, made it unnecessary to do anything about getting them up. He refused to recognize the contract as binding upon him, and simply claimed all the telegraph properties to be his. His attitude was one of distinct repudiation of any obligations towards Stokes. The latter was then in the position of having turned over substantially all the property in his possession, and then of hearing Mackay disavow the contract upon the faith of which he had acted. He had divested himself of the control of the telegraph company, and of the great bulk of the securities and properties of which he had become possessed, and stood ready to fulfill every condition; while Mackay, who had seen him give up everything, refused to pay the cash consideration named in the contract. His course was plain. There was a breach of the contract. He had lost the control of the telegraph company, and had delivered most of the property called for by the contract. He could elect to rely upon the responsibility of the vendees and sue them upon the contract for what remained to be paid by them of the consideration moneys. This he did, and his offer to make a tender of the bonds yet undelivered, before suit, was expressly waived by De Castro, as useless. Indeed, in view of Mackay's express repudiation of the contract, it would have been an unnecessary and meaningless ceremony for Stokes to go through the form of tendering the remaining bonds, and no tender was called for. *Cornwell v. Haight*, 21 N. Y. 462; *Shaw v. Insurance Co.*, 69 N. Y. 286. In the latter case the English rule deducible from the cases was adverted to, that "the positive, absolute refusal by one party to carry out the contract is in itself an immediate, complete breach of it on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent and gives

immediate right of action"; and it was held that, while our decisions may not have gone so far as those of the English courts, yet that where a party has repudiated all obligation, and so declares, it would be "a useless act," after that, to make an offer to perform. The law does not compel a man to do a vain and fruitless act. The situation of the parties was sharply defined. Stokes claimed that a contract had been made with De Castro and Mackay, under which he had substantially performed what was required of him, and that Mackay had become bound, either by his telegrams, or by subsequent adoption and ratification. Mackay, on the other hand, repudiated any obligation under the contract; claimed the telegraph properties were his without any payment, and that Stokes had given up all his interests, relying upon his (Mackay's) generosity as to compensation. Stokes therefore elected to sue him upon the contract, and in affirmance thereof, to recover that portion of the cash consideration which remained unpaid. That fixed the rights of the parties, and presented distinct issues for trial, which would result, either in a decision that Mackay was not bound in any way by the contract, and that Stokes had gained no rights thereunder, or had abandoned them, or that a contract had been validly made, by the terms of which Mackay had become obligated, and that Stokes had done everything on his part which entitled him to enforce that obligation and to recover the moneys demanded. The evidence was such as, in the former judgment of this court, to require the submission of the case to a jury, and they have decided the contention, by their verdict, in favor of Stokes; and all questions of fact essential to Stokes' recovery will be deemed to have been passed upon favorably. No acts done by the plaintiff after the commencement of the action could affect the cause of action, for the right of action had become vested upon the breach of the contract. That breach consisted in the repudiation of a contract then substantially executed, and in the refusal to pay the contract price, while retaining practically all the property sold and delivered under the contract. The plaintiff's subsequent acts could only create a cause of action in favor of the defendants. Under the allegations of the complaint, the defendants might at any time, after the action was commenced, have demanded the bonds yet undelivered, upon offering to pay the \$75,000 claimed from them. If their delivery had become impossible to the plaintiff, the defendants would have had the right to compel him to account for what he could not deliver; but nothing which might happen to the bonds after the right of action had vested, and was availed of, could divest such right of action. *Westfall v. Peacock*, 63 Barb. 209. That some bonds remained pledged to others to secure liabilities of the plaintiff proves nothing against his right of recovery. If

he could not redeem them, he could be compelled to account for the moneys received for them. If any had been converted, and passed beyond his control, after the commencement of the action, and without fault on his part, at most, if at all, under the circumstances, he could be compelled to account for their actual value. The rule is not questioned that, by the election to sue upon the contract for the price, the plaintiff has kept alive all his own obligations under it. He recognized them by offering to make tender of what bonds he had not yet delivered, and by keeping the tender open in his complaint. The defendants have at all times been entitled, upon offering to pay the \$75,000, to have the bonds. Their payment of this judgment will leave them still entitled to demand them, and a failure to comply will create a cause of action in their favor for their value.

We have considered the main question on this appeal with great care, and we think that neither in the rulings upon which it arose, nor in any other of the rulings referred to, was there any error committed which would justify us in ordering a new trial of the action. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 177)

GRAY v. SHEPARD et al.

(Court of Appeals of New York. Oct. 8, 1895.)

MASTER AND SERVANT—DISCHARGE OF EMPLOYEE—BREACH OF DUTY.

1. Parol evidence is inadmissible to limit the word "incompatibility," named as one of the grounds for discharge in a contract of employment on a newspaper, to "unsuitableness" of the employé for the employment.

2. The retention by an employé of a letter from his employer in reference to his work, after the matter referred to therein has been closed, is ground for his discharge, where it appears that the letter was kept to blackmail his employer. 29 N. Y. Supp. 975, affirmed.

Appeal from supreme court, general term, First department.

Action by Frank S. Gray against Augustus D. Shepard and others, executors, for breach of contract. From a judgment of the general term (29 N. Y. Supp. 975) affirming a judgment of the special term for defendants, plaintiff appeals. Affirmed.

A. J. Dittenhoefer, for appellant. Noah Davis, for respondents.

ANDREWS, C. J. This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of his wrongful discharge by the original defendant, Shepard, from his employment on the Mail and Express, a newspaper in the city of New York. The employment was under a written contract dated April 18, 1888. By the contract the plaintiff undertook to devote his whole time (Sun-

days excepted), and all his energies and talents, "to pushing the publication, subscription, circulation, advertising, influence, and all the interests of said newspaper, and in every method he may devise or be advised or directed, to be approved by Mr. Shepard, and in no way against Mr. Shepard or his successor's interest." The contract was to continue for five years and the plaintiff was to receive as compensation for his services \$8,000 a year, and in addition, during each of the last three years, was to be credited \$5,000 towards the purchase of an interest in the paper. The contract provided that "for any dishonesty, incapacity, incompatibility, or breach of the agreement" on the part of the plaintiff, Mr. Shepard should be at liberty to annul and cancel it. On the 4th day of January, 1890, Mr. Shepard notified the plaintiff, in writing, that under the option in the contract he annulled it for the plaintiff's "dishonesty, incapacity, incompatibility, and breaches of the agreement." The answer alleged that the discharge was justified by the conduct of the plaintiff, his unfaithfulness, dishonesty, and incompetency, and because his habits and manners were such as to produce incompatibility between him and the employer and other persons connected with the business. The jury rendered a verdict for the defendant, and the only questions before us arise on exceptions taken upon the trial.

The plaintiff offered to prove a conversation between himself and Mr. Shepard when the contract was presented to him, and before its execution, in which Mr. Shepard, in reply to an inquiry made by the plaintiff as to the meaning of the word "incompatibility," in the contract, said that "it meant that he should have the right to discharge you if at any time you were unsuited to newspaper work, or tired of newspaper work, and that is all it meant." The judge excluded the evidence and the plaintiff excepted. The ruling was proper. The plaintiff, by the evidence offered, sought to limit the meaning of a word in common use, the only indefiniteness of meaning consisting in its wide application, and which for that very reason, as may be inferred, was introduced into the contract. The elements and qualities which may create incompatibility between persons elude exact definition, so varied are the circumstances, and so dependent is such a state of feeling upon education, habits of thought, and peculiarities of character. It must be assumed that the parties understood the wide signification of the word, and used it understandingly. The service to be rendered involved mutual confidence between the parties, and intimate personal association. Want of harmony between them, for any cause, would be likely to interfere with the newspaper enterprise, and made the insertion of this ground for discharge natural and reasonable. The word is not a word of art, or of technical or

local meaning, or having two distinct meanings,—circumstances which have been held to justify parol evidence of the meaning of a word used in a written contract. *Greenl. Ev.* § 295. The largeness of the meaning of the term used in the contract is no reason for limiting its interpretation, nor does it furnish any reason for permitting parol evidence in explanation. Whether there was incompatibility which justified the discharge was a question for the jury, upon the evidence. The employer could not allege incompatibility as a pretense for discharging the plaintiff. The incompatibility must have existed in fact, to justify a discharge under this term of the contract.

The defendant, among other things, sought to justify the discharge of the plaintiff by reason of his conduct in respect to a memorandum sent by him from Bar Harbor, July 28, 1888, and one of the exceptions relied upon by the plaintiff is to the charge of the judge upon that subject. On the 28th of July, 1888, the defendant, being at Bar Harbor, sent by mail to the plaintiff, in New York, a pencil memorandum, without date or signature, relating to the subject of procuring for the Mail and Express certain public printing, which was controlled by the police commissioners of the city of New York. The memorandum was inclosed in a letter envelope, with the defendant's check for \$5,000, payable to the order of the plaintiff. The memorandum referred to the subject of commissions to be paid for the printing contract. The printing was given to some other paper. In August, 1888, the defendant, having returned from Bar Harbor, asked the plaintiff for the check and memorandum. The plaintiff returned the money, but told the defendant he had destroyed the memorandum. Subsequently differences arose between the parties, and the defendant desired to dissolve the relation between them. The defendant testified, in substance, that when these later differences arose the plaintiff threatened that the defendant would not dare to discharge him, because of the memorandum, which he then said he had not destroyed; and he refused, on request of the defendant, to give it to him. In fact, the plaintiff had not destroyed the memorandum, and it was produced on the trial. He testified, "I have kept it all the time in the safe-deposit vault of the National Park Bank." It was claimed on the part of the plaintiff that the check of \$5,000 was sent to be used to influence the police commissioners to award the printing contract to the Mail and Express, and that the memorandum confirmed this view. The defendant, on the trial, denied, under oath, that the check was sent for the purpose claimed, and explained the allusions in the memorandum consistently with an honest purpose. The jury found the version of the transaction given by him, and were authorized to find that the plaintiff preserved the

memorandum, to be used as a means of coercing the defendant to retain him in his employment. It appeared that it was the custom of the defendant to give directions to his employes by informal written memoranda, in pencil, without date or signature, in the same form as the one in question. The judge, in his charge to the jury, referring to the transaction alluded to, said: "According to Mr. Gray's testimony, the paper was given to him by the defendant, as his manager. Whatever its contents, or whatever its purpose, it was given in the course of his employment; and the master would have the right, afterwards, to demand that or any other paper which he had intrusted to his employé, and he would have no right to refuse it. That which the master had a right to demand, if it shall be refused by the employé, is necessarily a breach of the agreement existing between them." He further charged, "If you come to the conclusion that there was a breach of the contract with reference to the matters I have submitted to you, I charge you, as matter of law, it is your duty to render a verdict for the defendant." The plaintiff's counsel excepted to the charge, in the following language: "I except to that portion of the charge where the court said, in substance, that the master would have a right to demand from the servant the return of the letter concerning the advertisement sought to be procured from the police department for the Mail and Express, and that what the master has the right to demand, which shall be refused, is necessarily a breach of the contract of service." It will be observed that no question was made as to the correctness of the assumptions of fact in the charge that the memorandum was given by the defendant to the plaintiff as the manager, and that it was a paper intrusted to the plaintiff by his employer. The plaintiff seeks to apply to the case the rule that an agent has the right to retain letters written to him by the master, relating to his agency, which may be necessary for his protection. The case in question does not come within the rule. The memorandum was like any other order relating to the current affairs of the business, which, when it had served its purpose, belonged to the defendant. The plaintiff had no interest to protect in keeping it. He had returned the money, and that was an end of his responsibility. He made no claim that the retention of the memorandum was necessary for any laudable or honest purpose. On the contrary, he informed the defendant at the first interview that he had destroyed it. We think the judge correctly charged, in view of the circumstances, that the plaintiff's refusal to deliver the memorandum to the defendant was a breach of duty, and was good cause for his discharge. The claim that the defendant, by retaining the plaintiff in his employment after knowledge

of violations of duty, thereby condoned these offenses, and that they could not thereafter be used as grounds for discharge, is without force, in view of the fact that his violations were committed from time to time, continuing until the discharge. The master may overlook breaches of duty in the servant, hoping for reformation; but if he is disappointed, and the servant continues his course of unfaithfulness, he may act in view of his whole course of conduct, in determining whether the contract of employment should be terminated. We find no error in the record, and the judgment should be affirmed. All concur. Judgment affirmed.

(147 N. Y. 694)

NASSAU BANK v. CAMPBELL et al.

(Court of Appeals of New York. Oct. 8, 1895.)

NOTES—DISCHARGE OF INDORSER—IMPAIRING COLLATERALS.

In an action against the indorsers of notes which recited that certain mortgage bonds were deposited therewith as collateral security, defendants claimed to be released from liability by the fact that such bonds had been postponed to other liens on the mortgaged property. It appeared that one W., who was the owner of the bonds in question, had pledged them to secure a loan to him by plaintiff bank. Afterwards the owner of the mortgaged premises desired a further loan thereon, which the proposed lender agreed to make, if all the bond owners under the existing mortgage would consent to have their bonds postponed to the new loan; and, in order to procure the consent of plaintiff to postponing the bonds held by it, it was arranged that the notes in suit, indorsed by defendants, should be delivered to W., who should take them to plaintiff, and procure the surrender of said bonds. The notes were given accordingly, and the bonds were surrendered by plaintiff. At the time the notes were given, no bonds accompanied them; and it did not appear that any bonds were ever deposited anywhere as collateral security for their payment. *Held*, that there was no evidence to sustain such defense.

Appeal from supreme court, general term, First department.

Action by the Nassau Bank against Joseph Campbell and others, executors of William Campbell. From a judgment of the general term (26 N. Y. Supp. 831) affirming a judgment entered on a nonsuit, plaintiff appeals. Reversed.

Aaron P. Whitehead, for appellant. William H. Arnoux, for respondents.

HAIGHT, J. This action was brought to recover the amount of two promissory notes, dated April 12, 1886,—one for \$5,000, and the other for \$4,810, drawn by Phylfe & Campbell to the order of William Campbell, payable on demand, with interest, and indorsed by the defendants' testator. The \$5,000 note contained the following clause at the end thereof: "Having deposited with this note as collateral security, with authority to sell the same at public or private sale on the non-performance of this promise without notice,

five Fifth Avenue Plaza bonds, for one thousand dollars each, with accrued interest on the same from October 1st, 1884." The other note contained the same clause, with the exception that four bonds only were mentioned instead of five. The trial court and the general term appear to have reached the conclusion that the plaintiff failed to establish a cause of action, for the reason that the defendants' testator, as indorser, had the right to depend largely upon the value of the securities pledged for the payment of the notes, and that the subsequent postponing of the bonds pledged as security to the payment of other bonds diminished their value, and operated to relieve the surety. *Bank v. Campbell*, 63 Hun, 229, 17 N. Y. Supp. 737.

We have carefully read and re-read the evidence, and have failed to find any such question presented. The evidence is exceedingly meager, and the meaning of the witness is not in every instance made clear; but the facts disclosed, as we understand them, are substantially as follows: Phylfe & Campbell were owners of what is known as the "Plaza Hotel Property," and at the time of the making of the notes in question, were engaged in the construction of that building. They had already mortgaged the property to the New York Life Insurance Company for the sum of \$660,000, and again, by second mortgage, running to Charles A. Peabody, Jr., as trustee, for \$200,000, upon which bonds had been issued, secured by the mortgage. Twenty-two of these bonds had been issued to one Jacob F. Wyckoff, some of which, if not all, had by him been pledged to the plaintiff as security for a loan made to him. Phylfe & Campbell were desirous of procuring another loan upon the property, and the New York Life Insurance Company had offered to make a further loan of \$200,000, provided the bondholders of the second mortgage would consent to have their bonds postponed and made a subsequent lien to the new loan. Most of the bondholders had consented, but Wyckoff, having pledged his bonds to the Nassau Bank for money loaned, was unable to procure them to have them indorsed or stamped as postponed, and made a subsequent lien to the new loan. To accomplish this, it was arranged that Phylfe & Campbell should make the notes in suit, and procure the indorsement thereof of William Campbell; that such notes should be delivered to Wyckoff, who should take them to the bank, and procure the surrender of the bonds held by it as collateral for his loan. The notes were accordingly executed, taken to William Campbell, who indorsed them, and then they were delivered to Wyckoff. What he did with the notes does not clearly appear. Two days later we find him at the office of the attorney for the insurance company, stating that he could not get the bonds out of the bank without paying \$9,000, and that for that sum he would get the bonds and have them stamped. It does not appear whether any

one agreed to pay him that sum or not, but that he then said he was going to the Nassau Bank to get the bonds, and thereafter returned with nine \$1,000 bonds, which he delivered up in lieu of the notes, and at that time he received a check from Mr. Peabody for the notes. Whether Peabody purchased the notes on his own account, or whether he advanced the money for Phyfe & Campbell, does not appear. The notes upon the trial were produced by the plaintiff. At the time the notes were indorsed and delivered to Wyckoff, there were no bonds or other securities attached to or accompanying them. It does not appear that any bonds had ever been deposited in any place as collateral security for their payment. They describe 5 and 4 "Fifth Avenue Plaza bonds for one thousand dollars each," making 9 in all. There were 200 like bonds that had been issued. The general term appears to have been of the impression that the bonds held by the plaintiff were the ones that were intended to be pledged as security for the payment of the notes, but they say there were 15 of these bonds, and they were held by the bank as collateral for the payment of Wyckoff's notes. They were his bonds, pledged by him, and not bonds owned by or under the control and management of Phyfe & Campbell, so that they could be pledged by them for the payment of their debts. It will thus be seen that the evidence fails to establish the defense alluded to.

It is further urged that the notes had been paid. The only evidence upon that subject is the response made by Mr. Phyfe in answer to the question as to whether any demand was made on him "after the payment of the notes in the lifetime of William Campbell." His answer was "that there was not except on the date of the stamping of the bonds. They demanded payment then, and we paid them." By referring back to the time alluded to, we find that Peabody delivered his check to Wyckoff for the notes. This evidence has already been referred to, and attention called to the fact that the nature of that transaction is not disclosed. Under the circumstances, the court could not hold, as matter of law, that the notes had been paid. The most that could be claimed for the evidence was that it presented a question of fact for the jury.

No other question is presented that requires consideration here. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 687)

ENSIGN v. JARVIS et al.

(Court of Appeals of New York. Oct. 8, 1895.)

BOND FOR PERFORMANCE OF JUDGMENT—LIABILITY OF PRINCIPAL—RIGHTS OF SURETY.

Judgment in an action for divorce provided for payment of a certain sum as alimony,

and the discharge of a mortgage on property of the wife; and the judgment defendant, with his brother as surety, gave a bond for its performance. Prior to the entry of such judgment, and in anticipation thereof, plaintiff and defendant in the action for divorce joined in a conveyance of other property of the wife to an attorney, who, after the judgment was rendered, conveyed it to a trustee as security for the fulfillment of the bond. The declaration of trust recited that the trustee should sell the property as soon as practicable, and, if the amount realized was more than the sum due on the bond, pay the excess to the surety thereon, and that, if the bond was paid or fulfilled before the sale, he should convey the property to such surety, or his representative. *Held*, that such property constituted a primary fund to secure performance of the judgment and bond, and that the alimony, having been paid, and the proceeds of a sale of such property having been exhausted in payment of the mortgage, the surety could not compel the trustee and the administratrix with the will annexed of the principal in the bond to account for the full proceeds, on the theory that such principal was primarily liable for the discharge of such mortgage, before the trust property could be used for that purpose.

Appeal from supreme court, general term, Fifth department.

Action by May Ensign, individually and as administratrix with the will annexed of Charles Ensign, deceased, against Nathaniel Jarvis, Jr., and Cornelia Hamilton, individually and as administratrix with the will annexed of Elisha W. Ensign, deceased, to compel defendants to account for the proceeds of the sale of certain real estate alleged to have been held in trust for plaintiff's testator. From a judgment of the general term (22 N. Y. Supp. 1120, mem.) affirming a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Adelbert Moot, for appellant. Sherman S. Rogers, for respondents.

BARTLETT, J. The complaint was dismissed by the special term in Erie county, and the judgment affirmed by the general term of the Fifth department. This action was brought to compel defendants to account for the proceeds of the sale of certain real estate situated at Fremont, Ohio, alleged to have been held in trust for plaintiff's testator, Charles Ensign. The facts are admitted, and this appeal presents only questions of law. Elisha W. Ensign (whose administratrix with the will annexed is a party defendant) and his wife, Jennie, prior to December, 1875, resided in the city of New York, at No. 357 West Thirty-Fourth street. The title of these premises, as well also of those located at Fremont, Ohio, was vested in Jennie Ensign, the wife of Elisha. On the 13th of December, 1875, the court of common pleas for the city and county of New York granted a judgment of absolute divorce in favor of Jennie Ensign, against Elisha W. Ensign, and it was further adjudged that the defendant pay to the plaintiff, as alimony, \$25,000, as follows, viz.: \$2,500 on entry of judgment, and \$2,500 and interest semi-annually until the whole amount was paid,—and

that he also pay, and discharge of record, within five years from date of judgment, a mortgage covering the premises No. 357 West Thirty-Fourth street, on which there was due and unpaid the sum of \$13,500, and that he also give to the plaintiff his bond, with security, for the performance of the judgment. Thereupon the defendant and his brother, Charles Ensign, executed and delivered to the plaintiff the bond required by the judgment. A few days before the judgment for divorce was entered, and in anticipation of it, Elisha W. Ensign and wife conveyed to William C. Traphagen, of the city of New York, the attorney for plaintiff in the divorce suit, the premises situated at Fremont, Ohio. After the judgment for divorce was entered, Traphagen conveyed the premises to Nathaniel Jarvis, Jr.; and the latter executed a declaration of trust December 15, 1876, acknowledging that he held the premises as security for the fulfillment of the bond given in pursuance of the judgment for divorce, and agreeing to sell the property so soon as he deemed it prudent and practicable. If, at the time of the sale, there was less due on the bond than the amount realized, he was to pay the balance to Charles Ensign; and, if the bond had been paid, he was to pay to Charles Ensign the net proceeds of the sale. The trustee also agreed that if, at any time before sale, Elisha W. Ensign or Charles Ensign paid or fulfilled the bond, he would convey the premises to Charles Ensign, or to his representatives or assigns. Elisha W. Ensign died in October, 1877, in possession of the Fremont premises, leaving a will, upon which letters testamentary issued to his brother, Charles Ensign. Elisha W. Ensign, in his lifetime, and Charles Ensign, as his executor, made various payments to Jennie Ensign on account of her alimony, and on the 30th of December, 1878, the full amount of \$25,000 and interest had been paid. Charles Ensign died on the 3d of December, 1880, in possession of the Fremont property, as Elisha's executor. On the 7th of January, 1881, the defendant Cornelia Hamilton was appointed administratrix with the will annexed of the estate of Elisha W. Ensign. On the 21st of February, 1882, Sherman S. Rogers, the attorney for Cornelia Hamilton, purchased and took an assignment of the bond and mortgage covering the Thirty-Fourth street premises, in the city of New York, there being then due thereon \$7,298.81. On the 13th of March, 1888, the defendant Cornelia Hamilton entered into a contract for the sale of the Fremont property for \$7,000; and prior to that time Mr. Rogers, or his partner, had secured from Mr. Jarvis, the trustee, and one Holt, as executor and trustee of the estate of Charles Ensign, quitclaim deeds of the premises to Mrs. Hamilton, which were to be held in escrow until the mortgage on the New York property was paid and discharged. In order to carry out the sale of the Fremont property, by convey-

ing the title to Mrs. Hamilton, Mr. Rogers, by special agreement, on the 31st of March, 1888, caused the New York mortgage to be discharged of record, although it was not in fact paid, and could not be paid until the proceeds were received from the sale of the property. On the same day, Jennie Ensign, the plaintiff in the divorce suit, delivered to Mr. Jarvis, the trustee, her consent to the cancellation of the bond given to her by Elisha W. Ensign and Charles Ensign, and its delivery to Cornelia Hamilton, as administratrix of the estate of Elisha. On the 5th of April, 1888, the sale of the Fremont property was consummated. Mrs. Hamilton made her deed to the purchaser, and the \$7,000, proceeds of the sale, which was the full value of the premises, were received by Mr. Rogers, and applied by him, according to the previous agreement, in payment of the New York mortgage. It was after this transaction had been thus construed and closed by the immediate parties in interest, or their legal representatives, that the administratrix of the estate of Charles Ensign, the surety on the bond, sought to compel Mr. Jarvis, the trustee, and Mrs. Hamilton, individually and as administratrix of Elisha W. Ensign's estate, to account to her for the entire proceeds realized on the sale of the Fremont property.

The plaintiff's main contention is based upon the proposition that Elisha W. Ensign and his estate rested under the obligation to extinguish the New York mortgage for the benefit of the Fremont property. The facts in this case create no such obligation. It is clear from the acts of the parties that Jennie Ensign, having secured an absolute divorce from her husband, was satisfied to receive \$25,000 as alimony, and the discharge of the mortgage covering her residence in the city of New York, on which there was unpaid the sum of \$13,500. It is evident that the provisions of the judgment were well understood before it was actually entered, and that Jennie Ensign was willing to devote her Fremont property to securing the performance of the judgment in her favor. To this end she placed the title in her attorney, and, immediately after entry of judgment, it was conveyed to the trustee as security for the fulfillment of the bond given under the judgment. Charles Ensign had no interest in the Fremont real estate, and he appeared on the scene only as the surety of his brother, undertaking that the latter would obey the decree of the court as to alimony and the payment of the mortgage on the New York property. It is evident that Jennie Ensign intended to constitute her Fremont property a primary fund to secure the performance of the bond executed to her by her husband and Charles Ensign. What her motives may have been is not disclosed by this record, but it is clear that she fully understood the situation, and consented that her Fremont property might be used in carrying out the provi-

sions of the judgment. This purpose is evidenced by the fact that she reserved no residuary interest under the declaration of trust. This action on the part of Jennie Ensign was in the interest of Charles Ensign, in the event Elisha W. Ensign failed to perform in full the covenants of his bond. This anticipated event happened, and the estate of Charles Ensign was relieved from liability to pay the balance due on the New York mortgage, and it was paid with the proceeds realized on the sale of the Fremont property. The only interest that Charles Ensign ever had in the Fremont property was of an equitable nature, to protect him, as surety, against the liability assumed by him when he signed his brother's bond, and that protection his estate has enjoyed. It is true that the declaration of trust provided that if the trustee sold the property, and realized more than was due upon the bond, the balance should be paid to Charles Ensign. It also provided, in case of sale, if the bond had been paid, the net proceeds should go to Charles; also, if the bond was paid before sale by Elisha or Charles, the property should be conveyed to Charles. It suffices to say that neither of these contingencies happened, nor does the record disclose why these remote residuary interests were vested in Charles. It is apparent that Elisha's arrangement with his divorced wife contemplated that she should be satisfied with the provisions of the judgment, and that he was to have what remained of the Fremont property after its use as a primary fund under the surety trust. The residuary interest vested in Charles was evidently a private arrangement between the brothers, but there is nothing in the facts of this case to justify the appellant's contention that Elisha, in entering into a transaction to secure the performance of his obligations to his divorced wife, as required by the judgment, at the same time made an agreement with Charles which would secure to the latter the Fremont property free and clear. There is no phase of this case that directly or indirectly suggests such a result, but, on the contrary, everything points to the use of the Fremont property as a primary fund. Charles Ensign never paid anything as surety, and his equitable rights in the property were extinguished when the trustee sold, realizing no surplus.

It is suggested by the appellant that the quitclaim deed of the Fremont property given by Holt, the executor and trustee of the estate of Charles Ensign, to Mrs. Hamilton, and held by Mr. Rogers, or his partner, in escrow, until the satisfaction of the New York mortgage, was void, for the reason that Holt had been removed, as executor, before the final delivery of the deed to Mrs. Hamilton. Charles Ensign had no legal title in the property, and his deed, or that of his trustee, was not required to convey the fee. It is not necessary to pass upon the validity of this deed. The legal title rested in Mr.

Jarvis, as trustee; and his deed to Mrs. Hamilton was authorized by the declaration of trust, and vested the fee in her.

The appellant makes the further point that Mr. Rogers having satisfied the New York mortgage while the deeds of Holt and Jarvis were still in escrow, and while he was acting as counsel for Mrs. Hamilton, the payment of the mortgage must be deemed as made at the request of Mrs. Hamilton as administratrix of Elisha Ensign's estate, and thereupon the contingency arose which bound the trustee to convey the Fremont property to the plaintiff, or account to her for the proceeds. The trial court found that until Mr. Rogers received the proceeds of sale the mortgage in fact had not been paid, although the satisfaction piece was recorded. The evidence sustains this finding, and shows that the satisfaction of the mortgage, the cancellation and surrender of the bond, the vesting of the title in Mrs. Hamilton, the sale of the property, and the payment of the proceeds to Mr. Rogers, and his application of the same, were all parts of one transaction. The trust seems to have been properly administered in an open and honorable manner by all concerned, and the provisions of the divorce judgment have been fully carried out. The judgment dismissing the complaint on the merits should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 78)

PEOPLE v. SHEA.

(Court of Appeals of New York. Oct. 8, 1895.)

CRIMINAL LAW — EVIDENCE — OTHER CRIMES — CONTINUANCE — EXTRAORDINARY TERM OF OYER AND TERMINER.

1. The appointment of "extraordinary court" of oyer and terminer is sufficient, under Code Civ. Proc. § 234, authorizing the governor to appoint an "extraordinary term" of such court.

2. Code Civ. Proc. § 234, authorizing the governor, when public interest so requires, to appoint an extraordinary term of the court of oyer and terminer, and "to designate the time and place of holding the same," authorizes him to designate for the holding of such extraordinary term the same day on which a regular and ordinary term of that court is held.

3. A motion to dismiss an indictment on the ground that certain persons, not officers of the law, distributed to each of the persons composing the grand jury list a circular letter advising them as to their duties, and on other matters prejudicial to defendant's rights, and that unauthorized persons had interviews with the grand jurors, is properly denied where the only evidence in support of the moving affidavit is that a committee of citizens had distributed to the grand jurors a circular reminding them of the great importance of their duties, stating some of their powers as set out in the statute, and offering to further advise them, if they would call at the headquarters of the committee, of the methods by which each grand jury could do effective work.

4. A postponement of a murder trial is properly denied where the only ground stated therefor is that counsel wanted time, and that it was not customary to try an indictment for so grave an offense so soon after it was found.

5. A new trial will not be granted, on the ground that justice requires it, where the evidence was conflicting, and the finding of the jury does not appear to be clearly against the weight of the evidence, or to have been influenced by any improper considerations.

6. Where the homicide was committed at a polling place during an affray between political factions to which defendant and decedent, respectively, belonged, evidence that defendant was procuring persons to vote unlawfully is admissible, where it appears that he was highly interested in the election; that, in furtherance of the interest of his party, he associated himself with a number of men for the purpose of depositing illegal ballots; and that he went to the polls armed for the purpose of overcoming any resistance that might be offered him.

7. Under Code Cr. Proc. § 271, providing that the names of the witnesses examined before the grand jury must be indorsed on the indictment before it is presented to the court, and that if the names are not so indorsed the court must, on the application of defendant, at any time before trial, direct the names of such witnesses to be furnished to defendant forthwith, the omission of some of the names from the indictment, to which no objection was made on the trial, is not a ground for granting a new trial.

Appeal from court of oyer and terminer, Rensselaer county.

Bartholomew Shea was convicted of murder in the first degree, and appeals. Affirmed.

John T. Norton and Galen R. Hitt, for appellant. Thomas S. Fagan and George Raines, for the People.

PECKHAM, J. The defendant, having been convicted of the crime of murder in the first degree at an extraordinary term of a court of oyer and terminer held in the city of Troy, has, by appeal, brought the record of his trial before this court for review, pursuant to subdivision 8 of section 485 and sections 517 and 528 of the Code of Criminal Procedure. There has been imposed, by the sections of the Criminal Code above mentioned, a very arduous duty upon this court. We act not only in the capacity of an ordinary appellate tribunal, reviewing errors of law pointed out by exceptions duly taken, but if satisfied that the verdict is against the weight of evidence, or against law, or that justice requires a new trial, it is the duty of the court to grant it, whether any exception shall have been taken, or not, in the court below. The duty imposed upon us is that of reading the whole evidence in the case of every conviction of murder in the first degree. The Code provides (subdivision 8 of section 485) that the case and exceptions shall consist, among other things, of a copy of the stenographer's minutes of the trial, the result of which provision is that a large mass of evidence, frequently upon points not really disputed or disputable, is returned, all of which must yet be perused before the court can properly come to a conclusion in the case. It seems to us that a practice might be provided by the legislature, which, while retaining all that is now sought for in an appeal to this court, would yet restrain within some reasonable

limits the printing of a vast mass of prolonged examinations and cross-examinations, filled with repetitions and immaterial matter, and set forth by question and answer. The case now before us is an apt illustration of the vice of this kind of practice. Ten thousand folios, embracing some 2,000 printed pages of evidence, compose the record, exclusive of some 300 pages of examination of jurors, no question in regard to whom was raised or argued in this court. Taking all this mass of evidence, and printing it by question and answer, with its innumerable and everlasting repetitions of the same thing said in the same way, does no good to any one, and at the same time makes the reading a burden which ought not to be imposed upon the court. The evidence should, as it seems to us, be placed in the record, and the case settled by the trial judge, as in other cases; and not more than the material evidence ought to be returned, and, except in special cases, the evidence should be in a narrative form. Notwithstanding this great mass of evidence returned as the present law provides, the whole record has been examined and deliberated upon with that degree of care and attention which the interests at stake would naturally call for. The counsel for the defendant have argued before us several propositions, which will be now disposed of.

1. Objection was made in due time to the jurisdiction of the court to try the defendant, on the ground that it was an extraordinary court of oyer and terminer, called under the proclamation of the governor, and designated to be held on the same day for which a regular and ordinary court of oyer and terminer had theretofore been properly appointed by the justices of the supreme court; and it was asserted that there was no authority of law for organizing or holding more than one oyer and terminer in the same county at the same time. Some criticism was also made in regard to the form of the proclamation convening the extra term, in that it appointed "an extraordinary court of oyer and terminer" instead of an extraordinary term of the court of oyer and terminer, as provided for by section 234 of the Code of Civil Procedure. This latter criticism is so clearly without merit that we do not feel called upon to further discuss it. The other objection is also untenable. The law provides for the designation by the justices of the supreme court of the times and places for holding the ordinary and usual special terms, circuit courts, and courts of oyer and terminer in the several judicial departments of the state. Code Civ. Proc. § 232. It is then provided by section 234 that the governor may, when in his opinion the public interest so requires, appoint one or more extraordinary general or special terms of the supreme court, or terms of a circuit court, or court of oyer and terminer. He is granted power by the same section "to designate the time and place of holding the same." There is no limitation in the grant of power

to the governor by reason of which he cannot designate a time and place for the holding of the court, which is the same time and place already designated by the justices of the supreme court for the holding of a regular term of the court. The statute is full and ample, and under it the discretion is vested wholly with the governor as to the occasion for appointing, and the proper time and place for holding, the extra term of the court which he convenes.

2. The defendant also moved to dismiss the indictment presented to the court on the grounds—First, that improper and unlawful influence was exercised upon the board of supervisors in the selection of the grand jury; second, that certain persons, not officers of the law, issued and distributed to each of the persons composing the grand jury list of 300 names a circular letter, advising them as to their duties, and on other matters prejudicial to defendant's rights; third, that unauthorized persons had interviews with the grand jurors composing the panel which brought in the indictment, and by such means unlawfully procured the bringing in of the indictment. The motion was based upon affidavits of the defendant and his attorney, and the only fact proved was the distribution of a circular to grand jurors reminding them of the great importance of their duties; stating some of their powers as evidenced by citations from the statute; offering to further advise them, if they would call at the headquarters of the committee, of the methods by which each grand jury could do effective work. It was added that the efforts of the committee were not for political or sectarian effect, as it was composed of Roman Catholic priests, several Protestant clergymen, and a number of prominent Republicans and Democrats. The circular was signed by the chairman and secretary of the committee, which, at the head of the circular, was designated the "Committee of Public Safety." The defendant, in his affidavit, characterized this circular in quite a variety of language; and he therein stated as a fact that it had rendered the members of the grand jury who found the indictment unfit and improper persons to perform judicial functions, or to administer justice according to law, or to see that the rights and securities guaranteed by the constitution and the laws of a free country were secured to the defendant. The defendant had been confined in jail ever since the death of Ross, and the question would, of course, suggest itself as to where the defendant obtained his knowledge of the effect of the circular upon the grand jurors who listened to the evidence in the case, and, upon their oaths, alleged that he was guilty of murder in the first degree. His affidavit furnishes no light upon that subject, nor is there any given by the affidavit of his attorney. It is unnecessary to here discuss the question whether there was not some matter in the circular which, as addressed to possible and

prospective grand jurors, it would have been better to have omitted. It is the duty of the court to charge the grand jury, and to explain the duties of the grand jury in such manner and to such extent as, in its discretion, is deemed best. Whatever the contents of the circular may have been, some prejudice to the defendant must result, or such facts be proved that an inference of prejudice could justly be drawn therefrom, before the court would be called upon to interfere in the way suggested by this motion, even if it had the power to dismiss on such ground. We here assume that the law gives to this court jurisdiction to review the determination of the court below upon this point, which we are not at all sure of, but which it is not necessary here to decide, because we are of the opinion that the court below decided the questions correctly. There was not a particle of proof that any man was on the panel who was not a legally constituted juror, fulfilling in every respect all the requirements of the law. There was not even an allegation that the evidence given before the jury was incompetent in its nature, or insufficient, if believed, to warrant and call for the indictment which was found. There was absolutely no ground set forth which was sufficient in law to justify the court in dismissing the indictment, and the defendant has no ground of complaint based upon the denial of his motion.

3. The defendant then made a motion to postpone the trial, based upon an affidavit of his attorney. The motion was denied, and, as we think, properly, although here, also, it is doubtful if we have any jurisdiction to review the decision of the court on this question. The counsel for the defendant did not assert that there was any absent witness, and, as the learned trial justice said, the motion seemed to be based upon the suggestion that the counsel wanted time, and that it was not customary to try an indictment for so grave an offense so soon after it was found. The decision of the court was so plainly right as to require no discussion.

4. The counsel for defendant appeals to us for a new trial upon the general merits of the case, and on the ground that justice requires it. A plain statement of some of the more important facts appearing in the record will not be out of place, in disposing of this ground for a new trial. Some of them are sworn to by the defendant himself, upon cross-examination, and others are attested by a large number of witnesses, who, we have no doubt, tell the case as it appeared to them, and as in fact it was.

There was a charter election held in the city of Troy on the 6th day of March, 1894, at which a mayor and supervisors and aldermen were elected. Although the contest was quite animated, in the Thirteenth ward, over the election of mayor, yet the greater interest and excitement were there raised in the election of alderman. Two Republican candidates were running for that office, each

whom claimed regularity of nomination, while the Democrats had made no nomination of their own, and the whole contest for alderman was thus carried on between the two Republican nominees. Mr. Dunlop was one of such nominees, and Mr. Hancox was the other. The defendant was a friend of Mr. Dunlop, and sometimes tended bar for him, when Dunlop desired to be absent from his saloon. There had been a Republican ward caucus in February preceding the election, at which there had been a contest for the nomination for alderman between Dunlop and another; and the defendant had been present at that caucus, and his friend McGough was chairman of it. The latter was also a friend of Dunlop. At the caucus there was a disturbance between the friends of the different candidates; the Ross brothers and Boland, and some others being on one side, and McGough, the defendant, Shea, and others on the opposite side. Shea broke through a window to come into the place where the voting was going on, and brandished a revolver which he had, and went to his friend McGough, who gave to him the ballot box; and the defendant then marched out of the room with it, and gave it back to McGough, some distance from the polling place. The trouble then arose as to the regularity of the proceedings of the caucus, and the two men (Dunlop and Hancox) ran, each claiming to be the regular Republican candidate for alderman of the ward. It is evident from the record that there was great and continuous excitement upon this question of the election of alderman, among those who took an interest in the politics of the ward, from the time of the caucus up to the day of election. The evening prior to that day the defendant provided himself with his pistol, for the reason, as he said, that he always anticipated more or less of a row on election day. He is a young man, and was then but about 23 years of age, and a molder by trade, but by no means a steady worker; traveling to the West, and working "off and on." He and his friend McGough, and one or two others with them, were very greatly interested in the success of Dunlop; and so far did they carry their interest that during election day they carried on, as leaders and conductors of a number of ruffians, the most open, shameless, and reckless system of fraudulent voting, by means of repeating and by false personation of legal voters, that has ever come to our notice. Fraud, as a means or measure of concealment, was not resorted to. The names and residences of reputable and well-known citizens were openly taken, called out to the inspectors of election, and voted on, by these miscreants, while the citizens themselves, whose names were thus taken, were in the booths preparing their ballots; and in some instances the citizen would come out of the booth, and protest against his name being used for such a purpose, but no weight was given to the pro-

test; and, when challenged, these repeaters swore in their votes under the names thus taken. A line of legal voters, formed for the purpose of voting in their proper turn, would be broken, and this "bunch" of rascals would get to the polls, and each deposit a ballot, and retire, only to repeat the performance at the same poll in a short time. This was particularly the case at the First election district of the ward, and the defendant and others acted as the captains and directors of the men who were personally doing the repeating, conducting them to the polls from a saloon near by, and gathering them again in time for another raid. This conduct of the defendant and his companions is almost beyond belief, and were it not for the fact that it has been testified to by numerous witnesses, who, so far as we can judge from the record, were reputable business men, and entitled to credit, we should have great hesitation in accepting the narrative as true. The reckless audacity displayed in the commission of these offenses would, of itself, lead us to doubt whether any one would be willing to run such risks as to thus openly violate the law in the presence of so many reputable and decent men. The facts are, however, established by evidence which is simply overwhelming. In the light of such events, it is a somewhat difficult task to preserve that judicial temper which ought always to characterize the expression of the views of this court. Such acts as those above described are not alone a gross outrage upon the rights of the citizen, but they lead directly to riot, bloodshed, and murder; and, if they should become habitual, there would cease to be a government by the people, might would become right, and anarchy and despotism would be the result. In this case it was by reason of, and while in the actual perpetration of, these lawless acts, that the deceased, Robert Ross, was killed. He was one of four brothers living in the Third district of the Thirteenth ward, and all of whom were engaged in the business of manufacturing in the city of Troy. They were all interested in the election, and were bitterly opposed to Mr. Dunlop and his friends. They expected some trouble at the polls, and they had armed themselves with clubs, and some of their party had pistols, also. This conduct on the part of the deceased and his friends in thus arming themselves in a peaceful community is characterized by counsel for the defendant as evidence of lawlessness on the part of the former, and as being the direct cause of the trouble which arose subsequently. Perhaps it was evidence of lawlessness. It is stated that if, instead of arming and preparing themselves for an affray, the deceased and his friends had borne themselves as law-abiding citizens, no trouble would have arisen, and that it was owing to their own violations of law that the deceased came to his death. Looking at the transaction in the light of the facts testified

to, it would seem that, in order to completely act the role of peaceful and law-abiding citizens, it would have been necessary either to remain absent from the polls entirely, or to quietly, and without even remonstrance, submit to the open violation of the law by the defendant and his companions; to look on with the silence of resignation, if not of approbation, while they stuffed the ballot box, and weighed down the votes of honest and reputable citizens by the votes of these repeaters. Under these circumstances, we cannot say that those men who had armed themselves for the purpose of resisting an attack, and for self-defense, were themselves thereby guilty of a violation of law, because they refused to be driven from the polls, and attempted to answer with force an armed attack upon themselves. The arming of citizens for the purpose of forwarding the interests of particular candidates at an election, and to intimidate others from the exercise of their legal rights, cannot be too severely or too summarily condemned and legally punished. This court cannot listen with complacency to an account of the arming of the citizens of any portion of the state for the purpose of going through the forms of holding an election, and to be ready to protect themselves in case of attack. It is an appeal to the force of arms, instead of to the protection of the law, and such an appeal is one which courts cannot be expected to look upon with the least patience or toleration. Still, when the whole case is surveyed, the criticism comes in bad form from the defendant, and we think that there is nothing in the evidence which justifies him, or mitigates the character of his act.

Up to the time when the defendant and his companions appeared, it is not pretended that the least disorder had prevailed at the polling place, although it may be assumed there were men belonging to all parties there present. The trouble commenced upon the arrival of the defendant and friends, and the fighting was precipitated by them. While condemning in unmeasured terms the general practice of carrying weapons, we cannot, in this case, admit that the deceased or his companions ought to be denounced as violators of the public peace because of their conduct on this occasion. Courts cannot and must not recognize the claim of right to take the law into their own hands by citizens, under any circumstances; but at the same time they can see the difference, and make the proper distinction, between acts done in furtherance of an unlawful purpose, and in violation of the criminal law, and those acts which are done by private citizens in order to obstruct the accomplishment of that purpose, and to prevent such violation. The citizen must not himself be guilty of a violation of law, in his efforts to prevent its violation by others, but the intent with which an act is performed is the important fact which characterizes and gives point and force to the act itself.

We think the action of the deceased and his friends cannot properly be said to have led to this catastrophe. Early on election day the deceased and his brothers went to the polling place of the Third district. There is no proof of any dispute or difficulty arising there in the absence of the defendant and his companions, and it is entirely evident that the trouble that was anticipated was to come only from that quarter. The defendant and his friend McGough and some others were present at the Third district polling place on one or two occasions during the forenoon, and before the time when the affray in question occurred. On one of these occasions they commenced a quarrel with some one of the Ross party, and struck one or two in the face; but nothing serious then took place, and the defendant and his party left the polls. Finally, a little after 12 o'clock, the defendant McGough and others, to the number of seven or eight, were seen on their way to the Third district polling place, and some of their number, in the presence of the defendant, were heard to utter threats to "do them"; that they were strong enough, and that they should "come on"; "to hell with them,"—and such expressions. Upon their arrival at the polling place, which was held in a small house a little back from the street, they started at once for the room in which the ballot boxes were; the defendant only going as far as the hall leading into the room, and some of his men passing in and at once proceeding with their scheme of voting. It was at this time, and while the defendant was in the hallway, that one of his men assumed the name of William Armstrong, of 51 Glen avenue, and claimed his right to vote as such. The real William Armstrong was then in the booth preparing his ballot, and, hearing the claim, stepped out, and faced the man, and asked him if his name was William Armstrong, and if he lived at 51 Glen avenue, to which the man answered "Yes"; and Armstrong replied: "You don't do it. I am the only man that lives there. I occupy the whole house. You don't live there at all." And, turning to the inspectors, he said: "This man has no right to vote here. He is a repeater. The man voted, nevertheless, on that name, and the real Mr. Armstrong had to swear in his vote. One or two more efforts to repeat were made by others of the defendant's men while he and his companions were in the hallway blocking up the same to a great extent, and exercising a supervision over the whole of their subordinates. Before the completion of that work one of the opposition, named Hayner, came to the hallway, and persisted in an attempt to get through it, and into the voting room, claiming as much of a right to be there as any of the others. His passage was blocked and obstructed by defendant and his companions, and the result was the expulsion of Hayner, who was immediately followed by defendant and others, all going out

into the open air. Here a slight affray took place, the defendant and McGough striking some of the others, among them Hayner, and the latter replying by attempting to strike back; and, pulling a sort of wrench, used by stove mounters, from his pocket, he attempted to use, and possibly did use, it upon some of his opponents. The defendant and McGough had pistols in their hands. The crowd became quite thick, surging back and forth and up and down the open street; and during that time McGough and William Ross came together, and the latter was shot by the former and fell at once. Robert Ross, seeing the difficulty, started towards where his brother fell, and ran in pursuit of McGough, who was running away, and whom he soon overtook; and just at that time, owing to some stumble or misstep on the part of one or both, McGough and Robert Ross fell,—the former under, and the latter half covering him. At that time the defendant came towards Robert, and while Robert was in a sitting or bending attitude the defendant walked up behind him, and, placing his pistol within two or three feet of the back of Robert's head, deliberately fired it into him. The defendant was then, as some of the witnesses testified, seen to walk around in front of Robert, and again to fire his pistol at him. McGough in the meantime had twisted himself from under Ross, and, getting up, proceeded to run away, in which action the defendant then joined. This description of the affray which resulted in the death of Robert Ross is very meager, as compared to that given with great detail by the numerous witnesses called by the prosecution, but enough is given to show the main points. Some 15 or 20 shots, in all, were fired by different men. The first ball which was fired by the defendant at Robert Ross penetrated the back part of his head, entered the brain, and caused instant death. The autopsy showed this fact.

As may be supposed, the account of this affair given by the defendant and his witnesses differs radically from that which has been stated above. The facts claimed by the prosecution were proved by more than 20 different witnesses, and while no two saw the whole transaction in exactly the same light, as to every detail, yet they all agreed as to the main facts in regard to the shooting of the deceased, and as to how and in what position, relative to the deceased, the man stood when the shot was fired. All the witnesses did not recognize the defendant as the man who did the shooting, being too far off to identify him; but about 15 respectable men saw the occurrence, and identified the defendant as the man who did the shooting, and under the circumstances detailed above. The defendant denied, in toto, the shooting. He denied that he was at the spot at the time the shooting was done, and insisted that at that time he had himself been shot, and was leaning up against a fence, too weak

to stand alone. In the course of the affray it is true that the defendant was shot and slightly wounded, but no serious effect was produced by it, and he was seen to run from the place as soon as he had done the shooting. The defendant is contradicted in his story, not only in its main points, by many witnesses, but he was himself guilty of several misstatements as to the occurrence when asked about it soon thereafter. He denied having had any pistol, and he denied having done any shooting on the day in question, and it is plain that each denial was false, and in the course of his cross-examination he so conceded. The witnesses which were called for him were the men who were his companions during the day, and were present at the time of the affray. They appeared in a very unsatisfactory light on cross-examination, as to their character and antecedents. One or two of them had served terms in the penitentiary, and not one of them seems to have been a steady worker at anything, other than frequenting saloons, and passing his time in such pursuits as are usually followed there. While denying the shooting himself, the defendant and his witnesses endeavored to give the impression that the deceased was in reality killed by one Boland. It appears without contradiction or dispute that Boland was one of the Ross party, supporting the same candidates, a member of the same wing of the Republican party, and a close friend of the deceased and of his brothers, and that he was engaged in a respectable business in Troy. How there could be any possibility of Boland shooting Ross was something calling for an explanation, as, on its face, the proposition was absurd. The explanation was attempted on the part of the defendant by showing one man 15 or 20 feet ahead of Robert Ross, and, just before the shooting, running away from Ross; while a few feet in the rear of Ross, who was himself running in pursuit of the fleeing man, was Boland, who had a pistol in his hand, and, while running, fired it, and Ross immediately fell. This, it was urged, left room for the explanation that both Ross and Boland were in pursuit of the same man, and all three in a line running towards the west, the unknown man ahead, Ross behind and within 15 or 20 feet of him, and Boland very near Ross, but behind him, and that, while thus in pursuit, Boland, in attempting to shoot the foremost man, did, through mistake, shoot Ross. A great many well-attested facts are at variance with this theory. The course of the wound in the back of the head of Robert also demonstrates the falsity of the claim. One of the witnesses for the defendant took the position that there was no mistake about it; that he saw Boland aim his pistol directly at the head of Ross, and but a short distance from it, and then deliberately fire at and kill his companion and friend. Such manifest and reckless perjury it is sickening to read. To sum up,

here were presented the two different contentions on the part of the prosecution and the defendant. There was no claim or assertion made on the part of the defendant that the killing was done in self-defense, or in the heat of passion, or to aid a companion of the defendant. His version of the occurrence precluded any defense of that nature, for he denied that he shot the deceased at all, and asserted that the whole evidence of the people as to the affray, so far as he was concerned, was a deliberate falsehood, or, at any rate, a mistake. The issue thus formed was presented to the jury in a fair charge by the learned trial judge, to which no exception was taken, and the jury have found the defendant guilty as indicted. We are now asked to set that verdict aside upon the merits, and to grant a new trial because justice requires it. We cannot do it. We are entirely satisfied that the jury have arrived at a just conclusion, although, if we had a rational doubt on that subject, there being at the least a conflict in the evidence, from which different inferences might be drawn, we should not feel at liberty to reverse the finding of the jury, where such finding is not clearly against the weight of evidence, and does not appear to have been influenced by any improper considerations. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275.

5. The counsel for the defendant challenge the correctness of the rulings of the trial court in admitting evidence of the repeating in the presence and under the supervision and direction of defendant at the different polls, as stated in the point last discussed. Proper exceptions were taken to the decisions of the court in that regard, and the question has been argued before us at great length. The objection taken is that the evidence was immaterial, and had no proper or legitimate bearing upon the issues joined for trial, and that it simply tended to show the defendant guilty of some other, separate, and different crime from that for which he was indicted and then on trial, and to greatly prejudice him in his defense. The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claim-

ed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear, beyond a reasonable doubt, to a jury of 12 men. In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question. In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, the doctrine is dwelt upon, and the cases upon the subject collected. Evidence, however, which is relevant to the issue, by tending, for example, directly to explain or characterize the act which is in question on a criminal trial, has never been held incompetent or inadmissible because it also tended to, or did, prove the accused guilty of another crime. We think the evidence in question comes under this latter rule. It was received by the learned trial judge upon the question of the intention and deliberation of the defendant in firing the shot at the deceased. The evidence admitted, together with other evidence, shows the defendant highly interested in the election of his friend for alderman, and it also shows that for the purpose of furthering such election he arms himself with a pistol in order to overcome possible, if not expected, opposition, associates with himself several others, and they, acting together, secure the services of a number of men, whom they conduct and direct to the various polling places for the purpose of depositing their illegal ballots. It shows that these leaders were provided with pistols, and were ready to overcome even armed opposition, which, in the nature of things, they must have foreseen might be the accompaniment of their work. It shows them at the Third district polling place two or three times before they finally made the attempt to work in their fraudulent and illegal ballots, and they saw there was a crowd of citizens there with whom it might be dangerous to come in conflict for the purpose of accomplishing their object. With this knowledge, the defendant and his companions nevertheless come to the Third district polls for the last time, and there make the attempt to have their repeaters vote. In the course and by reason of carrying out this "repeating" plan, which could only have been adopted to further the accomplishment of the main design, to secure by any means the election of Dunlop, an affray commences which the defendant had necessarily foreseen was probable, and which he would seem to have been prepared for. The jury might judge his actions from that moment as those of a man who had deliberated upon, if not planned, the disturbance which arose; and such actions, the jury

might say, were not those of a man suddenly confronted with excitement and danger, but of one who, having foreseen the commencement of the affray, was prepared to act during its continuance with calmness and deliberation. Evidence which thus plainly tends to show that the affray must naturally have been regarded as probable and calculated upon by the defendant, tends also to show directly the deliberate character of the act of defendant in firing the shot which killed the deceased. It tended to show, as against the defendant, that the disturbance itself was not an ordinary election affray, growing out of a sudden and unpremeditated dispute between men whose feelings had become wrought up to a high state of nervous excitement, which was quickly followed by a resort to personal violence, and which culminated in the use of a deadly weapon in a moment of uncontrollable passion. On the contrary, the evidence in question tends to render clear, to strengthen, and to free from doubt, the question as to the state of the defendant's mind, in regard to coolness and deliberation, at the very time when he aimed the shot which killed the deceased. It tends to show that the act was deliberate, and that in its perpetration the defendant was guilty of murder in the first degree. What took place at the caucus in February preceding the election was drawn from the defendant within the proper limits of a cross-examination, and was competent as an examination of any witness for the purpose of bearing upon his credibility and his interest. No crime was proven there, and none was asserted, as against Shea, the defendant. It showed the great interest he took in the success of his friend Dunlop from the commencement of the contest down to the murder of Ross. Upon the ground which has thus been stated, and for the purpose mentioned, we are clear the evidence objected to, as to repeating, was admissible, and the defendant's exception thereto is without merit.

8. The defendant's counsel moved for a new trial after his conviction, and, among other grounds, specified the failure of the prosecution to indorse on the indictment the names of all the witnesses called and examined before the grand jury. It appears that the names of two witnesses who were called before the grand jury were omitted from the indorsement of names on the indictment, all the other names being there. How the names happened to be omitted, was not explained. Section 271 of the Code of Criminal Procedure directs that the names of the witnesses examined before the grand jury must be indorsed upon the indictment before it is presented to the court. If not so indorsed, the court must, upon the application of the defendant, at any time before trial, direct the names of such witnesses, as they appear upon the minutes of the grand jury, to be furnished to him forthwith. The defendant's

counsel concede that, if no names had been indorsed upon the indictment, the course pointed out by the above section would have been their only remedy; but they assert that, inasmuch as some names appeared on the indictment, they had the right to suppose that all of them had been indorsed, and when, in the course of the trial, it appeared that those two names had been omitted, they had the right to pursue this remedy, and to demand that a new trial should, for that reason, be granted. We dissent from that view of the subject, and we fail to see any such distinction. While the counsel for a defendant might, if so disposed, assume that the indictment had all the names indorsed upon it, still the fact that it bore some names would not preclude the defendant from seeking information upon that subject, and from appealing to the court, under that section, for the purpose of obtaining information; and, if it should then appear that any names had been omitted, the court could direct them to be then furnished. In addition to that answer in this case, it does not appear that defendant suffered the least prejudice on account of the omission, or that the witnesses were, in truth, of such a character that it prejudiced the defendant to have their evidence received, while he had not had the time or means at his disposal to show their true character, or that their particular testimony was false. Under such circumstances, it would be a most lame conclusion for this court to order a new trial, and set aside a verdict which had been reached after so enormous an amount of labor and the expenditure of so large a sum of money as this trial has already cost the people of Rensselaer county. Where it is entirely clear the defendant has suffered no prejudice from this omission to comply with the statute, it is the duty of the court to deny the application; assuming that it might, under some possible circumstances, be ground for the granting thereof, and that this court might review the determination of the trial court.

This completes the review of the questions which were prominently brought to our attention on the argument. We have looked at the other questions raised by the numerous exceptions of the counsel for the defendant upon the trial, and also the other grounds for reversing the convictions which are set forth in the proceedings subsequent to the verdict. We find nothing in them to warrant us in disturbing the judgment of the court below. The record which we now close contains a melancholy instance of the results of idleness and bad companions upon a young man. This defendant and many of his associates had no steady employment, and apparently had no desire for it. They themselves concocted and entered upon the plan of electing their candidate by fraudulent votes, and they pursued it as if it were a fair, decent, and honest object. It does not appear, nor is it important to know, to what

political party the defendant ostensibly belonged. Such men have no politics. As the soldiers of fortune of a bygone age fought, so these repeaters vote for the candidate who pays them. They are neither Democrats nor Republicans, but are the enemies of law and order at all times and under all circumstances. The crime is one against self-government, against republican institutions, against freedom itself. Government by the people cannot long exist, if practices such as this record discloses are continued. We cannot, and we do not, for one moment believe that there are prominent public or party men of either political party who countenance or who would sustain these modes of conducting an election; otherwise, we should despair of the republic. The defendant and his companions seem to have been alone in their methods, and to have proceeded in a manner evincing the most entire disregard of every principle of law. We feel, therefore, that unless our institutions are to become a farce, and elections are to represent a combination of force and fraud, such practices as are now spoken of must be stamped out by the most vigorous and active legal measures, and by the co-operation of all political parties. The repeater is the modern pirate, an enemy of organized and civilized society, and it is the duty of all men of all parties to assist the officers of the law in the prompt punishment of the guilty. The importance of the subject cannot be overestimated, but this is not the occasion to enlarge upon it. Viewing this case in all its aspects, we feel that there is nothing for this court to do, other than to affirm the judgment, and it is affirmed accordingly. All concur. Judgment affirmed.

(147 N. Y. 241)

SAGE et al. v. CULVER et al.

(Court of Appeals of New York. Oct. 15, 1895.)

**CORPORATE OFFICERS—MISAPPLICATION OF FUNDS
—ACTION BY STOCKHOLDERS—PLEADING—
LACHES—HOW OBJECTION RAISED.**

1. An action against corporate officers for mismanagement and misapplication of corporate funds may be brought by a stockholder in his own name, where the corporation itself is exclusively controlled by such officers.

2. In an action by stockholders in a railroad company against the corporate officers, a complaint alleging that defendants, as officers and trustees, took from themselves, as trustees of another railroad, a lease thereof, at an exorbitant rent, thereby depleting the funds of the first company, to plaintiffs' injury, and alleging that defendants, as such trustees, took large sums of money from the treasury of the company in payment to themselves of alleged loans and advances, the origin and nature of which they have fraudulently concealed from plaintiffs, is good on demurrer.

3. The objection of laches or stale demand should be made by answer, and not by demurrer.

Appeal from supreme court, general term, Second department.

Action by Henry W. Sage and others

v. 41 N. E. no. 18—38

against Andrew B. Culver and another for discovery and accounting. From an order of the general term (24 N. Y. Supp. 514) reversing an order sustaining a demurrer to the complaint, defendants appeal. Affirmed.

George W. Wingate, for appellants. Wm. O. De Witt, for respondents.

O'BRIEN, J. While the complaint in this action is open to criticism as lacking in that clearness and fullness of statement essential to good pleading, yet we think that the decision of the general term overruling the defendants' demurrer was correct. When a complaint is met by a demurrer on the ground of insufficiency, the question always is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. The complaint will be deemed to be sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative, and the pleading deficient in logical order and in technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. *Zabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 N. Y. 14, 23; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263. The complaint in this case was not, we think, so deficient in the statement of facts as to warrant the defendants in assailing it by demurrer.

The defendants own a very large majority of the stock of the railroad which is joined with them as defendant, and they are its trustees, and practically, by reason of their ownership of nearly all the stock, the sole directors and managers. The plaintiffs own a small amount of the stock and some of the bonds of the road, and, to the extent of their holdings, are interested in the management of the property. They bring this action, as such stockholders, against the defendants, as directors, and ask the court to adjudge that the defendants account to them or to the corporation concerning certain transactions in regard to the management of the affairs of the corporation which are stated in the complaint. It is the sufficiency of these allegations as the basis of an action that is challenged by the demurrer. The complaint contains proper allegations to warrant the plaintiffs, as stockholders, in bringing the action, instead of the corporation itself; and there is no difficulty on that ground, if the allegations are otherwise sufficient. Where the corporation is exclusively under the control of the trustees and officers whose acts and management are questioned, a demand that the corporation bring the action would be idle and fruitless, and in such cases equity permits the stockholder to bring the action in his own name. *Brinckerhoff v. Bostwick*,

88 N. Y. 52; *Hawes v. Oakland*, 104 U. S. 450; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363.

There are, we think, at least two facts stated in the complaint, or which are fairly to be gathered or implied from the allegations, which are sufficient to require the defendants to answer: (1) It is alleged, in substance, that the defendants, as officers and trustees of the defendant railroad, took from themselves, as trustees and officers of another railroad, a lease of the latter, which they practically owned and managed, to the defendant corporation, at an exorbitant rent, which arrangement has the effect to unlawfully deplete the funds and earnings of the defendant corporation, and to injure the plaintiffs, as stockholders therein. (2) It is also averred, in substance, that the defendants, as officers and trustees of the defendant railroad, have taken from its treasury large sums of money, and paid the same to themselves, as individuals, on account of alleged loans or advances made by them to the corporation of which the plaintiffs are stockholders; that they have concealed the origin and nature of this debt from the plaintiffs, and have made false statements in regard to the same. When a trustee or the officer or director of a corporation deals with himself, as an individual, or in the character of trustee, director, or officer of another corporation, with respect to the funds, securities, or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders; and the trustee is bound to explain the transaction, and show that the same was fair, and that no undue advantage has been taken by him of his position, for his own advantage, or the advantage of some other corporation in which he has an interest. When it can fairly be gathered from all the allegations of a complaint that the officers and directors of a corporation have made use of relations of trust and confidence in order to secure or promote some selfish interest, enough is then averred to set a court of equity in motion, and to require an answer from the defendants in regard to the facts. When it appears that the trustee or officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is, in equity, a presumption against the transaction, which he is required to explain. *Cowee v. Cornell*, 75 N. Y. 100; *Crowe v. Ballard*, 1 Ves. Jr. 221, note 2; *Gibson v. Jeyes*, 6 Ves. 278; *Michoud v. Girod*, 4 How. 553; *Butts v. Wood*, 37 N. Y. 317; *Ogden v. Murray*, 39 N. Y. 207; *Gardner v. Ogden*, 22 N. Y. 332. Parties holding relations of trust and confidence towards others, such as these defendants occupy towards the plaintiffs, cannot ordinarily afford to admit, by a demurrer, charges, though quite indefinite and uncertain, that they have made profit for themselves by means of transactions, such as are

fairly to be gathered from the averments of the complaint.

It is also urged that, since the complaint shows upon its face that the transactions stated were had many years ago, the plaintiffs are chargeable with such laches, and their cause of action, if any, is so stale that equity will decline to interfere. The answer to this point is that, if the claim or cause of action is barred by lapse of time, that defense must be presented by answer, and the mere fact that it is old is not an objection that can ordinarily be presented by demurrer. *Zebley v. Trust Co.*, 139 N. Y. 461, 34 N. E. 1067. The order of the general term overruling the demurrer should be affirmed, with costs, with leave to the defendants to answer within 20 days from service of the order, upon payment of costs. All concur. Ordered accordingly.

(147 N. Y. 248)

SULLY v. SCHMITT.

(Court of Appeals of New York. Oct. 15. 1895.)

LANDLORD AND TENANT—ABANDONMENT OF PREMISES BY TENANT.

1. Though a tenant covenanted to keep the premises in a cleanly and healthful condition, he is justified in abandoning the same where the landlord rendered the premises uninhabitable by repeatedly filling up an open sewer underneath said premises, after the tenant had frequently cleaned the same.

2. A landlord has no right, in the nature of an easement, to use a sewer underneath the rented premises so as to render the latter untenable.

Appeal from superior court of Buffalo, general term.

Action on a lease by Betsey Sully against Henry Schmitt. From a judgment of the general term (11 N. Y. Supp. 694) affirming a judgment of the special term (11 N. Y. Supp. 153) denying his motion for a new trial, defendant appeals. Reversed.

Seward A. Simons, for appellant. Adelbert Moot, for respondent.

GRAY, J. This was an action to recover rent due to the plaintiff by the terms of a written lease made between her and the defendant, and the defense was that the premises were untenable, and dangerous to life and health, and that defendant had abandoned them, and had surrendered the same to the plaintiff. After the plaintiff had proved the making of the lease, and an occupation and a payment of the stipulated rent for two years of the term by the defendant, the latter undertook to prove that after the execution of the lease, and after he went into possession, he discovered the presence of an open sewer under the leased premises, which was filled with filth and dirt from the plaintiff's hotel, of which his premises were a portion; that the sewer was insufficient in size to carry away the deposit from the hotel

closets; that the hotel sewer, instead of being connected with this open sewer, simply dropped its contents into it; that the plaintiff continued to use her sewer in this way during the time of his occupation, and no change was made in its construction; that he, from time to time, cleaned out the sewer under his premises, but it was immediately refilled by the use made by plaintiff of her adjacent premises; that from this open sewer came a stench, which was a nuisance and disagreeable, and which rendered the occupancy of the premises by the defendant dangerous to life. Evidence of these facts was excluded by the trial court, upon the plaintiff's objection, as was also evidence to show various other facts, namely, that the plaintiff represented to the defendant, before he took possession, that there was no cellar underneath the leased premises; that there was no opportunity for the examination of the premises before the execution of the lease; and that the defendant had no knowledge of their condition before, or at the time when, he entered into possession. There was conflicting evidence upon the subject of whether the plaintiff had accepted a surrender of the leased premises from the plaintiff, and the defendant asked to go to the jury upon the proposition that there had been such a surrender and an acceptance, but the request was denied, and the defendant excepted. A verdict was directed for the plaintiff.

The lease was for a term of three years, and described a front room on the ground floor of the Fillmore House, in the city of Buffalo, which had formerly been the dining room of that hotel. It contained, among other provisions unimportant to be mentioned, the agreements of the lessee to keep the premises in good repair, to prevent them from being injured by fire or otherwise, and to keep "the premises hereby leased * * * in a cleanly and healthful condition." It was shown that the premises were leased for a barroom. They consisted of one room, with no windows or openings, except a door opening upon the street. The floor covered the entire room, with no aperture or access to a cellar beneath. Some four months after the defendant took possession, he was allowed to make use of the space underneath the floor for the purpose of storing liquors and jugs, and then first became acquainted with its nature and condition. The case presented seems to be one as to which there should be no doubt with respect to the propriety of permitting the defendant to prove the facts set up in his defense, and contained in his offer of proof. If the evidence which he was not allowed to give should establish the existence of such a state of things as was set forth in the answer and the offer, and the abortiveness of his efforts to remedy it, through the continuance of acts by his landlord which rendered it impossible, there was an eviction at law, which warranted the abandonment of the premises, and exonerat-

ed the tenant from the payment of rent thereafter. There was neither any express nor any implied warranty that the premises were fit for habitation when leased, or for any purpose for which leased; but the landlord could not be instrumental in rendering them uninhabitable, and hold his tenant to his agreement to pay rent. If they became untenable through her default and wrongful acts, then she did that which obstructed their beneficial enjoyment, and justified the tenant in abandoning them. It is a long-established and perfectly familiar rule that a physical eviction is not necessary to exonerate the tenant from the payment of rent. The landlord's acts, though not amounting to a physical expulsion, may nevertheless be of so pronounced and offensive a character as to create a nuisance, which, by preventing the reasonable use by the tenant of the premises, would affect directly the consideration of the contract between them. *Dyett v. Pendleton*, 8 Cow. 727; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293. Applying the rule to the present case, if the defendant's evidence had been received it would have shown, or tended to show, that when he discovered the state of things underneath his room, and endeavored to remedy it by cleaning out the sewer, the landlord not only made no change in its construction, but continued to maintain it in a disagreeable, and possibly dangerous, certainly offensive, condition, by suffering the contents of her hotel sewer to flow into and refill the open sewer as often as the tenant would clean it. The neglect of the landlord would seem to be monstrous, and to amount to the creation and continuance of a nuisance upon the adjacent premises. Certainly, it would be for the jury to say whether the evidence made out such a state of facts as exhibited the landlord in the attitude of continuing in the performance of acts which amounted to the maintenance of a nuisance, and through which her tenant's premises were rendered unfit for reasonable use and occupation. The tenant's covenants in the lease obligated him with respect to the maintenance of his own premises in good repair and in a cleanly condition, but the nuisance from the stench arose upon the landlord's property, and because of her repeated neglect. The tenant's covenants did not bear upon such a condition of things, and went no further than to oblige him to do what lay in his power towards keeping his premises in good repair and in a cleanly state. The verdict would turn upon the question whether the defendant had neglected anything which he was able and might reasonably be required to do under his lease, and, if he was not at fault, whether the premises, through the wrongful acts of the landlord, were rendered unfit for occupation, in consequence of which the tenant was justified in abandoning, and did in fact abandon, their possession. It was not necessary that the defendant should have been induced

to enter into the lease by the misrepresentation or fraud of the plaintiff. If he was able to show that during his occupation his landlord was guilty of affirmative acts, which caused a nuisance, of a nature dangerous to life or health, and against which the tenant was remediless by the performance of any acts called for by his own covenants, the evidence should have been received.

It is argued for the respondent that she has a right, in the nature of an easement, to continue the use of the sewer. While that is true, as a general proposition, as applied to the facts of this case it fails as a defense, if the use made of it amounted to an abuse of the right, and so injuriously affected the tenant's possession as to make it impossible or unsafe for the latter to continue in occupation. The point is, not that the landlord did not have the right to make use of this sewer for her house, but that by its defective construction it became a source of offense, and possible danger, and the efforts which the tenant made to keep it in clean and reasonably fit condition were nullified by the refusal of the landlord to remedy the defects in construction, the result whereof was that the stench and offense were constantly renewed by the refilling of the sewer with the filth and waste from the hotel.

Upon the question, also, of whether the plaintiff had accepted the defendant's surrender of possession, there was evidence given by the latter which, if believed by the jury, would have supported a verdict to that effect.

For the errors adverted to there should be a reversal of the judgment below, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 697)

WENDT v. CRAIG.

(Court of Appeals of New York. Oct. 15, 1895.)

CREDIBILITY OF WITNESS—QUESTION FOR JURY.

Where a complaining witness withdrew a charge of assault, and made affidavit in the withdrawal that she made the charge through fear, and afterwards testified that she withdrew the charge through fear, it was error to hold, as a matter of law, that the affidavits were not contradictory. 17 N. Y. Supp. 748, reversed.

Appeal from supreme court, general term, Second department.

Action by Margaret Wendt against Patrick Craig for slander. From a judgment of the general term (17 N. Y. Supp. 748) affirming a judgment for plaintiff, defendant appeals. Reversed.

J. Newton Fiero, for appellant. James M. Seaman, for respondent.

PECKHAM, J. We are of the opinion that the learned judge erred in his charge to the jury that the second affidavit of Eliza Flynn does not contradict the first. It was so word-

ed that the jury might well have come to the conclusion that it did contradict, and was so intended. In that way her credibility was impugned, and the effect was for the jury. In the second affidavit she says she made the first through fear, and that she did not want to make it, as she had nothing against Mr. Craig; also, that she wanted to withdraw whatever charge she made. The expression of her desire to withdraw the charge might be interpreted as a desire to withdraw because she did not wish to prosecute or because it was not true; and, again, when she said that she had nothing against Mr. Craig, it might naturally be construed as meaning she had no ground of complaint against him. It cannot be said, as matter of law, that there is no contradiction between the two affidavits, and their effect upon the credibility of the witness should have been left to the jury without the statement of the court that there was no contradiction in them. The verdict was quite a large one, and the case closely contested, and an error of this kind may have been quite prejudicial to the defendant's case. The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 255)

HENNESSEY v. PAULSEN et al.

(Court of Appeals of New York. Oct. 15, 1895.)

EJECTMENT—PLEADING—DEMURRER—PARTIES—OCCUPANT OF PREMISES.

1. In ejectment, an answer alleging that "there is a defect of parties defendant herein, in that at the time of the commencement of this action one M. was, and now is, an occupant of a part of the premises described in the complaint, and a tenant of one D., who was, and still is, the legal owner and in possession of said premises, and neither of said persons has been made a party defendant," which does not allege that either of such persons held adversely to the plaintiff, is demurrable. 33 N. Y. Supp. 638, affirmed.

2. Under Code Civ. Proc. § 1502, providing that if the property sought to be recovered in ejectment is actually occupied "the occupant" thereof must be made defendant, it is not necessary that all of the occupants of the premises be made parties defendant. 33 N. Y. Supp. 638, affirmed.

Appeal from superior court of New York City, general term.

Action of ejectment by John Hennessey against Martin Paulsen and others. From a judgment of the general term (33 N. Y. Supp. 638) reversing an order overruling a demurrer to part of the answer, defendant appeals. Affirmed.

Charles O. Sanders, for appellants. John Townshend, for respondent.

GRAY, J. This action was for ejectment on a tax lease, and the complaint is, in our judgment, sufficient. The answer, as a separate defense, alleges "that there is a defect of parties defendant herein, in that at the time of the commencement of this action one

John Mulhall was, and now is, an occupant of a part of the premises described in the complaint, as a tenant of one Rachel Duffy, who was, and still is, the legal owner and in possession of the whole of said premises, and neither of said persons has been made party defendant herein." To that defense the plaintiff demurred as being insufficient in law, and his demurrer was overruled at the special term. Upon appeal, the general term reversed the decision of the special term and sustained the demurrer.

That such a defense is insufficient in law cannot be doubted. So far as the facts are therein alleged, it does not appear that Mulhall, however an occupant of a part of the premises, holds adversely to the plaintiff, and it may well be, for all that appears, that he acknowledges the rights of the plaintiff. Though Rachel Duffy may be the legal owner and in possession of the whole of the premises, that allegation is not equivalent to an allegation that she is in occupation thereof, and her ownership and possession may be in subordination to plaintiff's title, as Mulhall's occupation of the premises may be without any hostility to the claim of the plaintiff under his tax lease.

Passing over what seems to be defective in the allegations constituting this defense in the answer to the complaint, the question arises whether the plaintiff in effectment is obliged to make all those who may be occupants of the premises described parties defendant. Section 1502 of the Code of Civil Procedure provides that, "if the property is actually occupied, the occupant thereof must be made defendant in the action." That language is hardly open to the reading that all the occupants must be sued in one action. Undoubtedly the plaintiff may make every occupant a defendant in his action; but I do not think that he is obliged to do so by the Code. We may read the words in section 1502, "the occupant thereof," as meaning an occupant, and not all the occupants. It is difficult to perceive any good reason for permitting these defendants to object to the nonjoinder of another defendant, when such joinder could in no wise benefit them or be necessary for the determination of their rights. We can see how Mulhall as an omitted party might claim the right to be made a party to the action, if he deemed his interests in the real property to be imperiled; but how the defendants, who are alleged to be wrongdoers with respect to the plaintiff's property rights, have any interest which the law will recognize in having another or other wrongdoers joined with them as defendants, we do not perceive.

In whatever light we look at the nature of this defense which the defendants have interposed to the complaint, we think it insufficient in law, and therefore we agree with the general term below that the demurrer should have been sustained, and their judgment should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 258)

CASOLA v. VASQUEZ.

(Court of Appeals of New York. Oct. 15, 1895.)

ATTACHMENT—WHEN LIES—PREFERRING CREDITORS.

Though a statute of another state prohibits an insolvent limited partnership from transferring its goods with intent to give preference, such transfer, when made in payment of a bona fide indebtedness, will not authorize an attachment under Code Civ. Proc. § 636, subd. 2, on the ground that defendants had disposed of or secreted their property with intent to defraud their creditors.

Appeal from supreme court, general term, First department.

Action in attachment by Adolfo Casola against Francisco Vasquez, impleaded, etc. From a judgment of the general term (32 N. Y. Supp. 1140, mem.) affirming an order denying a motion to vacate the attachment, defendant appeals. Reversed.

William H. Blymyer, for appellant. Louis Marshall, for respondent.

ANDREWS, C. J. The application for the warrant of attachment was based on the ground that the defendants "had assigned, disposed of, or secreted their property with intent to defraud their creditors." The affidavits wholly failed to establish a case within this clause of the statute. They show simply that the firm of Kugelmann & Co., in violation of the Maryland statute regulating the formation of limited partnerships, being insolvent, sold and transferred to the defendant, Francisco Vasquez, or to the firm of Francisco Vasquez & Sons, effects of the firm, in payment of a valid debt owing by the firm to Vasquez, or Vasquez & Sons, with intent to give a preference to such creditor or firm. The bona fides of the debt is not questioned, nor is it claimed that the effects transferred exceeded in value the amount of the debt. The Maryland statute declares (section 15, art. 73, of the Public General Laws of Maryland) that a transfer made by a limited partnership, under such circumstances, "shall be void as against the creditors of such partnership." Vasquez, having been at the time of the transfer a special partner in the firm of Kugelmann & Co., became, as is claimed, by accepting this transfer, liable, under the seventeenth section of the act, as general partner. The sale and transfer, although in violation of the limited partnership act, did not bring the case within the attachment law. It was void, but solely by force of the partnership statute. It was not a fraud at common law, under which preferential payments by an insolvent debtor are permitted. The transaction could be set aside for the benefit of the body of creditors of Kugelmann & Co., because the statute of Maryland declared it to be void, and Vasquez, by assenting to the transfer in violation of the act, may have subjected himself to liability as a general

partner. But, to authorize an attachment under subdivision 2 of section 636 of the Code, there must be actual or intended fraud upon creditors; such fraud as was contemplated by the statute of Elizabeth and similar statutes. The violation of the limited partnership act by the preferential payment of an honest debt does not show that the debtor has "assigned, disposed of or secreted his property" with intent to defraud his creditors, within the attachment law. The orders of the general and special terms should be reversed, and the attachment vacated, with costs. All concur. Orders reversed.

(147 N. Y. 237)

FEETER v. ARKENBURGH.

(Court of Appeals of New York. Oct. 15, 1895.)

ATTORNEY AND CLIENT—ACTION FOR SERVICES—REFERENCE—LONG ACCOUNT—WHAT CONSTITUTES.

An itemized bill by an attorney for services to defendant while the latter was acting as executrix of an estate, which consists of separate charges for consultations, writing of letters, and attendance on the court during the executorial accounting, is not a long account, within Code Civ. Proc. § 1013, providing that a reference may be had when the issue involves the examination of a long account. 33 N. Y. Supp. 1127, mem., reversed.

Appeal from supreme court, general term, First department.

Action by Jacob W. Feeter against Eliza J. Arkenburgh for services as an attorney at law. From an order of the general term (33 N. Y. Supp. 1127, mem.) affirming an order granting a reference, defendant appeals. Reversed.

Charles Edward Souther, for appellant. Jacob W. Feeter, for respondent.

BARTLETT, J. The plaintiff, as an attorney and counselor at law, sued the defendant to recover \$2,259.84 and interest for services rendered upon her retainer in drawing, copying, and engrossing various instruments, examining accounts of certain executors, and attending the accounting of the executors before surrogate, and in counseling and advising the defendant concerning her rights, duties, and obligations as an executrix, and for divers journeys and other attendances in and about the business of defendant, at her request, and for money paid, laid out, and expended by the plaintiff, at her request, in and about her business. The complaint refers to, and makes a part thereof, a bill of items annexed, which covers some 16 pages of the printed record. The answer denies the allegations of the complaint. The plaintiff moved for an order of reference, on the ground that the trial of the issues involved the examination of a long account. The motion was opposed, but the special term of the supreme court in the city of New York granted an order of reference, which the general term affirmed.

This court held (*Randall v. Sherman*, 131 N. Y. 669, 30 N. E. 589) that, in an action by an attorney to recover for his services in defending a certain suit upon a retainer, he was not entitled to an order of reference for the reason that he had rendered an account or bill itemizing his services. It was pointed out that his cause of action was single, as his contract was entire, although it required distinct items of service on his part before his duty was fully discharged to his client. In the case at bar the learned judge at special term was of opinion that, while the plaintiff's services were rendered in one estate, yet they were so connected with different matters in which the estate was interested as to give the bill of items the character of a long account, within the statute requiring the plaintiff to prove specifically services in disconnected matters. The general term followed this reasoning, writing no opinion. We cannot agree with the court below, and are of opinion that this case is not referable. The complaint avers a retainer of plaintiff by defendant, and the bill of items shows that plaintiff's services were confined mainly to looking after the interests of defendant as executrix of Robert H. Arkenburgh's estate, and one or two personal matters. A very large part of the bill, of 150 items, is made up of charges for consultations with the defendant and others connected with the estate, and for writing nearly 100 letters, each of which is represented by a separate item. The balance of the bill, with the exception of a very few items, is made up of the usual professional services incident to attending before the surrogate in an executorial accounting. The other principal items were attending a sale by executors of real estate at Rahway, N. J.; attending a like sale of Ninety-Eighth street lots in the city of New York, and attending and closing purchase of 127 and 129 West Seventy-Fifth street by defendant. This bill is not a long account, within the meaning of section 1013 of the Code of Civil Procedure; and proof of plaintiff's claim can be readily made under a few general items, and within the reasonable limits of a jury trial. We do not mean to intimate that the relation of attorney and client may not, under certain special circumstances, involve a long account, but we hold that this is not such a case. The orders of the special and general terms should be reversed, with costs. All concur. Orders reversed.

(53 Ohio St. 291)

YOUNG v. SHALLENBERGER et al.

(Supreme Court of Ohio. June 25, 1895.)

BILL OF EXCEPTIONS—WHEN TO BE FILED—WRIT OF ERROR—WHEN CLERK AUTHORIZED TO ENTER JUDGMENT—FINAL ORDERS.

1. A bill of exceptions, to be available, must be perfected and filed in accordance with the provisions of the statute in force at the time. Under the amendment of March 22, 1892, of sec-

tions 5298, 5301, 5302 of the Revised Statutes (89 Ohio Laws, 124), the exceptions must be reduced to writing within such time as may be fixed by the court, not exceeding 50 days "beyond the date of overruling the motion for a new trial," or from the decision of the court when a motion for a new trial is not necessary, and the bill of exceptions must be filed within said period of 50 days, unless the time is extended as authorized by section 5302; but the time for filing the bill, when duly allowed and signed, cannot be restricted to less than that period.

2. The right or cause of a proceeding in error accrues at the time of the rendition of the judgment or making of the final order, and, under section 6723 of the Revised Statutes, such proceeding must be commenced within six months from that time. If commenced thereafter, the court acquires no jurisdiction of the case, and the petition should be dismissed.

3. When a general verdict is returned by the jury, the clerk is authorized, by section 5328 of the Revised Statutes, to enter judgment upon it, unless "the court order the case to be reserved for future argument or consideration"; and such judgment is regular and valid, though entered before the expiration of the statutory time for filing a motion for a new trial.

4. The overruling of a motion for a new trial is not a final order to which error can be prosecuted.

Burket and Shauck, JJ., dissenting.
(Syllabus by the Court.)

Error to circuit court, Fairfield county.

Action by Theodore Shallenberger and another against John Young. To a judgment for plaintiffs, defendant brings error. Affirmed.

On the 29th day of April, 1892, the defendants in error, Theodore Shallenberger and Lorenzo Bechtel, obtained a general verdict for a specific sum of money against the plaintiff in error in an action brought in the court of common pleas of Fairfield county, and on the same day judgment was rendered on the verdict and entered of record. On the 2d day of May, 1892, the defendant in the action filed his motion for a new trial, which, on the 20th day of June following, was heard and overruled, and, on motion of the defendant, 40 days were "allowed for the signing and sealing of a bill of exceptions as provided by law, and the clerk ordered to keep the journal open forty days for that purpose." All these proceedings occurred at the April term of the court, which finally adjourned July 7, 1892. A bill of exceptions was allowed and signed on the 6th day of August, 1892, and filed on the 9th day of the same month. A petition in error was filed in the circuit court by Young on the 19th day of November, 1892, upon which a summons was issued December 10, 1892, and served on one of the defendants in error on the 20th day of that month, and on the other defendant on the 27th day thereof. The circuit court, on motion of the defendants in error, struck the bill of exceptions from the files, on the ground that it had not been filed within the time allowed by law, and dismissed the petition in error because it was not filed in time, and rendered judgment for costs against the plaintiff in error, who brings the case here.

Brasee & Brasee and C. M. Strickler, for plaintiff in error. C. D. Martin, John G. Reeves, M. A. Daugherty, and J. M. Shallenberger, for defendants in error.

WILLIAMS, J. (after stating the facts). By the provisions of sections 5298, 5301, and 5302 of the Revised Statutes, as they were in force on the 6th day of February, 1890, when the action below was commenced, a party desiring a bill of exceptions was required to perfect and file the same within 30 days after the close of the term at which the verdict was rendered, or the finding of the court made. By an amendment of those sections, which took effect on the 15th day of April, 1890, the time within which bills of exceptions might be filed was enlarged to 40 days from the end of the term, or, where a motion for a new trial was made but not decided at the term, the bill might be filed within 40 days after the end of the term at which there was a decision of the motion. The sections were again amended on the 22d day of March, 1892, and, as so amended, were in force when the action below was tried, when the judgment was rendered, and when the motion for a new trial was overruled. As thus amended, section 5298 provides that: "The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not more than fifty days beyond the date of the overruling of the motion for a new trial, or from such decision by the court when a motion for a new trial is not necessary." Section 5301, in its amended form, requires that "the party excepting must reduce his exceptions to writing, and present the same to the trial judge or judges for allowance within fifty days after the overruling of the motion for a new trial, or the decision of the court where a motion for a new trial is not necessary." And by section 5302 it is provided that, where the "exceptions are not allowed and signed during the progress of the trial, the party excepting shall submit the bill of exceptions to the opposite counsel for examination not less than ten days before the expiration of said fifty days"; and that the same shall be submitted to the trial judge or judges, "for his or their signature, not less than five days before the expiration of said fifty days." When so presented, and found to be correct, or after it is corrected, "the trial judge or a majority of the judges composing the trial court must allow and sign" the bill, within the 50 days, and it must "be filed with the pleadings, * * * and an entry of the allowance and signing of the same must be entered upon the journal of the court within the time fixed for such allowance and signing." It is contended by the plaintiff in error that the taking and filing of a bill of exceptions relates to the remedy in the action, and therefore the sections of the statute referred to, as last amended, are rendered inapplicable to this case by the operation of section 79 of

the Revised Statutes, which provides that, when an amendment of a statute "relates to the remedy, it shall not affect pending actions, * * * unless so expressed." The sections as so amended contain no express provision making them applicable to pending actions. Counsel have argued this point upon the mistaken assumption that, if their position should be maintained, the sections as amended April 15, 1890, would govern in determining whether or not the bill of exceptions in this case was filed in proper time. If governed by that amendment, there could be no doubt that the bill was filed within the 40 days allowed after the close of the term, and should not have been stricken from the files. But it is obvious that amendment can have no application to the case, for it was not passed until after the commencement of the action, and was repealed before its termination. As has already been noticed, the statute in force when the original action was commenced required that a bill of exceptions should be filed within 30 days from the close of the term at which the verdict was rendered or the decision made by the court; and the record affirmatively shows that the bill was not filed within that time, the term having ended on the 7th day of July, 1892, and the bill was not filed until the 9th day of August following. The result, therefore, would be adverse to the plaintiff in error, if the position taken by his counsel were sustained. We are satisfied, however, that the bill of exceptions does not pertain to the remedy in the original action, which is terminated by the final judgment, and is no longer a pending action, while the only office of the bill is to bring properly upon the record questions raised on exceptions taken in the progress of that action, with such statement of the facts or evidence as may be necessary to show their pertinency and importance, in order to aid the party in the prosecution of another remedy, namely, a proceeding in error, which is in the nature of a new action, prosecuted by a distinct mode of procedure provided by statute. The bill is employed for no purpose, nor does it accomplish any result, except in the prosecution of error, and can have no effect whatever, either on the rights or remedies of the parties except in such proceeding; and it should, therefore, be perfected and filed in accordance with the provisions of the statute in force at the time.

The ultimate inquiry on this branch of the case, then, is whether the plaintiff in error, in perfecting and filing his bill of exceptions, complied with the statute as amended March 22, 1892. It is conceded the bill was filed within 50 days from the overruling of the motion for a new trial; but it is contended that was not sufficient, because the court, on the motion of the plaintiff in error, had fixed the period of 40 days for the allowance and signing of his bill, and it was not filed within that time. The language of section 5298, "time may be given to reduce the exceptions to writing, but not more than fifty days," etc., im-

ports that a less number of days may be fixed by the court, in its discretion, for that purpose; and the object of investing the court with that discretionary power becomes manifest from a consideration of section 5302, which requires that the bill of exceptions shall be submitted "to the opposite counsel for examination not less than ten days before the expiration of said fifty days," and to the trial judge or judges "not less than five days before the expiration of said fifty days." It is evident, we think, that the authority to fix a shorter period than 50 days for reducing the party's exceptions to writing, was conferred on the court in order that the time prescribed, at least, might be allowed for the examination of the bill by the court and counsel before the expiration of the 50 days, and for the correction, signing, and filing of the same within that period. But reducing the exceptions to writing for the purpose mentioned is not the same thing as filing the bill of exceptions after it has been duly allowed and signed, and, while the statute gives the court discretionary power in fixing the time for the performance of the former act, we have discovered no provision which authorizes the court to limit the time for the performance of the latter to less than 50 days after the overruling of the motion for a new trial, or the decision of the court when a motion for a new trial is unnecessary. It may be urged that, as the court, under section 5298, may allow the whole 50 days for reducing the exceptions to writing, the time fixed for that purpose must be regarded as the limit within which the bill can be filed, otherwise there could be no opportunity, after the bill should be prepared, for the court or counsel to examine it. But that section applies to all exceptions, whether to be put in the form of a bill of exceptions or not; and when a bill is necessary the court should, in the exercise of its discretion, so fix the time for the preparation of the bill that the court and counsel may have the requisite period for examination, before the expiration of the time allowed by the statute for the filing of the same. Cases may arise in which it may be desirable to allow more than the 10 days for the examination of the bill, and the court may, in such cases, shorten the time accordingly for reducing the exceptions to writing; but in case the whole 50 days should be allowed for that purpose, the trial judge or judges may extend the time for the signing of the bill "for a period not exceeding ten days beyond the expiration of said fifty days"; but the time for filing the bill, when properly allowed and signed, cannot be restricted to less than that period. So that, when a bill of exceptions, which has been duly allowed and signed, is filed within 50 days after the overruling of the motion for a new trial, or the decision of the court where such motion is unnecessary, and an entry thereof has been made on the journal of the court, the requirements of the statute as amended March 22, 1892, have been

fully complied with, and the bill cannot properly be stricken from the files without the consent of the party obtaining the same. No complaint is made in this case that the bill was not submitted in due time to opposite counsel, or to the trial judge, and the record fails to show any default in that regard. In the absence of such showing, compliance with the statute in that respect will be presumed from the allowance and signing of the bill. In view of the various provisions of the statute, the journal entry of the common pleas court, allowing 40 days for "the signing and sealing of a bill of exceptions as provided by law," must be treated as an allowance of the time named for reducing the exceptions to writing, in order that the bill might be perfected and filed within the 50 days allowed by the statute.

2. The other question in the case is whether the petition in error was filed in time. The right to file a petition in error is a cause of proceeding which arises at the time of the rendition of the judgment or making of the final order, and the proceeding must be commenced within the time limited by the statute then in force, otherwise the court acquires no jurisdiction. *O'Donnell v. Downing*, 43 Ohio St. 62, 1 N. E. 438; *Burke v. Taylor*, 45 Ohio St. 444, 15 N. E. 471. Section 6723 of the Revised Statutes, which was in force when the judgment of the trial court was rendered, provides that "no proceeding to reverse, vacate, or modify a judgment or final order shall be commenced unless within six months after the rendition of the judgment or the making of the final order complained of," except that persons under certain disabilities are allowed the same time after the disability is removed for the commencement of the proceeding. It is conceded that more than six months elapsed after the rendition of the judgment before the petition in error to reverse it was filed in the circuit court, but less than that period after the overruling of the motion for a new trial; and on this branch of the case it is urged by the plaintiff in error (1) that the judgment was prematurely entered, and, for the purposes of the question here, should be treated as rendered at the time of the overruling of the motion for a new trial; or (2) that the overruling of the motion was the final disposition of the case, and constitutes a final order to which error will lie. Section 5326 of Revised Statutes requires that: "When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration." And the next section provides that: "When the verdict is special, or when there is a special finding on particular questions of fact, or when the case is reserved, the court shall order what judgment shall be entered." These sections, it is apparent, afford ample authority for the clerk to enter judgment immediately upon the return of a general ver-

dict, and, indeed, make it his duty to do so, unless otherwise ordered by the court, in order that the case may be further heard or considered. If either party wishes to have the entry of judgment delayed to await the result of a motion for a new trial, he should, when the verdict is returned, make his desire known to the court; and, if he fails to obtain an order of the court directing such delay, a judgment entered upon the coming in of the verdict would seem to be in all respects regular and valid. True, that does not interfere with the party's right to file his motion for a new trial within the statutory time, and, if it be sustained, the judgment must, of course, be set aside; but, if overruled, the judgment remains, from the date of its entry, the final judgment in the action, unless reversed, vacated, or modified in accordance with law. Nor do we think the overruling of a motion for a new trial is a final order upon which error can be prosecuted. A final order to which error will lie is defined by the Code to be "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment." Rev. St. § 6707. It is clear that the overruling of the motion of plaintiff in error for a new trial was not an order made in a special proceeding, or upon a summary application after judgment. It was made in a civil action, as contradistinguished from special proceedings, and in the ordinary course of procedure in such actions. Nor is it an order in an action which both affects a substantial right, and, in effect, determines the action, and prevents judgment, within the meaning of the section of the Code alluded to. The action ends with the judgment; and the motion, which is an application to the court to reconsider its judgment, and for a retrial, is usually, though not always, essential to the proper preservation and presentation of the errors preceding the judgment, when relied on to obtain a reversal of it. Error lies to the judgment, but not to the decision of the motion though that decision may be made a ground for the reversal of the judgment. It has long been settled in this state that "an order of the court granting or overruling a motion to set aside the verdict of a jury and grant a new trial is not a final judgment or order, for the reversal of which error can be prosecuted before the final disposition of the case." *Conord v. Runnels*, 23 Ohio St. 601. Such a motion, it is held in that case, is addressed to the sound discretion of the court. If granted, it does not determine the action, but merely compels the parties to retry their case before the same tribunal; and, if overruled, it simply permits the determination of the action already reached to stand. It may be said that sustaining the motion has the effect of preventing a judgment in favor of the successful party at the trial, and affects a substantial

right of his by subjecting him to the costs and uncertainties of another trial, and it undoubtedly does temporarily prevent final judgment, but not eventually; and the costs and uncertainties of another trial is the result of some error which the court, in the exercise of its discretion, deems sufficient to warrant it. And so, if the motion be overruled, the unsuccessful party must incur the expense of a proceeding in error, if he is dissatisfied with the result; but neither the overruling nor sustaining of the motion is, within the meaning of the Code, such final order as may itself be the foundation of a proceeding in error. But it is said a party may be deprived of his remedy on error by the court declining or omitting to pass on the motion until the expiration of the time allowed, after the rendition of the judgment, for commencing the proceeding. It is not to be presumed that the court will disregard its duty, or fail to dispose of the motion at any time when requested by the party; and if he, by consent or inattention, permits the time to expire, he cannot complain of the consequences of his own act or omission. The right to prosecute error exists only when conferred by statute; and the remedy, to be effective, must be pursued in the time and mode provided. The statute has declared in explicit terms that "no proceeding to reverse a judgment shall be commenced unless within six months after the rendition of the judgment," and the court is powerless to enlarge its terms, if it desired to do so. The time begins to run from the day of the rendition of the judgment. *Robinson v. Orr*, 16 Ohio St. 284; *Bowen v. Bowen*, 36 Ohio St. 312. Judgment affirmed.

BURKET and SHAUCK, JJ., dissent.

(142 Ind. 263)

AYERS v. ARMSTRONG et al.

(Supreme Court of Indiana. Oct. 11, 1895.)

BILL OF EXCEPTIONS—SUFFICIENCY—WHEN PART OF RECORD—NECESSITY OF FILING.

1. A bill of exceptions not filed until after the expiration of 90 days allowed therefor is not rendered sufficient by an indorsement of the judge on the margin that it was presented to him for examination and signature on a date within the time allowed.

2. A bill of exceptions, though presented and signed within the time allowed, is not part of the record until filed.

Appeal from circuit court, Huntington county; O. W. Whitelock, Judge.

Action by Edwin B. Ayers against Frederick Armstrong and another. Judgment for defendants, and plaintiff appeals. Affirmed.

T. L. Lucas, for appellant. J. Q. Cline, for appellees.

MONKS, J. This was an appeal from a survey of real estate. The cause was tried. The court found against appellant, and, over a motion for a new trial, rendered judgment on the finding. The only error assigned is

that the court erred in overruling appellant's motion for a new trial. The correctness of the court's ruling on the motion for a new trial depends entirely upon the evidence. The motion for a new trial was overruled June 26, 1893, and 90 days given in which to file a bill of exceptions. A bill of exceptions, purporting to contain all the evidence given in the cause, was signed by the judge on the 24th of October, 1893, long after the expiration of the 90 days given. There is an indorsement on the bill of exceptions, signed by the judge, stating that the same was presented to him September 16, 1893. This, however, is no part of the record. *Cornell v. Hollett* (Ind. Sup.) 40 N. E. 132, and cases cited. The statute expressly requires that the date of presentation be stated in the bill of exceptions, not on its back or margin. It has been uniformly held that, when the date of presentation is not stated in the bill of exceptions, we must consider the date when the bill was signed as the date of its presentation. *Cornell v. Hollett*, supra, and cases cited. A bill of exceptions, even if presented and signed within the time given, is no part of the record until it is filed. *Billott*, App. Proc. § 805, and cases cited. Such filing must be after the bill is signed by the judge. *Guiri v. Gillett*, 124 Ind. 501, 24 N. E. 1036. The record does not show that the bill of exceptions was filed. It is true that it is stated in the record that the bill of exceptions was filed September 28, 1893; but, not being at that time signed by the judge, it was not a bill of exceptions, and did not thereby become a part of the record. *Guiri v. Gillett*, supra. It is clear, for the reason stated, that what purports to be a bill of exceptions is not part of the record. No question is therefore presented as to the action of the court in overruling the motion for a new trial. Judgment affirmed.

INDIANAPOLIS UNION RY. CO. v. HOLT,
County Treasurer.

(Supreme Court of Indiana. Oct. 12, 1895.)

APPEAL—FILING REMITTITUR—AFFIRMANCE.

Where parties to an appeal from a judgment file an agreement for a remittitur, the judgment will be affirmed, and remanded to the lower court for enforcement of the agreement.

Appeal from circuit court, Marion county; George L. Reinhard, Special Judge.

Bill by the Indianapolis Union Railway Company against Sterling R. Holt, treasurer of Marion county, to restrain the collection of taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

A. C. Harria, S. O. Pickens, and Baker & Daniels, for appellant. W. A. Ketcham, for appellee.

PER CURIAM. This was a suit to enjoin the county treasurer of Marion county, Ind.,

from collecting certain taxes for the years 1891, 1892, and 1893, claimed to be due from the appellant on its railroad property. The appellee filed a cross complaint, and obtained judgment for the taxes, penalties, and costs. It having been made to appear that William H. Schmidt has succeeded Sterling R. Holt as treasurer of Marion county, the said Schmidt is, on motion, substituted as appellee herein, in place of said Holt. An agreement has been filed herein that the judgment shall be affirmed on the entry of a remittitur in the court below for so much of said judgment as is equal to the taxes, interest, and penalties, over and above the amount thereof, resulting from a valuation of \$2,500,000 upon the property of the Indianapolis Union Railway Company and \$1,500,000 upon the property of the Belt Railroad Company for each of said years, and in addition for the year 1894, in accordance with the terms of the modification of the assessment of said property made by the state board of tax commissioners, by which the aggregate assessment of said property for each of said years was fixed at \$4,000,000, distributed as above, which modification of assessment by said board is filed with, and made a part of, the agreement of the parties herein. The judgment is therefore affirmed, at the cost of appellant; and, by agreement of parties, this cause is remanded to the court below, in order that the agreement above named may be carried out by proper orders of the court.

(142 Ind. 194)

BOWER et al. v. BOWER et al. 1

(Supreme Court of Indiana. Oct. 2, 1895.)

CONTEST OF WILL—ESTOPPEL—EVIDENCE—WITNESS.

1. Conversations with testator on the subject of wills, had four years before the execution of the will in controversy, are admissible as the basis of opinion of a nonexpert, testifying as to the testamentary capacity of the testator.

2. Testimony as to deceased's testamentary capacity, based on facts ascertained while collecting a bill for professional services, is not within Rev. St. 1894, § 505 (Rev. St. 1881, § 497), forbidding a physician to disclose matters communicated to him in his professional capacity.

3. A motion to strike out testimony as to the sanity of the testator, on the ground that no opinion was called for or given by the witness as to the mental condition of the testator, should be made before cross-examination.

4. Testimony as to facts and circumstances tending to establish insanity is not rendered incompetent by the failure to ask or obtain the opinion of the witness as to the testator's sanity.

5. On an issue as to a testator's sanity, an assessor's evidence that testator, after the execution of his will, did not make out his own tax list for two years, is admissible, and also the tax lists themselves.

6. On an issue as to a testator's sanity, an instrument executed by a contestant of the will, acknowledging the receipt of certain land in full consideration of further claims on the estate, is not admissible, where it did not appear that

there was necessity for showing the relations between testator and contestant before the execution of the will.

7. Under Rev. St. 1881, § 546 (Rev. St. 1894, § 555), making it the duty of the court, when requested, to instruct the jury to find specially on particular questions of fact, it was error to refuse to submit, on an issue as to the sanity of the testator, an interrogatory: "Did testator, at the time of the execution of the paper writing which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life, and act with discretion therein, and did he know his children and grandchildren, and have a general knowledge of the estate of which he was possessed?"—where the evidence entitled the party to a finding thereon, and was not covered by any other interrogatories.

Appeal from circuit court, Clark county; G. H. D. Gibson, Judge.

Action by Eliza Bower and others against William B. Bower and others to contest the validity of the will of Andrew Bower. Plaintiffs had judgment, and defendants appeal. Reversed.

Burt & Laggart, M. Z. Stannard, and C. L. Jewett, for appellants. J. K. Marsh and W. H. Watson, for appellees.

JORDAN, J. This action was instituted by the appellees in the Clark circuit court to contest the validity of the will of Andrew Bower, deceased. The complaint, *inter alia*, shows that the testator died at Clark county, Ind., on July 18, 1892, leaving surviving him the appellees, who are his children and grandchildren and heirs at law. The will in contest bears date of September 5, 1887, and its validity is assailed upon the grounds (1) that the testator, at the time of its execution, was of unsound mind; (2) that it was unduly executed; (3) that it was procured to be executed through the fraud of the defendants. A trial by a jury resulted in a verdict in favor of the contestants, and, over a motion for a new trial, the court adjudged the will to be null and void, and revoked and set aside the probate thereof. Appellants, in this appeal, have assigned five alleged errors of the trial court, but the third and fifth are the only ones that are argued by their learned counsel, and therefore the consideration of the others must be deemed to be waived.

Appellants, in the court below, filed an answer to the complaint in two paragraphs. The first was a general denial. The second was intended to be in bar, and was directed to so much of the complaint as alleged a cause of action in favor of appellee Margaret C. Bower. By this paragraph certain facts were averred, showing that this appellee, who is a daughter of the deceased testator, had on March 15, 1882, received from the latter a conveyance of certain described real estate, situated in the aforesaid county of Clark, and that said realty had been received by her in full consideration of all claims as an heir against her said father's estate; and it was therein prayed that by reason of said facts she be barred and estopped from

1 On rehearing, 45 N. E. 596.

prosecuting the action. On motion of the appellee Eliza Bower, the court struck out this second paragraph, and, by their third assignment, appellants affirm that in this the court erred. They insist that the provisions made for appellee by the alleged conveyance of land to her were in the nature of an advancement; and in consideration of the facts that she received the same, and agreed to make no claim against her father's estate, she was estopped from joining as a contestant in this action. Counsel cite us to no authority, and we are not aware of any, that will support this contention. If the conveyance of the property was by way of advancement in full of her interest as an heir in the estate under an agreement, then it perhaps might be a matter proper to be set up and considered against Margaret C. if the estate should come to be partitioned or distributed under the statute of descent. See Rev. St. 1881, §§ 1189, 2479 (Rev. St. 1894, §§ 1203, 2636). See *Stokesberry v. Reynolds*, 57 Ind. 425; *Brown v. Brown*, 139 Ind. 853, 39 N. E. 152. This point, however, is not before us in this case, hence we do not decide it. In any event, however, we think that the facts set up in this paragraph were not in any way relevant as a defense in bar of appellee's right to contest the will. They did not confess and avoid the cause of action alleged in the complaint, nor tend to constitute a cause of defense thereto, and would have served only to inject a collateral issue into the proceedings, and the court did not err in sustaining the motion to reject this paragraph.

Under the fifth assignment, it is averred that the court erred in overruling the motion for a new trial. Appellants do not ask that we review the evidence in order to ascertain if it is sufficient to support the verdict of the jury. They say that it was a duty which rested upon the trial judge; and, if any injustice was done by not sustaining the motion for a new trial upon that ground, the blame must be chargeable to him, and not to this court.

It is next claimed that the court erred in not striking out certain declarations of the testator, testified to by Margaret C. Bower. The alleged objectionable evidence given by this witness is substantially as follows: "He [referring to the testator] got to talking of some one that had made a will, and he said it was foolishness for any man to make a will, and I said, 'Why, ain't you going to?' and he said, 'No, I never allow to make a will,' and I said, 'Why?' and he said it was not right to make a will." The objections to this evidence, as stated in the motion to strike out, were (1) that it was hearsay; (2) that these declarations were made prior to the execution of the will, and in the absence of the defendants; (3) because they did not tend to support the opinion of the witness as to the mental condition of the testator at the time of the execution of the will. This witness seems to have been examined by ap-

pellee relative to the testator's alleged unsoundness of mind. She detailed to the jury conversations had with him, and his appearance and condition for a number of years before the execution of the will, and on down to his death. These particular declarations, against which the objections are urged, were made in one of the several conversations referred to by this witness, and occurred, as the witness said, about ten years prior to the trial, which apparently made the conversation occur about four years before the date of the execution of the will. After stating all of the facts to the jury, the witness was asked whether or not, in her opinion, the testator was, at the time of the execution of the will in question, a person of sound or unsound mind, and she answered that she thought he was of unsound mind.

Appellants contend that the statements made by the testator in this conversation about making a will did not tend to support the opinion given by this witness, for the obvious reason, as they say, that they were made some three or four years before the will was executed, and therefore too remote from the time at which the witness was asked to give her opinion. This witness was not an expert, and therefore, to render her opinion competent as to the mental condition of the testator, she was first required to state to the jury the facts upon which it was founded. This necessarily included what the testator said in conversations had, and the manner in which he conducted himself, etc. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, and 22 N. E. 990.

While it is true that in cases like the one at bar, where the mental capacity of the testator is involved, the principal question under investigation upon this issue is, was he of unsound mind at the time the will in controversy was executed? however, as bearing upon the mental condition of his mind at this given time, facts and circumstances which tend to show his mental condition, both prior and subsequent to the execution of the will in contest, may be received in evidence. This rule is recognized by the decisions of this court. *Dyer v. Dyer*, 87 Ind. 13; *Staser v. Hogan*, supra. Of course, the period of time that may be covered by the examination relative to the mental capacity of the person in question, both prior and subsequent to the execution of the will, under all the circumstances in each particular case, must necessarily be left, to a great extent, to the sound discretion of the trial court, the abuse of which may be subject to review upon appeal. Under the rule permitting a nonexpert to give an opinion, it may be, and frequently is, difficult to fix a limit to the facts about which the witness may testify, as it is evident that the weight of the opinion given must, of necessity, depend upon the facts upon which it is based. *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441; *Burkhart v. Gladish*, 123

Ind. 337, 24 N. E. 118. The opinion is of weight only so far as it is reasonably supported by the facts. The rule is well stated by a standard author: "On the whole, the issue of mental soundness or unsoundness is not to be decided upon the mere opinions of witnesses, however numerous and respectable, but each opinion should be tested by the facts in the case, in order to judge of its probable correctness. It is not the opinion of witnesses upon which reliance is to be placed, by the triers of the case, but from the premises which supplied the conviction in the minds of the several witnesses the court or jury, aided by these opinions and by the maxims of law, must form its own independent conviction, and decide accordingly." Schouler, Wills, par. 209. If any or all of the facts did not tend to sustain the opinion of the witness, counsel for appellants had the right of testing the same by a cross-examination, for the purpose of enabling the jury to properly estimate the weight, if any, to which the opinion of the witness was entitled. *Johnson v. Thompson*, 72 Ind. 167; *Railway Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197. The declarations of a testator upon the subject of making wills are competent when his will is contested on the ground of mental incapacity. *Staser v. Hogan*, supra; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771.

It must be presumed, until the contrary appears, that the witness based her opinion, not alone upon the declarations of the testator relative to making a will, but upon all the facts and circumstances detailed by her. As the declarations of the testator were admissible upon the issue of his mental capacity, we must presume that they were admitted for that purpose, and so considered by the jury. And the question as to the extent of support, if any, which they lent to the opinion given, was a matter to be determined by the jury. It follows that there is no apparent error in the action of the court in refusing to strike out this evidence.

On the trial, Dr. W. P. McGlynn was called as a witness in behalf of the plaintiffs. He had been formerly employed by the testator as a physician. The court would not permit him to disclose anything in evidence of which he had acquired knowledge in the discharge of his professional duty, but ruled that the witness should be allowed to state what he had observed relative to the testator, independent of any facts ascertained by him in the course of his professional business. Under this ruling of the court, the doctor was permitted to state that in the latter part of 1891 he went to see the testator for the purpose of collecting some money which was due him from the latter for services rendered him as a physician. He further testified that he met the testator in the road near his home, and that the old gentleman did not know him, and asked who he was, etc. The witness also testified as to the appearance of

the testator upon this occasion, and also as to his mental and physical condition. It is insisted by appellants that this testimony was incompetent, for the reason that the knowledge of the facts stated, to some extent, was acquired by the physician in the discharge of a professional duty; and in support of their contention they cite *Heuston v. Simpson*, 115 Ind. 62, 17 N. E. 261. We cannot concur with counsel in this contention, that the witness testified in violation of the rule laid down in the case cited. What he learned or observed in this conversation with the testator, in the road, when he called upon him to collect the bill for services before rendered, did not come under the protection of the rule prescribed by clause 4, § 497, Rev. St. 1881 (section 505, Rev. St. 1894). The disclosure of the facts stated by the testator under the circumstances, so far as it appears, certainly cannot be said to be forbidden by this statute. The call made by the witness was in relation to a financial matter, and in no manner akin to one made in the course of professional business. He did not expose or divulge any evidence the knowledge of which he had acquired through professional relations with the testator. While it is true that the rule which forbids a physician to disclose in evidence matters communicated to him in the course of his profession is a salutary one, nevertheless it cannot be extended beyond its evident letter and spirit. It is also claimed that this evidence was not competent for the reason that it was subsequent to the execution of the will. We have hereinbefore considered and passed upon this question, adversely to appellants' contention.

James Flfer, a witness for appellees, testified relative to his acquaintance with the testator, and about conversations and transactions had with him before and after the execution of the will, down to some time in the year of 1891, or probably in 1892. He described his condition at these various times, and described his infirmities, which he (the witness) had observed. After detailing to the jury all of these facts, his direct examination closed without the witness giving, or being asked to express, an opinion as to the sanity of the testator. At the close of the cross-examination of this witness by appellants, they unsuccessfully moved the court to strike out all of his evidence, except that relating to the borrowing of money and the valuation of real estate, for the principal alleged reason that no opinion was called for or given by him as to the mental condition of the testator. We think that this motion was not seasonably made by appellants, for the reason that it should have been interposed before they began their cross-examination. By this motion, they, in effect, not only moved the court to reject the evidence elicited from this witness by appellees, but that also given by him in response to their cross-examination. But, barring this phase of the question, the ruling of the court upon

the motion was correct. The failure upon the part of appellees to ask or to obtain the opinion of the witness did not render the facts stated by him, and otherwise competent, subject, upon motion of the adverse party, to be rejected and withdrawn from the jury. The rule which allows an opinion to be expressed is not imperative against the party calling the witness, but permissive of the right to ask for the opinion. It is said to be one of necessity, based upon the proposition that there may be something about the looks, deportment, etc., of the person whose mental condition is under investigation that may conduce to the conclusion that he is of unsound mind, and which cannot be described in words by the witness. *Cline v. Lindsey*, supra, and cases cited. The facts stated by the witness do not depend upon the opinion that may be given, and it is not the latter that makes them competent. The opinion, generally speaking, is only of value and weight to the extent that it is supported or borne out by the facts upon which it rests. Considering the reason on which the rule is founded, it is obvious, we think, that, after the facts tending to show the mental condition of the person in question have been elicited, it then becomes a matter optional, so far as the party calling the witness is concerned, whether he will exercise this right, and press the examination to the extent of asking him to express an opinion, or refrain from doing so, and leave the jurors to draw their own conclusions from the facts detailed by the witness. The motion to strike out this evidence was therefore properly overruled.

Complaint is made upon the grounds that the township assessor, a witness for appellees, was permitted to testify that for the years of 1891 and 1892 the testator did not make out his own tax lists, and that these lists were made out and sworn to by his son, William E. Bower, one of the appellants. These tax lists seem to have been offered and admitted in evidence over appellants' objection, along with that given by the witness relating thereto. The objections urged in the motion to strike out this evidence were that it was a matter subsequent to the execution of the will, and that the declarations of the testator in the lists in question were made at a time and upon an occasion other than that upon which the will was executed. This testimony was not open to these objections, for the reason that it seems to be in line with other testimony given, tending to show that the testator, for some years prior to his death, had been unable to and did not attend to his own business, and that it was transacted by his said son, William E. Bower. The fact that any of the appellants or the testator's family attended to his business, and otherwise treated him as being incapable to act for himself, was a proper matter to be shown, at least, as bearing upon his mental capacity. The assessor having stated that the tax lists

were made out by the appellant William E. Bower, they might be received along with this evidence, as tending to corroborate that statement. Where evidence is not wholly incompetent in a cause for any purpose, it is not error to admit it.

The action of the court in excluding the receipt of Margaret C. Bower, being the same mentioned in the second paragraph of the answer, and heretofore considered, is complained of and criticised by appellants. This document, which was offered in evidence by them, bears date of July 27, 1882, and is an acknowledgment upon the part of the appellee Margaret C. that she had received a certain tract of real estate from her father, the testator, and that she had agreed to make no further claims upon his estate. At the time appellants offered this receipt in evidence, they stated to the court that they did so for the purpose of showing the relations existing between this daughter and her father prior to the execution of the will. *Prima facie*, this paper was not relevant evidence under the issues in favor of appellants. We are not cited to any evidence in the record given by appellees whereby it was rendered necessary for appellants to show the relations existing between the testator and this daughter before the execution of the will. As it does not affirmatively appear that this evidence was competent for the purpose for which the same was offered, under a well-settled rule of appellate procedure, we must presume in favor of the ruling of the trial court.

Appellants, at the proper time and in due form, presented to the court five interrogatories, and requested that they be submitted to the jury, and answers returned thereto, in the event that they returned a general verdict. Of these the court submitted 1 and 2, and answers thereto were returned by the jury. The record shows that these were the only interrogatories submitted to the jury, and they are as follows: "First. Did the testator, Andrew Bower, on the 5th day of September, 1887, in the presence of Davis S. Allhands and Edgar O. Allhands, sign his name to the paper writing which is the subject of this contest, as and for his last will and testament? Second. Did Davis S. Allhands and Edgar O. Allhands, at the request and in the presence of the testator, Andrew Bower, sign their names to the paper writing which is the subject of this contest as attesting witnesses, after the said Andrew J. Bower had signed the same?" The court rejected and suppressed the third, fourth, and fifth, and this ruling of the court was separately assigned as reasons for a new trial.

The fifth interrogatory is as follows: "Fifth. Did the testator, Andrew Bower, at the time of the alleged execution of the paper writing which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life and act with discretion therein, and did he know his children and grandchildren, and have a general knowledge

of the estate of which he was possessed?" It is earnestly contended and argued by appellants that this interrogatory was pertinent and material to the issue on the question of the testator's sanity at the time of the execution of the will in contest, and they insist that under the holding of this court in the case of *Todd v. Fenton*, 66 Ind. 25, the action of the court in refusing to submit it to the jury cannot be sustained, and is clearly reversible error. Appellees contend that the interrogatory in controversy was obnoxious, for the reason that it embraced more than one particular question of fact. They insist that there were three particular facts therein about which an inquiry was made, namely: (1) "Did the testator, Andrew Bower, at the time of the alleged execution of the paper writing, etc., have mind and memory sufficient to understand the ordinary affairs of life and act with discretion therein? (2) And did he know his children and grandchildren? (3) And have a general knowledge of the estate of which he was possessed?"

By section 546, Rev. St. 1881 (section 555, Rev. St. 1894), it is made the duty of the court, when requested by either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. The next following section provides that, "when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." It is settled by the decisions of this court that where a party timely exercises this statutory right, and where other interrogatories that have been submitted to the jury do not fully cover the pertinent and material points embraced in those requested, it will be prejudicial error for the trial court to refuse the latter. *Clegg v. Waterbury*, 88 Ind. 21; *Elliott*, App. Proc. §§ 673, 733; 2 *Elliott*, Gen. Prac. § 911.

The case of *Todd v. Fenton*, supra, relied upon by appellants to sustain their contention that the court erred in rejecting the interrogatory in question, was a proceeding to contest the validity of a will, and one of the grounds was the alleged insanity of the testator. Appellants in that case tendered and requested the court to submit to the jury certain interrogatories, among which was the following, numbered 8: "At the time said Elizabeth Todd signed said will, did she have mind and memory sufficient to understand the ordinary affairs of life and to act with discretion therein? Did she know her children and grandchildren, and have a general knowledge of the estate of which she was possessed?" This interrogatory the court refused to submit to the jury, and likewise others requested, but substituted in their stead certain other general ones, and submitted the same to the jury, and answers were returned thereto. It was held in that case that the court erred in refusing to propound the interrogatory above set out to the jury. By comparing interro-

atory numbered 5 in the case at bar with the one rejected in the case cited, it is obvious that they are virtually identical; the only difference, in effect, being that the former omits a feature urged as an objection to the latter,—that of assuming the execution of the will. In considering the question of the suppression of the interrogatory in the *Todd* Case, this court, by Worden, J., on page 30 of the opinion, said: "This question, we think, should have been propounded. It was pertinent to the issue on the question of sanity. It was sufficiently single. Did the supposed testatrix have sufficient mind and memory to understand and know and act as stated in the question? It sums up very fairly the mental capacity necessary to make a will. It admits of a direct affirmative or negative answer. If answered in the affirmative, it would show sufficient mental capacity to make a will, and such answer would control the answer given to the first interrogatory propounded, which we cannot regard as anything more than a general finding upon the issue of sanity. It is objected by the appellees that the question rested 'on an assumed fact.' We see no assumption in the question, except that Elizabeth Todd signed the will. This the appellants have the right to assume, because it was fully conceded that she signed it, in the complaint, in setting forth the grounds of contest. Again, it is objected that the question was directed to matters of evidence, and fell short of any material fact in the case. It was directed to matter of fact concerning which evidence had been given, and not to matters of evidence; and, in our opinion, it did not fall short of any material fact in the case. If the testatrix had mind and memory sufficient to understand the ordinary affairs of life and to act with discretion therein, to know her children and grandchildren, and to have a general knowledge of the estate of which she was possessed, she had sufficient capacity to make a will."

The learned counsel for appellees seek to parry the force of this decision by insisting that it has been indirectly overruled by later decisions of this court. But none are cited, and we have been unable to discover any, that can be held to have that effect; and, until it is made to appear that the holding in that case upon the point involved is not sound, we are constrained to give it our adherence, and adjudge that it is controlling upon the question now presented. The two, and only, interrogatories submitted to the jury, and answered by them, sought to elicit responses as to whether or not the will had been properly signed and published by the testator, and attested by witnesses. They had no relation whatever to the facts involved in the one rejected. There is evidence in the record which entitled appellants, as a matter of right, to ask for a special finding upon the particular questions presented by the excluded interrogatory.

Other questions arising upon the suppres-

sion of interrogatories 3 and 4, and upon certain instructions given and refused by the court, are argued by counsel; but we do not deem it necessary to consider the same, and thereby extend this opinion. However, we may suggest that these two latter interrogatories might have been framed so as to have more appropriately embraced the question of fact pertinent to and involved in the issue of fraud or undue influence, and probably are faulty for the reasons claimed by appellees, but as to that question we express no opinion.

For the error of the court in suppressing interrogatory number 5, the judgment is reversed, and the cause remanded, with instructions to the trial court to sustain the motion for a new trial. All concur.

(142 Ind. 218)

PITTSBURG, C. C. & ST. L. RY. CO. v.
O'BRIEN et al.

(Supreme Court of Indiana. Oct. 9, 1895.)

SUIT FOR LAND—TITLE TO SUPPORT—PLEADING—FINDINGS—ESTATE BY ENTIRETIES—HOW CRAFTED—ASSIGNMENT OF ERROR—WAIVER—BILL OF EXCEPTIONS—NECESSITY OF FILING.

1. A complaint, in an action to recover land, which fails to allege that plaintiff is entitled to possession, as required by Burns' Rev. St. 1894, § 1066 (Rev. St. 1881, § 1054), is fatally defective.

2. Assignments of error not discussed in the briefs are waived.

3. Where the complaint in an action to recover land fails to allege that plaintiff is entitled to possession, a finding to that effect is of no avail, it being outside the issues.

4. Since the burden is on plaintiff, in an action to recover land, to show title and right to possession, a failure to find that plaintiff is entitled to possession is equivalent to a finding that he is not entitled thereto.

5. In an action to quiet title, if plaintiff is not entitled to possession, the complaint must show the nature of his interest or title, and that it is consistent with the right of possession in another.

6. In an action to quiet title, an allegation that plaintiffs are "owners in entirety" will be considered as an allegation of the statutory estate by entireties.

7. In an action to quiet title, where the source of plaintiff's title is specifically set out, no other source can be proven.

8. The estate by entireties (Burns' Rev. St. 1894, §§ 3341, 3342; Rev. St. 1881, §§ 2922, 2923) can be created only by a conveyance to a husband and wife.

9. Evidence set out in a bill of exceptions which is not shown to have been filed with the clerk of the court below is not in the record.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by James O'Brien and another against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, to recover land and to quiet title. Judgment for plaintiffs, and defendant appeals. Reversed.

Burchenal & Rupe, for appellant. O'Brien & Wolf, for appellees.

MCCABE, J. The appellees sued the appellant in the Howard circuit court, in a complaint of two paragraphs, the first of which

was to quiet the title of the plaintiffs to, and the second was to recover possession of, lots 19 and 50 in T. J. Faulkner's addition to the city of Kokomo, in Howard county, Ind. The venue was changed to the Tipton circuit court, where a trial of the issues formed upon the complaint resulted in a special verdict, upon which the plaintiffs below had judgment quieting their title and recovering the possession. The errors assigned call in question the action of the circuit court in overruling a demurrer to each paragraph of the complaint, in overruling appellant's motion for a venire de novo, in overruling appellant's motion for judgment in its favor on the special verdict, and in rendering judgment in favor of appellees upon the special verdict.

The second paragraph of the complaint is fatally defective, in its failure to state that the plaintiff was entitled to possession of the lots. The statute provides that "the plaintiff in his complaint shall state that he is entitled to possession of the premises, particularly describing them, the interest he claims therein and that the defendant unlawfully keeps him out of possession." Burns' Rev. St. 1894, § 1066 (Rev. St. 1881, § 1054); Leary v. Langsdale, 35 Ind. 74; McCarnan v. Cochran, 57 Ind. 106; Vance v. Schroyer, 77 Ind. 501; Levi v. Engle, 91 Ind. 330; Mansur v. Streight, 103 Ind. 358, 3 N. E. 112; Simmons v. Lindley, 108 Ind. 297, 9 N. E. 360; Miller v. Shriner, 87 Ind. 141. Strong as these authorities are in support of the error assigned on the ruling overruling the demurrer to the second paragraph of the complaint for want of sufficient facts, the appellant has waived it by the failure to discuss the same in its brief.

The substance of the special verdict is: That the railroad track the defendant now owns and operates through Howard county, Ind., was located where it now is in 1851 and 1852, under a charter originally granted to the New Castle & Richmond Company, and an extension of the charter of said company made in 1851; and the name of the company was changed, before the railroad was completed, to the Cincinnati, Logansport & Chicago Railroad Company, by which last-named company the most of the work of construction thereof had been done through Howard county. Prior to the establishment of said railroad through Howard county, Thomas J. Faulkner was the owner of the N. W. $\frac{1}{4}$ of section 31, township 24 N., range 4 E.; and said railroad route, now owned by said defendant, was located upon said quarter section, then owned by Thomas J. Faulkner. Afterwards, said Faulkner caused a part of said land to be surveyed and platted as an addition to the town (now city) of Kokomo, Ind., and acknowledged the same on May 5, 1868, and recorded it on said day in the record of such plats kept in the recorder's office of Howard county, Ind.; said plat containing lots numbered from 1 to 50, both inclusive,

of different sizes and shapes, as shown on the said plat. Said addition was located on both sides of said railroad route, and said lots were located up to within $17\frac{1}{2}$ feet of the center of said railroad track, on either side thereof. Said lots 19 and 50 were located on the east side of said railroad track, and adjoining said track, as described in said plat, and west of Sherman avenue, and north of George street, as indicated on said plat. On November 18, 1869, Thomas J. Faulkner and wife deeded to Napoleon B. Brown said lots 19 and 50, with a number of others in said addition, for \$700. In ascertaining the amount of ground in the lots so deeded, they were measured and paid for by the acre, and said lots 19 and 50 with others, to within $17\frac{1}{2}$ feet of the center of said railroad track. Prior to the time of the conveyance of said lots 19 and 50, they were fenced to a line near $17\frac{1}{2}$ feet on the east side of the center of said track, and occupied by said Faulkner as a garden or truck farm, and so continued to be used for two years or more after said Brown became the owner thereof. Afterwards, the fence became worthless, and the lots lay out as commons until some four to six years ago, when the defendant company, or some of its predecessors in ownership, put a fence on the east side of its track, 40 feet, or nearly so, from the center of its track, where it yet remains. Afterwards, on April 21, 1890, said Brown and wife made a warranty deed for lots 19 and 50 to the plaintiffs, James and Charlotte Louisa O'Brien, subject to any unpaid taxes or outstanding tax titles. On February 11, 1880, the auditor and treasurer of Howard county sold said lots 19 and 50 to Gustav R. Frees, who transferred his claim to Lewis Mergentheim, who took a tax deed therefor on February 16, 1882; and Mergentheim deeded said lots to the plaintiffs on April 21, 1890, they having been sold by said officers as the property of said Brown. On March 22, 1887, William A. Stewart received a tax deed for lot 19 from the treasurer of the city of Kokomo; and on May 21, 1890, said Stewart deeded said lot to the plaintiffs. The defendant in this action is entitled to all the rights of all its predecessors in ownership of said railroad route. The plaintiffs have title to lots 19 and 50, as laid out and located by said Faulkner in his plat aforesaid. The predecessor in ownership of the defendant, who obtained the right to locate defendant's road over the land of said Faulkner, embracing said lots 19 and 50, obtained 35 feet in width through said land, and no more, at the place where said lots are situate; and neither the defendant, nor any of its predecessors, ever had or used more than $17\frac{1}{2}$ feet from the center of their track, and on the east side thereof, adjoining lots 19 and 50, until four to six years ago. That the plaintiffs have been damaged by the detention of the part of said lots in the sum of three dollars.

The facts thus found do not justify a judg-

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ment recovering the possession by the appellees, because it is nowhere found that they were entitled to possession. That, as we have seen, was a fact indispensably necessary to be alleged in the complaint, to make it good, and it was equally necessary that the fact should be found. But the fact is neither alleged nor found. Had it been found, the verdict would still have been ill, because that finding would have been outside of the issues, and ineffective. *Burns' Rev. St. 1894, supra; Leary v. Langsdale, supra; McCarnan v. Cochran, supra; Vance v. Schroyer, supra; Levi v. Engle, supra; Mansur v. Streight, supra; Simmons v. Lindley, supra; Miller v. Shriner, supra; Swaynle v. Vess, 91 Ind. 584.* In an action for possession of real estate, the burden is upon the plaintiff to establish by affirmative proof his title and right to possession. *Roots v. Beck, 109 Ind. 472, 9 N. E. 698.* That being so, the failure to find that the appellees were entitled to possession is equivalent to a finding that they were not entitled to possession. *Henderson v. Dickey, 76 Ind. 264; Graham v. State, 66 Ind. 366; Johnson v. Putnam, 95 Ind. 57; Parmater v. State, 102 Ind. 90, 3 N. E. 382; Glantz v. City of South Bend, 106 Ind. 305, 6 N. E. 632; Railway Co. v. Hart, 119 Ind. 273, 21 N. E. 753; Town of Fowler v. Lingquist, 138 Ind. 566, 37 N. E. 133; Manor v. Board of Com'rs, 137 Ind. 367, 34 N. E. 959, and 38 N. E. 1101, and cases there cited; Coal Co. v. Hoodlet, 129 Ind. 327, 27 N. E. 741.* The finding, then, is, in legal effect, that the appellees are not entitled to possession. That finding precludes and prevents a judgment quieting title in them, because, as was said in *Ragsdale v. Mitchell, 97 Ind., at pages 461, 462: "An action to quiet title does not merely settle title so far as to invest the plaintiff with possession. It does much more than this, when successfully prosecuted. It sweeps away all claims and liens which impair the complainant's title." If the appellees have no right to possession, as the verdict, in effect, finds, then a judgment quieting title in them would be unsupported by the verdict and finding, because such a judgment and decree would invest the plaintiffs with the right of possession,—the very thing the verdict finds they were not entitled to. We do not mean to hold that a plaintiff cannot maintain an action under our statute to quiet title to real estate unless he is also entitled to the possession thereof. In such a case, where he is not entitled to possession, he must, in his complaint, state at least the nature of his interest or title, showing that it is consistent with the right of possession in the defendant or somebody else. As was said in *McMannus v. Smith, 53 Ind. 211, which was an action to quiet title: "In pleading a fee simple, it is only necessary to state it, because it includes the entire interest in the land; but, in pleading an estate in lands less than a fee simple, it must be particularly described, or it would not ap-**

pear what part of the fee simple it was, either in quantity of estate, time of its duration, or whether in severalty, coparcenary, or in common, or what one of the numerous parts into which the fee simple may be divided." The first paragraph of the complaint stated a fee simple in general terms, and hence a decree quieting title in them under it would invest them with the right of possession.

But there is another reason why the facts found are not sufficient to authorize a judgment quieting title in the appellees. They alleged a particular title in the first paragraph, seeking to quiet the same, namely, that "plaintiffs are the owners in entirety * * * of the following described real estate in Howard county, in the state of Indiana, viz.," and then follows the description of the lots. This description of the plaintiffs' title can only be construed to mean what was known at common law, and under our statute, as an "estate by entireties." Burns' Rev. St. 1894, §§ 3341, 3342 (Rev. St. 1881, §§ 2922, 2923); Davis v. Clark, 26 Ind. 424; Arnold v. Arnold, 30 Ind. 305; Chandler v. Cheney, 37 Ind. 391; Jones v. Chandler, 40 Ind. 588; Carver v. Smith, 90 Ind. 222; Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999; 6 Am. & Eng. Enc. Law, 894, and authorities cited. In ejectment, it is sufficient to state the plaintiff's title, without stating its source, in the complaint. McMannus v. Smith, *supra*. But, when the source of the plaintiff's title is alleged, no other can be proven, even in an action to quiet title. Ragsdale v. Mitchell, *supra*; Johnson v. Pontious, 118 Ind. 270, 20 N. E. 792; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629. In Ragsdale v. Mitchell, *supra*, which was a suit to quiet title, Elliott, J., speaking for the court, said: "The title of the appellee is specifically described, and, as he can only recover according to the allegations of his pleading, he must recover upon the title pleaded. It may not be necessary to specifically describe a title, but when the pleader does describe one title, and does describe it specifically as the only title upon which he relies, his recovery must be had upon his title as laid. Steph. Pl. 304; Sedg. & W. Tr. Tit. Land, § 343. According to the statements of the complaint, the title which the plaintiff purchased was such, and such only, as the sale and conveyance by the assignee could transfer; and, if this title is sufficient to cut off the rights of the wife, then the complaint is good, and otherwise it is not, for, as this is the title specifically described and exclusively relied on, the recovery must be had upon that, or not at all." Title by entireties can only be created in this state by a conveyance to a husband and wife. Burns' Rev. St. 1894, §§ 3341, 3342 (Rev. St. 1881, §§ 2922, 2923); Davis v. Clark, *supra*; Arnold v. Arnold, *supra*; Chandler v. Cheney, *supra*; Jones v. Chandler, *supra*; Carver v. Smith, *supra*; Thornburg v. Wiggins, *supra*. And

it was the same at the common law. 6 Am. & Eng. Enc. Law, 894, and cases there cited. It is probably true that the plaintiffs were husband and wife, but the fact is neither alleged nor found. It was perhaps sufficient to allege that they were tenants by entireties, or that they were owners by entireties. Under this allegation the relationship might be proven, and the joint deed to them could also be proven. But neither fact is found. There are other defects in the special verdict, which we deem it unnecessary to point out. The circuit court erred in rendering judgment on the special verdict.

The controlling questions as to the merits of the controversy between the parties arise on the overruling the motion for a new trial, which cannot be determined without the evidence. And, unfortunately, the evidence is not in the record, though it was attempted to be incorporated therein by means of a bill of exceptions, but there is nothing to show that it was ever filed in the clerk's office of the circuit court. This must be shown by the transcript. Shulse v. McWilliams, 104 Ind. 512, 8 N. E. 243; Loy v. Loy, 90 Ind. 404; Stewart v. State, 113 Ind. 505, 16 N. E. 186; Downey v. Head, 138 Ind. 503, 38 N. E. 169; Board of Com'rs v. Huffman, 134 Ind. 1, 31 N. E. 570; Guiri v. Gellert, 124 Ind. 501, 24 N. E. 1036; Shewalter v. Bergman, 132 Ind. 556, 27 N. E. 159. The judgment is reversed, with instructions to grant a new trial.

(142 Ind. 246)

PFAFFENBACK v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Indiana. Oct. 10, 1895.)

CARRIERS—INJURIES TO PASSENGERS—INSTRUCTIONS—MOTION FOR NEW TRIAL—REVIEW ON APPEAL.

1. The verdict of a jury on conflicting evidence will not be disturbed on appeal.

2. Ordering a party to give testimony prior to the trial as on discovery, and requiring him to submit to a medical examination before the trial, are not "errors of law occurring at the trial," presentable on motion for a new trial.

3. It is proper to refuse to instruct the jury to disregard evidence offered and excluded.

4. An instruction that the burden rests on plaintiff to establish his cause of action by a preponderance of the evidence, and, in determining upon which side the preponderance lies, the jury should pass upon the credibility of the witnesses, "in view of all the evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the preponderance of the evidence," is not misleading as tending to limit the jury to the consideration of "circumstances" as the basis for determining the preponderance of the evidence.

5. In an action against a carrier for personal injuries alleged to have been received while a passenger on defendant's train, an instruction that no recovery could be had if plaintiff was a trespasser on the train is warranted by defendant's plea of denial.

6. One who forgets to call a witness is not entitled to a new trial as for newly-discovered evidence.

7. On an issue as to whether plaintiff was a passenger a certain day on one of defendant's trains, plaintiff having testified that he was

such passenger, and that his ticket was taken up by a certain conductor, defendant's auditor may testify to defendant's system of issuing and selling tickets by consecutive numbers, of stamping them on the date of their sales, of the return and preservation of tickets canceled by conductors, and that the tickets returned as sold and dated on the day in question were taken up by a conductor other than the one with whom plaintiff claimed to have ridden.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Action by Martin Pfaffenback against the Lake Shore & Michigan Southern Railway Company for personal injuries alleged to have been received while a passenger on defendant's train. Judgment for defendant. Plaintiff appeals. Affirmed.

H. C. Dodge and J. A. Hubbard, for appellant. Baker & Miller and Greene & Gatzen-dainer, for appellee.

HACKNEY, J. The appellant sued the appellee, claiming damages for personal injuries alleged to have been received by him while a passenger upon the appellee's train, and from the appellee's negligence in permitting said train to collide with another train standing upon an open switch. Upon a trial by jury, there was a verdict for the appellee. The only error assigned in this court is in the action of the trial court in overruling the appellant's motion for a new trial. There are eight alleged errors discussed: (1) The sufficiency of the evidence to sustain the verdict; (2) ordering the appellant to give testimony prior to the trial as upon discovery; (3) requiring the appellant to submit to a medical examination out of court and before the trial; (4) refusal of an instruction to disregard evidence offered and excluded; (5 and 6) instructions given; (7) newly-discovered evidence; (8) admitting evidence of the manner in which the appellee charged its tickets to local officers, the registry of numbers, the report of sales by numbers, the return and preservation of used tickets, etc.

The appellant's evidence that he was a passenger on the occasion of the collision was practically but his own unsupported testimony, while the appellee sought to contradict this by the evidence of several—who were on board the train, were well acquainted with the appellant, and had opportunities to have seen him if on board—that they did not see him. There were contradictions as to the number of persons in the coach in which he claimed to have been, and there was evidence that the only tickets sold from his station to Chicago, his destination, and return, were punched and taken up by a conductor other than Harris, who was in charge of the train upon which appellant claimed to have been a passenger. There was evidence impeaching and supporting the appellant's character, and there were various circumstances, as to delay in suing, as to withholding the knowledge of his injuries, etc. It will be seen, therefore, that the case, upon the evi-

dence, was one peculiarly for the jury, and that we cannot reconsider it.

The second and third alleged errors could not have been "errors of law occurring at the trial," and were therefore not presentable upon motion for a new trial. *City of New Albany v. White*, 100 Ind. 206; *Cates v. Thayer*, 93 Ind. 156; *Reed v. Spayde*, 56 Ind. 394. As said in the last-cited case: "It is obvious that a new trial would not correct such an error; for, after a new trial was granted, the error would stand in the record the same as before."

The appellant's instruction numbered 1, which was refused by the court, was to the effect that the jury should not consider as evidence mere offers to make proof, such offers having been rejected. The question here presented is like that in *Railway Co. v. Horn*, 41 Ind. 479, where the trial court refused to charge that "the jury should, without regard to the parties, look alone at the evidence, and render such a verdict as, in their judgment, the evidence may require, without prejudice, partiality, or favor." Of that charge this court said: "There are some things that must be taken as true in judicial as well as other investigations. We think it fair to presume that jurors in any part of the state of Indiana are sufficiently intelligent to know that their duty, when sworn as such, requires them to decide the case according to the evidence, and without prejudice, partiality, or favor, and that the court cannot be said to have committed an error in not reminding them of that duty." To have been obliged to charge as requested would have been equivalent to a requirement that the court should have reminded the jurors that they had been sworn to render their verdict according to the evidence. Instructions are designed to advise the jurors of the law of such issues as are presented by the pleadings, and are not to admonish them that they should not violate their oaths.

The court's third instruction was that: "These averments and denials present the issue which you are to determine from the evidence. The averments of the complaint are affirmative allegations, and the law imposes upon the plaintiff the necessity of proving them by a fair preponderance of the evidence before he can recover; and, in determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses, for knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts, and circumstances proved on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence." Counsel for the appellant say: "This instruction is misleading. From the context of the

whole instruction it is clear that the average juror had excluded from his mind the necessity of employing the 'evidence' and 'facts' as a means of determining upon which side the weight or preponderance of the evidence was, and that they were restricted to a consideration of the 'circumstances' as being the basis upon which they should determine upon which side was the weight or preponderance of the evidence, and were not to weigh the evidence and facts as well as the circumstances in coming to that conclusion." This objection, if we comprehend it, is that the court denied the jury the right to consider the "evidence and facts" in determining which side had presented a preponderance of the evidence, and that such inquiry was limited to the "circumstances." As we understand the instruction, the objection made is not tenable. It combines the two rules that the burden rests upon the plaintiff to establish his cause of action by a preponderance of the evidence (not of the circumstances), and, in ascertaining where the preponderance of the evidence (not circumstances) lies, the jury should pass upon the credibility of the witnesses, considering the tests given, "in view of all the other evidence, facts, and circumstances proved on the trial," "and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence" (not circumstances). There is no affirmative limitation upon the duty of the jury to consider the evidence, in considering the two rules mentioned. Nor is there implied from the phrase "from all these circumstances" that the evidence should not supply a proper basis of consideration. "Circumstances" is defined as "an event; a fact; a particular incident." See *Webst. Int. Dict.* The word does not imply that events, facts, and incidents arise outside of the evidence and disconnected from the trial.

The fifth instruction given, and of which the appellant complains, is as follows: "In order to entitle the plaintiff to recover in this action, it must appear by a fair preponderance of the evidence that he was at the time of the injury, if any, a passenger on defendant's train of cars, and not a trespasser. If he was a trespasser, he cannot recover, and you should find for the defendant." It is urged that this charge is not within any theory of the case. On the pleadings, the appellee's denial made possible the theory that, if upon the train, the appellant was a trespasser, and not a passenger. From what we have said of the evidence, it will be seen that if upon the train without a ticket, and without having been seen by the conductor and other trainmen, who had opportunities to have seen and to have known him if in the coach and not in hiding, the theory that his injury, if any, arose while a trespasser, was possible upon the evidence. This view is, of course, the most favorable construction which the jury could have given the evidence from the appellee's standpoint; and

this view, the burden resting upon the appellant to make the error manifest, we are required to accept.

The next proposition is that arising out of the refusal of a new trial upon the alleged newly-discovered evidence. At the trial it was an issue of first importance as to whether, on the evening of December 6, 1889, the appellant had purchased a ticket for Chicago, and had taken the appellee's train for that city from the city of South Bend. It was also important, as a corroborative fact, that the appellant was upon a returning train on December 7, 1889, and, further, that he was ill when he returned to his home on that day. These facts, or supposed facts, were within the appellant's knowledge, and he gave testimony upon them. His alleged newly-discovered evidence is from one who on and after the 6th day of December, 1889, was employed by and lived at the house of the appellant; one who, as appellant now remembers, had walked with and remained in the company of the appellant to appellee's station on the occasion of the alleged purchase of the ticket, and saw him procure the ticket and depart upon the train; one who observed him upon the returning train, and who saw that appellant was ill when he returned to his home, and knows that he remained in his bed for three days. That the appellant did not produce at the trial a witness so important cannot be due to any other cause than forgetfulness, if the alleged evidence is true. Here was an inmate of his own household at the time in question, a person who accompanied appellant in the most important transaction connected with the trip, and met him and attended him upon his return,—the first and most natural source of information, and yet the discovery is not made until after verdict. It does not appear that inquiry was made of this witness, and no excuse is offered for the failure to do so excepting a faulty memory. That one forgets that which it is his duty to remember cannot be offered to excuse neglecting that duty is manifest. In motions of this kind such diligence must be shown as will "strongly, clearly, and satisfactorily" excuse the failure to bring forward the evidence upon the trial. *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697, and cases there cited. Such diligence was not shown by the appellant.

Finally, it is insisted that the trial court erred in permitting the appellee's auditor to testify to the system of issuing and selling tickets by consecutive numbers, of stamping upon them the dates of their sales and of the return and preservation of tickets used and canceled by conductors, and that the tickets returned as sold and dated on the day in question were not taken up by the conductor with whom the appellant claimed to have ridden, but by others. The importance and value of this evidence will be seen by an illustration: Suppose that tickets from South Bend to Elkhart and return, numbered 1, 2,

3, 4, and 5, are sent to the South Bend agent. In the course of the company's business, the five tickets are returned to the auditor, with the dates of sales stamped upon them, and bearing peculiar punch marks of the conductor who received them. Suppose that the only tickets stamped of the date of December 6, 1889, came back to the auditor, and took their places in the consecutive numbers, and that one of them contained the punch mark of the conductor with whom appellant claimed to have ridden. Would not such facts corroborate and lend strength to the appellant's claim that he was a passenger upon that particular train? Most manifestly. And if the returned tickets, all in proper order, had shown that they were punched by conductors who were in charge of trains other than the train upon which the appellant claimed to have been a passenger, the circumstance would have been as strong in favor of the appellee's theory that appellant was not a passenger upon the particular train. The principal objections to the evidence in the circuit court were that it was hearsay and was irrelevant. We think that the evidence was competent, especially when taken in connection with the tickets produced. We find no error for which the judgment should be reversed, and it is therefore affirmed.

(142 Ind. 254)

CITIZENS' ST. RY. CO. v. HAUGH.

(Supreme Court of Indiana. Oct. 10, 1895.)

STATUTES—AMENDMENT—CONSTITUTIONAL LAW—LIMITING JURISDICTION OF COURTS.

1. Act March 11, 1895, entitled "An act to amend section 399 of an act entitled 'An act concerning proceedings in civil cases,'" and setting forth the amended section in full, satisfies Const. art. 4, § 19, providing that "every act shall embrace but one subject which subject shall be expressed in the title," and Const. art. 4, § 21, providing that "no act shall ever be revised or amended by mere reference to its title but the act revised or section amended shall be set forth and published at full length."

2. Though no such act as "An act concerning proceedings in civil cases" was passed by the legislature of 1891, the act to be amended by Act March 11, 1895, entitled "An act to amend section 399 of an act entitled 'An act concerning proceedings in civil cases approved April 7, 1891,'" is sufficiently identified as being Act April 7, 1881, of the same title, as the court will take judicial notice that an act of such title was passed in 1881, and approved April 7th of the same year, and that the same was the only act with this title in force when Act March 11th was adopted.

3. The jurisdiction of a court that has been created by statute may be changed, if the act making the change makes proper provision for pending causes.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action between the Citizens' Street-Railway Company and Ida Haugh. From the judgment rendered, the railway company appeals. Affirmed.

Mason & Latta, for appellant. Ayers & Jones, for appellee.

MONKS, J. The only question presented in this case is as to the constitutionality of the following act of the general assembly of 1895:

"An act to amend section 399 and to repeal sections 400 and 401 of an act entitled 'An act concerning proceedings in civil cases,' approved April 7, 1891, and declaring an emergency. (Approved March 11, 1895.)

"Section 1. Be it enacted by the general assembly of the state of Indiana, that section 399 of the above entitled act, and being section 1360 of the Revised Statutes of 1881, be amended so as to read as follows: 'Section 399. In all cases where under existing or future laws of this state in like circumstances a person has the right of appeal from the circuit to the supreme or appellate court, an appeal may be taken direct to the supreme or appellate court from any order or judgment of either a special or general term of the superior court, and such appeals shall be governed in all cases by the law regulating appeals from the circuit court to the supreme or appellate court. Appeals from the special to the general term are hereby abolished. In all cases where appeals are now pending [in] the general term of any superior court in this state any party shall have the right to perfect an appeal from the order or judgment of the special term to the supreme or appellate court at any time within ninety (90) days after the passage of this act: provided however, that this provision shall not be so construed as to reduce the time in which an appeal may be taken to less than one year from the date of the order or judgment appealed from.'

"Sec. 2. Sections 400 and 401 of the above amended act, and being sections No[s]. 1361 and 1362 of the Revised Statutes of 1881, are hereby repealed.

"Sec. 3. An emergency is hereby declared to exist for the immediate taking effect of this act, and the same shall be in force from and after its passage." Acts 1895, p. 256.

If said act is constitutional, this case is to be affirmed; if not, it is to be reversed.

The first objection urged is that no act bearing the title, "An act concerning proceedings in civil cases," was ever passed by the legislature of 1891, and for that reason alone the act to be amended is not identified as required by the constitution. Section 19 of article 4 of the constitution provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Rev. St. 1881, § 115 (Rev. St. 1894, § 115). Section 21 of the same article provides that "no act shall ever be revised or amended by mere reference to its title but the act revised or section amended shall be set forth and published at full length." Rev. St. 1881, § 117 (Rev. St. 1894, § 117). It has been uniformly held by this court that it was intended by these sections that, in an amend-

ment of a section or revision of an act, two things were required: First, the title of the act to be amended should be referred to by setting it out; second, the act revised or section amended should be set forth and published at full length. When the act to be amended is identified in the manner required by the constitution, and it is not certain what act was intended to be amended, on account of two or more acts having the same title, or for any other cause, then the court will resort to means other than the title to determine what act was intended. But, if the act attempted to be amended is not designated in the manner required by the constitution, the court cannot resort to other means of identification, although such other means would point out the act intended beyond any question. *Feibleman v. State*, 98 Ind. 516; *Commissioners v. Smith*, 52 Ind. 420; *State v. Harrison*, 67 Ind. 71; *Hall v. Craig*, 125 Ind. 523, 529, 25 N. E. 538; *McIntyre v. Marine*, 93 Ind. 193; *Boring v. State* (Ind. Sup.) 41 N. E. 270. Courts are bound to ascertain and give effect to the legislative intention only when expressed as the constitution requires. Neither the courts nor the legislature can disregard the commands of the constitution. It is true, as claimed by appellant, that no such act was passed by the legislature of 1891; but the courts take judicial notice that an act with this title was passed by the legislature of 1881, and approved April 7, 1881, and that the same was the only act with such a title in force when the act in question was adopted. *Shoemaker v. Smith*, 37 Ind. 122, 131. An examination of the act of 1881 discloses the fact that there are sections 399, 400, and 401, being sections 1360-1362, Rev. St. 1881 (sections 1413-1415, Rev. St. 1894), in said act, and that they provide for appeals from a special to the general term of superior courts. The date of the approval of an act is no part of its title, and an act may be amended without giving or referring to the date of its approval. The constitution does not require that the date of the approval of the amended act be given in the title or body of the amendatory act. *Shoemaker v. Smith*, supra. The act in question fully conforms to all the requirements of sections 19 and 21 of article 4 of the constitution. The amended and amendatory acts have proper titles, as required by said section 19, supra. The title of the amendatory act refers to the title of the act amended, by setting it out in full, and declares that it is an act to amend section 399 and repeal sections 400 and 401 of said act; and the section amended is set forth and published at full length. It is clear, therefore, that the act, as well as the sections to be amended and repealed, are identified in the manner required by the constitution. The title and body of the act show beyond question what particular act, as well as what sections of said act, were intended to be amended and

repealed, while the rule is that no law is to be held unconstitutional if it is a doubtful question. To doubt is to resolve in favor of the constitutionality of the law. *Bush v. City of Indianapolis*, 120 Ind. 476, 22 N. E. 422; *Henderson v. State*, 137 Ind. 556, 36 N. E. 257.

The date "1891," in the title of the act in question, is clearly a clerical error, as shown by the title and body of the act, when compared with the act amended, and can therefore have no controlling influence in the determination of this case.

It is next urged that "said act is void for the reason that it deprives a co-ordinate branch of the state government of the power of exercising a jurisdiction which the legislature had previously conferred, and which had been assumed by the court." The superior courts are created by statute, and not by the constitution. They have only such jurisdiction as the statute gives. The power that creates them may abolish them, or change their jurisdiction; and if the law which abolishes the court, or changes its jurisdiction, makes proper provision for pending cases, by transfer to some other court or commencing a new action, so as not to interfere with vested rights or deprive the parties of any remedy, no objection can be made to the same. The act in question makes ample provision for all cases pending on appeal in the general term of the superior courts, so that no party to such cases was deprived of an appeal from the trial court. What effect, if any, the omission of this provision would have had on the act, we need not, and do not, determine. The act is clearly constitutional. Judgment affirmed.

(142 Ind. 259)

STATE ex rel. GOWEN et al. v. JACKSON et al.

(Supreme Court of Indiana. Oct. 11, 1895.)

RULING ON DEMURRER—WAIVER OF ERROR.

The filing of an amended pleading on the sustaining of a demurrer to the original pleading is a waiver of any error in the ruling on the demurrer.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action in the name of the state on the relation of George D. Gowen and others, against Wallace L. Jackson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Duncan & Batman and J. A. Zaring, for appellants.

HACKNEY, J. The appellants were plaintiffs in the suit below, and after the trial court had sustained a demurrer to their complaint they filed an amended complaint, upon which further proceedings were had. The only ruling of the circuit court assigned

here as error is that above mentioned. The filing of an amended pleading not only takes from the record the original pleading, but waives any error which may have been committed in rulings upon such pleading. *Johnson v. Conklin*, 119 Ind. 109, 21 N. E. 462; *Kennedy v. Anderson*, 98 Ind. 151; *Conley v. Dibber*, 91 Ind. 413; *State v. Hay*, 88 Ind. 274; *Barghoff v. McDonald*, 87 Ind. 549; *Eshelman v. Snyder*, 82 Ind. 498; *Miles v. Buchanan*, 38 Ind. 490; *Earp v. Commissioners*, Id. 470; *Aiken v. Bruen*, 21 Ind. 137; *Patrick v. Jones*, Id. 249; *Elliott*, App. Proc. 595, 683; *Gowen v. Gilson* (at this term) 41 N. E. 594. The record presents no error, and the judgment of the lower court is affirmed.

(143 Ind. 337)

TINDALL et al. v. MILLER et al.¹

(Supreme Court of Indiana. Oct. 11, 1895.)

WILLS—CONSTRUCTION—VESTED REMAINDERS.

A will devising to testator's wife certain property, at her death to pass "absolute to my daughter, J., if she still survive. If she shall be deceased, it is my desire that the property do pass to her heirs,"—vests a remainder in the daughter at the death of the testator, which may be disposed of by her.

Appeal from circuit court, Fayette county.

Action by Ida Tindall and others to determine their title to certain property adversely claimed by Charlotte Miller and others; both parties claiming under a clause in the will of Luther Hutchinson, deceased. There was judgment for defendants, and plaintiffs appeal. Affirmed.

D. W. McKee, J. I. Little, H. L. Frost, and A. V. Brown, for appellants. Reuben Conner, for appellees.

HOWARD, C. J. By his last will, Luther Hutchinson divided his property between his wife, Sarah Hutchinson, and his daughter, Julia Elliott. The real estate here in controversy was devised as follows: "Third. I give and bequeath to my beloved wife, Sarah, the east half of my present dwelling house and lot [describing the property], so long as she may live. She shall have the exclusive use and profits of said property, with the appurtenances thereto belonging; and, at the death of my said wife, the above-described property shall pass absolute to my daughter, Julia, if she still survive. If she shall be deceased, it is my desire that the property do pass to her heirs." Both devisees survived the testator, but each died before the bringing of this suit, the daughter dying before her mother. After the death of the testator, the devisees, Julia and Sarah, apparently in the belief that they were the sole owners of the property so devised, sold and conveyed the same by deed duly executed. The appellees claim under the deed so made. The appellants, who are the sole heirs of Julia Elliott, claim that the devise to her

was of a contingent remainder, to vest only on the death of her mother, Sarah; that, as Julia died before Sarah, Julia's title never vested, and her deed was void; and that on the death of Sarah the title to said real estate, by the terms of item third of the will, at once vested in appellants, as the heirs of Julia Elliott.

Seeking the intention of Luther Hutchinson from the words of his will, it would seem that he meant to devise the property in question to his wife for life, remainder to his daughter or her heirs. The fourth item of the will appears to bear out this view. In that item the testator provides that the residue of his property be converted into money, and the proceeds "be divided equal between my wife, as my widow, one-half, and my daughter, Julia, or her heirs, the other half." In both items his daughter and her heirs seem to have been present to the mind of the testator. If, then, we regard the rule that the intention of the testator must be our chief guide in the interpretation of a will, and also that all the words of a will should be given a meaning when possible, and if we also remember that the law favors vested, rather than contingent, titles, we can hardly have any difficulty in arriving at the conclusion that the devise here in dispute was of a vested remainder to Julia Elliott, the enjoyment of which was postponed to her, or to her heirs, until the death of her mother, the life tenant. "We affirm, as an established principle," said this court in *Amos v. Amos*, 117 Ind. 37, 19 N. E. 543, "that the law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of that estate." See, also, *Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687, and cases cited; *Doren v. Gillum*, 136 Ind. 134, 35 N. E. 1101; *Chambers v. Chambers*, 139 Ind. 111, 33 N. E. 334. In *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422, the devise was quite similar to that in the case at bar, and the remainder was there held to be vested. The cases cited by appellants' counsel are not, as we think, in conflict with the foregoing authorities. We do not question that if the fair meaning of a will fixes upon a definite future event as determining the time when title shall pass, then a remainder so devised will be conditional upon the happening of such event. The intention of the testator, however, to so devise his property, must be clear. Such intent was manifest in the devise in *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; also, in *Corey v. Springer*, 138 Ind. 506, 37 N. E. 322, and other cases relied upon by counsel for appellants. Nor do we think the case at bar one in which the remainder was vested, but subject to be divested, as in the case of *Bolling v. Miller*, 133 Ind. 602, 33 N. E. 354. Here the remainder was, in effect, to Julia Elliott, or her heirs. No lapse could take place. The remainder vested in her at the

¹ Rehearing denied.

death of the testator, and, had she not disposed of it, it would, on her death, at once have passed to her heirs. We find no error in the record. The judgment is affirmed.

(142 Ind. 260)

WILKINS v. HYDE et al.

(Supreme Court of Indiana. Oct. 11, 1895.)

LIBEL AND SLANDER—PRIVILEGED STATEMENTS—ALLEGATIONS IN PLEADINGS.

An allegation in a petition by the board of children's guardians, created by Act March 9, 1889, filed for the purpose of obtaining the custody of plaintiff's children, that she "leads a life of low and gross debauchery," being one of the statutory grounds on which the board may obtain such custody, is not actionable.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Georgia Ann Wilkins against Nathaniel A. Hyde and others, composing the board of children's guardians, for libel. From an order sustaining a demurrer to the complaint, and from judgment for defendants, plaintiff appeals. Affirmed.

Julian & Julian, for appellant.

JORDAN, J. Appellant instituted this action against the appellees to recover the sum of \$5,000, as damages for an alleged libel. The court sustained a demurrer to the complaint, and, appellant electing to stand upon her said pleading, judgment was thereupon rendered against her for costs. By her assignment of error she calls in question the ruling of the court upon the demurrer. A brief summary of the facts is that the appellees are members of, and constitute, the board of children's guardians of Marion county. On the 25th day of June, 1891, as members of this board, they filed their petition in the Marion circuit court for the purpose of obtaining the custody of appellant's children. The alleged libel is based upon the following words and matter written and embraced in said petition, to wit: "That she [appellant therein named] neglects her children, and leads a life of low and gross debauchery, and the associations of said children are such as tend to their corruption and contamination." It is averred that the defendants, by these words, meant to, and did, charge that the plaintiff was destitute of virtue, and in fact a common "prostitute." The board of children's guardians is created by an act of the legislature approved March 9, 1889 (page 261). Section 3 of this act, as amended and in force March 9, 1891 (section 3189, Rev. St. 1894) provides that whenever this board shall have probable cause to believe that any child under 15 years of age is abandoned, neglected, or cruelly treated by its parent or parents, or that the latter are of low and gross debauchery, etc., such board shall file its petition in the circuit court, setting forth such

facts. It is further provided therein that notice shall be given to said parent or parents of the filing of the petition, and upon the hearing thereof by the court, if the facts are found to be true, the custody of the children in question shall be committed to said board. It is well settled by many authorities that there are occasions upon which words may be spoken or written of a person, whereby the implication of malice which ordinarily arises from the words themselves is destroyed. Among these privileged classes or occasions is a proceeding in due course of law. No actual malice is shown in the complaint, but it appears that the words were written and published in a petition expressly authorized by statute, to be filed in a proceeding in court, and that the alleged libelous words were but the statutory grounds which, if found to exist, would warrant the court, under this statute, to award the custody of appellant's children to said board. It is obvious, therefore, that appellant's alleged cause of action arose out of a proceeding in court, in a matter expressly sanctioned by the statutes of the state, and comes broadly within the rule to which we have referred. The reason upon which the rule is founded is the necessity of preserving the due administration of justice. As to whether the charge be true or false, or whether it be sufficient or not to effect the object in view, if it be made in the due course of a judicial or legal proceeding, it is privileged, and cannot be made the basis of an action for defamation of character. *Hartsock v. Reddick*, 6 Blatchf. 255; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330, and authorities cited in note to this last case. *Strauss v. Meyer*, 48 Ill. 387. If the contention of the appellant could be sustained, the purpose of the statute providing for the change of the custody of the children of dissolute parents would be virtually destroyed, as the members of the board would be slow to act if every unsuccessful prosecution of a petition filed would subject them to an action for damages. The complaint did not state a cause of action, and the demurrer thereto was properly sustained. Judgment affirmed.

(142 Ind. 693)

WILKINS v. HARE.

(Supreme Court of Indiana. Oct. 16, 1895.)

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Georgia Ann Wilkins against Clinton L. Hare. Judgment for defendant, and plaintiff appeals. Affirmed.

Julian & Julian, for appellant.

JORDAN, J. The same question is involved in this appeal as was in the case of appellant against Hyde (decided at this term), *supra*, and upon the authority of that decision the judgment in this cause is affirmed.

(143 Ind. 264)

EVANS v. PITTSBURGH, C. C. & ST. L. RY. CO.

(Supreme Court of Indiana. Oct. 15, 1895.)

RAILROAD COMPANIES—INJURY TO PERSON ON TRACK—PLEADING.

1. An averment, in a complaint for injuries from a railroad train, that a brakeman saw plaintiff's peril, and "immediately signaled the engineer to stop the train," is not a sufficient allegation that the engineer knew of plaintiff's peril to render the railroad company liable on the ground of wanton negligence in failing to stop its train.

2. Where one placed in peril of a moving train by his own negligence is injured, a complaint to recover for such injury, as for wanton recklessness, in that the engineer, knowing of plaintiff's peril, failed to stop the train, must allege that the train could have been stopped in time to avoid the injury.

Appeal from circuit court, Henry county; Eugene H. Bundy, Judge.

Action by Curtis O. Evans against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company for personal injury. From judgment for defendant, plaintiff appeals. Affirmed.

John W. Morris and Brown & Brown, for appellant. L. P. Newby and John L. Rupe, for appellee.

HOWARD, C. J. A demurrer for want of facts was sustained to appellant's complaint. The pertinent allegations of the complaint are: That "the defendant, by its servants and employes, ran a locomotive and train of freight cars into the town of Ashland, and there stopped, and disconnected the locomotive from the train of cars standing upon its railroad track opposite the platform of its depot, and ran said locomotive on ahead, a distance of twenty rods, for the purpose, as the plaintiff supposed, of passing a switch and backing the said locomotive from thence onto a side track, for the purpose of gathering some cars and connecting them with its train, by bringing them onto the main track, and backing them to the said train of cars so left standing upon said main track. That the caboose of said train of cars was the last car in the rear of said train, and that there was in front of said caboose, and connected therewith, what is known as a 'scale tester,' which was a small, heavy, iron structure, placed upon four wheels, no wider than the track of the railroad, with a round, iron covering over the top, which said scale tester was made and used for the purpose of running onto scale platforms, and testing the accuracy of the scales. That whilst said defendant's cars were so standing upon said track the plaintiff had occasion to pass by the caboose, and, being attracted by the sight of the scale tester, walked up and placed one hand upon the end of the caboose, and placed his left foot upon the rail on front of the caboose, and in the rear of the scale tester, and stooped over to see under and look at the scale tester; and whilst in this

condition the servants and employes of said railway company, without having run off onto the switch, as they intended to do, carelessly and negligently, and without any warning or signal, ran said locomotive back against the train of cars so standing upon said track, and butted and pushed them back a distance of one hundred feet. That the plaintiff had on his left foot a heavy boot, with a thick sole, and that the wheel of the scale tester ran against his foot, and caught him fast, and threw him down, or nearly so, and he caught (with his hands) hold to some attachment to the caboose car, and held his body up off the railroad track, and that the wheel of the scale tester, when it struck his foot, slid upon the iron rail, holding his foot fast to said rail, and slid him in that condition fifty or sixty feet, said train going slowly all of said time. That whilst he was in this condition some of the bystanders came to his rescue, and aided him in holding his body off said railroad track. That whilst he was in this condition he hallooed, and made such efforts as he could to cause the employes of said defendant to stop the continuous backing of said train of cars. That a brakeman belonging to the crew of defendant's servants so managing said train saw the plaintiff in said perilous position, and immediately signaled the engineer to stop the train, and took off his hat and swung it, and hallooed at him, and notified him of the great necessity of at once stopping said train, and of the impending danger to the plaintiff of continuing to back said train; but the engineer, conductor, and other servants having charge and control of said train of cars, and with knowledge of the perilous position of the plaintiff, disregarding said warnings, hallooing, and violent motions, carelessly and recklessly continued to back said train of cars, by pushing the same with said locomotive, inasmuch that the wheels of said scale tester, by its continuous pushing and sliding the plaintiff's foot upon the iron rail, crushed and ground the same, and crushed and ground the bones of his foot into a shapeless mass, and thereby rendered the plaintiff a cripple for life. * * * That after the engineer who was backing said locomotive against said train of cars had notice of the perilous position of the plaintiff, if he had heeded the warnings thereof, could have stopped said train of cars within four feet from where plaintiff's foot was caught, and before his foot had received any serious injury."

It is admitted that the facts alleged show contributory negligence on the part of appellant, in placing his foot upon the rail, and near the wheel of the scale tester. It is also admitted that he was a trespasser. It remains, therefore, to determine whether the appellee wantonly and willfully caused the injury complained of. The question is not free from difficulty. There are general statements made in the complaint from which

such wanton and willful conduct might be inferred. We must, however, look to the particular facts and circumstances alleged, rather than to the conclusions drawn therefrom by the pleader. If appellee's employés in charge of the train knew of appellant's peril, and could have stopped the cars before they crushed his foot, the appellee must be held liable. If they did not know of such peril, or, knowing it, could not stop the train in time to avoid the result, the appellee should not be charged with the injury. Certainly, the employés were not to blame when they "ran said locomotive back against the train of cars so standing upon said track, and butted and pushed them back a distance of one hundred feet." It was the business in which the employés were then engaged, and which it was their duty to perform. It was not until after the locomotive had been thus butted against the cars that those in control of the train were signaled to stop it. This signaling was done by a brakeman who "saw the plaintiff in said perilous position, and immediately signaled the engineer to stop the train, and took off his hat, and swung it, and hallooed at him." This, we think, comes far from showing that the engineer knew that any one was in peril. The fact that the brakeman swung his hat, and hallooed at the engineer, rather indicates that the brakeman could not, and therefore did not, give the engineer any definite information of what the trouble was, or why the train should be stopped. The allegations as to these "warnings, hallooings, and violent motions" at least fail to show that the engineer, with knowledge of what he was doing, was wantonly and willfully engaged in endangering the life or limb of the appellant.

But is there anything alleged to show that the engineer could have stopped the train in time to have saved appellant from injury? The engineer, as we have seen, was not to blame for bumping the locomotive against the cars. But this bumping pushed the cars back a hundred feet. The wheel of the scale tester, however, as we learn from the complaint, when it struck the foot of appellant, "slid upon the iron rail, holding his foot fast to said rail, and slid him, in that condition, fifty or sixty feet." It was this "pushing and sliding the plaintiff's foot upon the iron rail" which crushed the foot, as is further stated in the complaint. If, then, the butting of the locomotive upon the cars sent the latter back a hundred feet, and if appellant's foot was caught and slid back on the rail but 50 or 60 feet, how are we to conclude that the train could have been stopped "within four feet from where the plaintiff's foot was caught," and in time to save appellant's foot?

We think that the allegations in the complaint fail to show that the engineer in charge of the train had knowledge of appellant's peril and we are of opinion, more-

over, that the allegations do show that, even if he had such knowledge, he could not have stopped the train in time to avoid the injury. See *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504. No willful or wanton wrong to appellant is therefore shown, and, there being no question of negligence, the judgment is affirmed.

(143 Ind. 44)

RISTINE v. JOHNSON et al.¹

(Supreme Court of Indiana. Oct. 15, 1895.)

REDEMPTION FROM TAX SALE.

Rev. St. 1894, § 8610 (Rev. St. 1881, § 6466), providing that the person redeeming land from tax sale shall pay "the purchase money * * * and all taxes which have been paid thereon with interest on such taxes," does not require the payment of interest on the amount paid at the tax sale.

Appeal from circuit court, Montgomery county; J. F. Harney, Special Judge.

Action by Hosea H. Ristine, guardian, against Charles Johnson and others, to redeem land from tax sale. From the judgment rendered, plaintiff appeals. Reversed.

Ristine & Ristine, for appellant. Dice & Wilkinson and Crane & Anderson, for appellees.

MONKS, J. In this case there was a special finding of facts and conclusions of law stated by the court. The only error assigned calls in question the conclusions of law. The facts, so far as necessary to the determination of the questions presented, are as follows: Appellant's ward is, and has been since 1887, a person of unsound mind. His real estate was sold at the tax sales in 1888, 1890, and 1891. Tax deeds were made to the purchasers at the sales of 1888 and 1890. This action was commenced in May, 1892, and tried February, 1893. The only question presented is whether interest is to be computed on the amounts for which said real estate sold at said tax sale. It is admitted by appellant that appellees are entitled to 6 per cent. interest on each payment of taxes by them made, if any, after said sales; but he insists that the court erred in computing interest on the money paid at said tax sales. We think appellant is right in this contention. Section 6466, Rev. St. 1881, and section 8610, Rev. St. 1894, which is a re-enactment of the first-named section, provide that the owner or occupant of any land sold for taxes may redeem the same at any time during the two years next ensuing, and, if redeemed after one year and within two years, he shall pay the purchase money, together with costs, and 25 per cent. in addition, and he shall also pay all taxes which have been paid thereon, with interest at the rate of 6 per cent. per annum on such taxes. Section 6467, Rev. St. 1881, and section 8611, Rev. St. 1894, provide that infants, idiots, and insane persons may redeem any lands be-

¹ Rehearing denied, 43 N. E. 310.

longing to them sold for taxes within two years after the expiration of such disability, in the same manner as provided in the foregoing section for redemption by other persons. Appellant's ward comes within the purview of these sections, and is entitled to the benefit thereof. The section referred to does not provide for any interest on the purchase money paid at the tax sale; only a penalty thereon and costs are allowed by law in case of redemption. Interest, however, is provided for on all subsequent taxes paid by the purchaser or his assignee. *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. 540, is not in point, as that case depended upon section 208 of the tax law of 1872 (1 Davis' St. p. 121), which expressly provides for interest on the purchase money paid at a tax sale in case of redemption. It follows, therefore, that the court erred in its conclusions of law. Judgment reversed, with instructions to restate the conclusions of law in accordance with this opinion, and for further proceedings not in conflict therewith.

(142 Ind. 75)

KROM et al. v. VERMILLION.¹

(Supreme Court of Indiana. Oct. 15, 1895.)

MORTGAGE AS EVIDENCE—FILING INSTRUCTIONS.

1. The certificate of acknowledgment is sufficient prima facie evidence of the execution of a mortgage to entitle it to be read in evidence.
2. Under Rev. St. 1881, § 533 (Rev. St. 1894, § 542), cl. 6, providing that "all instructions * * * must be signed by the judge and filed," the filing thereof is essential to make them a part of the record.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

Action by William P. Krom and others against Jesse Vermillion to cancel a certain note and mortgage. Defendant had judgment, and plaintiffs appeal. Affirmed.

Goodykoonts & Ballard, for appellants. Diven & McMahan and Wm. A. Kittinger, for appellee.

JORDAN, J. Action by appellants, in the lower court, to obtain the cancellation of a certain note and a mortgage, upon the alleged grounds that the same were executed without consideration, and that the possession of the instruments in question was obtained wrongfully by the appellee, and without the consent of the appellants. The former answered the complaint by a denial, and also by way of a cross complaint, whereby he sought to have the mortgage mentioned in the complaint foreclosed. Issues were ultimately joined between the parties on their pleadings, and a trial by jury resulted in a verdict in favor of the appellee, and upon his motion judgment was rendered accordingly. Subsequently, as the record recites, the court, at the request of the appellants, reopened the issues upon the cross complaint,

and the matters therein put in issue between the parties were tried by the court, and there was a finding in favor of appellee; and, over a motion for a new trial, a judgment for the recovery of the amount due upon the note and for the foreclosure of the mortgage was rendered.

The only questions that are discussed and pressed by appellants' counsel are those that grow out of the action of the court in overruling the motion for a new trial. Appellants earnestly contend that the judgment is not sustained by the evidence. We have examined and considered the evidence as it appears in the record, and while, in some respects, there is a sharp conflict in the same, nevertheless there is evidence sustaining the finding of the court, and, under the appellate rule by which we are controlled, we cannot weigh the same to determine on which side lies the preponderance.

Appellants complain of the court's action in permitting the appellee to read the mortgage in evidence without having proven the execution thereof, for the reason that they had, by their answer to the cross complaint, denied, under oath, its execution. It is true that the burden of proof is upon the party seeking to introduce and avail himself of a written instrument to establish its execution when the same has been denied by a plea of non est factum, and the onus of this issue so remains until the execution of the instrument in question is proven to the satisfaction of the court or jury trying that issue. The rule of evidence is that the party on whom this burden rests, after making a prima facie case in favor of its execution, may be permitted by the court to read it in evidence. The mortgage in question, however, had been duly acknowledged before an authorized officer, and recorded as prescribed by law. The certificate of its acknowledgment was sufficient prima facie evidence of its execution to at least entitle it to be read in evidence. *Carver v. Carver*, 97 Ind. 497.

Appellants insist that the court erred in giving to the jury instructions Nos. 1 and 4. We cannot consider this alleged error, for the reason that the instructions given by the court are not properly in the record. Clause 6, § 533, Rev. St. 1881 (section 542, Rev. St. 1894), provides that "all instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." The record in this case does not show that the instructions were filed. The filing thereof is essential in order to make them a part of the record. *Supreme Lodge v. Johnson*, 78 Ind. 110; *Olds v. Deckman*, 98 Ind. 162; *Elllott*, App. Proc. § 792, and cases there cited.

Other rulings of the court are said by appellants' counsel to be erroneous, but they wholly fail to point out in what manner these rulings are prejudicial to their clients.

¹ Rehearing denied.

There is much confusion in the record, but no apparent available error. Judgment affirmed.

(143 Ind. 433)

ARMSTRONG et al. v. DUNN et al.¹

(Supreme Court of Indiana. Oct. 11, 1895.)

**MISJOINDER OF PARTIES—DEMURRER—PLEADINGS
—FRAUDULENT CONVEYANCES—APPEAL
—RECORD.**

1. Misjoinder of parties plaintiff or defendant to an action is no ground for demurrer, under Burns' Rev. St. 1894, § 342 (Rev. St. 1881, § 339), stating causes for demurrer.

2. A demurrer reciting that "defendants separately and severally demur" to different paragraphs of a complaint, because neither of the paragraphs states a cause of action against them, is separate as to the paragraphs, but joint as to the parties defendant.

3. The fact that a single paragraph of a complaint states several causes of action will not support an objection that the paragraph does not state facts constituting a cause of action.

4. Where a complaint by several plaintiffs against several defendants, alleging and asking to have set aside separate conveyances by defendants as in fraud of creditors, shows that one of defendants is indebted on different debts to each of plaintiffs, due when he made his alleged fraudulent conveyance, a demurrer for want of sufficient facts is properly overruled.

5. Where a complaint by several plaintiffs against several defendants to set aside separate conveyances by defendants in fraud of creditors alleges, and on trial findings of fact are rendered showing, that plaintiffs all have claims against defendants, but that only one of defendants is the common debtor of each of plaintiffs, a conclusion of law that the lands found to be fraudulently conveyed by defendants be subject to the payment of the claims "mentioned in the complaint in the order of their priority" is not erroneous, as subjecting the land of one of defendants to the payment of a debt against another.

6. Evidence incorporated in a bill of exceptions is not part of the record, unless the record shows that the bill of exceptions was filed.

7. An objection to a ruling based on the evidence cannot be considered where the evidence is not in the record.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by Moses F. Dunn and others against Wesley S. Armstrong and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. E. Boruff, Newton Crooke, and McHenry Owens, for appellants. Dunn & Alexander, for appellees.

McCABE, J. The appellees, as separate judgment creditors of several of the appellants, sued them to set aside several conveyances of real estate situate in Lawrence county, made by some of the appellants to others of said appellants, as fraudulent against the creditors of the grantors. The circuit court overruled separate demurrers to each of the three paragraphs of the complaint. A trial of the issues formed upon the complaint resulted in a special finding of the facts by the court, on which it stated con-

clusions of law in favor of the appellees, on which they had judgment, over appellants' exceptions to the conclusions of law, and their motion for a new trial. Error is assigned on the action of the court in overruling the demurrer to the complaint and the several paragraphs thereof, in overruling the motion of appellants for a venire de novo, in overruling the appellants' motion for a new trial, and that neither paragraph of the complaint states facts sufficient to constitute a cause of action. The complaint was in three paragraphs, but, as to the only points of objection urged against each, they are exactly alike. The grounds of objection stated in the demurrers were (1) that neither paragraph stated facts sufficient to constitute a cause of action; (2) that several causes of action had been improperly joined in the complaint; (3) that there was a misjoinder of parties plaintiff; and (4) a misjoinder of parties defendant.

As to the last two causes of demurrer specified, it is sufficient to say that there is no such cause of demurrer known to the Civil Code. Burns' Rev. St. 1894, § 342 (Rev. St. 1881, § 339); *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447.

As to the ground of misjoinder of causes, it is provided by statute that no judgment shall ever be reversed for any error in sustaining or overruling a demurrer for misjoinder of causes of action. Burns' Rev. St. § 344 (Rev. St. 1881, § 341); *Rennick v. Chandler*, 59 Ind. 354; *Coan v. Grimes*, 63 Ind. 21. Therefore, we do not consider the question whether there was a misjoinder of causes or not. That leaves for our consideration only the first ground of objection specified in the demurrer; namely, want of sufficient facts to constitute a cause of action.

Under this objection, it is urged that neither paragraph of the complaint stated facts sufficient to constitute a cause of action, for the reason that neither of them shows a cause of action in favor of all the plaintiffs and against all the defendants. A failure to state a cause of action against some of the defendants in a complaint, while it states a cause of action against others, would not make the complaint bad as to all, nor be ground for sustaining a demurrer thereto for want of sufficient facts by all the defendants. In such a case the defect can only be taken advantage of by a separate demurrer by the defendants against whom no cause of action is stated in the complaint. *Berkshire v. Shultz*, 25 Ind. 527. The demurrers were by all the defendants, naming them, and then read: "Demurs jointly, as well as separately and severally, to the first, second, and third paragraphs of the complaint, and to each of them separately, and, for cause, says that neither of said paragraphs states facts sufficient to constitute a cause of action." In *Carver v. Carver*, 97 Ind. 497, the demurrer, on page 500, was as follows: "The defendants separately and severally demur to the first

¹ Rehearing denied.

and second paragraphs of the plaintiff's complaint, and, for cause of demurrer, say that neither of said paragraphs states facts sufficient to constitute a cause of action against them." This court there said of that demurrer that "this demurrer, we think, is separate as to each paragraph of the complaint, but clearly joint as to the parties. The words 'separately and severally' cannot be applied both to the separate paragraphs and also to the defendants. We think they apply only to the separate paragraphs. Such would seem to have been the intent of the pleader." To the same effect are *School Tp. v. Gant*, 125 Ind., at page 558, 25 N. E. 872, and *Axtel v. Chase*, 83 Ind. 546.

The assignment of error that the complaint does not state facts sufficient to constitute a cause of action is also joint by all the appellants (defendants below). A joint assignment of error must be good as to all who join therein, or it is good as to none. *Orton v. Tilden*, 110 Ind. 131, 10 N. E. 936; *Robbins v. Magee*, 96 Ind. 174; *Hinkle v. Shelley*, 100 Ind. 88; *Quick v. Brenner*, 101 Ind. 230; *Boyd v. Anderson*, 102 Ind. 217, 1 N. E. 724; *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *Sparklin v. Wardens, etc.*, 119 Ind. 535, 22 N. E. 8; *Arbuckle v. Swim*, 123 Ind. 208, 24 N. E. 106. Therefore, the question as to whether the complaint is bad as to part only of the defendants, for want of sufficient facts, is not presented by the record. But whether each paragraph thereof states facts sufficient as to all the defendants is presented.

Numerous judgments are alleged to have been recovered by the five plaintiffs against different ones of the defendants. A fraudulent conveyance of real estate is alleged to have been made by the defendant Wesley Armstrong and his wife to certain other defendants named; another, by Abner D. Armstrong and wife to certain of the defendants; and another, by Alvin Armstrong to the defendants Edward C. Stannard, Jeremiah Stannard, and Frank O. Stannard, who were then defendants in the cause. Their demurrer for misjoinder of causes having been sustained, they were taken out of the case and the alleged fraudulent conveyance to them; and Abner D. Armstrong and Jennette, his wife, have dismissed the appeal as to themselves, and no question raised by them in the assignment of errors or by the briefs will be further noticed.

It is first contended that each one of these alleged fraudulent conveyances constituted a separate and distinct cause of action. That would not make the facts insufficient to constitute a cause of action. The remedy was a motion to separate the causes of action into separate paragraphs, as all three of the alleged fraudulent conveyances were embraced in each paragraph of the complaint. We need and do not decide whether they

constituted separate causes of action or not, as that question is not presented by the record.

It is contended that neither paragraph of the complaint is good, because it does not appear therefrom that all the plaintiffs were jointly interested in the cause of action. Separate creditors may maintain a joint action to set aside a fraudulent conveyance made by their common debtor, and to subject the property thus conveyed to the satisfaction of their several debts. The joint interest they have in obtaining relief from the fraud, and subjecting the property fraudulently conveyed to the payment of the debts of the defendant, gives them such a joint interest as enables and entitles them to maintain such an action, though their claims or debts are separate and distinct. *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, and 36 N. E. 907; *Elliott v. Pontius*, 136 Ind. 641, 35 N. E. 562, and 36 N. E. 421, and cases there cited.

But it is contended that the plaintiffs do not all appear to be interested in all of the cause of action stated in the several paragraphs of the complaint. It is settled law, as appellants' learned counsel contend, that the complaint, to be good, must state a cause of action in favor of all of the plaintiffs. *Berkshire v. Shultz*, supra; *Lippard v. Edwards*, 39 Ind. 165; *Maple v. Beach*, 43 Ind. 51; *Parker v. Small*, 58 Ind. 349; *Harris v. Harris*, 61 Ind. 117; *Brumfield v. Dook*, 101 Ind. 190; *Brown v. Critchell*, 110 Ind. 31, 7 N. E. 888, and 11 N. E. 486. And it must further appear from the complaint that their interests are joint,—that each plaintiff is interested in the relief asked by the others, or some part of it. *Elliott v. Pontius*, supra, and cases there cited.

There were three conveyances alleged in the complaint to have been fraudulently made,—one by Wesley Armstrong and his wife, one by Abner D. Armstrong and his wife, and one by Alvin B. Armstrong. It was alleged that plaintiff Moses F. Dunn had recovered a judgment against the defendants Wesley Armstrong, Abner D. Armstrong, Alvin B. Armstrong, and Noah Armstrong for \$1,321.08; that the plaintiff Nathan Jackson had recovered one judgment against Alvin and Abner Armstrong, for \$633.74; and another, for \$925, against Abner Armstrong; another, for \$430.35, against Wesley and the appellant Wallis Craig, whom the court found to be surety for the other defendants therein,—and it is alleged that he paid off said judgment; and said Jackson recovered another judgment, for \$551.65, against Wesley S. Armstrong alone. The plaintiff Caroline M. Berry recovered a judgment for \$231.29 against Noah and Wesley S. Armstrong. The plaintiff Alfred F. Berry recovered a judgment for \$475.95 against Noah and Wesley Armstrong; and he recovered another judgment, for \$432.80, against Alvin and Abner Armstrong. These

judgments, or the debts on which they were founded, were in existence when the alleged fraudulent conveyances were made. So that it will be seen that each one of the alleged judgment creditors had a judgment in which Wesley S. Armstrong was either one of the judgment defendants or the sole judgment defendant. Wallis Craig, who was surety in one of the judgments recovered by Nathan Jackson, and who had paid it off for the principals, Wesley and Abner, was interested in reaching the property of Wesley fraudulently conveyed, and therefore had a right to join, as he did, with the other plaintiffs, in seeking to set aside said fraudulent conveyance. Therefore, all of the plaintiffs were interested jointly and alike in at least a part of the relief sought in the complaint. It is settled that, if the facts stated in the complaint entitle the plaintiffs to any relief, a demurrer for want of sufficient facts should be overruled. *Bennett v. Preston*, 17 Ind. 291; *Culbertson v. Munson*, 104 Ind. 451, 4 N. E. 57; *School Tp. v. Hay*, 107 Ind. 351, 8 N. E. 220; *Railroad Co. v. Van Shike*, 107 Ind. 480, 8 N. E. 289. There was therefore no error in overruling the demurrer for want of sufficient facts. The same rule applies to the assignment of error here that the complaint does not state facts sufficient.

The substance of the special finding is: That the appellee Dunn, on August 29, 1892, commenced an action in the Lawrence circuit court, the venue of which was changed on application of the defendants to the Monroe circuit court; and on October 26, 1892, he recovered a judgment (on his note executed October 1, 1889, by the defendants therein) against the defendants Alvin Armstrong, Abner Armstrong, Noah Armstrong, and Wesley S. Armstrong for \$1,308 and costs (a transcript of which was filed in the clerk's office of Lawrence county on October 29, 1892), and caused an execution to be issued on said judgment by the clerk of the Monroe circuit court on October 31, 1892, to the sheriff of Lawrence county, which came to the hands of said sheriff on November 2, 1892; and that said sheriff, on November 18, 1892, returned said execution nulla bona. That the plaintiff Nathan Jackson duly recovered a judgment on November 23, 1892, in the Lawrence circuit court, against Alvin and Abner Armstrong for \$633.74; and on November 23, 1892, he recovered another judgment in said court against Abner Armstrong for \$925, with costs; and on November 23, 1892, he recovered another judgment in said court against Wesley S. Armstrong, Abner Armstrong, and the plaintiff herein, Wallis Craig, for \$430.35 and costs, said Wallis being surety for said other defendants in said judgment; and on February 23, 1893, said Wallis Craig paid said judgment and costs in full, amounting to \$436.80; and on November 23, 1892, said Jackson recovered another judgment in said court against Wesley Armstrong for \$551.65 and costs. That

on November 23, 1892, the plaintiff herein, Alfred F. Berry, recovered a judgment in said court against Alvin and Abner Armstrong for \$432.60 and costs; and said Alfred, on the same day, recovered a judgment in said court against Noah and Wesley Armstrong for \$473.95 and costs. That on the same day, in the same court, plaintiff herein, Caroline M. Berry, recovered a judgment against Noah and Wesley Armstrong for \$231.29 and costs. That all said judgments were founded on promissory notes payable without relief, and the said judgments were rendered collectible without relief from valuation and appraisal laws, and said notes were all due prior to the 21st day of September, 1892. That executions were duly issued on them to the sheriff of said Lawrence county, and by him returned nulla bona about the same time the execution on the first judgment above named was so returned. That on September 21, 1892, the defendant herein, Wesley S. Armstrong, was the owner in fee simple of a large body of land situate in said Lawrence county, all of which is particularly described, containing 646 acres. And that on that day he and his wife and codefendant Clementine Armstrong, for the purpose and with the intent to cheat, hinder, delay, and defraud his creditors, conveyed said lands to one Virgil V. Boone, as trustee for the purpose of reconveying said lands to said Clementine Armstrong, wife of said Wesley, for the colorable consideration of one dollar, but for no actual consideration whatever; and on the same day said Boone (defendant herein), in furtherance of said fraudulent intent, for no actual consideration, conveyed said lands to said Clementine Armstrong. That, on the same day, said Abner D. Armstrong was the owner in fee simple of another large body of land, situate in said Lawrence county, containing in all 962½ acres, more or less. That, on said day, said defendant Abner D. Armstrong and his wife and codefendant Jennette Armstrong, for the fraudulent purpose to cheat, hinder, delay, and defraud the creditors of said Abner D., conveyed said lands to Virgil V. Boone, with the understanding that said Boone was to reconvey the said lands to the said Jennette Armstrong, wife of said Abner D., for said fraudulent purpose, and for the colorable consideration of one dollar, and no other consideration whatever; and said Boone, with full knowledge of said fraudulent purpose, did reconvey said lands to said Jennette Armstrong, for no other consideration than the colorable consideration of one dollar. That Clementine Armstrong was the daughter of Noah Boone, now deceased, and that she was married to the defendant Wesley S. Armstrong on the — day —, 1847, and has continued to live with him as his wife to the present date in said Lawrence county, Ind. That the defendant Jennette Armstrong was the daughter of Noah Boone, deceased, and was married to her codefendant Abner D. Armstrong

on the ——— day of ———, 1852, and since that date to the present time has lived with him as his wife in said Lawrence county. That Noah Boone, the father of Clementine and Jennette, died in Lawrence county, Ind., June, 1862, intestate, leaving a large personal estate, and about 1,300 acres of land, and a widow, Jane Boone; and that in the fall of 1847 said Noah Boone gave his said daughter Clementine \$500 in cash, which said Clementine at the time turned over to her said husband, Wesley S. Armstrong, as a gift, without any agreement whatever to pay the same back or in any way account for the same, but to have and hold the same as his own. That in July, 1853, said Noah Boone gave his said daughter Jennette \$500 in cash, which she at the time turned over to her said husband, Abner D. Armstrong, as a gift, without any agreement whatever to pay the same back, but to have and to hold the same as his own. That, after the death of said Noah Boone, his son Daniel Boone administered on said estate, and that said Clementine and Jennette each received from said administrator \$1,095.22 as their respective shares in said estate in the year 1862. That each of said wives, Jennette and Clementine Armstrong, handed over to their respective husbands, Abner D. and Wesley S. Armstrong, said money as a gift, without any agreement whatever to pay the same back or in any way to account therefor, but to have and hold the same as their own, respectively. That said Clementine and Jennette, with the consent of their husbands, in the fall of 1862, sold their interests in the real estate of their deceased father to Daniel Boone and Virgil V. Boone, for \$1,767.70 each, which amounts were then or soon thereafter received by them, but they did not execute deeds for the same until January 31, 1863. That said wives each handed her said amount so received by her for her interest in her father's real estate over to her husband as a gift, without any agreement whatever to pay the same back or in any way to account for the same. That, at the time of the execution of the deed aforesaid to said Clementine and Jennette Armstrong, said Wesley S. Armstrong was the owner of personal property to the value of \$1,000, and was also the owner in fee simple of 390 acres of real estate, free of incumbrance, of the value of \$2,000; and that he afterwards turned all this property over to his creditors, except \$545 worth thereof he held as his exemption, preferring his creditors so long as his property lasted; and on September 21, 1892, said Abner D. Armstrong was the owner of personal property to the value of \$3,800, and also the owner of an undivided one-half interest in 976 acres of land, with a mortgage thereon of \$8,000 and interest, which land was of the value of \$10,000. That, since said September 21st, he has turned over all his personal property to his creditors except \$580, which he claimed as his exemption. That he still

holds his interest in the 976 acres of land subject to be sold to pay these creditor plaintiffs. That Alvin Armstrong was the owner of personal property on said September 21st of the value of \$4,000, and real estate of the value of \$5,000, in his individual name, unincumbered, and an undivided one-half interest in the 976 acres of land aforesaid, of the value of \$10,000, with a mortgage of \$8,000 thereon. That all of said personal property, as well as his individual real estate, he turned over to preferred creditors, and that his interest in the 976 acres is still in his name, and subject to the payment of plaintiffs' judgments; and that Noah Armstrong was the owner of personal property of the value of \$2,500, and real estate, 300 acres, unincumbered, of the value of \$2,500; and that the entire amount of this was turned over to preferred creditors. That they were the owners of this property September 21, 1892, and have turned it over to their creditors other than plaintiffs since said date. That said defendants, on said 21st day of September, 1892, conveyed and transferred all of their real estate as set forth above, and held no real estate whatever, nor did either of them have or hold any real estate in their own names except the defendants Abner Armstrong and Alvin Armstrong, who then owned in fee simple in Lawrence county, Ind., about 1,000 acres of land, which is now and was September 21, 1892, incumbered with a mortgage executed to the state of Indiana by said Abner and Alvin Armstrong, for the sum of \$8,000, providing for 8 per cent. interest and attorney's fees, and which mortgage was executed by Abner and Jennette Armstrong, his wife, and by Alvin and Arie Armstrong, his wife; and that said mortgage was executed July 26, 1892, and is unpaid; and that said lands are mortgaged for near their full value, they being known as the "Noah Boone Lands," and owned by Abner and Alvin Armstrong jointly, and is a different and separate parcel of land from any of the lands mentioned in any of the special findings herein. That at the date of said conveyances, to wit, September 21, 1892, made for the fraudulent purposes aforesaid, the said defendants Wesley S. Armstrong, Abner Armstrong, Alvin Armstrong, and Noah Armstrong were all and each of them in the possession and owners of personal property consisting of stock horses, cattle, sheep, hogs, grain, and hay, of the value of \$6,000; and at said date, and after the commencement of the said action of said Moses F. Dunn and that of said Nathan Jackson, and after the service process therein, the said defendants Abner, Wesley S., Alvin, and Noah Armstrong sold and disposed of the same, and applied no part of the proceeds of said property to the payment of the debts then long due and owing to these plaintiffs, leaving no property on hand out of which the plaintiffs could collect their said claims and debts, or any part thereof. That said

sales of all of said personal property by said Wesley S., Abner D., Alvin, and Noah Armstrong were made for the fraudulent purpose and with the intent to cheat, hinder, delay, and defraud these plaintiffs, Moses F. Dunn, Nathan Jackson, Caroline M. Berry, Alfred F. Berry, and Wallis Craig, and each of them, out of their said debts. That at the time the several suits by the plaintiffs were begun against the defendants, and the rendition of the several judgments thereon, and at the time of making the conveyances complained of in this suit, and long prior thereto, the defendants Wesley S., Abner, Alvin, and Noah Armstrong were each of them greatly indebted and in failing circumstances, of which facts said defendants Clementine and Jennette Armstrong had full knowledge.

The conclusions of law stated are that the plaintiffs, and each of them, are entitled to the relief prayed for in their complaint, and are entitled to have the interests of Abner and Wesley S. Armstrong in the lands mentioned and described in the complaint, the description of which is again set out, subjected to the payment of the judgments mentioned in their complaint, in the order of their priority, and to have said conveyances, and each of them, vacated and set aside as fraudulent. The only objections pointed out in appellants' brief to these conclusions of law are the same as those urged to the sufficiency of the several paragraphs of the complaint. Appellants' counsel say that "a conclusion of law that the plaintiffs, and each of them, are entitled to have the interest of Abner Armstrong and Wesley S. Armstrong in the lands contained in the complaint subjected to the payment of their judgments in the order of their priority, and to have said conveyances set aside, * * * is too much for at least some of the plaintiffs; for, as we have said heretofore in reference to the complaint, plaintiff Dunn is the only one who has a single judgment against the four judgment defendants, and Caroline M. Berry has no claim upon or lien against Abner Armstrong, she having but a single judgment, which is against Wesley and Noah Armstrong. Neither has Alfred Berry any one judgment against Wesley and Abner D. Armstrong. How, then, could the court conclude from the facts found that the plaintiffs, and each of them, were entitled to the sale on their judgments of the lands of both Wesley S. and Abner Armstrong?" It is a sufficient answer to this objection to say that these conclusions of law only authorize the relief prayed for in the complaint; and the relief prayed for in the complaint was not that the lands of one of the alleged fraudulent grantors be subjected to the payment of a judgment or judgments against the other. The conclusion of law is that the lands found to be fraudulently conveyed "be subjected to the payment of the judgments mentioned in the complaint, in the order of their priority."

Under the circumstances, this is a very awkward expression, but it falls very far short of showing that the court intended to conclude, as a matter of law, that lands fraudulently conveyed by one of the defendants should be subjected to the payment of a judgment against another, or that such lands should be subjected to the payment of a judgment to which the owner of the land was a stranger. The language "payment of the judgments mentioned in the complaint in the order of their priority" indicates the direct contrary. It indicates the intention to subject the land to payment of judgments where there was priority of right or lien thereon between the judgments to be paid. There could be no such right or lien of a judgment against land that the judgment defendant never owned and never had an interest in. Besides, the whole record shows that there was no thought of subjecting lands to the payment of a judgment or judgments to which the owner of the land was not a party, and to which he was a stranger.

The appellants' counsel do not place their chief reliance on this point for a reversal. They principally rely on their motion for a new trial, contending that there was no evidence whatever to prove some of the essential facts found in the special finding; and, in support of this contention, they refer to and discuss the evidence at great length. But the evidence is not in the record. There is in the transcript what purports to be a bill of exceptions, incorporating the long-hand manuscript of the evidence and its incidents, but it nowhere appears in the transcript that such bill of exceptions was ever filed in the clerk's office. Under such circumstances, it cannot be considered as a part of the record. *Shulze v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Loy v. Loy*, 90 Ind. 404; *Stewart v. State*, 113 Ind. 505, 16 N. E. 186; *Downey v. Head*, 138 Ind. 503, 33 N. E. 169; *Board v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Guiri v. Gillett*, 124 Ind. 501, 24 N. E. 1036; *Shewalter v. Bergman*, 132 Ind. 556, 27 N. E. 159.

There is no discussion of the alleged error in overruling the appellants' motion for a venire de novo in appellants' brief, and therefore the error, if any, there was committed in said ruling, is waived by the appellants.

There being no available error assigned, the judgment is affirmed.

(13 Ind. App. 296)

CHICAGO & S. E. RY. CO. v. WOODARD.
(Appellate Court of Indiana. Oct. 11, 1895.)

RAILROAD COMPANIES—OBLIGATION TO FENCE—
PLEADING—SUFFICIENCY OF EVIDENCE.

1. A complaint in an action before a justice of the peace is sufficient if it contains enough to apprise the defendant of the nature of the demand, and is such that a judgment thereon will bar another action for the same claim.

2. Where plaintiff testified that he served a notice in writing, of his intention to construct a fence on defendant's right of way, on one of defendant's agents, whose name he did not remember, but who claimed to be defendant's agent at the place of service, and there was no contradictory testimony for defendant, a finding that the notice was served is sufficiently supported.

3. Where plaintiff identified the bill of particulars introduced in evidence as a copy of the itemized statement of the costs to him of the erection of a fence on defendant's right of way served by him "on the company," giving the agent's name, that service was sufficiently shown, in the absence of any proof to the contrary by defendant.

Appeal from circuit court, Clinton county; Samuel H. Doyal, Judge.

Action by Edwin A. Woodard against the Chicago & Southeastern Railway Company to recover for the construction of a fence on defendant's right of way where it abutted on plaintiff's land. There was judgment for plaintiff, from which defendant appeals. Affirmed.

W. R. Crawford and Bayless & Guenther, for appellant. A. J. Shelby, for appellee.

REINHARD, O. J. This action was commenced before a justice of the peace. The appellee sues to recover of the appellant \$113.50, and \$25 attorney's fee, for constructing a fence along the appellant's right of way where it abuts on the appellee's land. Rev. St. 1894, § 5324 (Elliott's Supp. § 1078; Acts 1885, p. 224, § 2). The cause was appealed to the Boone circuit court, where the venue was changed to the court below. In the trial court the appellant demurred to the complaint, which demurrer was overruled, and the appellant excepted. This ruling is assigned as error. A complaint in an action before a justice of the peace is sufficient if it contain sufficient substance to apprise the defendant of the nature of the demand, and is such that a judgment thereon will bar another action for the same claim. *Milhollin v. Fuller*, 1 Ind. App. 58, 27 N. E. 111; *Watson v. Conwell*, 3 Ind. App. 518, 30 N. E. 5; *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23. We have examined the complaint, and think, when it is tested by the rule above stated, it fully answers the necessary requirements. The court did not err in overruling the demurrer.

The only remaining error relied upon is the overruling of the motion for a new trial. It is urged that the evidence is insufficient to support the special finding in several particulars. The statute requires that 30 days' notice in writing of the intention to construct the fence on the part of the landowner shall be served on the nearest freight receiving and shipping agent employed by the company. The court found that this had been done. There was evidence tending to prove this fact. The appellee testified that he served the notice introduced in evidence on the agent more than 30 days before he proceeded to build the fence. On cross-examination he testified, in

substance, that he did not remember the name of the agent he served the notice upon at Lebanon, but that he claimed to be the company's agent at Lebanon. There was no testimony for the company whatever. If the latter or its agent at Lebanon never received any notice such as the appellee testified he served upon him, or if he was not the nearest agent, the appellant should have made proof of this fact or shown some excuse for not doing so. There being some evidence of notice on the agent, and this evidence being entirely unexplained or uncontradicted, we think the court had the undoubted right to draw the inference that the notice was served as claimed.

It is also contended that the finding that the appellee served a copy of an itemized statement of the cost of the work, duly verified, upon the company's agent at the nearest shipping station, is without support from any evidence in the case. The appellant identified the bill of particulars introduced in evidence, and testified that he served such a notice "on the company." He also stated upon cross-examination that the agent's name was Ulla. We think this was prima facie sufficient proof of the service of the itemized statement. If the company never had such service, or if the proper agent was not served, the appellant should have proved such failure to make proper service. We think there was sufficient evidence to authorize a recovery. The statute, being remedial in its nature, is entitled to a liberal construction. *Railway Co. v. Gascho*, 7 Ind. App. 407, 34 N. E. 648. Judgment affirmed.

(13 Ind. App. 308)

MAGNUSON v. STATE ex rel. JARRETT.
(Appellate Court of Indiana. Oct. 11, 1895.)
CRIMINAL LAW—REVIEW ON APPEAL—ARGUMENTS
OF COUNSEL.

1. The supreme court cannot pass upon the weight of evidence or credibility of witnesses.

2. It was harmless error to refuse to permit defendant's counsel to comment upon testimony taken at the preliminary hearing, and offered in evidence, where the testimony was immaterial, and plaintiff's attorney stated that he disclaimed any proof on the subject to which it related.

3. Where plaintiff's counsel commented on the character of defendant, and the court, upon objection, stated that he did not understand that there was any evidence on that question, but told the jury that it was for them to determine whether there was or not, and plaintiff's counsel repeated the remarks, there was reversible error.

4. Rev. St. 1881, § 658 (Rev. St. 1894, § 670), providing that a cause shall not be reversed in which it shall appear that the merits of the case have been fairly tried and determined, does not apply where the court is unable to say whether the jury were or were not influenced by improper remarks of the court and counsel.

Appeal from circuit court, Noble county; Jos. W. Adair, Judge.

Prosecution for bastardy by the state, upon the relation of Eliza Jarrett. The issue was

determined in favor of the relator, and defendant appeals. Reversed.

S. W. Welker, for appellant. H. O. Peterson and Thos. M. Eells, for the State.

ROSS, J. This was a prosecution for bastardy. Upon a trial, appellant was adjudged to be the father of relatrix's child, and a judgment in the sum of \$250, for its maintenance, rendered against him. The only specification of error discussed, of those assigned, calls in question the correctness of the court's ruling in overruling appellant's motion for a new trial. The learned counsel for appellant very earnestly insists that the verdict of the jury is not sustained by sufficient evidence, and, in support of this contention, points out several apparent inconsistencies in the evidence of the relatrix upon questions which are material to a recovery, and without which no recovery could have been had in this case, and, on account of such apparent contradictions, asks this court to disregard her testimony entirely. In other words, we are asked to weigh the evidence, and determine not only upon which side there is a preponderance, but also to determine the credibility to be attached to the testimony of the witnesses. This we cannot do. The rule is so firmly settled that this court cannot weigh the evidence, that we cannot conceive what more can be added to make it better understood. This court, it should be borne in mind, has nothing before it but the record, where all of the evidence comes upon the same footing, and the words of one witness mean just as much as the same words of another witness, when, perhaps, if the witnesses were seen while they testified, their manner noted, their voices heard, and the manner and demeanor while testifying observed, one might be believed, and the other wholly disbelieved. It is for this reason, if no other, that this court has announced and adhered to the rule that when the jury hearing the evidence have determined the truth of the controversy, and the trial court has given their verdict his approval, the judgment will not be reversed, if there is any evidence to support the verdict.

It is next urged that the court erred in refusing to permit counsel for appellant, when making his argument to the jury, to read to them, and discuss, a part of the examination of the relatrix taken on the original hearing before the justice of the peace, and introduced on the trial in the circuit court. Ordinarily, it is the privilege of counsel to discuss before the jury all of the evidence introduced on the trial, and, if the court interferes with such right or privilege, it is such a denial of justice as will warrant a reversal of a judgment rendered against the party whose rights have been thus abridged. In this instance, in view of the evidence in the case, and the statement of counsel for appellee, made on the trial, disclaiming any

proof on the subject to which the question and answers related, and which was an immaterial question, the refusal of the court to permit the reading and discussing of the question and answer referred to was harmless.

The last question discussed relates to the misconduct of counsel for appellee in his closing argument to the jury. It appears that counsel, in his closing argument, in speaking of the appellant, said that he "was a loose-footed fellow, and hasn't a foot of land in this county, and hasn't any habitation." To this statement of counsel the appellant's counsel objected, and requested the court to instruct appellee's "counsel to desist from further statements of a like character," but the court refused to so admonish counsel. The court then stated to counsel that he did not understand that there "was any evidence of the habitation, or that he was loose footed," and then said to the jury: "It will be for you, gentlemen of the jury, to determine whether the character of the witness is bad. Mr. Peterson insists, upon his part, that there is such evidence, but Mr. Welker insists that there is no evidence upon that question. The jury must determine that question for itself." To these statements of the court the appellant also objected and excepted. Counsel for appellee then continued his argument, and was permitted by the court to reiterate what he had previously stated to the jury, as above set out. It is the duty of the trial judge to see that counsel, in argument, do not go outside the evidence and record in the case. And if counsel make statements outside the record, and which there is no evidence to support, on objection from the opposing side the court should at once require a retraction of the statement, and, if necessary, should instruct the jury to disregard such statement. It is not for the jury to determine what evidence is before them,—that is for the court; the duty of the jury being to determine from the evidence what facts have been proven. The original statement of counsel, to which appellant took exception, if corrected by the statement of the court that he did not understand that there was any evidence of appellant's habitation, or that he was loose footed, does not correct the error in permitting counsel to reiterate such statement. By the permission thus granted by the court, counsel impressed upon the jury the importance of the fact that appellant had no permanent abode and was loose footed, and for that reason his testimony was not to be relied upon, and the possibility of his being guilty of the charge preferred against him more probable. If there was no evidence warranting such a statement by counsel, the court should not have permitted it to be made,—much less, after appellant's objection, should the court have permitted counsel to reiterate it. While it is very uncertain that the language used by the prosecuting attor-

ney, in itself, would have been prejudicial, taken in connection with the statement of the court, which was more objectionable than that of counsel; it is evident that the jury must have been prejudiced thereby.

Counsel for appellee call attention to section 658, Rev. St. 1881 (section 670, Rev. St. 1894), which provides that a cause shall not be reversed, in whole or in part, when it shall appear that the merits of the case have been fairly tried and determined in the court below, and insists that the judgment be affirmed. This section of the statute can be made the bulwark behind which the appellate court can often seek shelter to uphold a judgment which on its face, and from the record, appears just and right; but it should never be used for that purpose to uphold a judgment which, from the record, appears to rest upon an unjust or uncertain basis. If this court should say that the jury trying this cause was not influenced by the statement of counsel and the action of the court, we should not hesitate to affirm the judgment; but knowing, as we do, that juries are very often influenced by very trivial matters, we are constrained to give the appellant the benefit of the doubt. The question of misconduct of counsel in the argument of a cause was carefully examined and fully considered in an opinion by Reinhard, C. J., in the case of Newspaper Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(13 Ind. App. 248)

ANDERSON v. BEMENT et al.

(Appellate Court of Indiana. Oct. 9, 1895.)

TRESPASS—GRADING HIGHWAY—PLEADING.

1. An answer, in an action for digging up and carrying away gravel, alleging that defendant was road supervisor, and that the gravel was dug from within the limits of a certain road, and placed on another part of said road, within his road district, for its repair, does not raise the question as to whether defendant had the right to grade off the high places, and deposit the dirt in the low places, on said highway.

2. To justify a road supervisor in removing gravel from a highway, to be deposited in low places on the same highway, the removal must be for the improvement of the highway, and not merely the replacing of the material at the remote point.

Appeal from circuit court, La Porte county; Daniel Noyes, Judge.

Action by James L. Anderson against Ernest Bement and others for wrongfully digging up and carrying away his earth and gravel. A demurrer to the answer was overruled, and plaintiff appeals. Reversed.

Weir & Weir, for appellant. M. Nye, for appellees.

GAVIN, J. The appellant sued appellee for wrongfully digging up and carrying away his earth and gravel. Appellee answered that he was road supervisor, and dug the

gravel from within the limits of a certain road, and further averred that he placed it upon another part of the same road, within his road district, for its repair and improvement. The court overruled appellant's demurrer to the answer. Its sufficiency is the only question for our consideration.

The appellant founds his claims upon the statements of the court in *Turner v. Turnpike Co.*, 71 Ind. 547; while appellee insists that the question is "whether the supervisor had the right to work the highway by grading off the nose, and depositing the dirt in the low places along the line of said highway." The averments of the answer, however, are not sufficient to authorize us to take the question as presented by appellee. There is nothing to show that the gravel and earth removed were taken to improve or change the grade of the highway at the place from whence they were taken. For aught that appears in the pleading, the supervisor simply opened up a gravel pit on appellant's land, within the limits of the highway, and hauled out the material for the repair and improvement of the highway at distant points. It is not, in fact, averred that the highway, at the place from which the gravel was taken, was within appellee's road district. The pleading does not, therefore, make the case presented by counsel's question.

As to the right of municipal authorities to take material from within the limits of a highway at one point, not for, nor as an incident to, the improvement of the highway at that point, but for use upon that or other highways remote from the owner's land, without making compensation therefor, the authorities are at variance. Some distinction is recognized between the rights of the authorities over streets in towns and cities and country highways. *Elliott, Roads & S.* 523. But we are not now concerned with that distinction, as it tends to give to the public greater rights in streets than in country roads. In *Bissell v. Collins*, 28 Mich. 277, the city officials were held authorized to take gravel from below grade on one street, and haul it out to improve another, filling with less valuable material the excavation thus made. In line with this case, *Baxter v. Turnpike Co.*, 22 Vt. 119; *Adams v. Emerson*, 6 Pick. 57; *Huston v. City of Ft. Atkinson*, 56 Wis. 350, 14 N. W. 444; *Denniston v. Clark*, 125 Mass. 216. In the case last cited it is said that highway, turnpike, or railroad officials may, "for the purpose of repairing the same highway, turnpike, or railroad, take earth, gravel, or stones from one part, and deposit them on another," and that all the highways within one municipal jurisdiction are, for such purposes, to be regarded as one. That court expressly refused to follow the statements of law (viewed as dicta) in *City of Delphi v. Evans*, 36 Ind. 90. The holding of this Massachusetts case is also more or less authoritatively sustained by Al-

drich v. Drury, 8 R. I. 554, which involved a railroad right of way only; Chapin v. Railroad Co., 39 N. H. 564, of the same character; and Cole v. Drew, 44 Vt. 49, where the right to the grass was the subject of controversy. City of New Haven v. Sargent, 38 Conn. 50, decides only that the city is entitled to use, to grade one street, soil which must necessarily be removed in grading another street. In Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428, the court of appeals, after reviewing some of these cases, with others from New York, declined to accede to the Michigan doctrine, and declared that the municipality could not remove, for use in other places, the gravel, etc., from within the boundaries of the highway, where this removal was not necessary to, nor intended for, the establishment of the proper grade on that part of the highway. In Ladd v. French (Sup.) 6 N. Y. Supp. 56, we have a case quite similar to the one in hand, decided adversely to appellee. Cotanch v. Grover, 57 Hun. 272, 10 N. Y. Supp. 754, follows the leading New York case. Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2, and Villski v. City of Minneapolis, 40 Minn. 307, 41 N. W. 1050; Mayor, etc., v. Hill, 58 Ga. 595, are to the same effect, while Smith v. City Council of Rome, 19 Ga. 89, seems to go still further.

In Indiana the owner of the lands adjoining a highway is ordinarily the owner of the fee of the highway, subject to the easement of the public. In City of Delphi v. Evans, 36 Ind. 90, it is said: "The common council of a city has the undoubted right to establish the grade of a street, and may cause the same to be excavated at one point, and filled at another; and the earth, gravel, or stone excavated at one point may be used in making a fill at another point in said street. But the real and substantial question in the case under consideration is this: Had the common council the power to order or direct the cutting down of Frank street for the purpose of obtaining dirt or gravel with which to fill up Washington street? We think they possessed no such power." In Turner v. Turnpike Co., 71 Ind. 547, it is decided that although, by a lawful appropriation a public highway had become the property of the turnpike company, for the purpose of maintaining and constructing its road thereon, with a statutory provision authorizing it to take from the land so occupied stone, gravel, etc., for the road's construction, yet, under the law, it could not open a gravel pit in the highway, and haul out the gravel generally upon its road, without compensating the landowner therefor. It is further said that a road supervisor could not rightfully thus interfere with the rights of the owner of the fee. In City of Aurora v. Fox, 78 Ind.

1, it is declared by Elliott, J., after some criticism of City of Delphi v. Evans as to effect of irregularities in the proceedings making the city a trespasser: "The right to the soil of the street remains in the owner of the fee, and the municipal corporation has no right to remove it, unless its removal be necessary for the improvement of the street. The removal of the soil for any other purpose than that of improving the street is an actionable wrong,"—although, "where there is a general plan for the gradation and improvement of highways, intersecting streets and highways in the vicinity of the one improved are to be deemed parts of the same general plan, and soil may be removed from one, and placed upon another." Again, in the same case: "The city, as we have already said, had no right to remove the soil, unless it was necessary for the improvement of the street." It is doubtless true that some, at least, of what was said in the City of Delphi and Turner Cases, may have been mere dicta, and not conclusive statements of the law; but, taking all the cases together, we are of opinion that where a road supervisor digs up gravel or earth from within the limits of a public highway, not for its improvement at that point, nor for the purpose of bringing the highway there to the desired grade, but merely for the purpose of obtaining material for improving the highway at some place remote from the owner's land, the act cannot be regarded as a proper exercise of the municipal power. To justify the supervisor, the removal must be for the improvement of the highway, and not merely the replacing of the material at the remote point. Vide Elliott, Roads & S. 523; 2 Beach, Pub. Corp. § 1145; 2 Dill. Mun. Corp. §§ 687-689. We find nothing in sections 6318, 6330, or 6832, Rev. St. 1894, which gives to the supervisor the power essential to make this answer good. Judgment reversed, with instructions to sustain the demurrer to the second paragraph of answer, with leave to amend if desired.

(13 Ind. App. 699)

ANDERSON v. STEPHENS et al.

(Appellate Court of Indiana. Oct. 10, 1895.)

Appeal from circuit court, La Porte county; Daniel Noyes, Judge.

Action by James L. Anderson against William Stephens and others for wrongfully digging up and carrying away gravel. Defendants had judgment, and plaintiff appeals. Reversed.

Weir & Weir, for appellant. M. Nye, for appellees.

GAVIN, J. The questions involved in this case are similar to those in Anderson v. Beament (decided at this term) 41 N. E. 547. Upon the authority of that case, this is reversed.

(13 Ind. App. 289)

EVANSVILLE & R. RY. CO. v. MALOTT.

(Appellate Court of Indiana. Oct. 10, 1895.)

**INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE
—REVIEW—INSTRUCTIONS.**

1. Where a complaint against a railroad company for personal injury, by the tail gate of a car which he was coupling (through a defect therein) falling on him, alleges that plaintiff, in the line of duty, jumped on the brake beam of an engine, to couple it while chasing such car running down grade, to prevent the car from colliding with one at rest further down the track, in which there were men, and also contains a general averment of freedom from contributory negligence, a demurrer on the ground that the complaint shows contributory negligence on its face is properly overruled.

2. A finding on conflicting evidence will not, on appeal, be disturbed.

3. Requested instructions sufficiently covered by those already given are properly refused.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by Charles G. Malott against the Evansville & Richmond Railway Company for personal injury. From a judgment for plaintiff, defendant appeals. Affirmed.

W. R. Gardiner, C. G. Gardiner, W. R. Gardiner, Jr., and R. N. Palmer, for appellant. Matson & Siles, for appellee.

REINHARD, C. J. Appellee alleges in his complaint that he was a conductor on a freight train on appellant's railroad; that, while engaged in making up a work train in the appellant's yard at Bedford, he was injured by a defective car; that he had been ordered by appellant to make up said train, to take it to Seymour, and had also been ordered to take said car (marked "E. & T. H.," and numbered "3625") into said train; that, before he attempted to take said car from the side track on which it stood, he had placed upon the main track a certain coach, in which the appellant's workmen were to be conveyed, and into which a dozen or more of said workmen had gone to take passage on said train when it was made up; that, after so placing said car, he undertook to take the E. & T. H. car from the side track, and place it in said train, and gave to one Fairchild (an engineer of appellant's road, and who had been ordered by appellant to help make up said train) orders to so place said E. & T. H. car on the main track in said train and next to said coach; and while so engaged, without any fault of said Fairchild or of the appellee or any of his co-employees, the E. & T. H. car was started down a steep grade on the main track toward said coach, and toward the crossing of the appellant's road and the Louisville, New Albany & Chicago Railway, which was situated between where said car started and the said coach; and to avoid a possible collision at such crossing with the engines and cars of the Louisville, New Albany & Chicago Railway, and to avoid a collision between said E. & T. H. car and said coach,

which he avers would have been dangerous to the workmen in said coach, he immediately gave orders to said Fairchild to run his engine after said car, and overtake it; and, for the purpose of securing said car and holding it so that it would not collide with said coach or with said engines and cars, he did go upon the brake beam of the tender of said engine which said Fairchild ran towards said E. & T. H. car, so that he might couple the same to said engine when it was overtaken, and he rode upon said brake beam safely until said car was overtaken, and he had in his hand a coupling pin, ready to couple said car to the engine; but he avers that said E. & T. H. car was out of repair, in this: that the end gate thereof, it being a coal car, was loose and not fastened to said car, so that when the engine struck the car, so as to couple it to the engine and hold and stop it, the jar caused said loose and defective end gate to swing around and strike the appellee with great force and violence, and to crush him between said end gate and the said tender, thus seriously wounding and bruising him about the hip, etc.; that said car was also defective in this: that the brake was broken, so that it could not be stopped except by holding it by some appliance outside of said car; that he did not know of the defective condition of said car, but that appellant did know it; that the injuries happened because of the negligence of appellant in permitting said car to be and remain out of repair, knowing it to be so; and that in all said matters appellee was without any fault or negligence on his part.

The overruling of a demurrer to the complaint is assigned as error. It is insisted by the learned counsel for appellant that the complaint is insufficient, for the reason that upon its face it shows the appellee to have been guilty of contributory negligence. This negligence, the counsel say, is apparent from the conduct of appellee in jumping onto the brake beam, with a coupling pin in one hand, and the other necessarily employed in holding himself on, "thus riding in a chase after the car that he had sent down the grade in the hope of coupling it to the engine while both were under headway, the possibility of the accomplishment of which he does not claim." It must be admitted that the hazard necessarily incurred by the appellee in placing himself in the position described in the complaint was considerable; and if it appeared that he received his injury while in this position, and as a result thereof, there would be much force in counsel's argument that the injury was due in whole or in part to the appellee's own careless conduct, unless, indeed, the fact that a great emergency existed, in which the safety of life and property was involved, and that a sense of duty prompted him to pursue this course, changed the rule. But it does not appear from the complaint that

the appellee's position on the brake beam, or the speed of the engine in approaching the car, in any way contributed to the injury. On the contrary, it is averred that he rode on the break beam safely until the E. & T. H. car was overtaken. For aught that appears, the engine may have been going at a very slow rate of speed, and the appellee may have been walking between it and the car when the coupling was made. We cannot say that he would not have been able to make the coupling in any event, even if the car had been in good repair. We know judicially that coupling cars is a dangerous undertaking at best; and if employes are to be held guilty of contributory negligence because they undertake to discharge this duty under dangerous circumstances, however negligent the employers may have been, we apprehend that there could be few, if any, recoveries in this character of cases of negligence. We think the general averment of freedom from contributory fault is not overcome by the other averments of the complaint. The rule is well settled in this state that, "unless the facts specifically stated clearly show that there was contributory negligence, the general averment will rescue the complaint from its assailant." *Railroad Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446, and authorities cited on page 28, 7 Ind. App., and page 446, 33 N. E. The court did not err in overruling the demurrer to the complaint.

The remaining error assigned calls in question the sufficiency of the evidence to support the verdict. The appellant's counsel contend that it is conclusively shown by the evidence that appellee had knowledge of the defective condition of the E. & T. H. car for some time prior to the accident, and that he was therefore negligent in attempting to make the coupling under the circumstances. That appellee did have information that a car similar to the one by which he was injured had a loose or broken end gate is clearly enough shown; but that he knew it to be this identical car is a proposition he stoutly denied when testifying as a witness. Evidence is not wanting which tends to prove that appellee was, in the line of duty, endeavoring to couple the E. & T. H. car to the locomotive or tender, and that he did not know the condition of this particular car at the critical period; nor is the undisputed evidence such as to force the conclusion that appellee was at fault in not making an examination of the E. & T. H. car before he attempted the coupling. Apparently there was a great emergency, which required the appellee to act promptly in order to avoid a serious collision with the coach containing a number of appellant's workmen, and under such conditions there was no time for examinations. While it must be admitted that the apparent preponderance of the evidence is such as to convict the appellee of gross recklessness in undertaking to accomplish so dangerous a feat, if we view the case from

the appellee's side, and give full credence to his testimony, we cannot say that he was at fault. The court and jury heard both sides of the evidence, and, as they have determined the question of contributory negligence in appellee's favor, we do not feel warranted in disturbing the judgment for this cause.

Objections are made to some of the instructions given, but, when they are all considered together, we think they state the law applicable to the case correctly, and are not such as would tend to mislead the jury. Nor do we think there was any error in refusing instructions requested by appellant, as those given sufficiently covered the ground gone over by those which were denied. Judgment affirmed.

(13 Ind. App. 239)

JOHNSON v. STATE.

(Appellate Court of Indiana. Oct. 10, 1895.)

CRIMINAL LAW—APPEAL—ASSIGNMENTS OF ERROR
—DISORDERLY HOUSE—INDICTMENT FOR
KEEPING.

1. Appellant cannot rely upon error in the overruling of his motion to quash an affidavit, when there is nothing in the record to show that the motion to quash was made.

2. It is not necessary that the affidavit upon which a prosecution for keeping a house of prostitution is based should contain any description of the realty on which the house is situated.

3. An allegation, in the affidavit on which was based a prosecution for keeping a house of prostitution, that it was situated on a certain lot in a certain addition, being surplusage, the variance between it and proof that the house was situated on a lot of the same number in a subdivision of the same name as that given in the addition, but of lots in a different addition, is not fatal.

Appeal from circuit court, Jay county; R. E. McGriff, Judge.

Bell Johnson, prosecuted by affidavit for keeping a house of ill fame, was convicted, and appeals. Affirmed.

Perdien & Williamson, for appellant. W. A. Ketcham, Atty. Gen., and R. H. Hartford, for the State.

LOTZ, J. The appellant was charged with keeping a house of ill fame. The prosecution was by affidavit, instituted before a justice of the peace. The affidavit, omitting the caption and jurat, is in these words: "Samuel Bone swears that Bell Johnson, on the 14th day of June, 1894, and on divers other days prior to that day and the day of filing this affidavit, at said county, did unlawfully keep a certain house of ill fame, to wit, a house situated on lot numbered thirteen (13) in Tucker's addition to the city of Portland, in the county and state aforesaid, then and there resorted to for the purposes of prostitution by Hiram Nute, and others to the affiant unknown."

The first assignment of error is that the trial court erred in overruling appellant's mo-

tion to quash the affidavit. There is nothing in the record to indicate that a motion to quash was made, or that the court below ever ruled on such a motion. No question is presented under this assignment.

The only other error assigned is the overruling of appellant's motion for a new trial. The appellant insists that there is a fatal variance between the charge and the proof, in this: The affidavit alleges that the house which was unlawfully kept was situated on lot 13 in Tucker's addition to the city of Portland, while the proof shows that the house was situated on lot thirteen in Tucker's subdivision of outlots 7, 8, 9, and 10, in D. C. Baker's addition. It is earnestly contended that there is an essential difference between an addition to a city or town and a subdivision of a part of an addition; that it is necessary to describe the realty on which the house was situated specifically, and to prove the description as alleged. The statute (section 2080, Burns' Rev. St. 1894; section 1904, Rev. St. 1881) provides that "whoever keeps a house of ill fame resorted to for the purpose of prostitution or lewdness * * * shall be fined," etc. If it was essential to describe the real estate in the affidavit, it was also essential to prove it substantially as alleged, or there would be a fatal variance, and this rule applies to unnecessary matters of description as well as to necessary matters. That is to say, if some description is necessary, but the pleader goes further, and alleges unnecessary matter of description, then he is required to prove both as alleged. *Ball v. State*, 26 Ind. 155; *Wertz v. State*, 42 Ind. 161; *Dennis v. State*, 91 Ind. 291; *Lewis v. State*, 113 Ind. 59, 14 N. E. 892. But, if no matter of description need be pleaded at all, then, if pleaded, it is surplusage, and need not be proved as alleged, or at all, and there is no variance. In *Hull v. State*, 120 Ind. 153, 22 N. E. 117, this language was used: "Where unnecessary descriptive matter is mingled with matter of essential description, the whole must be proved as laid; but the limit of the doctrine is that if the entire averment, whereof the descriptive matter is a part, is surplusage, it may be rejected, and the descriptive matter falls with it, and need not be proved." 1 Bish. Cr. Proc. § 487. Was it necessary, in the affidavit under consideration, to give any description of the lot or parcel of real estate on which the house was situated? If so, then the description must be proved as alleged, even if the description descend into unnecessary detail. But, if no description was necessary, then that alleged may be treated as surplusage, and no part of it need be proved. There is much confusion in the authorities as to when matters of local description are necessary to be alleged. In the early history of English criminal jurisprudence, the jurors were the witnesses, who lived in the immediate locality of the crime, and were supposed to have knowledge of its

commission. They were summoned as witnesses. In the indictment or charge it was necessary to designate vicinage where the crime was committed, so that the sheriff might know where to look for them. Not only the county, but the immediate locality within the county, was required to be stated in the indictment. But when jurors became triors of facts, and were summoned from the body of the county, it was only necessary to aver that the crime was committed in the county. The general purpose of alleging the venue, now, is to show that the court has jurisdiction of the offense. 1 Bish. Cr. Proc. §§ 362-367, inclusive. But there is a class of cases in which place becomes an element of the offense, and in such cases the minor locality within the county must be alleged. Thus, if an offense can only be committed in some place less than a county, the local description must be alleged; for example, if the offense can only be committed within a city of the county, it must be alleged to have been committed within the corporate limits of the municipality. There is also another class of cases in which it is necessary to allege a local description, as where the judgment of the court must operate upon a particular thing, such as abating a nuisance, or in case of forcible entry and detainer, where restitution is to be awarded (2 Bish. Cr. Proc. § 866), although, perhaps, in this state, even where a nuisance is sought to be abated, the premises need not be specifically described (*Howard v. State*, 6 Ind. 444). The general rule is that an indictment must be sufficiently specific to advise the defendant of what he is required to meet, and to bar another prosecution for the same offense, but it is not essential that it shall be so specific as to bar a future prosecution without the aid of parol proof. The identity of two accusations may be shown by parol. *State v. Smith*, 7 Ind. App. 166, 34 N. E. 127. It may, however, be said that, unless the indictment describes the lot or tract of real estate upon which the house is situated, the defendant may not be apprised of what he is to meet; that he may have kept several such houses in different localities, and thus be misled as to his defense. It is difficult to bring the case at bar within the rule of some of the decided cases. It has been held that an indictment similar to the affidavit under consideration was sufficient which did not contain a description of the lot or parcel of ground. *Betts v. State*, 93 Ind. 375. Neither do the established forms for this offense require a description of the realty on which the lot is situate. Bish. Directions and Forms, § 782; Gillett, Cr. Law, § 709. In view of these authorities, we have reached the conclusion that it was not necessary to give any description of the real estate on which the house was situated, and that such description in the affidavit before us is surplusage, and need not have been proved as alleged, or at all. Judgment affirmed.

(13 Ind. App. 697)

MILHOLLIN et al. v. SHARP et al.

(Appellate Court of Indiana. Oct. 11, 1895.)

SALE—WARRANTY—ACTION FOR BREACH—PLEADING—RELEASE.

1. Where the complaint alleges a sale, the warranty, breach, and consequent damage, a defense that plaintiff had released his claim against defendant is not available under a general denial.

2. Where the complaint in an action to recover for a breach of warranty alleges a sale, the warranty, its breach, and consequent damages, and the only answer is a general denial, defendant cannot complain that by the verdict he was given the benefit of a partial, instead of an entire, release.

Appeal from circuit court, Delaware county; L. J. Monks, Judge pro tem.

Action by William Sharp and others against Nathan Milhollin and others to recover damages for a breach of warranty. There was judgment for plaintiffs, and defendants appeal. Affirmed.

Gregory & Silverberg and W. Cromer, for appellants. W. W. Orr and Warner & Brady, for appellees.

GAVIN, J. Appellees sued appellants to recover damages for a breach of warranty of a stallion sold by appellants to appellees. The complaint alleged a sale, the warranty, the breach, and consequent damage. The only answer was a general denial. The sole question argued relates to the sufficiency of the evidence. By this, although flatly contradicted, appellees proved most directly and explicitly the sale, the warranty, its breach, and damage, thus covering all the material averments of the complaint. Appellants' counsel, however, insist that there is a "failure of proof," a "fatal variance," and an entire departure from the theory of the complaint, because the evidence also develops that appellants had previously purchased the horse under a warranty from Powell Bros., with whom appellees made an arrangement by which Powell Bros. took back a half interest in the horse, and gave appellees a half interest in another horse. By this arrangement, appellants and Powell Bros. claimed, appellees released and satisfied all claims to damages by reason of any breach of warranty, while appellees asserted that this arrangement was made at appellants' suggestion, with the understanding that it should release them from one-half the damages, but that they should remain liable for the other half. The verdict resulted, apparently, in giving appellants the benefit of this release, as to one half, and holding them for the other. We are wholly unable to see any failure of proof, or departure from the theory of the complaint. Appellants seem really to have fared better than the issues authorized. If, in fact, appellees released one-half or all the claim, such release should have been pleaded. It was not strictly available under the general denial, being matter

in confession and avoidance. *Crum v. Yundt* (Ind App.) 40 N. E. 79. An enforcement of strict rules of pleading might well have deprived appellants of that which they did obtain. We are of opinion that they have no cause for complaint. Judgment affirmed.

LOTZ, J., did not participate in the decision of this cause.

(13 Ind. App. 284)

SMITH v. ROSEBOOM.

(Appellate Court of Indiana. Oct. 15, 1895.)

DECEIT—COMPLAINT—HARMLESS ERROR.

1. An allegation, in an action for deceit, that defendant, in exchange for a stock of goods, conveyed to plaintiff certain lots which were not the lots bargained for, does not show that the lots bargained for were not conveyed to plaintiff.

2. An allegation, in an action for deceit, that plaintiff agreed to exchange a stock of goods for certain lots shown to him by defendant, does not show that defendant was bound by the transaction.

3. In an action for fraudulently conveying lots other than those agreed to be conveyed in exchange for other property, an allegation that "plaintiff relied entirely on the representation which was made by defendant, that the lots described in the deed were the lots pointed out," is not a sufficient showing of fraud; nor was it aided by an averment that defendant, "for the purpose of inducing plaintiff to make the exchange," caused the lots to be shown to plaintiff, and represented that they were the property of defendant.

4. Unless it appears that the judgment is founded on a good paragraph of complaint, the error of overruling a demurrer to a bad paragraph is not harmless.

Appeal from circuit court, Clinton county; Samuel H. Doyal, Judge.

Action by Daniel M. Roseboom against John A. Smith. Plaintiff had judgment, and defendant appeals. Reversed.

Palmer & Palmer and John C. Rogers, for appellant. W. R. Moore, for appellee.

REINHARD, C. J. The second paragraph of the appellee's complaint, to which a demurrer was overruled, is as follows, with the caption omitted: "For second and additional paragraph of amended complaint, plaintiff says that heretofore one Nathan E. Mills was the agent of plaintiff and one Simon Folk, to exchange a certain stock of goods and clothing then belonging to plaintiff and said Folk, which was situated in Tipton, Indiana, for real estate and property and money; that said Mills did exchange said stock of goods for certain land in Illinois and certain outlots in the city of Indianapolis, Indiana, to the defendant, John A. Smith; that at the time of making the exchange, and for the purpose of inducing said Mills to make the exchange and trade, defendant, John A. Smith, caused certain lots to be shown to said Mills, which lots were in the city of Indianapolis, Indiana, and represented that they were the property of said defendant;

that, after examining and looking at the said lots, said Mills agreed to exchange said stock of goods to said Smith, and take in, as part payment thereon, the lots so shown as above set out, at the price of three thousand dollars (\$3,000); that said lots shown Mills were of the value of three thousand dollars (\$3,000), and are described as follows, to wit: [here follows the description]; that the stock of goods was transferred to defendant, who received the same, and made his deed to said Folk for the Illinois land, and also made a deed to the following described real estate, to wit: [here follows a description of the lots contained in the deeds]; that said deed was executed to plaintiff, who caused the conveyance to be made to himself and his wife, Nancy J. Roseboom; that said Mills and plaintiff, being wholly ignorant of the location of the said land by description, relied entirely upon the statement of the defendant, and representation which was made by defendant, that the lots described in the deed were the lots pointed out and shown Mills before the said exchange, whereas, in truth and in fact, the land described in the deed does not describe the lots shown Mills, which defendant well knew; that the land so pointed out, and that which plaintiff and said Mills contracted for, is north of the land described in the deed about eight hundred (800) feet, and is of great value, to wit, three thousand dollars (\$3,000), while the lots described in the deed are of little value,—worth not more than two hundred dollars (\$200). Wherefore, plaintiff says he has been damaged in the sum of three thousand dollars (\$3,000), for which amount he prays judgment, and all other proper relief."

The rule that a pleading is construed most strongly against the pleader is not altogether abrogated, even under the Code. A pleading is required to be certain to a common intent. It is true that indefiniteness is generally not a cause for demurrer, unless the uncertainty is so great that by fair inferences the meaning contended for cannot be given it. The rule of intendment is not so liberal when the pleading is demurred to as when objection to it is first raised after verdict. In the latter case the verdict supplies every inference which can be legitimately deduced from all the averments of a complaint, and generally, if there be enough substance to bar another action, and appraising the defendant of the nature of the demand, the complaint will be held sufficient. The action in the present case is for deceit in the exchange of property. The theory is that the appellee and another owned a stock of goods which they desired to exchange for other property, and for which purpose Mills was their agent; that the defendant showed certain real estate to Mills, with a view of inducing him to take it in exchange for the goods; that he made a pretended convey-

ance of said property to the plaintiff, but that it was not the property shown said agent, although the appellant represented that it was; and that appellee, being ignorant of such fact, relied upon the representations made to said Mills that it was the same property. Before the appellee can recover, he must show that he was damaged in some way. He must show that the land contracted for was not conveyed to him as it was agreed that it should be. In the complaint before us there is no averment whatever that the land or lots which appellee says he bargained for were never conveyed to him, and, for aught that is shown, such conveyance may have been made, although not in the same deed with that for the other lots. It is averred that the appellant represented that certain lots pointed out belonged to him. The truth of this representation is not denied, and we must assume that it was true. If the lots were his property, he was in a condition to convey them, and, in the absence of an allegation to the contrary, it must be presumed that he did convey them. Fraud is never presumed, but must be alleged and proved before it can be adjudged to exist.

Moreover, the allegation that Mills agreed to exchange the stock of goods for the lots shown him in no way connects Smith with the transaction. It is not averred that Smith agreed to the exchange, or with whom the appellee agreed. No inference can be drawn from the complaint that the agreement was made with the appellee, for it is nowhere so averred. It is nowhere charged that appellant or his agent made any misrepresentation to the appellee or to Mills. That the appellant represented that the lots described in the deed were the same as those shown the appellee was not a sufficient showing of fraud, unless the representation was made to appellee or Mills, his agent; and if the appellee relied upon a representation not made by the appellant, or upon his authority, he did so at his own peril. That appellee was induced to accept the deed by any statement or representation of appellant is nowhere averred.

The appellee's counsel emphasize the averment that appellee caused the lots to be shown to Mills "for the purpose of inducing said Mills to make the trade and exchange." But this may have been true without the least sinister motive on the part of the appellant, for it is not averred in this connection that appellant represented to Mills that these were the lots he intended to convey to him, but that he owned them. The representation that appellant owned the lots is in no manner connected with the fact that appellant conveyed other lots than those for which appellee contracted. Hence the objection that there is no averment that appellant made any material, untruthful statement or representation, which was intended to induce appellee to make the exchange, is

not answered by saying he represented the lots to be his.

For these reasons, we think the court erred in overruling the demurrer to the second paragraph of the complaint. It does not appear upon which paragraph of the complaint the verdict is predicated. Assuming, without deciding, that the first paragraph of the complaint is sufficient when assailed for the first time by an assignment of error, we cannot say that the overruling of the demurrer to the second paragraph was a harmless error. Unless it clearly appears from the record that the judgment is founded on a good paragraph of complaint, the error of overruling a demurrer to a bad paragraph cannot be regarded as harmless. Elliott, App. Proc. § 637.

A number of other questions are presented, but, as they will not necessarily arise again on a future trial, they need not now be determined. Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the complaint.

(13 Ind. App. 281)

McFADDEN et al. v. LOVITT.

(Appellate Court of Indiana. Oct. 15, 1895.)

ACTION ON APPEAL BOND—EVIDENCE.

In an action on a bond on appeal from a judgment of a justice of the peace, it was not necessary that the evidence show what disposition the judgment debtor had made of his property; it was sufficient to show that at the date of appeal he had sufficient property subject to execution to satisfy the judgment, and that at the determination of the appeal he was insolvent.

Appeal from circuit court, Shelby county; William A. Johnson, Judge.

Action by William Lovitt against James B. McFadden and others on a bond. Plaintiff had judgment, and McFadden appeals. Affirmed.

J. B. McFadden, for appellant. Wray & Campbell, for appellee.

DAVIS, J. On the 1st of June, 1892, appellee recovered judgment before a justice of the peace for work and labor against one Milton Roberts. On the 4th of June said Roberts appealed from said judgment to the Shelby circuit court. The appeal bond, properly conditioned, was executed by appellant as surety. The appeal was dismissed on the 4th of October, 1892. This action was instituted on the bond. It is alleged in the complaint, in substance, that, when said appeal was taken, said Roberts was the owner of sufficient property subject to execution out of which the judgment could have been collected; and that, after the appeal was taken, said Roberts sold and transferred part of his property, and expended and used the proceeds thereof; and that, when the appeal was dismissed, he did not have, and has not had since, any property subject to execution

to satisfy the judgment, or any part thereof. The cause was tried by the court. The facts were found specially. Conclusions of law were stated by the court, on which judgment was rendered against appellant.

The appellant assigns two errors in this court, to wit: (1) That the court erred in its conclusions of law on the facts found; (2) that the court erred in overruling the motion for a new trial.

The court found that, at the date of the rendition of the judgment, said Roberts owned personal property mentioned and described in the finding of the net value of \$700 above incumbrances. Appellee's judgment, including costs, amounted to \$50.79. Roberts was a householder. The court further found that in October, 1892, and up to the time of the institution of this suit, said Roberts was insolvent, and did not have property of the value of \$600. In support of his motion for a new trial, counsel for appellant insists the evidence does not sustain the finding that Roberts was insolvent, and did not have property of the value of \$600, in October. It is conceded that Roberts was solvent on the 4th of June, 1892. The contention is that the presumption that he continued solvent was not overcome by the evidence. Roberts, as well as other witnesses, testified in relation to the property he owned in June and October and the intervening months, and Roberts testified that in October, 1892, he did not own more than \$600 worth of property. This testimony, in connection with the other facts and circumstances appearing in evidence, was sufficient to justify the inference that he owned no property subject to execution in October.

The only argument in support of the assignment that the court erred in its conclusions of law on the facts found is that the finding fails to disclose the facts showing that Roberts, after the appeal, sold and transferred his property, and that he expended, used up, and consumed the proceeds of certain sales. The gist of the averment in appellee's complaint was that Roberts, when the judgment was rendered, owned sufficient property subject to execution to satisfy the judgment, and that, when the appeal was dismissed, he owned no property subject to execution. The finding supports this charge. It is true the finding does not set out what property he had sold or transferred, or what he had done with the proceeds of the sales. The important question was not, however, what he had done with his property. When it was ascertained that he owned property subject to execution sufficient to satisfy the judgment at the time the appeal was taken, the next material question under the issues was whether he owned any such property when the appeal was dismissed. All the appellee was required to do on this question was to show that, when the appeal was dismissed, said Roberts owned no property subject to execution. If Roberts owned, at the

time the appeal was taken, sufficient property subject to execution to satisfy the appellee's judgment, and if the appeal prevented the collection of the judgment by execution, and if, when the appeal was dismissed, Roberts owned no property subject to execution, it requires no argument to show that the measure of appellee's damages which he was entitled to recover in an action on the appeal bond was the amount of his judgment, with interest and costs. So far as our attention has been called to the record, we find no error that would justify a reversal of the judgment of the court below. Judgment affirmed.

(14 Ind. App. 89)

OLDFATHER v. ZENT.¹

(Appellate Court of Indiana. Oct. 15, 1895.)

MALICIOUS PROSECUTION—DAMAGES—NEW TRIAL.

1. Under a general allegation of damage in a complaint for malicious prosecution, evidence of damages resulting from plaintiff's inability, on account of sickness occasioned by such prosecution, to perform a certain contract of employment, is inadmissible.

2. Where plaintiff in an action for malicious prosecution recovers damages for loss of salary under a contract, a new trial should be granted on showing newly-discovered evidence that plaintiff had been paid his salary under such contract.

Appeal from circuit court, Marshall county; A. C. Capron, Judge.

Action by John S. Zent against Samuel W. Oldfather for malicious prosecution. There was a judgment for plaintiff, and from an order denying a new trial, and one sustaining a demurrer to a complaint for a new trial, defendant appeals. Reversed.

H. S. Biggs, J. W. Parks, and W. D. Frazer, for appellant. Royse, Drummond, Widaman & Watkins, for appellee.

LOTZ, J. This cause and cause No. 1,564 have been consolidated by the previous order of this court. This action was instituted by the appellee against the appellant to recover damages for alleged malicious prosecution. The complaint is in two paragraphs. The first alleges that the defendant maliciously, and without probable cause, procured the plaintiff to be arrested and prosecuted upon a charge of obtaining money under false pretenses from the defendant; that the plaintiff was tried, and final judgment of acquittal rendered. It is further averred that "the plaintiff was put to great expense in the employment of counsel, in the sum of fifty dollars, and at an expense of himself in the sum of two hundred dollars, and his loss of time in the sum of two hundred dollars; and he says that he was put to great trouble and annoyance in procuring bail; and he says that he was greatly injured in his business and reputation, in the sum of twenty-five thousand dollars; and therefore he asks judgment for twenty-six thousand dollars, and all other proper relief in the premises." The second

paragraph is similar to the first, although more general in its averments. The prayer for damages is in these words: "And plaintiff was put to great trouble and expense, and was damaged in the sum of twenty-five thousand dollars. Therefore, he asks judgment for twenty-five thousand dollars, and for all proper relief in the premises." The cause was put at issue by the general denial, and the jury returned a special verdict assessing the plaintiff's damages in the sum of \$1,750. Appellant's motion for a new trial was overruled, and judgment rendered in favor of the appellee. Subsequent to the term of court at which the judgment was rendered, the appellant filed his complaint for a new trial, on account of newly-discovered evidence, which came to his knowledge after the close of the term. A demurrer was sustained to this complaint. The overruling of the motion for a new trial, and the sustaining of the demurrer to the complaint for a new trial, are the only assignments of error discussed by appellant's counsel.

Upon the trial of the cause the appellee gave evidence, over appellant's objection, to the effect that he had a special contract with an insurance company, by which he was receiving \$300 per month for his services, and that by reason of the prosecution he became ill, and was unable to attend to his business for the period of four months, and he was compelled to forfeit his earnings for that period. The jury, in its special verdict, made the following finding: "We find that, in order to make a proper defense of himself to the indictment instituted against him by the said Oldfather in the Kosciusko circuit court, he was compelled to and did pay, in attorney's fees, witness fees, and loss of time, the sum of one hundred and fifty dollars, and that, as a result of such arrest and prosecution so instituted against him, he became sick and unable to attend to business for a period of three months, and that he was receiving at that time, and would have received had he been able to attend to business, the sum of three hundred dollars per month; and we find that he was annoyed, distressed, and humiliated and put to shame, by such arrest and prosecution." The admission of the evidence relating to the ill health produced by the arrest and prosecution was made one of the causes for a new trial. It is clear from the finding that this evidence affected the verdict of the jury. Was this testimony admissible under the allegations of the pleadings? All damages which may be recovered in an action at law must be such as are the proximate consequences of the injury complained of. It is true that in some instances the law permits a recovery for such damages as are physically secondary or consequential of the controlling cause or injury, but even in such cases the damages must be the proximate result. Damages are either general or special. General damages are such as the law implies or presumes to flow from the in-

¹ Rehearing denied.

jury or wrong done. Special damages are such as really took place, although not implied by law. They are such as are usually superadded to general damages. Whenever the damages naturally flow from the act done, or, in other words, when they are implied by law, it is sufficient to allege them generally, for it is unnecessary to plead presumptions of law, or aver them as facts. But, when the law does not necessarily imply that the plaintiff sustained damages by the act complained of, it is essential to the validity of the pleading that the resulting damages should be shown with particularity. Mr. Chitty, in his work on Pleading (page 370), says: "And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it." See, also, Sedg. Dam. §§ 1261, 1265; *Lindly v. Dempse*, 45 Ind. 246. In an action of trespass for killing a mare, it was held that damages for nursing and feeding two colts which the mare had been suckling, and for care and attention to the mare's wound, were not recoverable under a general allegation (*Teagarden v. Hetfield*, 11 Ind. 522), although, as to the care and treatment of the wound, perhaps a different rule prevails now (*Railroad Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39). In an action for breach of a marriage contract, seduction is a proper matter in aggravation of damages, but no such damages can be recovered unless specially pleaded. *Cates v. McKinney*, 48 Ind. 562. It has also been held, in an action for breach of a marriage promise, that the loss of the plaintiff's health is not the direct, natural, and necessary consequence of a breach of the contract, and that proof thereof is inadmissible unless such damages are claimed in the complaint. *Bedell v. Powell*, 13 Barb. 183. So, in an action against a tenant for holding over, where the complaint only claimed general damages for the detention of the premises, it was held that this only included the rents for the use and occupancy, and did not include waste, such as breaking window lights, currant bushes broken down, grapevines dug up and carried away, and fences torn down, and it was not error to exclude such evidence, in the absence of an averment covering these items. *Rothschild v. Williamson*, 83 Ind. 387. For the loss of business, in the sense of loss of time, no specific allegation is necessary; but for a loss caused to a particular business, or in refer-

ence to a particular contract, a special averment is necessary. Sedg. Dam. § 1269. Here the evidence showed that the plaintiff had a contract with an insurance company, by which he was guaranteed \$300 per month; but the complaint did not disclose this fact, and the defendant could not be expected to meet it, in the absence of an averment. There are also instances in which the complaint alleges facts from which special damages must necessarily result. In such cases evidence is admissible in regard to such special damages, although no specific amount is claimed, *eo nomine*, on that account. Bodily pain and suffering, mental anguish and humiliation, may be mentioned as examples. *Hutts v. Shoaf*, 88 Ind. 395. But in the case at bar it did not necessarily and naturally follow that, because the plaintiff was arrested and prosecuted upon a charge of false pretenses, he would become ill, and thereby lose time from his business. There was nothing in the complaint to apprise the defendant of such fact. Nor was there any averment to apprise the defendant that the plaintiff had a special contract with an insurance company, which he was compelled to surrender on account of the prosecution. It would be manifestly unfair to the defendant to require him to meet such evidence, when it was not within the issues. It was error to admit it.

The court may, in some instances, order a remittitur of a part of the judgment, when the proof or finding shows that a part of it was erroneous, and that the evidence relating thereto did not otherwise affect the amount of the recovery. But in this case, if the arrest and prosecution so humiliated and distressed the appellee that he became ill, the court has no means of knowing how much this fact affected the jury in fixing the amount of recovery on account of the humiliation and distress. Its natural effect would be to increase it.

The complaint for a new trial, after the formal averments, alleges, in substance, that the appellant had discovered that he could prove by a witness that the appellee did not lose three months' pay on account of ill health, but, on the contrary, the insurance company for which he was working paid him the amount agreed upon for that period. The evidence relating to ill health and loss of time was improper, under the pleadings. The appellant was surprised, and not prepared to meet it. His complaint shows diligence, and states a good cause of action, and the demurrer should have been overruled. The cause is reversed, with instructions to sustain appellant's motion for a new trial. Judgment for all costs of both appeals against the appellee.

(157 Ill. 369)

PEOPLE ex rel. GORE, Auditor of Public Accounts, v. PEORIA MERCANTILE LIBRARY ASS'N.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

TAXATION—EXEMPTION—LIBRARY.

A building belonging to an incorporated library association, partly used for a library, and partly leased for business purposes, is subject to taxation, not being expressly exempted by statute.

Application by the people, on the relation of David Gore, auditor of public accounts, for an order to set aside and reverse the decision of the board of supervisors of Peoria county exempting from taxation the property of the Peoria Mercantile Library Association. Application granted.

M. T. Moloney, Atty. Gen. (T. J. Scofield and M. L. Newell, of counsel), for relator.

WILKIN, J. This is a proceeding under the third clause of section 97 of the revenue act (2 Starr & C. Ann. St. p. 2057). The assessor of Peoria township, for the year 1894, listed and assessed as the property of the Peoria Mercantile Library Association 54 feet on Jefferson avenue by 170 feet on Main street, being a part of lot 10 in block 13, original town of Peoria, at the sum of \$12,700. At the April meeting, 1894, of the board of supervisors of the county, the library association presented the following petition: "The undersigned respectfully petition your honorable body to exempt and strike off from the list of taxable property the lot and building known as [describing the property]. Said building in fact belongs to, and all its income of whatever kind is now, and for many years has been, and is, used exclusively for, a free public library, and, under the second clause of section 2 of the chapter entitled 'Revenue,' is by the statute made exempt from taxation." Upon the 14th day of July, 1894, the petition coming before the committee on equalization, it was favorably reported by that body, with the recommendation that the prayer be granted, and on the same day the board adopted its report. The county clerk having made out and forwarded to the auditor a statement of all the facts in the case, he, having decided that the property in question was subject to taxation, files in this court a statement of the facts certified to him by the clerk, with his objections to the decision of the board of supervisors. The reason stated for his decision is that the statement of facts submitted shows that the library association does not use the property for maintaining a public library, but rents the same to various parties for profit.

The Peoria Mercantile Library Association was incorporated February 15, 1865, under a special act of the legislature; its object be-

ing, as stated in the charter, to establish and maintain a public library, merchants' exchange, and reading rooms. See 2 Priv. Laws 1865, p. 18. Prior to the year 1894 it erected a large and expensive building on the ground assessed, and for several years thereafter maintained in the same, and circulated under its rules and regulations, among its patrons, a large library. On March 1, 1892, it disposed of this library to the Peoria Public Library; and from and after that date the Peoria Mercantile Library Association has not owned or operated any library, but has leased quarters in its said building to said Peoria Public Library, and the rents and revenues derived from the property have been used in liquidating an incumbrance placed upon the same for the purpose of erecting the main building, for operating expenses of the building, and repairs thereon. These facts are fully established by the statement of the county clerk, and are in no way controverted. That they fully sustain the auditor's decision is impliedly conceded by the failure of the library association to file any argument against it.

By section 1 of the revenue act, all real and personal property in this state is liable to assessment and taxes, except such as is expressly exempted by section 2. This latter section contains 10 clauses, each naming classes of property as exempt. The property in question falls within none of those clauses, nor is it possible, by any construction, however strained, to bring it within any of them; whereas the rule is that laws exempting property from taxation are always to be strictly construed. The decision of the auditor was clearly right, and it will be affirmed. Affirmed.

(157 Ill. 403)

PEOPLE ex rel. GORE, Auditor of Public Accounts, v. YOUNG MEN'S CHRISTIAN ASS'N OF PEORIA.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

TAXATION—EXEMPTION—Y. M. C. A.

A building belonging to a Young Men's Christian Association, and used partly for the purposes of the association, and partly rented for business purposes, is not exempt from taxation under Rev. St. 1893, c. 120, § 2, cl. 2, exempting from taxation "all church property actually and exclusively used for public worship."

Application by the people, on the relation of David Gore, auditor of public accounts, for an order to set aside and reverse the decision of the board of supervisors of Peoria county exempting from taxation the property of the Young Men's Christian Association of Peoria. Application granted.

M. T. Moloney, Atty. Gen. (T. J. Scofield and M. L. Newell, of counsel), for relator.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

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WILKIN, J. This case is certified to us by the auditor of public accounts, under clause 3, § 97, of the revenue act. The question for decision is whether or not certain property belonging to the Young Men's Christian Association of Peoria is liable to taxation. The local assessor assessed it at \$13,000. The board of supervisors of the county held it exempt, and ordered the assessment stricken out. The county clerk forwarded a statement of all the facts to the auditor, who reversed the decision of the county board, and sends the record here, with the reason for his decision, which is: "The statement of facts submitted shows that the property is not used for purely charitable and educational purposes, neither is it used exclusively for public worship. On the contrary, a large part of the building is rented to various tenants, and a considerable yearly income derived therefrom. It is therefore used for profit, and is not, in the opinion of the auditor, exempt from taxes." No brief or argument is filed on behalf of the owner of the property. The material facts are: The Young Men's Christian Association of Peoria was incorporated under the statute of this state December 16, 1882, its stated object being "the improvement of the spiritual, mental, social, and physical condition of young men." Thereafter it purchased the lot assessed, and erected a "substantial and expensive five-story brick and stone building, covering the entire lot." The statement of facts certified by the county clerk further shows that the rear one-third of the building is, and has been since its erection, used exclusively for the purposes of said association, and consists of an auditorium room for the purpose of holding religious and other meetings, and other rooms, used for a gymnasium, reading rooms, bath rooms, etc.; that the association also uses for its own purposes, for parlors, sitting rooms, or reading rooms, the greater portion of the front two-thirds of the second story of the building. The remainder, not occupied and used by the association itself, it rents to divers tenants, at an aggregate rental of about \$11,000 per year. Among such tenants are a bank, a title-guaranty and abstract company, a number of lawyers, dentists, doctors, and insurance agents.

As we said at this term in *People v. Peoria Mercantile Library Ass'n*, 41 N. E. 557, this property must be held liable to assessment and taxation under section 1 of the revenue act, unless exempt by some provision found in the following section: (2) Here, as there, no one of the 10 clauses in section 2 is pointed out as exempting this class of property, nor can any such be found. If it be said it is in the nature of church property, and falls within the terms of the second clause,² the answer is, it was not exclusively used for public worship. Laws exempting property from taxa-

tion are not to be extended by construction, but must be strictly construed. *Cooley, Tax'n* (2d Ed.) 205; *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845; *In re Swigert*, 119 Ill. 87, 6 N. E. 469, and cases there cited. As this case is presented, it is unnecessary to decide whether or not property used exclusively in carrying out the object and purpose of this Young Men's Christian Association, as stated in its charter, would be liable to taxation. Certainly, because a part of a building may be so used, the whole does not become exempt. We entertain no doubt as to the correctness of the decision of the auditor, and it is affirmed. Affirmed.

(157 Ill. 350)

JOHNSON et al. v. MCGREGOR.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

APPEAL — JURISDICTION — HUSBAND AND WIFE — WITNESS—GAMING—INSTRUCTIONS—DEMAND.

1. Under Rev. St. 1893, c. 37, § 25, which limits the right of appeal from the appellate to the supreme court, in actions *ex contractu*, to cases in which the amount involved is over \$1,000, and declares that the term "*ex contractu*" shall not be construed to include actions involving a penalty, an appeal lies to the supreme court in an action to recover three times the amount won at gambling, regardless of the amount involved.

2. Under Rev. St. 1893, c. 51, § 5, which permits a husband to testify for his wife in an action in which the wife would, if unmarried, be a party, a husband may testify for his wife, in an action brought by her to recover three times the amount lost by him at gambling, since Rev. St. 1893, c. 38, § 132, allows such an action to be brought by any person.

3. Under Rev. St. 1893, c. 38, § 132, which allows the recovery, by suit, of treble the value of any money or valuable thing lost by gambling "at any time or sitting," an instruction that if, during the period covered by all the games, the money won by the alleged losing party equaled or exceeded his losses, there can be no recovery, may properly be modified by substituting the words "on such occasions" for the words "during the period covered by such gambling," since each time or sitting is a complete and separate subject for the prescribed penalty.

4. An instruction that such suit is not brought to determine the losses sustained by the defendant, and that he cannot recover such losses therein, is not misleading.

5. No demand being expressly required by said section, demand is not a prerequisite to suit for such penalty.

Appeal from appellate court, Third district.

Action on the case by Emma L. McGregor against Willis Johnson, Jr., and A. B. Barreau. Plaintiff obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 530. Defendants appeal. Affirmed.

Crea & Ewing, for appellants. W. G. Cochran and Mills Bros., for appellee.

BAKER, J. This is a special action on the case, in which appellee recovered judgment against appellants, in the circuit court of Macon county, for \$690. That judgment was

² That clause exempts from taxation "all church property actually and exclusively used for public worship."

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

affirmed by the appellate court for the Third district. The action was brought to recover treble the amount claimed to have been lost by appellee's husband, H. B. McGregor, to appellants, in certain games of chance, and was based upon section 132 of the Criminal Code, which provides that money or other valuable thing so lost "at any time or sitting," amounting in the whole to the sum of \$10, may be recovered by the loser from the winner, and, in case the loser shall not sue within six months, it shall be lawful for any person to sue, and recover treble the value thereof, one-half to the use of the county, and the other to the person suing.

Upon the bringing of the cause here, appellee moved to dismiss the appeal on the ground that no appeal lies to this court, for the reason that the action is a case sounding in damages, and the judgment of the circuit court was for an amount less than \$1,000, exclusive of costs, and was affirmed by the appellate court. The motion was reserved till the final hearing of the cause. We deem it unnecessary to enter into a discussion of the statute regulating the right of appeal from the appellate court to this court. Section 8 of the appellate court act designates in what cases the judgment of the appellate court shall be final and conclusive, and in what cases an appeal shall lie therefrom to this court. This suit is a special action under the statute, for the recovery of a penalty, i. e. three times the amount of certain moneys lost at gaming; and said section 8 allows, in such a case, an appeal from the appellate court to this court, without regard to the amount sought to be recovered, or of the judgment of the court below. *Umlauf v. Umlauf*, 108 Ill. 651. The motion to dismiss is overruled.

Appellants contend that the trial court erred in permitting the husband of appellee to testify as a witness in her behalf. Section 5 of chapter 51, Rev. St., provides that where the wife would, if unmarried, be plaintiff or defendant, and where the litigation shall be concerning her separate property, the husband may testify in her behalf. Appellee's right of action is not one resulting from marriage; for, if unmarried, she might have maintained this suit, inasmuch as the statute permits any person who will to sue after the lapse of six months, the loser himself not having sued within that period. When the loser (her husband) did not sue within six months to recover the amount lost by him, and appellee, after the expiration of that period, sued to recover the penalty, the right to the penalty became her personal and separate property, and the amount recovered she may hold free from his interference. We are satisfied, therefore, that the husband of appellee was a competent witness, and that there was no error in permitting him to testify. *Smith v. Long*, 106 Ill. 485; *Railroad Co. v. Dunn*, 52 Ill. 260.

Appellants contend, in the next place, that

the trial court erred in modifying certain instructions offered in their behalf. Said instructions, as asked, told the jury that if, during the period covered by all the games in which appellee's husband engaged with appellants, the money won by the former equaled or exceeded his losses, then appellee could not recover. But the court modified the instructions by substituting the words "on the same occasion," and "on such occasions," for the words "during the same period," and "during the period covered by such gambling"; thus limiting appellee to the recovery of the loss at any time or sitting, but not to the net loss of the whole period before the suit was brought. The court, in making such modifications, committed no error. The statute is so clear and explicit on this point that there is no room for any doubt as to its meaning. It expressly says "at any time or sitting," in referring to the money lost at gaming for which the right of recovery is given, thereby making each "time" or "sitting" a complete and separate subject for the penalty thereafter prescribed. As said in the opinion of the appellate court, "the statute was designed to punish and discourage gambling, by making it unprofitable to the winner."

The first instruction given for appellee was as follows: "The court instructs the jury that this suit was not brought to determine the losses sustained by the defendants to the witness McGregor, in gaming at their house, nor have the defendants any right to recover any such losses in this action." Objection is made to it by appellants on the ground that it is at variance with the modified instructions given for them, and that the language of the second clause is misleading. The instruction did not state an incorrect proposition of law; and although not, perhaps, entirely appropriate, still, when read in connection with the other instructions, we do not see how it could have misled the jury. Both McGregor and appellants could not have lost at any one "time or sitting," and this suit is based upon the losses of McGregor on such an occasion. Moreover, had it been proven on the trial that appellants, and not McGregor, were the losers, they could not recover any such losses in this action, for McGregor is not a party to the suit.

Appellants claim, finally, that the trial court erred in overruling their motion in arrest of judgment. The ground upon which the motion was made was that the declaration did not allege a demand. Independent of the statute, appellee would have no right of action, for it exists by virtue of the statute only. The statute creating the right names the conditions upon which it is based, and points out the manner in which suit shall be brought, but is silent on the subject of a demand. It is to be assumed, therefore, that the legislature intended that a demand should not be necessary. And especially should it be so held when such a construction

is not unreasonable, or inconsistent with the object the legislature manifestly had in view in enacting the statute. The motion, then, was properly overruled. The judgment of the appellate court will be affirmed. Affirmed.

(157 Ill. 379)

HENDERSON et al. v. DAVISSON.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

ACTION ON NOTE—INDORSEMENT—PLEDGE.

The indorsee of a note, who again indorses it as collateral, but who obtains possession of it again from the second indorsee for the purpose of suit, may sue thereon in his own name, notwithstanding the second indorsement. 57 Ill. App. 17, affirmed.

Appeal from appellate court, Third district.

Assumpsit by H. D. Davisson against Harry M. Henderson and Frank R. Henderson. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 17. Defendants appeal. Affirmed.

The note in controversy, for \$1,435, executed by appellants to one J. C. Phillips, as payee, was sold and indorsed by Phillips to appellee. Appellee afterwards borrowed \$400 from the People's Bank, and pledged the Henderson note as collateral, by indorsing his name on the note, and delivering possession of it to the People's Bank. On April 12, 1894, the Hendersons refusing to pay their note, then past due, Mr. Davisson, appellee, called with his attorney, Mr. Lillard, at the People's Bank, and procured possession of this note against appellants, so he could sue upon it in his own name, and, by judgment and execution, compel its payment by appellants. Defendants in the court below objected to the introduction of the note on the ground that the legal title to the note was in the People's Bank, and they made the point that the bank alone could bring the suit; but the court overruled the defendants' objections, and finally rendered judgment for the plaintiff for \$1,583.87. There were no disputed questions of fact, the controversy being solely on questions of law. The trial was had before the court without a jury. The defendants submitted the following propositions of law to be passed on by the court, and asked the court to hold the same, which were refused: "First. The legal title to a note indorsed as collateral security is in the party holding such note as collateral. Second. The legal title to the note in suit, as shown by the testimony, is in the People's Bank, and not in the plaintiff, and no recovery can be had thereon by the plaintiff

in this suit. Third. The note in suit was indorsed by plaintiff to the People's Bank for collateral security. Fourth. The mere loaning of the note (to bring suit thereon) by the bank to the plaintiff did not reinvest the plaintiff to the legal title, so that suit could be maintained in his own name, the evidence showing the bank still held the note as collateral." The refusal was assigned as error. On appeal to the appellate court of the Third district, the judgment was affirmed.

John E. Pollock, Neville & Lindley, and E. M. Prince, for appellants. Lillard & Williams, for appellee.

PHILLIPS, J. (after stating the facts). The note having matured, and suit instituted thereon, if a judgment is rendered no subsequent holder could thereafter maintain a recovery on the same. Middleton v. Griffith (N. J. Err. & App.) 31 Atl. 405. It is a matter with which the defendant has no concern, as to the rights between the plaintiff and another in the beneficial interest in the judgment, unless his defense is set-off, payment, etc. Parks v. Brown, 16 Ill. 454. Possession of the note is prima facie evidence of ownership, and a payee or indorsee in possession may recover notwithstanding an indorsement of his name on the back thereof. Gillham v. Bank, 2 Scam. 245; Laffin v. Sherman, 28 Ill. 391; Palmer v. Gardiner, 77 Ill. 143; Best v. Bank, 76 Ill. 608. Notwithstanding the indorsement, the plaintiff, when the note again comes to his possession, may disregard the indorsement or strike it out. Its existence does not defeat a recovery. Parks v. Brown, 16 Ill. 454; Richards v. Darst, 51 Ill. 140; Humphreyville v. Culver, 73 Ill. 485; Palmer v. Gardiner, supra; Best v. Bank, supra. The purpose for which the note was delivered to the plaintiff, with the manner of the indorsements, was sufficient to authorize suit in the plaintiff's name. The first proposition stated an abstract proposition of law, and the third proposition stated a fact shown by the evidence; but, whether read separately or together, both ignore the fact of the return of the note to the plaintiff, and possession, etc. The second and fourth propositions have the same vice. It was not error to refuse those propositions. The note was admissible in evidence, and it was not error to enter judgment thereon. Nor was it error in the appellate court to affirm that judgment. A motion is entered in this court to affirm the judgment, and assess 10 per cent. damages, because the appeal is alleged to be taken for delay. That motion cannot be sustained, under the questions presented on this record. Questions of law are here presented. The judgment is affirmed. Affirmed.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

(147 N. Y. 208)

RIENDEAU v. BULLOCK et al.

(Court of Appeals of New York. Oct. 22, 1895.)

SALE—RESCISSION BY SELLER—WHAT CONSTITUTES
—ACTION FOR BREACH—EVIDENCE—
DEMURRAGE.

1. A contract provided for the sale by plaintiff to defendants of "all" his ice then in storehouses on a canal, to be delivered on canal boats during June and July. Afterwards, on defendants agreeing to pay 25 cents more per ton, the time was extended so they could take it during August. The first boat for ice arrived August 27th, and five others arrived during the month. The last boat was loaded early in September, when 805 tons remained, which defendants never took. August 27th plaintiff wrote defendants he would charge only 25 cents extra on ice taken after September 10th, and to "please let me know if you accept this offer." They replied August 29th, refusing to pay the advance, and telling him to sell elsewhere. September 7th, in reply to telegram, plaintiff told them he would call the ice so far loaded at the August figures, and the balance at 25 cents extra. *Held*, that there was no waiver by plaintiff of the conditions of the contract. 20 N. Y. Supp. 976, reversed.

2. The contract required the seller of ice to load each boat within 24 hours after arrival, or pay \$10 per day on each boat after the 24 hours expired. The purchasers understood that but one boat could be loaded at a time. They hired and sent the boats to get the ice, and the masters demanded no demurrage. *Held*, that the purchasers were not entitled to demurrage for boats not loaded within 24 hours after arrival.

3. In an action on a contract by the seller of ice against the purchasers for failure to take all the ice sold, it was proper to admit evidence showing the location of the ice houses on the canal, and the depth of the water; that but one boat could be loaded at a time; that this was understood by defendants; and that the ice became worthless after defendants refused to take it.

Appeal from supreme court, general term, Third department.

Action by Homedass R. Riendeau against Roselle Bullock and others to recover damages for breach of contract for the sale of ice by plaintiff to defendants. From a judgment of the general term (20 N. Y. Supp. 976) reversing a judgment for plaintiff entered on the report of a referee, plaintiff appeals. Reversed.

G. H. Beckwith, for appellant. R. Corbin and W. H. Dunn, for respondents.

HAIGHT, J. This action was brought to recover damages for the breach of a contract for the sale and delivery of a quantity of ice. On the 31st day of May, 1890, the plaintiff entered into a contract in writing with the defendants, in and by which he agreed to sell, and they agreed to take, all the ice in his storehouses on Chambly canal, to be delivered f. o. b. on canal boats at such storehouses, at \$2.75 per ton for all delivered during the month of June, 1890, and \$3 per ton for all delivered during the month of July, 1890; the weight to be determined by the weighlock weight at Waterford. It was also agreed that plaintiff would load all the boats within 24 hours after their arrival at the storehouses, and in case of failure would

pay \$10 per day on each boat after the expiration of 24 hours. The ice was to be good, sound, clear, and merchantable. On the 21st day of July, 1890, the above-mentioned agreement was modified by the parties so as to extend the time during which the defendants were to take the ice through the month of August, they agreeing to pay 25 cents per ton in addition to the July price for all of the ice taken during the month of August. The first boat that the defendants sent for the ice arrived at the plaintiff's storehouses on the evening of the 27th day of August, and during the remaining days of August five other boats arrived, making six in all, which were loaded by the plaintiff with ice during the remaining days of August and the early part of September. No other boats were sent by the defendants for the remaining ice, they refusing to take more. It was for this breach of the contract that this action was brought. The referee has found that there remained in the ice houses 805½ tons of good, sound, clear, and merchantable ice, which became a total loss to the plaintiff, and that he was entitled to recover the contract price for August therefor, together with the amount due and unpaid upon the ice taken by the defendants, and ordered judgment for the amount thereof.

The order of the general term reversing the judgment does not state the grounds upon which its decision was made. We must assume, therefore, that the reversal was upon the law, and not the facts. Code Civ. Proc. § 1338. We are thus limited to a review of the exceptions taken to the admission of the evidence and to the conclusions of law.

Upon the trial, evidence was given on behalf of the plaintiff tending to show the location of his ice houses upon the canal, the depth of the water, the place where the ice was to be taken; that but one boat could be loaded at a time; that this was talked over and understood by the defendants; and that the ice became valueless after defendants refused to take it. Exceptions were taken to the admission of this evidence, but it was so clearly competent that further discussion is unnecessary. The evidence as to the expenses of the plaintiff in caring for the ice after the defendants refused to take it, and the expenses incurred by him in a fruitless effort to sell and dispose of that which remained, becomes unimportant, for the reason that the referee did not allow any such expenses in the judgment awarded by him. But one exception was taken to the conclusions of law as found, and that was as to the amount the plaintiff was entitled to recover. Inasmuch as this conclusion follows and is in accordance with the finding of fact upon the subject, the exception is of no avail.

We are thus brought to the consideration of the real question in the case, and that is, was there a waiver by the plaintiff of the conditions of the contract? Requests to so find were made by the defendants, and refused

by the referee. The facts bearing upon this question are undisputed, and they are, in substance, as follows: On the 27th of August the plaintiff wrote to the defendants that: "The ice was to be all taken before 1 Sept. I have had a great loss in keeping it over to try and meet you, so my intention is, if you take it all by the beginning of Sept., say in the first ten days, to make only twenty-five cent extra on whatever be taken after this month and up to 10th Sept. Please let me know if you accept this offer." On the 29th of August the defendants replied, saying: "The market will not stand it. We cannot get our money back as it is, and, rather than pay an advance, would prefer, after you load the boats we put in this month, that you sell it elsewhere." On September 4th they wired the plaintiff, asking the number of tons he still had, and whether he intended to load any more boats at the August prices; to which the plaintiff answered that he expected to have in all about 16 boat loads. On September the 6th the plaintiff was asked to answer that part of the defendants' telegram relating to price, and on the 7th he answered that he would call the four boats loaded at August figures, and the balance at 25 cents extra, provided the defendants would keep sending on the boats. On the 8th they replied: "All right. You need not load any more boats for us, as we cannot pay the advance," to which the plaintiff on the same day replied: "To meet you friendly, will load balance of ice at August price, provided you take it by the 20th inst."; to which they replied: "Telegram received, but too late." In considering these facts we must not overlook the situation of the parties, or the events that had already transpired. For the purposes of the case we shall assume, as the respondents contend, that the contract was executory. It pertained to the sale of ice by the ton, which it appears would melt and diminish during the summer months. This fact is recognized by the parties in the contract by providing a higher rate for each month as the season progresses. It is quite evident, therefore, that it was the intention of the parties that time should be of the essence of the contract. Once the contract had been changed by extending the time upon the consideration of 25 cents advance. June, July, and a part of August had passed, and the defendants had not taken a pound of ice. The plaintiff was still holding the ice under the contract, waiting for the defendants to take it, although it was daily shrinking away. He finally became uneasy. This is apparent from his letter of the 18th of August, in which he asks the defendants to see about sending boats at once to load "their ice, for time was getting short." Again he wires them, asking if boats were coming, and thus the time passes until the 27th of August, and not a boat appears to be loaded. It was under these circumstances that the letter of that date was writ-

ten. Three days then remained in which the defendants were to take the ice. He knew that it was not possible to load all of the ice within that time. The defendants had received one extension of time, and he offered them another. The letter contained no refusal to perform on his part, and related only to the ice that was not taken during the month of August. As to that which was left he proposed a charge of 25 cents extra. It was but an offer, a proposal, as we understand it, to continue and amend the existing contract, and nothing more. It was evidently so understood by the defendants, as is apparent from their reply. The same is equally true with reference to the plaintiff's dispatch of September 7th. It was a mere offer or proposal in reference to renewing the contract. He refused nothing; he waived nothing. The defendants were then in default. The time within which they had agreed to take the ice had expired. They were then liable for the damages which the plaintiff had sustained. His offer to renew the contract, or to continue the delivery of the ice, was but a friendly attempt on his part to adjust the matter between them, and in no sense was intended as a waiver of any of his rights which had then accrued to him under the contract. As we have seen, the defendants refused to take the ice on the 8th of September. On the same day the plaintiff wired them that he would continue to load the ice at August prices, providing they would take it all before September 20th. Here was an immediate tendering of performance on his part. He could do no more. The defendants were to furnish the boats at his storehouses to be loaded. This was to be done on or before the 1st of September. They had not performed the conditions of the contract in this regard. Negotiations had taken place for a renewal of the contract, which had been unsuccessful. Then plaintiff made his offer of September 8th, and that was rejected. It appears to us that he did all that he was required to do, and that the defendants cannot escape liability for the damages which he sustained.

Treating the contract as executory, it became the duty of the plaintiff, upon the refusal of the defendants to take the ice, to dispose of it to the best advantage possible. *Gray v. Railroad Co.*, 82 Hun, 523, 31 N. Y. Supp. 704. This he attempted to do. He not only wrote dealers, but he sent a person to New York City to offer it to any ice dealers that could be found. But, owing to the advance of the season, and the distance the ice was from the market, no sale could be effected, and the ice became a total loss.

It is contended that the referee erred in not allowing the defendants demurrage upon the boats that were loaded by the plaintiff. It is not clear that this question is raised by any exception that can be now reviewed. The referee was requested to find certain facts upon this subject, which was refused.

The general term might have reviewed the facts bearing upon this subject, but, as we have seen, it has not done so; at least we are obliged to so assume under the provisions of the Code heretofore referred to. No conclusion of law appears to have been found or demanded upon the subject. But, assuming the question was raised, and is properly here for consideration, we think that it should not be held that an error was committed by the referee in not allowing the defendants' claim for demurrage. They understood the situation of the premises, and that but one boat could be loaded at a time. The plaintiff had stated that he could load the boats if they were not sent in a nest. It was evidently contemplated that the boats would be sent along from time to time so that but one boat would be required to be loaded at a time; at least the referee was justified in so finding. Boats were hired to go and get the ice. They were loaded, and it appears that no demurrage was demanded or claimed on the part of the captains. The judgment of the general term should be reversed, and that entered upon the report of the referee affirmed, with costs to the plaintiff in all the courts. All concur (GRAY, J., in result), except ANDREWS, C. J., not voting. Judgment accordingly.

(147 N. Y. 1)

PEOPLE ex rel. HENDERSON v. BOARD OF SUP'RS OF WESTCHESTER COUNTY.

(Court of Appeals of New York. Oct. 8, 1895.)

ANNEXATION OF TERRITORY TO MUNICIPAL CORPORATION—EFFECT ON LEGISLATIVE APPORTIONMENT.

Const. 1894, art. 3, § 3, provides that the state shall be divided into 50 senate districts, and that the Twenty-Second senate district shall consist of the county of Westchester. Section 5 provides that the boards of supervisors, in constituting assembly districts, shall so arrange them that each shall be wholly within a senate district formed under the same apportionment, but declares that "nothing in this section shall prevent the division at any time of counties and towns." Article 6, § 2, declares that the legislature shall divide the state into four judicial departments, and that the "First department shall consist of the county of New York, the others shall be bounded by county lines." *Held*, that Laws 1895, c. 934, annexing a portion of the county of Westchester to the city and county of New York, is valid, but that portion must still be considered as attached to Westchester county as part of the Twenty-Second senate district for the apportionment of assemblymen and the election of judges of the supreme court.

Petition for mandamus by the people, upon the relation of Henry G. Henderson, to compel the board of supervisors of the county of Westchester to reform the assembly districts so as to include therein certain territory detached from said county and annexed to the county and city of New York. From a judgment granting the writ, defendant appeals. Affirmed.

William H. Robertson, for appellant. William D. Guthrie, for respondent.

ANDREWS, C. J. This controversy involves the constitutionality of chapter 934 of the Laws of 1895, approved June 6, 1895, and which took effect the same day, annexing a portion of the county of Westchester to the county of New York. The annexed territory at the time of the annexation consisted of a town and parts of towns and of two villages in the county of Westchester, having a population of upwards of 13,000 persons, excluding aliens, of whom about 2,500 were duly-qualified voters. The act declared that the territory therein described, "with the inhabitants and estates therein, is hereby set off from the county of Westchester and annexed to, merged in and made a part of the city and county of New York and of the Twenty-Fourth ward of said city and county, subject to the same laws, ordinances, regulations, obligations and liabilities, and entitled to the same rights, privileges, franchises and immunities in every respect and to the same extent as if said territory had been included within said city and county of New York at the time of the grant and adoption of the first charter and organization thereof and had so remained to the passage of this act, and except as may be modified by this act, as if such territory had been included within said Twenty-Fourth ward by the provisions of chapter 613 of the Laws of 1873, entitled 'An act to provide for the annexation of the towns of Morrisania, West Farms and Kingsbridge in the county of Westchester to the city and county of New York,' and the several acts amendatory thereof, and had so remained up to the passage of this act." The board of supervisors of Westchester county assembled on the second Tuesday of June, 1895 (six days after the act of annexation took effect), pursuant to the requirement of section 5, art. 3, of the new constitution, to divide the county into three assembly districts, equal to the number of members of assembly apportioned to Westchester county; and made the division of the then existing territory of the county into three assembly districts, excluding from the division the territory embraced in the act of annexation. The board of aldermen of the city of New York on the same day assembled and divided the city and county of New York into assembly districts, but in the division no notice was taken of the annexed territory, and the division was confined to the territory of the city and county of New York as it existed before the act of annexation. The result of the action of the two boards was, therefore, to leave the annexed territory unattached to any assembly district. Thereupon this proceeding was instituted, to compel the board of supervisors of Westchester county to reassemble and re-form the assembly districts by including in the division the territory taken from the county of Westchester by the act of annexation. The proceeding

was taken on the view that, notwithstanding the act, the annexed territory remained a part of Westchester county for assembly district purposes. A mandamus proceeding was also instituted in the city and county of New York to compel the board of aldermen of that city to reassemble, and include in an assembly district to be found therein the territory added to the county by the act of annexation. This proceeding was based on the contention that the act of annexation operated from the time of its passage to make the excluded territory for all purposes, including the formation of assembly districts, a part of the city and county of New York. In addition to the two proceedings mentioned, actions were commenced in the county of Westchester, one by the town of Westchester and one by the village of Williamsbridge, which town and village were included in the act of annexation, against certain officers of the street and police departments of the city of New York, who, acting under the authority of the city, had intermeddled with the public property of the town and village, to obtain an injunction to restrain them from interfering therewith. The act of annexation by its terms vests in the mayor, aldermen, and commonalty of the city and county of New York all the public property in the annexed territory, and these actions were based upon the theory that the act of annexation was wholly unconstitutional and void for all purposes whatever. The mandamus proceeding against the board of aldermen of the city and county of New York has been heard and decided by the special and general terms in the First district and department, and the other mandamus proceeding and the injunction actions by the courts in the Second department, and all the cases have been argued before us on appeal. The courts below have concurred in the opinion that the annexed territory should be treated as a part of Westchester county in the formation of assembly districts, and that it was the duty of the board of supervisors of Westchester county to have included it in one of the three districts in that county. The courts in the Second department affirmed the constitutionality of the act, chapter 934 of the Laws of 1895, as an act of annexation, but held that the annexed territory is still a part of the Twenty-Second senate district, and that for the purpose of voting for senator, assemblyman, and judges of the supreme court it must still be considered as a part of Westchester county. The learned judge who delivered the opinion at special term in the case arising in the city and county of New York held substantially the same view as that of the judges in the Second district. The general term of the First department did not pass upon the question of the constitutionality of the act, but limited itself to deciding the precise question presented in that case, viz. whether the annexed territory should be included in an assembly district in the city and county of New York or in the county of

Westchester. The appeals before us, taken together, cover the whole field of controversy, and they impose upon the court the duty of finally determining the grave and difficult questions presented.

The main grounds of attack upon the constitutionality of the annexation act are: (1) That it changes the Twenty-Second senate district, which, by the constitution, was declared to consist of the county of Westchester; the claim being that no alteration in county lines can be made without changing the senate district, since, by the constitutional arrangement, the county of Westchester, with its established boundaries at the time of the adoption of the constitution of 1894 and the senate districts, were and must remain inseparably associated until after another enumeration. (2) That taking from Westchester county a part of its territory changes the basis of the apportionment of members of assembly made by the constitution to the county of Westchester, and nullifies the requirement that each assembly district shall be wholly within a senate district formed by the constitution, because it would become impossible of execution if the act is valid. The Twenty-Second senate district, it is claimed, existing after the act took effect, would not be the same district defined in the constitutional apportionment, viz. the county of Westchester as then organized. (3) The act changes the lines of judicial districts and departments theretofore established, in defiance of constitutional restrictions.

It becomes necessary, in considering these objections, to refer to the provisions of the new constitution. The constitution, by section 3, art. 3, divides the entire territory of the state into 50 senate districts, corresponding to the number of senators to be elected, consisting of one or more counties or of subdivisions of a county. It declares that the Twenty-Second senate district shall consist of the county of Westchester, and it divides the city and county of New York into 12 senate districts, bounding each of the 12 districts by streets and avenues, or by streets, avenues, and public waters, except that in constituting the Twenty-First senate district (one of the 12 districts) a general clause is added to the description by streets and avenues, which includes therein territory taken from the county of Westchester, and annexed to the city and county of New York by the act chapter 613 of the Laws of 1873, which territory, it is said, had not been mapped and laid out with streets or avenues on a permanent plan when the convention prepared the legislative article. Section 4 of the same article provides that an enumeration of the inhabitants of the state shall be taken in the year 1905, and every tenth year thereafter, and directs that the senate districts "shall be so altered by the legislature at the first regular session after the return of every enumeration, that each senate district shall contain as nearly as may be an

equal number of inhabitants, excluding aliens, and be in as compact a form as possible, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in one county." The section also prohibits the division of a town, or block in a city, inclosed by streets or public ways, in the formation of a senate district. By section 2 of the same article the assembly is to consist of 150 members. Section 5 deals with the subject of apportionment of members of assembly, and prescribes the manner of constituting assembly districts in counties entitled to more than one member. It perpetuates the single-district system, and declares that each county theretofore established (counting Fulton and Hamilton counties as one county) shall be entitled to one member of assembly. It directs that the members of assembly shall be apportioned by the legislature at the first regular session after the return of every enumeration "among the several counties of the state as nearly as may be, according to the number of their respective inhabitants, excluding aliens." It prescribes the ratio for apportionment, and how members shall be apportioned on remainders. The section itself makes the first apportionment. It declares that, "until after the next enumeration, members of assembly shall be apportioned among the counties as follows," and apportions 35 members to the county of New York and 3 members to the county of Westchester. The constitution does not, as in the case of senate districts, divide counties entitled to more than one member into assembly districts. It imposes that duty upon the boards of supervisors, except that in any city embracing an entire county, and having no board of supervisors, the common council, or the body exercising the powers of a common council, is to make the division. This latter provision, under existing circumstances, is applicable only to the city and county of New York. The board of supervisors of any county entitled to more than one member of assembly, or, in the city and county of New York, the common council of that city, is required to "assemble on the second Tuesday of June, 1895, and at such hour as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts, as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled;" and (the section adds): "Such apportionment and districts shall remain unaltered until another enumeration shall be made as herein provided." It prohibits the division of a town, or

block in a city, in forming assembly districts, and following the provisions above enumerated are the words: "Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature." Section 1, art. 6, of the new constitution, continued the existing judicial districts "until changed as hereinafter provided," and authorizes the legislature to alter the judicial districts "once after every enumeration of the inhabitants of the state." Section 2 of the same article declares that the legislature shall divide the state into four judicial departments. "The First department shall consist of the county of New York, the others shall be bounded by county lines." In obedience to this mandate of the constitution, the legislature on the 13th day of April, 1895,—two months prior to the act of annexation now in question,—divided the state into four judicial departments, the First consisting of the county of New York, and the Second "of the counties embraced within the present Second judicial district," of which Westchester county was one.

The act of annexation, as has been stated, set off from the county of Westchester the territory described therein, with its inhabitants and estates, and declared that it was annexed to and merged in and made a part of the city and county of New York. As a necessary consequence, it divided the county of Westchester, and changed the boundary lines both of the county of Westchester and the county of New York. It preserved, however, the existing arrangements for the collection of unpaid taxes and assessments in the territory annexed, and the sale of lands therefor, and provided for the equitable apportionment, and for the payment by the city and county of New York, of such portion of the debts and obligations of the county of Westchester and of the towns and villages taken from Westchester as should be fixed by the apportionment. If the act is valid, the territory taken from Westchester county became from the time of the approval of the act, on the 6th day of June, 1895, except as otherwise specified therein, for all purposes of local government and administration, a part of the city and county of New York, and it was made subject to the burdens, and became entitled to the rights, privileges, and immunities, "in every respect, and to the same extent," as if the annexed territory had originally been a part of that city and county, and had been included in the territory annexed thereto from the county of Westchester by the act chapter 613 of the Laws of 1873 and the acts amendatory thereof.

The constitution vests in the senate and assembly the legislative power of the state (article 3, § 1), and the power to divide counties or towns, and to erect new counties and towns, or to change their boundaries, is legislative in its character, and is conferred upon the senate and assembly by the general

grant of legislative power; and, unless restrained in a particular case by other provisions or arrangements of the constitution, the time and mode of its exercise is in the discretion of the legislature. The power of the legislature to erect new counties, although not conferred by any express grant, is implied in the prohibition in section 5, art. 3, relating to members of assembly, that "no new county shall be hereafter erected unless its population shall entitle it to a member." The power is by this clause both recognized and limited. The power to divide towns or counties, or to erect new towns, was not given by any direct language in the constitution of 1846, but it was exercised in many cases by the legislature as a part of its ordinary legislative power. We shall have occasion to refer to some provisions in the constitution of 1895, in which the existence of this power is expressly recognized. The act of annexation now in question is, therefore, presumptively valid, because it is an act of legislation within the ordinary scope of legislative power, and for the further reason that the presumption of constitutionality attaches to every statute enacted by the legislature. The duty and the burden of demonstrating that the act of annexation is unconstitutional rests, therefore, upon the parties asserting its unconstitutionality. It needs no citation of authorities in support of the doctrine that a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld. The senate districts are established by the constitution. The whole territory of the state is, by section 3, art. 3, divided into senate districts upon a plan which preserves the unity of the county in their formation, no county being divided except to constitute two or more senate districts within the same county. The rule that counties were not to be divided in the formation of senate districts, except in the cases specified, was followed by the convention, and it was made obligatory in all future apportionments. We think it is plain that the general scheme of the constitution was to associate senate districts with county organizations, and to make them co-terminous with county boundaries; and that when, by the constitution, it was declared that a senate district was to consist of certain specified counties, there was established an organic relation between the counties as they existed territorially at the adoption of the constitution and the senate districts thereby established, and that a subsequent change of county boundaries by the legislature, whereby a senate district would comprise a part of two counties, would violate the constitutional plan, unless permitted by some other provision of the instrument. The claim that the counties determine the senate dis-

tricts merely in the sense that their boundaries on a certain day were used as convenient measurements for the district ignores the constant relation between counties and senate districts, which has been maintained during the whole existence of the state government. This was equally true of the large senate districts established by the constitutions of 1777 and 1821, and of the single senate districts under the constitution of 1846 and the constitution of 1895. The general principle that the apportionment of representatives in the legislature is to be made upon the basis of population has been modified to preserve the autonomy of counties and their relation to representative senate districts. There could, doubtless, be a more exact mathematical division of population for the purpose of legislative representation if the boundaries of counties were disregarded. But the principle of equality in representation is to some extent subordinated to the purpose of making counties the representative territorial unit in the apportionment of senators. It is not difficult to trace the origin of this system embodied in our state constitution. It has its root in the prominence given to county government and to county organizations from the earliest period of our history, and to the habits and associations of the people formed under the county system. The territory of the state in colonial times was divided into counties. Under the state constitution the county has been the agency of local government and administration in county affairs. Through the counties the state collects its taxes, and through county officers the judgments of its courts have been executed. Powers of local legislation from the beginning have to a greater or less extent been exercised by county boards, and the inhabitants of a county have been accustomed to act together in public affairs and in the promotion of local interests. It was not for mere convenience, therefore, that senate districts established by the constitution were made to consist of counties. There was inserted in the constitution of 1821 a provision which has been incorporated into every subsequent state constitution, that "no county should be divided in the formation of a senate district," a provision which, though addressed to the legislature, and applicable to future apportionments only, is an emphatic formulation of the policy which has uniformly prevailed.

We assent, therefore, to the proposition that when the constitution declares that the Twenty-Second senate district shall consist of the county of Westchester, it was a declaration that the county of Westchester as then organized, with its then existing territorial limits, should constitute that district; and that a change of the territorial boundaries of the county would change the senate district as established, because neither the whole district nor any part of it was by the general scheme to remain outside of the coun-

ty organization. The answer that the word "county" in article 3, § 3, constituting Westchester county as the Twenty-Second senate district, refers to that county as a political organization, and that, so long as the county exists, although shorn of a part of its territory, the part remaining constitutes the district, must be rejected. The claim assumes that by the act of annexation the excised territory became, for senate district purposes, a part of the city and county of New York. The specific boundaries in the constitution of the senate districts in the city and county of New York by streets, avenues, and public waters, with the general clause, in connection with the boundaries of the Twenty-First district, inserted to embrace territory in the city not capable of a description by street boundaries, do not admit of enlargement so as to include territory subsequently added to the city by the legislature, and the added territory would form no part of any senate district in the state if dissevered from the Twenty-Second district. But there is a broader objection to an interpretation of the constitution which would permit the legislature to take territory from one county and senate district and annex it to another senate district. It would interfere with the basis of apportionment founded upon population, upon which the convention acted, and enable the legislature at any time, by changing the boundaries of counties, to subvert the approximate equality in population of the senate districts which it was the aim of the constitution to establish. It would place it in the power of the legislature to undo and defeat the work of the convention under guise of changing county boundaries. The constitution gave to the county of Westchester one senator and three members of assembly, and the apportionment was fixed on the basis of its then existing population. The argument assumes that Westchester county would continue, until another enumeration, entitled to one senator and three members of assembly, although the greater share of its population may, by an act of annexation, be transferred to another county, and although the county to which it is annexed will gain no additional representation. The consequences which might flow from the interpretation of the constitution just considered forbid its adoption. It would open the door for legislative interference with representative districts for partisan purposes under the guise of changing the boundaries of counties, the prevention of which was the object of many provisions of the constitution.

Leaving out of view for the present a consideration of special clauses in the new constitution relating to the division of counties and towns, and assuming that the legislative power over the subject is that only which is embraced in the general grant of legislative power, we have, on the one hand, senate districts consisting of counties constituted and defined by the constitution, and, on the

other, a general legislative power to change the boundaries of counties and towns and to erect new ones. The constitution contains no express declaration restraining the legislature from altering the senate districts established by that instrument, intermediate a decennial enumeration. It requires the legislature so to alter the districts as to produce equality as near as may be, at the first regular session after the return of every enumeration, but no power is given by express language to alter them at any other time, and, in the absence of any express or implied power so to do, the legislature would not possess the power. If the validity of the act of annexation now in question depends solely upon the force of the general grant of legislative power, the case of *Lanning v. Carpenter*, 20 N. Y. 447, is an authority against its constitutionality. That case arose under the constitution of 1846, and involved the validity of the law passed in 1854 (intermediate two decennial periods), creating Schuylar county out of parts of three counties, and the new county as formed embraced parts of two senate districts and of two judicial districts. The act was held by a divided court to be unconstitutional, for the reason that the existing judicial, senate, and assembly districts organized by or in pursuance of the constitution then in force continued unchangeable until after the next succeeding enumeration, and that a change of county boundaries which should leave senate districts not bounded by county lines was a change in contravention of the constitutional requirement that they should consist of entire counties. It was claimed in support of the act that the power to erect a new county was vested in the legislature under the general grant of legislative power, and that such incidental and temporary changes in the county boundaries of judicial and legislative districts as might result from the exercise of this power did not invalidate the act. The court rejected this view, and held that the general power must yield to the specific regulations for the formation of senate and judicial districts, and that the power of the legislature to erect a new county, if it involved a change in the boundaries of senate and judicial districts by county lines, could only be exercised contemporaneously with the return of a new enumeration. In the subsequent case of *Kinne v. City of Syracuse*, *42 N. Y. 110, an act changing the boundaries of the city of Syracuse, passed in 1858, by annexing territory belonging to an assembly district in that county to territory in another assembly district therein, was held to be invalid on the ground that it was an alteration of assembly districts intermediate two decennial periods, in violation of the constitution. But the question as to the validity of the annexation act of 1895 does not arise under the constitution of 1846. The constitution of 1895 contains provisions not found in the constitution of 1846, which, in our judgment, material-

ly affect the question now to be determined. When the constitutional commission of 1873 assembled, these cases had been decided. The legislative article proposed by that commission divided the state into eight senate districts, as under the constitution of 1821, and apportioned the members of assembly among the counties as under the constitution of 1846. It appears from the journal of the commission that, after the legislative article had been reported by the committee having this subject in charge, on motion of a member from the Seventh judicial district, who resided in one of the counties from which Schuyler county was taken, the article was by unanimous consent amended by adding to the section relating to the apportionment of members of assembly and the constitution of assembly districts the clause: "Nothing in this section shall prevent division at any time of towns and counties to be effectual for the purpose of town and county administration." See Journal of Constitutional Commission, p. 408. Subsequently, when the article was reported by the committee on revision, this clause was changed so as to read: "Nothing in this section shall prevent division at any time of counties and towns and the erection of new towns and counties by the legislature," and in this form was adopted by the people. But the plan of eight senate districts was rejected. The clause, in a form slightly changed, is incorporated in the present constitution. There was no similar clause in the constitution of 1846. There can be no doubt that this provision was inserted to overrule the doctrine of the *Kinne Case*, and to relieve the legislature in the exercise of the power to divide counties and towns from the restriction imposed by the decision in that case. The power, it declares, may be exercised "at any time." It is neither restricted as to time, nor by the relation which the dissevered territory may bear to existing assembly districts. Under this power a town may at any time be taken from one county and added to another. Towns belonging to one assembly district may be divided, and the part taken away may be added to a town in another assembly district. Such changes would not violate the prohibitions that "no town shall be divided in the formation of assembly districts," and that assembly districts once formed "shall remain unaltered until another enumeration," on the construction that the assembly districts existing when a division is made remain territorially the same, notwithstanding the division. It is true that the clause is inserted in the section relating to the apportionment of assemblymen and the creation of assembly districts, and it declares that "nothing in this section shall prevent," etc. Upon this reading is based an argument that the rule in *Lanning v. Carpenter*, as applicable to the change of senate districts, remains unaffected. But we think the insertion of this clause

indicates an intention to leave the legislature free to exercise the power to change the boundaries of counties and towns and to erect new towns at any time in its discretion. It is difficult to see any reason for denying this power when its exercise would affect a senate district and for permitting its exercise in the case of the smaller unit. There is another clause of some significance in the legislative article of the new constitution, taken from the amendments of 1874,—“but the legislature may abolish the county of Hamilton and annex the territory thereof to some other county or counties.” This power could not be exercised between two apportionments without changing the lines of the Twenty-Seventh senate district, since, after the division, that district would cease to be bounded by county lines. We are of opinion that under the present constitution the act chapter 934 of the Laws of 1895, as an act of annexation, was within the constitutional power of the legislature, although it changed, as to the Twenty-Second senate district, the county boundaries of the district. But such effect should be given to the act as will least disturb the general plan, and this will be accomplished by regarding the annexed territory as still a part of that district for the election of a senator. The departure from the plan that senate districts shall be bounded by county lines will be temporary. Upon a new enumeration, the counties of New York and Westchester, as they stand at that time, will be units of division in forming the new legislative districts. It will be then the duty of the legislature, under the mandatory provisions of the constitution, to organize the senate districts out of the then existing counties; and courts, in considering the constitutionality of statutes, may act upon the assumption that a duty positively enjoined will be performed. This mode of reconciliation between the constitution and the statute will not interfere with the policy, so carefully guarded in the constitution, of preventing a change of representative districts intermediate two enumerations, for partisan purposes. It also gives full effect to the requirement of the constitution (article 3, § 5) that boards of supervisors, in constituting assembly districts, shall so arrange them that each assembly district "shall be wholly within a senate district formed under the same apportionment."

There are some embarrassments in regarding the annexed territory as part of the county of Westchester for the purpose of division of the county into assembly districts. Boards of supervisors in counties entitled to more than one member of assembly are, by section 5, art. 3, of the constitution, to meet, and "divide such counties" into assembly districts. The annexation act took the annexed territory out of Westchester county, and made it a part of the county of New York. Its corporate relation to Westchester county was changed. The framers of the

constitution may not, in using the word "counties," have had in view the case of a change of county boundaries after an apportionment and before a division into assembly districts. But, construing the word "counties" in this connection as meaning the territorial division existing when the apportionment was made, the difficulty may be overcome. So, also, upon the construction we give to the act of annexation, the inhabitants of the annexed territory will not be represented in the board of supervisors of Westchester county when it comes to form the assembly districts. So, also, their interests as residents of the city and county of New York may possibly at times be antagonistic to those of the inhabitants of Westchester county, and yet the senator and members of assembly from that county will be the common representatives of such diverse interests.

We are not unmindful of the difficulties in the case. But they attend any construction which may be given to constitutional provisions, on their face somewhat hostile, but which the court is bound, if possible, to reconcile. We think the construction of the act of annexation which affirms its validity as such, but leaves the annexed territory part of the Twenty-Second district and of the Second judicial district and department, and within the jurisdiction of the board of supervisors of Westchester county for the purpose of forming assembly districts, most nearly harmonizes the provisions of the constitution relating to senate, judicial, and assembly districts, and the power possessed by the legislature to divide counties and towns.

The objection to the annexation act that it violates the constitutional provision establishing judicial districts and departments is answered by the reasoning upon which we sustain the change in the county lines of the Twenty-Second senate district. The words, "in the same manner and to the same extent," found in the annexation act, read in connection with the context, are satisfied by construing them as referring to municipal burdens and municipal rights in which the annexed territory and its inhabitants were to share. The voters in the annexed territory will be entitled to vote for senator, member of assembly, and for judges of the supreme court, the same as though the annexation act had not been passed. Elections in the annexed territory will of necessity be conducted under the control of the election officers of the city and county of New York, and the returns will be made to the proper authorities of Westchester county. This was the plan adopted under the annexation act of 1873, and for several years elections were conducted thereunder without confusion or difficulty.

Our conclusion is that the annexation act of 1895 is constitutional, but that it did not operate to take the annexed territory out of the jurisdiction of the board of supervisors

of Westchester county in forming assembly districts pursuant to section 5, art. 3, of the constitution, and that it was the duty of the board at its meeting, on the second Friday of June, 1895, to have included the annexed territory within one of the three assembly districts allotted by the constitution to the county of Westchester. The board having failed to perform this duty, the mandamus was properly granted. The judgment should be affirmed. All concur. Judgment affirmed.

(147 N. Y. 284)

FLOOD v. VAN WORMER, Commissioner of Highways.

(Court of Appeals of New York. Oct. 22, 1895.)

HIGHWAYS — ENCROACHMENT — REMOVAL — INJUNCTION.

Laws 1890, c. 568, § 105, provides that, on failure of an abutting owner to remove an encroachment on the highway within the time specified in the notice served by the commissioners of highways, he shall forfeit \$25, and the commissioners may remove it, "or" bring an action to compel the owner to remove it. *Held* that, where a commissioner states to an owner, on whom he has served notice that his house encroaches on the highway, that he will remove the house after collecting the fine, the owner may enjoin him without waiting for the commissioner to commence such removal. Peckham, J., dissenting. 24 N. Y. Supp. 460, affirmed.

Appeal from supreme court, general term, Third department.

Action by John Flood against Henry Van Wormer, as commissioner of highways of the town of Rotterdam, to restrain the removal of plaintiff's house as an encroachment on the highway. From a judgment of the general term (24 N. Y. Supp. 460) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Alonzo P. Strong, for appellant. Lewis Cass, for respondent.

GRAY, J. This was an action in equity to restrain the defendant, as commissioner of highways, from removing the plaintiff's house, as encroaching upon the highway. The judgment recovered by the plaintiff adjudged that his house did not encroach upon the highway, and restrained the defendant as prayed for.

We think that the equitable interference of the court was properly invoked, and that its decree should be sustained, upon the ground that the defendant, as a public officer, under color of office, had threatened to do an act which would inflict permanent damage to plaintiff's property, and that the plaintiff was not bound to wait until the defendant had actually committed the threatened act. Section 105 of chapter 568 of the Laws of 1890, known as the "Highway Law," provides, in the event of the neglect or refusal of the owner or occupant of land to remove an encroachment within the time specified in the notice served by the commis-

sioners of highways, that, "he shall forfeit to the town the sum of twenty-five dollars; and the commissioners may remove such obstruction or encroachment at the expense of the town, * * * or the said commissioners may bring an action in any court of competent jurisdiction to compel such owner or occupant to remove such obstruction or encroachment." The defendant served a notice upon the plaintiff to the effect that his house encroached upon the highway, to an extent described, and he was "required, according to the statute in such case," etc., to remove the building within 60 days. Annexed to it was a copy of an order, reciting that the commissioner of highways had ascertained that the highway in question was encroached upon in a certain manner, and to an extent described, and which ordered the house to be removed.

I do not think that the action could be maintained upon the ground that the notice, which was filed in the town clerk's office, created a cloud upon the plaintiff's title. The notice lacked the elements of a judicial determination, and was an *ex parte* proceeding. But I think the action was maintainable upon the ground of a threatened abuse of authority by a public officer, under color of office. By the terms of the highway act, authority was conferred upon the commissioner of highways to remove the obstruction or encroachment upon the highway, and it is made optional with him whether he shall first bring an action to compel such a removal. According to the evidence, and the referee so found, the defendant stated to the plaintiff that he would move his house after collecting the fine. Was the plaintiff bound to wait until the commissioner had actually commenced to remove his building, and had committed a trespass upon his freehold, of a nature perhaps not to be compensated for in damages? I think not. The section of the highway law referred to did not provide the opportunity, which previously existed under the law, for the trial of the question of encroachment, and it seems to be in the line of a just protection to the rights of the citizen, with whose property a public officer, acting under the color of law, has threatened to interfere, that he should be permitted to go into a court of equity, and, assuming the burden of proving that he has not rendered himself amenable to the provisions of the law, under which the public officer claims to act, have the question once and for all determined, and thus prevent irreparable injury. In *Ryan v. Brown*, 18 Mich. 196, the bill was filed to restrain the defendants, a canal board, from committing a threatened trespass upon the complainant's property, by removing certain cribs as a foundation for docks in a river, and the point was made that the injury complained of was not such as to authorize the interference of a court of equity. Justice Campbell, speaking for the court, very pertinently observed that

"the case involved an abuse of authority by public officers and agents, under color of office; and ever since the case of *Osborn v. Bank*, 9 Wheat. 738, it has been held that such official oppression would make it proper to interfere upon a less grievance than would justify proceedings on private misconduct, for reasons that are too obvious to require explanation." In *People v. Canal Board*, 55 N. Y. 390, it was held that, while a court of equity has no supervisory power or jurisdiction over public officials or public bodies, it will exercise its peculiar jurisdiction over them to prevent some illegal act, under color or claim of right, affecting injuriously the property rights of individuals. It is under one of the heads of equity jurisdiction that the court interferes to prevent injury to land, if the trespass will be attended by irreparable mischief, and plaintiff may be unable to obtain relief at law. *Spear v. Cutter*, 5 Barb. 486. The highway act gives the power to the defendant to proceed summarily against the plaintiff's property and he has threatened to exercise it, and I see no good reason for refusing to the plaintiff the aid of a court of equity to restrain the threatened mischief, when he establishes that he does not come within the provisions of the act, under whose authority the defendant threatens to proceed. The judgment should be affirmed, with costs. All concur, except *PECKHAM, J.*, dissenting, on the ground that there is no evidence in the case showing any threats made on the part of the defendant to do any irreparable injury. The threat was to commence an action first, and, upon recovery in that action, then to remove the obstruction. Judgment affirmed.

(147 N. Y. 597)

CLOSE v. NOYB.¹

(Court of Appeals of New York. Oct. 22, 1895.)
DEBTS OF CORPORATION — LIABILITY OF STOCKHOLDERS.

1. A corporation organized under Laws 1848, c. 40, desiring for its manufactory certain premises occupied by defendant as lessee, took an assignment of the lease, and, in lieu of the rent for the first year, issued to defendant a number of shares of its stock. *Held*, that the taking of defendant's leasehold interest was a purchase of "property," within Laws 1853, c. 333, providing that the trustees of a company incorporated under Laws 1848, c. 40, might purchase "mines, manufactories and other property necessary for their business," and that the holders of stock issued in payment thereof should not be liable to corporate creditors, though the whole amount of capital stock had not been paid in, nor any certificate issued, as required by section 10 of the said incorporating act.

2. A person exempt under Laws 1853, c. 333, from liability to the creditors of a corporation in which he holds stock, because of having taken such stock in payment of property transferred to the corporation, and necessary for its use, is not affected by the stock corporation law of 1890, c. 564, which, though it repeals, in terms, the act of 1853, provides (section 71) that it shall not impair any right already acquired under the law repealed.

¹ Rehearing denied.

Appeal from superior court of Buffalo, general term.

Action by Charles J. Close against Richard K. Noye to recover on notes given by the American Bit-Brace Company, a corporation, of which defendant was a stockholder. From a judgment of the general term (26 N. Y. Supp. 93) affirming a judgment for plaintiff, defendant appeals. Reversed.

D. N. McNaughtan, for appellant. Simon Fleischmann, for respondent.

HAIGHT, J. The American Bit-Brace Company was a corporation organized under the manufacturing act of 1848 and the amendments thereto, and commenced business on or about January 1, 1888. Its capital stock was \$50,000, divided into 500 shares of \$100 each. \$47,500 of the stock was paid in cash. The remaining \$2,500 of the stock was not paid in, and no certificate has ever been filed showing full payment of the capital stock. In 1892 the corporation became indebted to the plaintiff upon promissory notes in the sum of \$10,000, upon which a judgment was entered in the superior court of Buffalo, and an execution issued thereon against the property of the corporation, which has been returned unsatisfied. The defendant was the owner of 16 shares of the capital stock of the corporation, which was issued to him at various times between the 1st day of March, 1888, and the 8th day of March, 1889. This action was brought to recover of the defendant the indebtedness of the corporation, to the amount of the stock held by him.

Laws 1848, c. 40, § 10, provide that "all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded," etc. This act was amended by Laws 1853, c. 333, by providing that "the trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act." Under this amendment it has been held that a person to whom stock has been issued for a manufactory, or other property, purchased by a corporation, is not liable to the creditors of the company because of a failure on the part of the president and trustees to file the certificate required by section 10, above referred to; that, as to such stock, the

holders thereof are exempt from the provisions of the act. *Brown v. Smith*, 13 Hun, 408; affirmed in this court, upon the opinion of the general term, 80 N. Y. 650. See, also, *Rowell v. Lambert*, 66 Hun, 4, 20 N. Y. Supp. 822.

The defendant claims exemption from liability under the act of 1853. The question is thus presented as to whether the stock issued to him was in payment for a manufactory or other property necessary for the business of the corporation. He requested the trial court to find that it was, but this was declined, and an exception was taken. The evidence bearing upon the question is brief, and is without substantial controversy. The defendant had leased of one White the premises in question, for the annual rental of \$1,500. The corporation required these premises for its manufactory. Arrangements were thereupon entered into, by which White assigned the defendant's lease to the corporation, with his consent; he agreeing to accept during the first year the capital stock of the company, for rent, in lieu of cash. This arrangement was carried out, and the defendant in this manner became the owner of the 16 shares of stock referred to. The leasehold premises were necessary for the business of the corporation. It was a manufactory, and, we think, "property," within the meaning of the statute. A lease of lands is a chattel real. 1 Rev. St. p. 722, § 5; *Putnam v. Westcott*, 19 Johns. 72; *Bigelow v. Finch*, 17 Barb. 394.

The trial court appears to have been of the opinion that even if the stock was issued to the defendant for property purchased by the company necessary for its use, and that he was exempt from liability for the debts of the company, under the existing statutes, he is now made liable under the stock corporation law of 1890, c. 564. In this view we differ from the learned trial judge. In the law of 1890 the exemption clause of 1853 is omitted, and that act, together with that of 1848, is repealed. But there was a saving clause incorporated in the act. It is as follows: "Sec. 71. The repeal of a law, or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, * * * under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent, as if such law had not been repealed." Section 24 of chapter 563 of the Laws of 1890, known as the "General Corporation Law," has recently received the attention of this court, in the case of *Cameron v. Water Co.*, 133 N. Y. 336, 31 N. E. 104. It was then held that proceedings that had been theretofore taken to consolidate several companies, under chapter 960 of the Laws of 1867, as amended, etc., were not affected by the repeal of the acts under which the proceedings were instituted; that the agreement to consolidate represented a right accruing, or in process of enforcement, and was protected by the saving clause, which is

identical in language with that provided for in section 71 of the stock corporation law. This case sustains the appellant's contention. He became the owner of the stock under circumstances which then relieved him from personal liability for the debts of the company. He was exempt from the provisions of section 10 of the act of 1848. This was a right which he had acquired, and which had accrued, and he consequently is saved from the operation of the stock corporation law of 1890. In 1892 the stock corporation law was further amended (Laws 1892, c. 2), but, under the view taken by us with reference to the saving clause in the act of 1890, it becomes unnecessary to consider the effect of the last amendment. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 277)

FORTUNATO v. PATTEN.

(Court of Appeals of New York. Oct. 22, 1895.)

ASSIGNMENT OF CHOSE IN ACTION—PRIORITY—NOTICE TO DEBTOR.

1. As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice of such assignment to either the subsequent assignee or the debtor.

2. A stipulation in a street-grading contract, that such contract shall not be assigned, nor any of the moneys due thereunder, without the written consent of the city, and that no claim, as against the city, can be asserted by virtue of an assignment without consent, is solely for the benefit of the city, and cannot, in a contest wherein no claim is asserted against the city, be invoked by a junior assignee, with consent, to defeat the demand of one to whom the contract has previously been assigned as collateral security for a debt, though without the consent of the city. 25 N. Y. Supp. 333, reversed.

Appeal from common pleas of New York city and county, general term.

Action by Malcho Fortunato against Thomas Patten, impleaded with the Twelfth Ward Bank of the City of New York and others, to have certain liens and claims against moneys payable to the defendant John F. Dawson, under a contract with the city, and the order of their priority, determined. From a judgment of the general term (25 N. Y. Supp. 333), affirming a judgment awarding priority to the claim of the Twelfth Ward Bank over that of defendant Patten, the latter appeals. Reversed.

Robert E. Deyo, for appellant. Charles E. Patterson, for respondent.

BARTLETT, J. This is an appeal from a judgment of the general term of the court of common pleas for the city and county of New York, affirming a judgment entered upon the report of a referee determining the order of payment to various creditors out of a fund paid into court by the city of New York. John F. Dawson, in October, 1886, entered in-

to a contract with the city to regulate and grade Edgecomb avenue and other streets. Prior to April 11, 1887, the appellant, Patten, loaned to Dawson \$0,000, and the latter on that day assigned to Patten all his rights and interest under the contract. The referee found that this absolute assignment in form was made as security for a debt, being the balance due of \$5,000 on the loan made by Patten to Dawson. Under the familiar rule that the form of words used in making an agreement is not alone to receive attention, but all the circumstances of the transaction are to be considered (*Williams v. Ingersoll*, 89 N. Y. 521), Patten stands as an assignee of a portion of the moneys due under the contract. It is also found that Dawson entered upon the performance of the contract, and thereafter entirely completed the same, and the work was accepted by the city on the 28th of January, 1891. In December, 1887, Dawson assigned to the Twelfth Ward Bank all moneys due and to grow due under the contract as collateral security for the payment of moneys advanced and to be advanced by the bank to Dawson. On the 1st day of March, 1889, Dawson made a second assignment of \$5,000 of the first money to grow due on the contract as collateral security for the payment of that amount, which was the balance then due on the original loan made to Dawson by Patten. It is provided by the contract, in substance, that the contractor shall not assign the contract, or any of the moneys payable thereunder, without the consent of the city, signified in writing by the commissioner of public works indorsed on the agreement; that in the absence of such consent no right under the contract, nor to any moneys to grow due by its terms, should be asserted against the city of New York. The city was not asked to consent to the first assignment to Patten, but it did consent to the assignment to the Twelfth Ward Bank, and the second assignment to Patten. Upon the completion of the contract the city owed Dawson a balance of a little over \$57,000. In February, 1890, the plaintiff began this action to foreclose a mechanic's lien filed against the money so due, and all persons interested in the fund were made parties. The issues were tried before a referee, who rendered judgment, as between Patten and the bank, that the assignment of the latter was entitled to priority for the reason that Patten's assignment was not consented to by the city, and also because the bank had no notice of Patten's assignment. As this judgment has been affirmed by the general term, and it appears that if the bank is paid in full Patten will receive nothing, it becomes of importance to inquire whether the judgment can be sustained.

The provision of the contract adverted to has been treated by the court below as rendering void all assignments of moneys to grow due unless the consent of the city was obtained, and as available by any assignee to defeat the rights of a senior assignee who had

failed to secure the necessary consent. We do not think that this provision is capable of any such construction. It was inserted in the contract solely for the benefit of the city, and prevents any claim being asserted against it in the absence of consent. It is a shield to protect the city, and not a weapon with which a junior assignee is to fight his way to a more favorable position in the line of payment. The general term held that this case is governed by the maxim, "*Modus et conventio vincunt legem*." The late Judge Allen of this court liberally translated the maxim as follows: "The terms and conditions of a contract have the force of law over those who are parties to it." *Lowry v. Inman*, 46 N. Y. 129. As between Dawson and the city, the covenant we are considering does have the force of law, for the reason they are parties to the contract, and come within the express terms of the maxim quoted; but the bank is not a party, and cannot invoke this provision of the agreement to defeat the claim of Patten. The city has paid into court the money due under the contract, and will be protected by any judgment rendered. No claim is being asserted against it, and the covenant does not apply to the situation now presented.

It was strenuously urged on the argument, by the counsel for the bank, that the disposition of this case by the court below is justified by *Burck v. Taylor*, 152 U. S. 634, 14 Sup. Ct. 696. It is sufficient to point out that the case cited dealt with a contract made by an individual with the state of Texas, which contained an absolute, unqualified covenant that it should not be assigned, in whole or in part, without the written consent of the state. In the case at bar, the substance of the covenant is that, if the contract, or any of the moneys due under it, are assigned without consent, no claim can be asserted by virtue thereof as against the city. In the case at bar, no absolute assignment has been made of the contract, but all transfers were of moneys due thereunder as collateral to secure the payment of a debt. There is a wide difference between assigning moneys due under a contract, and an absolute assignment of the contract itself, as the latter act disturbs that relation of personal confidence which exists between one desiring work done that requires a high order of skill and intelligence and the contractor he may have selected as possessing these necessary qualifications. *Delaware Co. Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 479, 10 Sup. Ct. 399. For these reasons, we think the case of *Burck v. Taylor* has no application to the case before us.

It is further argued, on behalf of the bank, that, even if Patten's assignment is valid, he is estopped from urging his claim as against the bank, as he allowed Dawson to continue in the performance of the contract, and that the bank was misled by his apparent ownership. We have already referred to the finding that

Patten's first assignment, while absolute in terms, was intended and treated as a collateral security, and that Dawson's relations with the city were not disturbed. It cannot now be claimed, in the face of the proofs and the findings, that Patten was the owner of this contract between Dawson and the city by absolute assignment. He stands in the position of an assignee who is entitled to receive, as collateral security, moneys due under the contract. Furthermore, there is nothing in the evidence to justify the claim that the bank was misled. No proof was offered that Patten knew of the provision of the contract requiring the consent of the city, or that he knew the bank was advancing money to Dawson or held his assignment, or that he attempted to conceal his first assignment. The bank cannot claim to have been misled, unless it is the fact that Patten was legally bound to have notified it and the city of his first assignment. We have already pointed out that he rested under no obligation to notify the city unless he sought to assert some claim against it. In that event, he would have been compelled to obtain the consent required by the contract. Patten, as matter of fact, makes no claim as against the city, and stands in no different position than any other assignee of a share of the fund which is sought to be distributed in this action. This being so, he comes within the rule laid down by this court, to the effect that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 117 N. Y. 320, 22 N. E. 1039; *Williams v. Ingersoll*, 89 N. Y. 508; *Muir v. Schenck*, 3 Hill. 228. A different rule exists in England, in some of the states, and in the United States courts. The respondent's counsel has cited many of these foreign cases that are contrary to the law as long established in this state.

It is also urged by the bank that Patten waived all rights under his first assignment by taking a second assignment, and releasing all but 30 per cent. of the moneys payable by the terms of the contract. The second assignment was by way of additional collateral, to secure the payment of a balance due on the original loan, and did not in any way affect the first assignment, and the release referred only to the second assignment.

The learned counsel for the bank has submitted, upon his brief, other legal propositions, which have been carefully considered, but the views we have already expressed render a further discussion of the case unnecessary. The judgment entered upon the report of the referee, and the judgment of the general term, should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 704)

SHULTES v. SICKLES.

(Court of Appeals of New York. Oct. 22, 1895.)

DIRECTING VERDICT—RIGHTS ON DENIAL—MORTGAGE OF LEASE—RIGHT TO POSSESSION.

1. Though both parties request the court to direct a verdict, the party whose request is denied is not precluded from requesting that the case be submitted to the jury, if the evidence warrants it.

2. Where a lessor obtained a judgment of re-entry against the lessee of a manorial lease in perpetuity, and, before execution was levied thereon, the lessee's interest in the premises was purchased by a mortgagee thereof on foreclosure, and the judgment of re-entry was assigned to one who, after levying execution against the lessee and defendant, his son, conveyed the lands to defendant, the mortgagee, in the absence of any evidence showing a redemption of the premises under the judgment from the lessor or his assigns, is not entitled to possession thereof.

Appeal from supreme court, general term, Third department.

Ejectment by Arthur Shultes against Nicholas A. Sickles. From a judgment of the general term (24 N. Y. Supp. 145) affirming a judgment for defendant, plaintiff appeals. Affirmed.

William Youmans, for appellant. George L. Stedman, for respondent.

O'BRIEN, J. This was an action of ejectment, in which the plaintiff claimed to recover the possession from the defendant of a parcel of land, containing about 123 acres, situated in the county of Albany. At the close of the trial both parties requested the trial judge to direct a verdict, each in his own favor. A verdict was directed in favor of the defendant. The plaintiff, having excepted to this ruling, then requested the court to submit the case to the jury upon all the questions of fact. This request was denied, and the plaintiff excepted.

While it is true that, in a case where both parties request the court to direct a verdict, the court is thereby clothed with the functions of the jury, with respect to any questions of fact in the case, and, in the absence of a request to go to the jury by the party against whom the verdict is directed, the decision stands in the place of a verdict, yet in this case the plaintiff, upon a denial of his motion, made the request to have the case submitted to the jury. He was not precluded from making this motion by his previous request to have a verdict directed in his favor, and if there was any evidence competent to submit to the jury upon the disputed questions of fact, the denial of his motion would probably be error. *Howell v. Wright*, 122 N. Y. 667, 25 N. E. 912; *Dillon v. Cockcroft*, 90 N. Y. 649; *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130; *Thompson v. Simpson*, 128 N. Y. 270, 23 N. E. 627. The question, therefore, is, whether the plaintiff had given any evidence to carry the case to the jury. The common source of title is a manorial lease in perpetuity by Stephen Van Rensselaer to Johannes Sha-

fer of the lands in question, with others, reserving certain yearly rents, with the right of re-entry in case of nonpayment. The title and interest of the grantee under this lease became, through various mesne conveyances, vested in John Sickles, the defendant's father, in the year 1845, subject, however, to the obligation to pay the rent reserved in the lease, and to the right of re-entry in case of nonpayment. On April 28, 1864, Van Rensselaer recovered a judgment against Sickles in ejectment for the recovery of the premises, based upon the covenants in the lease and the nonpayment of the rent reserved, but no attempt was made, so far as appears, to enforce this judgment for many years afterwards. In the meantime, and in the year 1875, one Joseph I. Shultes foreclosed a mortgage which he held upon the interest of Sickles in the land, and became the purchaser thereof upon a sale under the decree entered in the foreclosure action; but his title was expressly subject to the superior rights of Van Rensselaer under the manorial lease. It does not appear that Shultes ever went into actual possession, but it does appear that, the next year, he contracted to sell his interest to the defendant, who is the son of John Sickles, and who succeeded his father in the possession of the land. Subsequently Joseph I. Shultes died, and whatever claim the plaintiff, who is his son, may have is derived through his father's will. In the year 1883 Walter S. Church, having become the assignee of the judgment in ejectment at the suit of Van Rensselaer, proceeded to execute the same. Leave was granted by the court, permitting the owner of the judgment to enforce the same by execution or writ of possession, and it was executed against John Sickles and the defendant, his son, who were then in possession. The sheriff made return upon the process that, on July 27, 1883, he delivered the possession of the premises to Church, the assignee of the judgment. On the same day, the defendant and his father executed an instrument in writing to Church, whereby they admitted that possession of the farm was that day surrendered by them and delivered to Church, and they acknowledged that they held the premises as tenants at will under Church. On the 12th day of January, 1885, Church conveyed the lands to the defendant by deed duly executed and delivered, and under this title the defendant was in possession at the time of the commencement of this action.

Some questions were discussed by the learned counsel for the plaintiff which relate to the procedure by which the judgment was revived and finally executed, but, we think, they have no bearing upon this appeal. The judgment in favor of Van Rensselaer adjudged his title to the land and his right to the possession. It was not impaired by the lapse of time. The court in which it had been rendered had the power and jurisdiction to enforce it, and no error or irregularity in the or-

der permitting the execution to issue, even if such existed, can be reviewed upon this appeal. If there was any error or irregularity in the proceedings which resulted in the delivery by the sheriff of the possession to Church, the plaintiff's remedy was by appeal or motion, and the only question here is the power of the court to set the sheriff in motion. We have no doubt in regard to the power, and very little with respect to the regularity, of the proceedings. But it is urged by the learned counsel for the plaintiff that the deed of Church to the defendant, based upon the judgment, execution, recovery of possession, and attornment, above referred to, conferred no title as against the plaintiff. This proposition is sought to be deduced from certain dealings and transactions between Church and the plaintiff's father, Joseph I. Shultes, whereby it is claimed that the latter was reinstated in all the rights that he had prior to the proceedings to recover possession under the judgment. It is said that the plaintiff's father had, under the statute, six months in which to redeem the land after the delivery of possession to Church under his judgment, and that, by agreement, this time was extended to April, 1885; that such redemption was made, either wholly or partially, and that the deed to the defendant, when given, was subject to all the rights and equities that Shultes obtained under his mortgage title.

With respect to the various considerations submitted in support of these general propositions, it is quite sufficient to say that the plaintiff gave no proof to show that his father ever in fact redeemed, or attempted to redeem, this land. There is no proof in the record to show that Church ever intended to surrender or waive any right which he obtained under the judgment and execution. Nor is there any proof upon which it could properly be found that Shultes, in his lifetime, attempted, by any acts or arrangements on his part, to restore the situation as it existed prior to the execution of the judgment under which defendant claims. Church was the owner of a money judgment against Shultes. It had no relation to his title to the land in question. If it was paid in full, it would not in any way affect that title. The various agreements, stipulations, and payments to which our attention has been called, and which appear in the record, relate to this judgment which Church held and Shultes was bound to pay. It is to be inferred, also, from the proof, that Church claimed that Shultes owed him certain arrears of rent, which had accrued some time between the rendition of the judgment and its execution in 1883. The dealings between Church and the plaintiff's father relate entirely to these personal claims, and not to the judgment under which possession had been obtained, or to any right of redemption that remained in Shultes.

The learned counsel for the plaintiff has, we think, misapprehended their true nature and legal effect. All claim to or interest in the

land in question which the plaintiff's ancestor ever had was subject to the judgment at the suit of Van Rensselaer, and when that judgment was enforced these rights, whatever they were, disappeared, and nothing took place afterwards, between him and the purchaser under that judgment, that was effectual to restore them. There was no redemption and no waiver by Church of any right which he obtained by virtue of the execution of the judgment and the attornment of the parties in possession to him. Therefore, the title and possession of the defendant were not in any way impaired or affected by the transactions and dealings between Church and Shultes in regard to the personal claims referred to. It is quite clear, we think, that no such force can be given to the proofs in regard to these transactions as is claimed by the learned counsel for the plaintiff. They could afford no basis for a finding by the jury that Shultes ever redeemed, or attempted to redeem, the land in question from the judgment in ejectment, or that Church intended to or did waive any right that he acquired under the judgment, or in any other way qualified or impaired his title.

It follows that the learned trial judge was correct in directing a verdict in favor of the defendant. The other exceptions in the case present no questions that require discussion, or any error that would justify a new trial. The judgment must therefore be affirmed, with costs. All concur, except PECKHAM, J., taking no part. Judgment affirmed.

(147 N. Y. 260)

IN RE BOARD OF RAPID TRANSIT
COM'RS FOR CITY OF
NEW YORK.

(Court of Appeals of New York. Oct. 22, 1895.)

CONSTRUCTION OF STREET RAILWAY — APPOINTMENT OF COMMISSIONERS — JURISDICTION OF GENERAL TERM — CONSTITUTIONAL PROVISIONS — CONSTRUCTION.

Const. 1846, art. 3, § 18, in force until the adoption of Const. 1894, provided that no street railroad should be constructed without the consent of the owners of one-half in value of the abutting property, but that, in case such consent could not be obtained, the "general term of the supreme court in the district" should, on application, appoint three commissioners, whose report, when confirmed by such court, should be taken in lieu of such consent. Const. 1894, art. 3, § 18, is practically identical with such section, except that it provides that the application shall be made to the "appellate division of the supreme court." The appellate division is created by Const. 1894, art. 6, § 2, which provides that its existence shall begin on January 1, 1896, and that it shall have the jurisdiction formerly exercised by the supreme court at general terms. Article 15 provides that the constitution shall be in force from January 1, 1895, "except as herein otherwise provided." *Held*, that the provision of section 18, that the application shall be made to the appellate division, will not prevent the making of such application until such division comes into existence, but that the jurisdiction of the general terms of the supreme court to hear and determine such application continues until January 1, 1896.

Appeal from supreme court, general term, First department.

Application by the board of rapid transit commissioners for the city of New York to the general term for the designation of newspapers in which to publish notice of intention to apply for the appointment of certain commissioners. From an order refusing to take jurisdiction of the application the board appeals. Reversed.

Edward M. Shepard, for appellant.

PECKHAM, J. This is an appeal from an order of the general term of the supreme court of the First department, refusing to entertain the application of the rapid transit commissioners for the designation of newspapers in which to publish notices of their intention to apply to the court for the appointment of commissioners to report after due hearing whether a railroad ought to be constructed, etc. The appeal is somewhat anomalous, as there is no adverse interest and no respondent before us. The rapid transit commissioners are desirous of proceeding with the discharge of their duties under chapter 4 of the Laws of 1891, as amended by chapter 519 of the Laws of 1895. They state, in their application, that they have adopted routes for the proposed road in the city of New York, and they claim to have complied with all the provisions of the acts above mentioned, but they allege they cannot obtain the requisite consents of the property owners along the line, and hence the necessity for an application to the court.

We are without the benefit which we always derive from an opinion of the learned court making this order, giving the reasons for its action; but, as we understand it, the court refused to entertain the application, because of its doubt whether it had jurisdiction to act upon it, such doubt being founded upon the adoption of and the provisions in the new constitution. The argument is that article 3 of the constitution took effect, by the express terms of that instrument, on the 1st day of January, 1895 (article 15, § 1), and as section 18 of article 3 provides that an application of this nature shall be made to the appellate division of the supreme court, the general term had no jurisdiction to entertain it. Referring to section 2 of article 6 of the constitution, it is there seen that the appellate division does not come into existence, so as to exercise judicial functions, until January 1, 1896, and the consequence is stated that there is no court now in existence to which this application can be made, and the commissioners must wait until January 1, 1896, before attempting to proceed further. The wording of the instrument in regard to the subject under discussion is such as to render a doubt as to its proper construction at least plausible, and we think the learned court was, therefore, as matter of sound policy, amply justified in refusing to entertain

the application until the question should be laid at rest, because, if the court had acted, and proceedings were taken which might subsequently be reviewed and reversed, as unwarranted, by reason of the lack of jurisdiction in the general term, a most unfortunate state of affairs would have been created. The legal question being now presented, by this appeal, whether the general term has jurisdiction to entertain such an application during the year 1895, we have come to the conclusion that it has.

In stating our reasons for this determination, it is somewhat material to note the history of the constitutional provision directing application to be made, under certain circumstances, to the appellate division of the supreme court. It is quite brief. Prior to 1874 no such provision existed. One of the amendments to the constitution of 1846, adopted by the people in 1874, and taking effect on the 1st day of January, 1875, added several sections to article 3, and the following is a copy of the last portion of section 18, which was among the sections so added: "The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction and operation of a street railroad except upon the condition that the consent of the owners of one-half in value the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

This provision, regarding the building of street railroads, had continued as part of the constitution ever since its incorporation into that instrument in 1875, and of course was in full force in 1891 when the rapid transit act, chapter 4 of the Laws of that year, was passed. It was in force at the time when the new constitution of 1894 was in process of formation by the constitutional convention of that year. Section 18 of article 3 of the new constitution is, almost word for word, identical with the same section in the third article of the former constitution, excepting that in the portion relating to railroads it substitutes the phrase "the appellate division of the supreme court in the department," for that of "the general term of the supreme court in the district," so that the application is by this provision to be made to the appellate division for the appointment of commissioners. The

reason for this change in the phraseology is plain. It was simply to conform to the provisions of another article in the constitution. Upon a reference to article 6 it will be seen that while the supreme court is continued with general jurisdiction in law and equity, the second section of that article provides for the creation of what is therein termed an appellate division of the supreme court, and the section provides that, "from and after the last day of December, 1895, the appellate division shall have the jurisdiction now exercised by the supreme court at its general terms, * * * and such additional jurisdiction as may be conferred by the legislature." The effect of this provision is to abolish the general terms of the supreme court after the last day of December, 1895, and to substitute in their place what is termed an appellate division of the same court, with precisely the same jurisdiction, and such additional as might be granted by the legislature. In the meantime, however, the general terms exist, with all their jurisdiction unimpaired, unless, by the wording of that portion of the eighteenth section of article 3, already alluded to, it is taken away solely as to matters of this nature, and no tribunal substituted until January 1, 1896, leaving a period of one year, from January, 1895, until January, 1896, during which there would be no court in existence to which applications of this nature could be made.

It is safe to say that no such conclusion was intended by those who framed this change of phraseology, or by the people when, by their votes, they adopted the instrument in which such change occurred. It cannot be thought that, while insisting upon the necessity of an application to the court under certain contingencies, there could be an intentional omission on the part of anybody to provide for the existence of the court itself to which the application should be made. That such a condition would exist for only one year somewhat detracts from the force of this argument, yet we are unable to imagine any reason for the intentional abrogation of this jurisdiction of the general terms during such year. For all other purposes of their creation, they exist in full force, up to January, 1896; yet, by this construction, the general terms are, for the last year of their existence, shorn of their powers in this particular only, while their successor does not come into practical existence during that time. By section 1 of article 6 the existing supreme court is continued with general jurisdiction in law and equity. The general terms are but branches of that court, and the same may be said of the appellate division when it shall come into operation. Indeed, in substance, the appellate division will be nothing more than a continuation of the old general terms under a new name and with more judges. Those judges will be selected, in the same manner as were the general-term judges,

from among the justices of the supreme court, of which the appellate division forms a branch. The state continues to be divided into departments, as it was for the general terms, and the jurisdiction of the appellate division will be the same as was that of the general terms, but liable to be added to by the legislature. Absolutely no reason has suggested itself to our minds which would afford a plausible foundation for the belief that here there has been an intentional withholding of jurisdiction from the general terms, during this last year of their existence, as to this one subject only.

Being convinced that there was no intention to take away this particular jurisdiction from the general terms during the last year of their existence, the further question is whether the language of the constitution is such as necessarily to accomplish that result. Article 15 provides that "this constitution shall be in force from and including the first day of January, 1895, except as herein otherwise provided." There is no language in the third article which provides in express terms when such article or any particular section thereof shall take effect. By section 2 of that article it is provided that the senate shall consist of 50 members, and yet the senate sitting after January 1, 1895, consisted of but 32 members. Although the article took effect in one sense, so far as to provide that the senate thereafter sitting should consist of 50 members, yet I think it entirely clear that it did not take effect, so as to blot out the then existing senate, and leave the state without a legislature until one should be elected, pursuant to the provisions of the constitution, in the fall of 1895. If the effect of article 15 upon section 13 of article 3, standing alone, were to be considered, it might perhaps be decided that the whole section took effect January 1, 1895, but when we come to examine, in connection with it, other provisions of the new constitution, together with the instrument to be superseded, we must, as it appears to us, come to a different conclusion.

The canons of construction applicable to written constitutions, as well as to statutes, are quite familiar to us all. They are well stated in *People v. Potter*, 47 N. Y. 375, in an able opinion by the late Chief Judge Folger. The intent is to be sought for, and, when discovered, must prevail over the literal meaning of the words of any particular portion of the law. The general purpose is to be ascertained, and a constitution must be also supposed to have been prepared and adopted with reference, not only to existing statutory provisions, but also to the existing constitution, which is to be amended or superseded. Looking at section 18 of the constitution of 1846, as in force in January, 1875, and thereafter, we find, in the last part of such section, the provision above quoted as to street railroads. Comparing it with the same section in the new constitution, we

find the only difference to be a provision for the application to the appellate division, instead of the general term, of the supreme court. Then, turning to article 6, we find that the appellate division does not come into existence until January 1, 1896, and the constitution, as to that division at least, does not take effect until the last-named time. All these provisions should be considered. We have the policy of the state, as evidenced by the constitutional amendment of 1875, insisting upon an application under the facts stated in the amendment, to the general term of the supreme court. We have the rapid transit act of 1891, providing in detail for the proceedings in accordance with such existing provisions. We have the provision in the new constitution, exactly the same as in the old, excepting the designation of the court as the appellate division, and we have the creation of such division to go into effect January 1, 1896. Taking all these things into consideration, it seems plain to us that the general terms of the supreme court continue to have the same jurisdiction they have had, ever since 1875, to entertain such an application as this, and that such jurisdiction continues until the appellate division comes into existence on the 1st of January, 1896.

For the purpose of such application, the provision of the latter clause of section 18 of the new constitution does not take effect until there is an appellate division capable of hearing the same, and the provision in the section of the old constitution already referred to, and also those in the rapid transit statute of 1891, all providing for an application to the general term, remain in the meantime in force. When the appellate division comes into being, and a commission previously appointed by the general term is ready thereafter to report, it is clear, to our view, that the report is to be made to the appellate division the same as if it had itself appointed such commission subsequent to January 1, 1896. Reading the section which provides for an application to be made to the appellate division in connection with the article creating that division, and giving it judicial functions only from January 1, 1896, we think the time for the taking effect of such first provision is, not January 1, 1895, but that such time is, within the fifteenth article, "otherwise provided," and that it is January 1, 1896. It cannot be pretended that this phrase, "otherwise provided," means otherwise provided in express terms. Any language used in, or any proper and necessary construction of, the instrument which shows an intention that the particular provision shall take effect at some time other than January 1, 1895, would be sufficient. We think this intention is shown, and becomes quite apparent, in those portions of the instrument already alluded to, especially when taken in connection with the provision on the same subject in section 18

of article 3 of the old constitution. For the purpose of conforming that provision to the constitution as it would exist on and subsequent to January 1, 1896, the designation of the name of the court was changed, and that change was obviously intended to come into effect simultaneously with the division which was created, while the old provision would remain until that event took place. This is the result of reading all the provisions of the constitution together. Any other construction would be, as it seems to us, exceedingly technical, plainly contrary to the spirit and intent of the instrument itself, and quite too narrow to be applied in such a case as this. The provisions should receive a reasonable construction, and one that may not work a public mischief. A construction which shuts the doors of a court to all applications of this nature for one year, and closes all operations of street-railroad building in the state for that time (where an application to the court is necessary), ought not to be adopted without a plain mandate to that effect from the constitution itself. We think no such mandate can be found.

These views lead to a reversal of the order of the general term. The proceedings should be remitted to that court, in order that the application may be there acted upon on its merits. All concur. Ordered accordingly.

(58 Ohio St. 352)

STEARNS v. VILLAGE OF WYOMING et al.

(Supreme Court of Ohio. Oct. 22, 1895.)

MEMBER OF COUNCIL—CONTESTED ELECTION—DE-
CISION OF COUNCIL.

The determination by a council of the contested election of a member of its body cannot be reviewed on error.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

In the court of common pleas of Hamilton county the plaintiff in error, William S. Stearns, filed a petition in error against the village of Wyoming and the members of its common council named in the petition. He claimed that, at an election held in the village on April 2, 1894, he was duly elected to the common council as one of its members, and certified as such, and that, in a contest instituted in the council by certain parties on behalf of J. I. Taylor, he was ousted as a member, and that Taylor was declared elected, and seated in his place. The plaintiff claimed that the council erred in receiving oral testimony as to certain ballots, received by the judges and not counted, and in counting them for Taylor, contrary to the provisions of the statute on the subject. The common pleas, after hearing the case, affirmed the action of the council, and dismissed the plaintiff's petition, with costs. The judgment was affirmed on error by the circuit court, with costs, and plaintiff brings error. Modified.

PER CURIAM. Held, that the power conferred by section 1679, Rev. St., on common councils of municipal corporations to "judge of the election, returns, and qualifications of their own members" is not only exclusive of any other jurisdiction to hear and determine the matter, as decided in *State v. Berry*, 47 Ohio St. 232, 24 N. E. 286, but is also final. The power exercised by councils in such cases is political in character, and not judicial, in the sense that their determination of the question who is and who is not entitled to a seat in their body can be reviewed by a court. *State v. Harmon*, 31 Ohio St. 250. It therefore follows that the judgment of the circuit court should be affirmed, with costs, and that that of the common pleas should be affirmed so far as it dismissed the petition of the plaintiff in error in that court, and reversed as to costs. Judgment accordingly.

(53 Ohio St. 314)

STATE ex rel. SCHWARTZ, Prosecuting Attorney, v. FERRIS, Probate Judge.

(Supreme Court of Ohio. June 27, 1895.)

TAXATION — DIRECT INHERITANCE TAX — CONSTITUTIONAL LAW.

1. Funds raised by the taxation of franchises, rights, and privileges may be applied to purposes of general revenue, or any other purpose authorized by statute.

2. A law of a general nature, which is in full force in every part of the state, complies with section 26 of article 2 of the constitution, requiring laws of a general nature to have a uniform operation throughout the state.

3. The act of April 20, 1894, entitled "An act to impose a direct inheritance tax" (91 Ohio Laws, 166), by its exemption from taxation of the right to receive or succeed to estates not exceeding \$20,000 in value, and taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and in taxing at a higher rate per centum the right to receive or succeed to estates of larger value than to estates of smaller value, is in conflict with section 2 of the bill of rights of the constitution of this state, which declares that: "All political power is inherent in the people. Government is instituted for their equal protection and benefit;" and the whole act is therefore unconstitutional and void.

4. The first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," is not, as to the question in this case, broader than the second section of our bill of rights.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

This case was commenced in the circuit court of Hamilton county, in the name of the state on relation of John C. Schwartz, prosecuting attorney, against Howard Ferris, judge of the probate court of said county, in mandamus in the nature of *procedendo*, to compel the judge of said court to proceed and perform his official duties under the act of April 20, 1894, entitled

"An act to impose a direct inheritance tax" (91 Ohio Laws, 166), as applicable to the estate of George K. Duckworth, who was a resident of said county, and died on the 8th day of May, 1894, leaving an estate of over \$50,000. The petition says that letters of administration have been granted to the widow, Lucy B. Duckworth; that the prosecuting attorney has made proper application to said probate judge for the appointment of appraisers to appraise the property of said estate for the purpose of having said direct inheritance tax assessed; that said probate judge refused, and still refuses, to make such appointment, on the ground that said statute is unconstitutional. To this petition the probate judge filed a demurrer, which was sustained by the circuit court, on the ground that the statute is unconstitutional, and to which plaintiff excepted. Judgment was thereupon rendered in favor of defendant below. A petition in error was then filed in this court to reverse the judgment of the circuit court. Affirmed.

John C. Schwartz, Thos. H. Darby, and J. K. Richards, for plaintiff in error. Thomas McDougall, Alfred C. Cassett, Paxton, Warrington & Boutet, Edward S. Rawson, W. F. Ampt, and Boynton & Horr, for defendant in error.

BURKET, J. This case has been argued with marked ability on both sides, and the arguments have greatly aided the court in reaching its final conclusions. We have carefully examined and considered all the cases cited by counsel, and many others, and shall state rather the conclusions reached than lengthy arguments in support thereof.

The first section of the statute in question is as follows: "Section 1. Be it enacted by the general assembly of the state of Ohio, that all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, including annuities, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of section 4182 of the Revised Statutes of Ohio, or the lineal descendant thereof, the lineal descendant of any adopted child, the wife or widow of a son, the husband of a daughter of decedent, or of any one in trust for such person or persons, shall be liable to a tax as follows, to wit: When the value of the entire property of such decedent exceeds the sum of twenty thousand dollars and does not exceed the sum of fifty thousand dollars, one per cent.; when it exceeds fifty thousand dollars and does not exceed one hundred thou-

sand dollars, one and one-half per cent.; when it exceeds one hundred thousand dollars and does not exceed two hundred thousand dollars, two per cent.; when it exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars, three per cent.; when it exceeds three hundred thousand dollars and does not exceed five hundred thousand dollars, three and one-half per cent.; when it exceeds five hundred thousand dollars and does not exceed one million dollars, four per cent.; and when it exceeds one million dollars, five per cent.; seventy-five per cent. of such tax to be for the use of the state, and twenty-five per cent. for the use of the county wherein the same is collected; and all administrators, executors and trustees shall be liable for all such taxes, with lawful interest, as hereinafter provided, until the same shall have been paid as herein-after directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property." It is this first section that is claimed to be unconstitutional, and which was so held by the circuit court.

In view of the authorities cited, it must be conceded that the general assembly has the power to pass an inheritance tax for purposes of general revenue, unless prohibited by the constitution of our state. Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. The right to dispose of property during the lifetime of the owner cannot be separated from the property itself, and therefore to tax the right of disposal by contract in the lifetime of the owner, even though to take effect at his death, is to tax the property itself. But the right to dispose of the property by will or descent, taking effect after the death of the owner, is not so closely connected with the right of property, and it is not so clear that such right may not be taxed. But when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime or at his death. This right to receive property is under the control of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the constitution. To regulate by taxation or otherwise the privilege or right to receive property, is not in conflict with the first section of the bill of rights, which recognizes the inalienable right of acquiring, possessing, and protecting property. Were it otherwise, all our laws as to wills, descent, distribution, and conveyances would be unconstitutional.

It is urged, however, that the statute in question does not tax the right or privilege of receiving property, but taxes the property itself. It must be conceded that the language used in the statute is upon its face

clearly a taxation of the property itself, and not of the right to acquire property. And for myself, I think this is the true construction of the act. Others of the court, however, think that when the operation and effect of the statute are considered, it may be regarded as taxing the right or privilege, rather than the property. Certain it is that the only thing that can be constitutionally taxed is the right or privilege of succession, and a statute having such taxation in view should express its purpose in words applicable to such subject-matter of taxation.

It is conceded by all parties that, if this statute imposes a tax on property, it is unconstitutional. As a majority of the court are of opinion that it is not a tax on property, but upon the right to receive property, the statute must, as to this point, be sustained.

It is also contended that this tax is a tax on property, because it is made a lien upon the real estate received; and cases are cited sustaining this view. In *re Bittinger's Estate*, 129 Pa. St. 344, 18 Atl. 132. The statute in that case provides as follows: "The tax on real estate shall remain a lien on the real estate on which the same is charged until paid" (Act Pa. May 6, 1887; P. L. 79); while the statute in this state provides simply that the inheritance tax "shall at once become a lien upon said property." But, aside from the difference in the words of the statute, there is no force in the contention. If the legislature has the power to assess a tax upon the right to receive and succeed to property, it clearly has the right to make such tax a lien upon the property received by the use of such right; and the making of such lien does not change the tax from a tax upon the right to receive to a tax upon the property received under the right.

Next it is urged that, if the statute imposes a tax only upon the right or privilege to receive property, as the taxation thereby imposed is for general revenue, it is in conflict with section 2 of article 12 of the constitution, which provides that laws shall be passed taxing by a uniform rule all property according to its true value in money. The claim is that for purposes of general revenue property only can be taxed. The constitution is silent as to the application of the fund arising on taxation on subjects other than property. The constitution being silent, it follows that, if such taxes can be levied and collected at all, their application is within the sole and exclusive power and discretion of the general assembly. The power of taxation, without limitation, is given in section 1, art. 2, of the constitution, which provides that: "The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives." In *Telegraph Co. v. Mayer*, 28 Ohio St. 521, it was held that the general grant of legislative power vested in the general assembly by this section in-

cludes the power to collect revenue for public purposes, and the limitations on the exercise of this power are to be found in other provisions of the constitution. In *Hill v. Higdon*, 5 Ohio St. 243, it is said by the court: "In our present constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument." The power of taxation granted in the first section of the second article, being unlimited, is broad enough to include the power to tax rights, privileges, and franchises. Is there any limitation upon this power found in any other section of the constitution? The only section which it is claimed limits this power is section 2 of article 12. That section is in the following words: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published, as may be directed by law." It will be noticed that this section is not a limitation upon the power to tax rights, privileges, and franchises, because the limitation by this section imposed is as to the taxation of property; that is, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also real and personal property. Nothing whatever is said about rights, privileges, or franchises, and therefore this section cannot fairly be construed as a limitation of the power to tax rights, privileges, and franchises, unless they are property, within the meaning of this section of the twelfth article. That a franchise is not property, within the meaning of said section, was held by this court, for reasons which seem unanswerable, in *Bank v. Hines*, 3 Ohio St. 1. The court say, on page 8: "A corporate franchise, therefore, being a mere privilege, or right of authority by the government, is not property of any description, and consequently not subject to taxation under the above provisions of the constitution." It will be noticed that the court here say that a franchise is not such property as can be taxed under the above provisions of the constitution. The provisions referred to are those contained in section 2 of article 12. That a franchise is valuable, and in that sense property, has sometimes been held; but it is not property, in the sense used in said section of the constitution, and its tax-

ation is not by that section limited or restricted.

With the power of taxation of rights, privileges, and franchises, granted by the first section of the second article, unlimited and unrestricted by other parts of the constitution, what authority is there to limit and restrict this kind of taxation to purposes other than for general revenue? No warrant therefor is found in the constitution. This court, in *Bank v. Hines*, supra, after quoting the second section of the twelfth article, on page 10, by Bartley, C. J., says: "The manifest effect of this constitutional provision is to make property the basis, and the sole basis, of taxation." Again, on page 40, the court, by Thurman, J., says: "The objects of taxation declared in that instrument are the real and personal property and choses in action in the state." The part of the constitution under consideration was the second section of article 12, and nothing whatever is said about the general grant of power found in section 1 of article 2. Throughout the whole case of *Bank v. Hines*, section 2 of article 12 is regarded as the granting of the power of taxation, instead of a limitation and restriction of the general power granted in section 1 of article 2. That such is not the true or correct construction of the constitution is now universally conceded. That construction was not necessary to the decision of the question then before the court, but it did not lead to an incorrect determination of that case. It mattered not in that case whether the grant of power of taxation was found in section 1 of article 2 or in section 2 of article 12; nor whether section 2 of article 12 was a grant of power of taxation or a limitation of the power granted by the other section of the constitution. The question for determination in that case was as to taxation of banks under section 3 of article 12, and that led to the question as to whether section 2 of that article permitted the deduction of debts from moneys and credits. The question before the court had relation to property only, and, construing section 2 of article 12 as a grant of power, instead of a limitation of power granted in another section, and as nothing except property is spoken of as taxable in said section 2, the court held that what was therein expressed as taxable by implication excluded everything else, and therefore announced the rule that under said section the sole basis of taxation is property. That property is not the sole basis of taxation under the power granted by section 1 of article 2 appears by many decisions of this court, among which are the following: *Telegraph Co. v. Mayer*, 28 Ohio St. 533; *Baker v. Cincinnati*, 11 Ohio St. 540; *Adler v. Whitbeck*, 44 Ohio St. 565, 9 N. E. 672; *Anderson v. Brewster*, 44 Ohio St. 585, 9 N. E. 683; *State v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721; *Metz v. Hagerty* (Ohio) 38 N. E. 11.

The error of regarding the second section

of article 12 as a grant of power of taxation, instead of a limitation upon that power, was carried into the decision of the case of *City of Zanesville v. Richards*, 5 Ohio St. 589, but was partly corrected in *Hill v. Higdon*, Id. 243, and fully corrected in *Reeves v. Treasurer*, 8 Ohio St. 333. The court, on page 592, in 5 Ohio St., by Ranney, J., says: "The public burdens are made to rest upon the property of the state, and whenever money is to be raised by taxation the positive injunction is, that 'laws shall be passed, taxing by a uniform rule all moneys, credits, interest in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money.'" That the public burdens are not made, by the constitution, to rest exclusively upon the property of the state, is shown by the cases above cited, and that which is spoken of as an "injunction" that laws shall be passed taxing by a uniform rule all moneys, etc., is, instead of an injunction, a restriction and limitation upon the general power of taxation granted by section 1 of article 2. In the *City of Zanesville Case*, supra, the question was whether an exemption of lands, not laid out into lots, within the city of Zanesville, from all taxes except for road purposes, was constitutional. The second section of article 12 was again regarded as the source of the power of taxation, but, as only taxes on property were under consideration, this led to no erroneous results in that case; and the court held that all lands within the city limits must be taxed for all purposes for which lots were taxed. The court say: "No tax, either for state, county, township, or corporation purposes, can be levied without express authority of law; and this section of the constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes to be levied for either purpose." If by the applicability and governing principle is meant equality of taxation of property without exemption,—that is, that when some property in a city is taxed for state, county, township, or corporation purposes, all property within the city must be taxed for the same purposes without exemption,—it is correct. But if it means, as we think it does not, that subjects of value, other than what are regarded property within said section, cannot be taxed for state, county, township, or corporation purposes, it is incorrect. That the former was meant clearly appears from the subject-matter under consideration. The question as to the taxation of rights, privileges, and franchises was not under consideration, and the language used is not applicable thereto.

Speaking of the ninety-fourth section of the tax law, the court say, on page 592, that it seems to imply that municipal corporations might exist which were authorized to tax only such real estate as was laid out into lots when platted and recorded. The court do not so construe that section, and say that, if so

construed, it would conflict with section 2 of article 12. The question under consideration being whether lands within the city not laid out into lots could be taxed for purposes other than road purposes, the court say: "We are clear in the opinion that if it [section 94] means what is claimed for it, and intends to provide for exemption of any part of the property in a municipal corporation otherwise subject to taxation from contributing its proportion to the general revenue fund, it is in conflict with the second section of the twelfth article of that instrument, and should be treated as a nullity." This is the first time in the line of decisions that "general revenue" is mentioned. It will be noticed that it is property, and not franchises, that cannot be exempted from contributing to the "general revenue" fund. It will further be noticed that it is not stated here that only tax on property can contribute to the general revenue fund. The full force of the decision is that property cannot be exempted from contributing to the general revenue fund. The court, in the *City of Zanesville Case*, say that property cannot be exempted from contributing to the general revenue fund; and when reference is made to that case in the case of *Hill v. Higdon*, 5 Ohio St. 243, the word "property" is still retained; the court saying, on page 246: "In the case of *City of Zanesville v. Richards*, decided at the present term, we have held that this section is equally applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township, or corporation purposes; and that it requires a uniform rate per cent. to be levied upon all property, according to its true value in money, within the limits of the state, or the local subdivisions for which the revenue is collected." The governing principle here referred to is that all property shall be taxed according to its true value in money, when raising revenue for state, county, township, or corporation purposes, and that there can, in such cases, be no exemption of property, except as provided in said section. This very clearly appears when the whole case is read, and by what immediately precedes the part above quoted. The question in the case was whether special assessments for street improvements were constitutional or not. There was no question involved whether or not general revenue could be raised by a tax on franchises or privileges, and what is said as to taxation for general revenue is to show that in raising general revenue there can be no exemption of property other than is provided in section 2 of article 12. And when the court say, on page 249, that "the second section of the twelfth article has established the principles upon which all taxes for general revenue purposes must be levied," the principles referred to are the principles of equality, and that all property must be taxed, without exemption, as provided for in said section. That this is so is shown by the language used by the

court, the subject-matter under consideration, and the fact that those are the only principles found in said section. General revenue is not mentioned in the section. In order to sustain assessments for street improvements, the court, in this case of *Hill v. Higdon*, abandoned the position that the second section of article 12 was the source of the power of taxation, and the concession was made that "the general grant of legislative authority includes the power of taxation in all its forms," and that "restrictions upon its exercise are to be looked for in other parts of the instrument." The doctrine and line of decisions, that general revenue cannot be raised otherwise than by a tax on property, are both based upon the above cases of *Bank v. Hines*, *City of Zanesville v. Richards*, and *Hill v. Higdon*, none of which support the doctrine, but decide that in raising general revenue all property must be taxed, without exemption, as provided in said second section. The cases following the above three cases refer to the doctrine as well understood and settled by those cases, without examining the doctrine anew to see whether or not it is well founded. The doctrine is not necessary to a proper decision of any of the cases in which reference is made thereto, and all of them not heretofore overruled were correctly decided without its aid, including *Watson v. Commissioners*, 49 Ohio St. 622, 32 N. E. 472, and *Pittsburgh, C. & St. L. Ry. Co. v. State*, 49 Ohio St. 189, 30 N. E. 435. In none of those cases is the doctrine sustained that general revenue cannot be constitutionally raised by taxation on franchises, rights, and privileges; but the doctrine sustained is that, when general revenue is to be raised by taxation on property, all the property of the state, county, township, or corporation must be taxed without exemption, as provided in said section 2 of article 12 of the constitution. It follows, therefore, that imposing the tax in question upon the right to receive property does not render the act unconstitutional.

Next it is urged that the statute in question is in conflict with section 26 of article 2 of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state." This section of the constitution is not intended to guaranty the equal protection of all the inhabitants of the state, but only to provide that laws of a general nature shall be in force in all parts of the state. *State v. Nelson*, 52 Ohio St. —, 39 N. E. 22, and cases there cited.

In the next place, it is urged that the statute in question is unconstitutional in this: that it exempts estates of \$20,000 and under from all taxation, and in case the estate exceeds \$20,000 it taxes the entire estate without any exemption whatever; and also in this: that large estates are taxed at a higher rate per cent. than smaller ones. Section 2 of the bill of rights provides as follows: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." This statute is

in direct conflict with this section of the bill of rights. If government is instituted for the equal protection and benefit of the people, it follows that laws which are passed under a government so instituted must likewise be for the equal protection and benefit of the people. This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property. The right to receive the first \$20,000 of an estate not exceeding that sum is protected from taxation, while the right to receive the first \$20,000 of an estate exceeding that sum is taxed the sum of \$200. This is not equal protection. Again, the right to receive \$50,000 worth of property of an estate not exceeding that sum is taxed \$500, while the right to receive \$50,000 of an estate exceeding that sum is \$750. This is not equal protection. The same may be said of the other gradations provided for in the statute. The right or privilege of receiving or succeeding to property is valuable in proportion to the value of the property received. It cannot be consistently said that the right to receive \$20,000 is of no value, and that the right to receive \$20,001 is of the value of \$200.01. Again, he who uses the right or privilege of receiving property of the value of \$20,001, and pays therefor a tax of \$200.01, is not equally benefited for the tax paid as he who uses the same right or privilege of receiving property of the value of \$20,000, without paying any tax whatever for the use of such right. The exemption of \$20,000, and the increase of the per cent. as the value of the estate increases, renders this statute unconstitutional. Our constitution requires equality in our tax laws, and also equality in their execution, as near as may be. The only exemption allowed as to taxation of property is personal property to the amount of \$200 to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as section 2 of article 12 permits an exemption from taxation of personal property not exceeding \$200, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property an exemption up to \$200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent. must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all. It was this principle, more than any other, that induced the decision in *Coal Co. v. Rosser*, 52 Ohio St. —, 41 N. E. 263.

In support of the law it is urged that this

exemption and gradation may be sustained upon the ground that the costs of administration in a small estate are proportionately larger than in a large one, and that therefore the small estate should be free from this taxation. The answer is that equality in taxation is required by the constitution, and that our administration laws are enacted upon the principle of equal protection and benefit of the people, and this unequal mode of taxation is not required to remedy any defect in the burdens of these laws.

Again, it is urged in support of the law that an estate not exceeding \$20,000 is in the nature of a necessity for the support of widow and children; that the widow and children succeeding to so moderate a property ought to be exempted from paying the state anything for that privilege. The answer to this, as well as to the former proposition, is that we are not here considering the policy or equity of this exemption, but the power of the legislature to make such discrimination, when prohibited from so doing by the second section of the bill of rights. When this power is once conceded, the manner of exercising the same is limited only by the will of the legislature. In determining constitutional questions, courts should not attempt to solve them by reasoning only along the lines of the principles of equity, but the reasoning should be along the lines of the constitution, for it may be that the very object of the constitution is to abandon and cut loose from what had theretofore been regarded as equity in particular cases, or upon a particular subject-matter. The question is, therefore, not what would be equitable, but what is constitutional. Equity cannot be permitted to override the constitution.

Again, it is urged in favor of the statute that the state has the right to say that the heir or legatee or devisee of a large property enjoys a disproportionate privilege, because what he receives is in the nature of a luxury, and luxuries ought to be subject to higher taxes. The answer to this is that the value of the right to receive is in direct proportion to the value of the property received, and must, under the constitution, be taxed accordingly, if taxed at all. As to the higher tax on luxuries, it may be said that such a rule might find a place in tariff legislation, where all are free to indulge in the luxuries or not, as they see fit, but that such rule can find no support in taxation under a constitution requiring equality in taxation, and laws to be for the equal protection and benefit of all.

Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the state has a right to say that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death. The an-

swer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances; and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. The act is clearly one for taxation, and not for regulation, as shown by its provisions and title. The state finds no warrant in its constitution for saying that it will make a greater rate of charge for the privilege of succeeding to large estates than to smaller ones, but, on the contrary, this is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people. This requirement applies as well to laws for regulation as to laws for taxation.

It is also contended by those opposing the law that the statute is inoperative, for the reason that it fails to provide any machinery for the collection of a tax levied on property which passes by "deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor." Whether there is sufficient machinery supplied in this and other statutes to enforce collection of such tax need not now be determined, as that question is not involved in this case, and does not go to the constitutionality of the statute, but to its enforcement, if found constitutional.

As to the first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws," it is sufficient to say that the provisions of this section of the federal constitution, as to this question, are not broader than the second section of our bill of rights, and that, therefore, a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the constitution of the United States.

While the facts in the case of *Railway Co. v. Connelly*, 10 Ohio St. 160, said to have been followed and relied upon by the circuit court, bear little, if any, relation to this case, the rule of decision in that case was in line with the second section of our bill of rights, and was, therefore, very properly followed by the circuit court. Judgment affirmed.

SHAUCK, J., concurs in the third and fourth propositions of the syllabus, and in the judgment of affirmance.

(58 Ohio St. 347)

STATE v. OAK HARBOR GAS CO.

(Supreme Court of Ohio. Oct. 22, 1895.)

ABANDONED GAS OR OIL WELLS—FILLING SAME—
FORM OF PETITION.

When an oil or gas well is about to be abandoned, or operation thereof cease, the statute (90 Ohio Laws, 24) requires that, before

drawing the casing therefrom, it shall be securely filled in such manner as shall prevent the surface or fresh water from penetrating to the oil or gas bearing rock, and also as shall prevent the gas and oil from escaping therefrom. To comply with this statute, it is required that the necessary filling be done while the casing yet remains in the well; and a petition for the violation of this statute need not aver that the casing has been drawn.

(Syllabus by the Court.)

Error to circuit court, Ottawa county.

Action by the state, on complaint of David Gordon, against the Oak Harbor Gas Company.

The petition of plaintiff below, plaintiff in error here, is as follows: "The defendant is a corporation duly incorporated under the laws of the state of Ohio. The defendant for several years last past has been the operator of a certain well, constructed for the purpose of producing petroleum oil and natural gas, the same being situated upon the parcel of land described as follows, to wit: The east half of the southwest quarter of section three, Salem township, Ottawa county, Ohio. Defendant claims to be the owner of said well, and pretends to be operating the same for the production of petroleum oil and natural gas. But complainant alleges that said well has ceased to produce either petroleum oil, natural gas, or any other profitable mineral substance, and has become wholly non-productive, and of no value or use, and in fact the defendant has ceased to operate the same, and the condition of said well is such that surface or fresh water penetrates the oil or gas bearing rock through said well. Complainant alleges that defendant has ceased to operate said well, and ever since the 1st day of April, 1893, he has unlawfully and willfully neglected and omitted to securely fill said well with rock sediment, or with mortar composed of two parts sand and one part cement, to the depth of two hundred feet above the top of the first oil or gas bearing rock, in such manner as to prevent the surface or fresh water from penetrating to the oil or gas bearing rock, and in such manner as shall prevent the gas and oil from escaping from said well, as required by law; but the defendant has wholly, willfully, and unlawfully neglected and omitted and failed to fill said well in any manner whatever, and has omitted to make any attempt to do the same in any manner, and all of which defendant refuses so to do,—whereby the fresh or surface water penetrates to the oil and gas bearing rock of said well, and gas and oil escapes therefrom, contrary to the form of the statute in such case made and provided. Wherefore complainant prays that the defendant be found guilty of the facts charged, and required to pay the penalty provided by law, and that a mandatory injunction may issue compelling the defendant to comply with the provisions of the act of February 9, 1893, entitled 'An act to regulate drilling, operating and abandonment of petroleum oil, natural gas

and mineral water wells, and prevent certain abuses connected therewith.'"

To this petition defendant below filed a general demurrer, to the effect that the petition did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was overruled by the court of common pleas, and exceptions taken, and thereupon defendant filed the following answer: "The defendant now comes and admits that it is a corporation, as alleged in the petition. It also admits that it is the owner of the well described in the petition, and that it has not filled up its said well; but it denies each and every other allegation contained in said petition."

Upon trial of the case to a jury a verdict of guilty was returned, and the penalty of \$100 was assessed against the defendant. A motion for a new trial was filed, on the ground that the verdict was against the weight of the evidence, and that the court erred in overruling the demurrer. This motion was overruled, and exceptions taken, and judgment entered on the verdict. Upon proceedings in error, the circuit court reversed the judgment, on the ground that the petition does not state facts sufficient to constitute a cause of action, and that the court of common pleas erred in overruling the demurrer to the petition. Therefore a petition in error was filed in this court, seeking to reverse the judgment of the circuit court. Reversed.

PER CURIAM. Section 2 of the act of February 9, 1893 '90 Ohio Laws, 24), provides that the owner or operator of any gas or oil well, when about to abandon or cease operating the same, and before drawing the casing therefrom, shall securely fill such well with rock sediment, or mortar composed of two parts sand and one part cement, to the depth of 200 feet above the top of the first oil or gas bearing rock, in such manner as shall prevent the surface or fresh water from penetrating to the oil or gas bearing rock, and also as shall prevent the gas and oil from escaping therefrom. The penalty for a violation of the statute is \$100.

The particular in which the petition is claimed to be defective is that it does not aver that the casing had been drawn from the well. It is urged that, so long as the casing remains in the well, there is no violation of the statute. It will be noticed that the statute requires the well to be securely filled in such manner as shall prevent the surface or fresh water from penetrating to the oil or gas bearing rock, and also as shall prevent the gas and oil from escaping therefrom. The filling is to be such as will keep the water out, and the gas and oil in the rock. To draw the tubing out, leaving the casing in, would permit a free escape of gas

and oil from the well; and if, by reason of age, corrosion or other cause, the casing should become full of holes, and leak, the fresh water would penetrate to the oil and gas bearing rock, to the great damage of the surrounding oil and gas territory. So that, in case of such defective casing, even though the casing remains in the well, the fresh water will get to the oil or gas bearing rock, and the oil and gas will escape therefrom. It is therefore clear that it is not the drawing of the casing that is the test as to whether a well has been abandoned or ceased to be operated. The well may be abandoned, and all operations cease, with the casing left in the well. If the casing is in good condition no water can get into the well, but, the tubing being pulled out, the gas and oil can freely escape, even though the casing remains in the well. The reason the filling is to be done before drawing the casing is that the filling cannot be so securely done after the casing is drawn. To shut down a well, leaving in the tubing and casing, is not to abandon it, nor ceasing to operate it. What is meant by the statute is a permanent abandonment, or a permanent ceasing to operate, followed by pulling out the tubing, and, usually, though not always, followed by drawing the casing. It is therefore not necessary to the abandonment of or ceasing to operate a well, that the casing should be drawn, and it is not necessary to make an averment to that effect in the petition. The petition in this case, therefore, states facts sufficient to constitute a cause of action against the defendant, and the demurrer was properly overruled. The circuit court, therefore, erred in reversing the judgment. The judgment of the circuit court is reversed, and that of the common pleas affirmed.

(142 Ind. 269)

LAMPOR T v. LAKE SHORE & M. S. R. CO.

(Supreme Court of Indiana. Oct. 15, 1895.)

DIRECTING VERDICT—ACCIDENT ON RAILROAD TRACK—PRESUMPTIONS.

1. Where, in an action against a railroad company for the death of a person on its track, there is evidence that the deceased could have seen the train in time to have avoided the accident, which is not overcome, it is proper to direct a verdict for defendant.

2. Where there is evidence that one killed by a moving train could have seen it in time to have avoided the accident, the law will assume that he did actually so see it.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Action by Mary J. Lamport, administratrix, against the Lake Shore & Michigan Southern Railroad Company, for the death of her intestate. From a judgment for defendant, plaintiff appeals. Affirmed.

Andrew Anderson, for appellant. Baker & Miller, Geo. C. Greene, and O. G. Getzen Danner, for appellee.

MCCABE, J. The appellant, as administratrix of the estate of Hortensius M. Lampport, sued the appellee in a complaint of two paragraphs for \$10,000 damages to the widow and children of said decedent in causing his death through the alleged negligence of the appellee, as charged in the first paragraph, and through its willfulness, as charged in the second paragraph, of the complaint. At the close of the plaintiff's evidence the trial court instructed the jury to return a verdict for the defendant, which the jury accordingly did, upon which the appellee had judgment over appellant's motion for a new trial. Error is assigned here on the action of the circuit court in overruling that motion. It appears from the evidence that the decedent and his brother-in-law, Henry Boles, while approaching the appellee's station from the west on one of the appellee's side tracks at the village of Oskesola, in St. Joseph county, were both struck and killed by a backing gravel train on the evening of March 25, 1892. The appellee's railroad runs east and west of said station and village, and the village, containing about 100 inhabitants, lies east of the station or passenger depot. The appellee has four tracks, all passing on the north side of the depot,—two side tracks and two main tracks. The north track and the south track are side tracks. Boles lived on a farm a little north of west of the depot, 35 or 40 rods, the railroad running through his farm. His house was 5 or 6 rods north of the track. He had lived there 17 years. People coming on foot from that direction to the depot were in the habit of walking on the appellee's tracks for some distance west up to the depot, and had been for years. The decedent Lampport lived at Kendallville, Ind. He frequently visited his brother-in-law, Boles, and was familiar with all the surroundings, the running of the trains on appellee's railroad at that place, and the tracks. Outside of the roadbed the ground was wet and soft with some water standing in low places, though there was grass on it, and wagon loads of wheat had been frequently hauled over it; and there was no way provided for persons coming on foot from the west to the depot to avoid water and mud without walking on the roadbed of appellee. There were croquet grounds on appellee's grounds at the place, and such grounds of appellee were 15 rods wide on each side of the tracks. The decedent Lampport, on the day mentioned, came to the house of Boles, bringing with him his mother, who was also the mother of Mrs. Boles, to stay a few days with her daughter, arriving there on a west-bound passenger train over appellee's railroad about 8 o'clock in the afternoon. Lampport intended to return home on the east-bound passenger train over said railroad, which was due at that station at 7:50 o'clock that evening. He and Boles started to walk from his house to the depot at about 7:30 o'clock for the purpose of Lampport taking pas-

sage on that train east to his home. No person ever saw them alive afterwards. Their dead bodies were found next morning, lying on the ground, one on the north side and the other on the south side of the north side track, some distance west of the depot, and their hats were found on the back end of the last or hindmost car of the gravel train. About the time they started from Boles' house there was a freight train passing on the south main track west, and the gravel or work train passed east beyond the station about the time they started. The gravel or work train came in on the north main track, and left the caboose standing on that track, a short distance west of the depot, with red lights on it, pulled up east of the depot, and backed in on the north side track westward until it came west of the depot. And the facts and circumstances already narrated, it is claimed, were sufficient to warrant the jury in inferring that the hindmost flat car in that train, while thus backing up, struck and killed Lampfort and Boles while they were walking eastward towards the depot meeting it. The evidence further shows that there was no light on that car, but it shows that that train could be seen and heard 15 or 20 rods away. It is contended that the railroad company was guilty of negligence in not providing a safe way for passengers coming from that direction to get to the depot, and not providing a light on the rear end of that train to warn pedestrians and persons approaching the depot from that direction of the approach of the train. The foregoing is the substance of all the evidence.

We may concede, without deciding, that the company, by the foregoing facts, in substance is shown to have been guilty of negligence, and yet that is not enough to establish the appellant's cause of action as alleged in the complaint. It is alleged in the first paragraph thereof that, "while in the exercise of ordinary care, and without any fault on their part, [they were] run against and struck by said flat car, and were thereby mortally injured and killed." The second paragraph charges a willful killing, but there is no claim or pretense by the appellant that there is a particle of evidence to prove such a killing. So that it is essential to prove by some evidence that the plaintiff's intestate was exercising ordinary care, and free from fault or negligence contributing to his injury and death. In *Man v. Railroad Co.*, 128 Ind., at page 142, 26 N. E., at page 820, this court said: "When one approaches a point upon the highway where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution; and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. The requirements of the law,

moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence per se." To the same effect is *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. 603. The duty to exercise care and caution is no less incumbent on one who is walking upon a railroad track either with or without the permission of the railroad company, because, as was said in the case just quoted from, "the presence of a railroad track upon which a train may at any time pass, is notice of danger," and, as was said in *Pennsylvania Co. v. Meyers*, 136 Ind., at pages 262, 263, 36 N. E., at page 37: "If we were wrong in assuming that the decedent, at the time the accident occurred, had no right to be on the track, and if in fact he had a legal right to be there, still if * * * the decedent, by his own negligence, contributed materially to the production of his own injury, then he cannot recover, because in that case he has no cause of action, even though appellant's negligent conduct also contributed to the production of the injury." As was said in *Railroad Co. v. Goldsmith*, 47 Ind., at page 49: "The track of a railroad belongs to the company, and is in no sense a public highway to those who are not being transported thereon. At public crossings the public have the right to cross the track of a railroad, but in so doing all persons are required to exercise reasonable care and caution to avoid receiving injury, and the company is compelled to exercise the same degree of care and caution to prevent the infliction of injury. But between the stations and public crossings the track belongs exclusively to the company, and all persons who walk, ride, or drive thereon are trespassers; and if such persons walk, ride, or drive thereon at the sufferance or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking." But it is contended that the company, by failure to provide a safe approach to its passenger depot, and by long acquiescence in the use of its tracks for such purpose by the public, authorized the public and the decedent to use the tracks of appellee as the most convenient approach to its passenger depot. As was said in *Pennsylvania*

Co. v. Meyers, supra: "But conceding, without deciding, that the appellee's intestate had a right to go on the railroad track of appellant for the purposes named, that did not absolve him from the duty to exercise due care for his own safety." The burden was on appellee to show that the deceased exercised such care. *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. 892; *Railroad Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Railway Co. v. Stommel*, 126 Ind. 35, 25 N. E. 862; *Railway Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530. It was said in *Hathaway v. Railway Co.*, 46 Ind. 25, that: "When a person crossing a railroad track is injured by a collision with a train, the fault is *prima facie* his own; and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury." As was said in *Railroad Co. v. Butler*, 108 Ind., at page 40, 2 N. E., at page 138: "This presumption is at least sufficient to require from him an explanation of his relation to the occurrence, and an affirmative showing that the circumstances were such, and his conduct such, that he was not in fault." Here the evidence shows that the appellant's intestate could have both seen and heard the backing train that collided with him and Boles, and killed them, if he had attentively listened and looked. Under such circumstances the law will assume that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Cones v. Railway Co.*, 114 Ind., at page 330, 16 N. E., at page 639. Under such a state of the evidence the trial court did not only not err in directing a verdict for the defendant, but did the only thing which it could do without erring. Hence there was no error in overruling the motion for a new trial. The judgment is affirmed.

HOWARD, C. J., took no part in this decision.

(142 Ind. 276)

HAMILTON v. STATE.

(Supreme Court of Indiana. Oct. 15, 1895.)

LARCENY—INDICTMENT—SUFFICIENCY OF EVIDENCE.

1. Under Rev. St. 1894, § 2007 (Rev. St. 1881, § 1934), making the felonious taking of the property of another larceny, an indictment alleging that defendant "feloniously" took the property of another is a sufficient allegation that he took it with the intent to deprive the owner of it.

2. On prosecution for larceny, evidence that complainant was drinking with defendant, one of several tramps congregated in a saloon; that defendant saw that complainant had money, and where he kept it; that when the last drink was taken, before the tramps left, defendant crowded in between complainant and the saloon proprietor; that, three minutes after the tramps left, complainant told the proprietor that his money was taken; that defendant endeavored to escape,—is insufficient to support a conviction.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Daniel Hamilton was convicted of larceny, and appeals. Reversed.

John W. Talbot, for appellant. Oliver M. Cunningham and Wm. A. Ketcham, Atty. Gen., for the State.

HACKNEY, J. The appellant was prosecuted and convicted, in the circuit court, upon an information charging that he, with others, on the 18th day of March, 1895, at, etc., did "unlawfully and feloniously take, steal, and carry away, of the personal property of Jacob Miller, sixteen dollars in money, then and there of the value of sixteen dollars, contrary to the form of the statute," etc.

The action of the circuit court in overruling appellant's motion to quash the information and his motion for a new trial is assigned as error. The sufficiency of the information is questioned because of the absence of an allegation that the money was taken with intent to deprive the owner of it. The charge is substantially in the language of the statute defining the offense. Rev. St. 1894, § 2007 (Rev. St. 1881, § 1934). This ordinarily, is sufficient. *Smith v. State*, 85 Ind. 553; *Bates v. State*, 31 Ind. 72; *Malone v. State*, 14 Ind. 219. The word "feloniously," employed in the charge, as said in *Scudder v. State*, 62 Ind. 13, "qualified and rendered criminal the * * * acts." That word, as it is used in the statute defining the offense of larceny, was intended to supply that element of the ordinary definition of larceny implying criminal intent, and its use in the information was, for the same purpose, entirely sufficient.

That the conviction was not supported by the evidence is next pressed upon our attention with much earnestness, and we have carefully read all of the evidence in the record. It was disclosed that the appellant and another young man were tramping through St. Joseph county, when they came upon six other tramps, with whom they remained over the night of March 17th, and the next morning took the road with their newly-chosen comrades. At about 9 o'clock, of the forenoon of that day, the eight men reached the village of Littleton, in said county, and entered Rhinehart's saloon, where they remained until near noon. During their visit to the saloon, the prosecuting witness, Jacob Miller, visited the saloon twice, and on the second visit remained until the tramps went away. Miller and the tramps drank frequently and played cards together; and just before the convivial party dispersed, while standing at the bar, taking the final drink, the appellant pressed in against Miller, on the right, and between him and one Gross, who stood very near. It is not clear that it was necessary for the appellant to do so that he might reach the bar, but at that point he secured his glass and took the drink. When Miller went to the bar on this occasion, he had in a purse,

kept in a pocket on the right hip, from \$15 to \$17 in money, consisting of one \$10 bill, one \$2 bill, and some silver money. That Miller had money in that pocket the appellant had an opportunity to know. When this last drink had been taken, the appellant and his comrades left the room, and went to Bremen, a point some six miles distant, leaving Miller and some others in the saloon. After the departure of the tramps, some two or three minutes, Miller went out of the building to an outhouse, and, after he had been there from three to five minutes, he discovered that his purse and money were missing. Returning to the saloon, he remained some time, when he told his friend Gross that the "hobos" had taken his money, whereupon he and Gross drove to Bremen, where a posse was organized and armed, and went out to arrest the tramps. The tramps were soon overtaken, and a number of shots were fired, ranging somewhere from 50 to 400, and whether by the posse only or by the posse and the tramps is in doubt; but, during the storm of shot, the appellant attempted to scale a fence, and reach the nearest thicket beyond. This attempt was frustrated, and the appellant and six others of his comrades were arrested. This, we think, is a fair statement of all of the evidence in the record upon which the state could rely to convict the appellant of the alleged crime, or to prove that a theft was committed. We have not in this statement attempted to weigh conflicts in the evidence, though there are a few which are of but little importance, but we have stated the facts as they appear most favorable to the appellee. In our opinion, the facts fall short of establishing conclusively the appellant's guilt. The facts do coincide with the conclusion of guilt, but they do not exclude every reasonable hypothesis of innocence. They show a possible opportunity to have picked the pocket of Miller, but even this possibility is not enhanced by any fact which points surely and unerringly to the conclusion that the purse was taken from the pocket. The discovery by Miller, after the appellant had forced in between him and Gross, that he had lost his purse, was after the final drink, was after the appellant had gone from the saloon some minutes, and after Miller had gone to an outhouse and remained some minutes longer. If the possible opportunity mentioned had been accompanied by any act indicating an effort on the part of the appellant to hide the purse, or if money of the character of any of that lost had been found in the possession of the appellant when arrested, such fact would have aided the conclusion that the money had been stolen, and that the appellant was the thief. If the evidence had excluded the hypothesis that no other than the appellant had an opportunity to take the money, and that, instead of its having been taken, it had been dropped from Miller's pocket upon the floor, or while going to the outhouse, or in the outhouse, the case could have rested upon a

stronger support. Instead of the evidence so showing, it fails to establish any search for the missing purse, and shows affirmatively that, at the time it is claimed the appellant pressed between Miller and Gross, there were several others crowding about Miller.

Where the evidence leaves standing some reasonable hypothesis of innocence, there can be no conviction; and, when the record discloses that fact to the appellate tribunal, a judgment of conviction cannot be affirmed. It is not the rule that this court will not pass upon the sufficiency of the evidence to support the finding of the lower court, but the rule is, as often declared, that this court will not weigh the evidence to pass upon conflicts therein, and will not disturb a finding which has evidence sufficient to support it when all contradictions and explanations of such evidence are disregarded. The transcript of the evidence in this case does not suggest a careful and accurate stenographic report of the testimony, and possibly there are omissions of evidence, upon which the able and learned judge of the lower court acted. However this may be, we are governed by the record as we find it. The judgment of the circuit court is reversed, with instructions to grant the appellant's motion for a new trial, and the warden of the State's Prison North is directed to return the appellant to the sheriff of St. Joseph county.

HOWARD, C. J., did not participate in this case.

(143 Ind. 280)

CITY OF HUNTINGTON v. GRIFFITH.

(Supreme Court of Indiana. Oct. 16, 1895.)

CHANGE OF STREET GRADE—PRIOR ESTABLISHMENT OF GRADE—ACCEPTANCE OF CITY CHARTER BY TOWN—EFFECT—BILL OF EXCEPTIONS.

1. The acceptance of a city charter by a town does not impliedly work an adoption by the city of street grades established by the town, so that the city cannot change such grades without compliance with Rev. St. 1881, § 3073 (Rev. St. 1894, § 3508), forbidding a city to change a street grade legally established by it unless the damages are first assessed and tendered to the abutting owners. 41 N. E. 8, affirmed.

2. Where the clerk certifies that the bill of exceptions contains a copy of the longhand manuscript of the evidence, such evidence, though not previously filed, is properly in the record.

On rehearing. Denied.

For former opinion, see 41 N. E. 8.

Kenner & Lesh, for appellant. J. M. Hatfield and B. F. Ibach, for appellee.

HACKNEY, J. In her petition for a rehearing the appellee earnestly insists that the evidence disclosed the establishment, prior to September 7, 1877, of a grade for the street in question, both by the action of the former town, adopted impliedly by chartering as a city under the statute, and as proven by the recitals of the ordinance of September

7, 1877. As held in the original opinion, the acceptance of a city charter does not impliedly work an adoption by the city of street grades established by the former town in the sense that, under the statute creating a liability, the city may not establish a grade. *City of Wabash v. Alber*, 88 Ind. 428. The recitals in the ordinance of September 7, 1877, not only do not establish or purport to establish a grade, but they are far short of the evidence required to show that the city had taken, by corporate action, the steps necessary to establish such alleged prior grade. See *Mattingly v. City of Plymouth*, 100 Ind. 545. If, prior to September 7, 1877, as the trial court found, the city had established a grade for the street in question, that fact should have been proven by showing the authoritative acts and proceedings of the common council in adopting the former town grade or in designating a new grade.

Again, it is insisted that the evidence is not in the record, first, because the bill of exceptions contains the original longhand manuscript of the evidence, which, it is further claimed, was not filed; and, second, because the only certificate that the bill contains all of the evidence is that of the stenographer. As to the first objection, we will say that the record discloses that the bill of exceptions was filed within the time allowed, and the clerk certifies, not that the record contains the original, but that it contains copies of all proceedings, etc. It is perhaps true, as counsel suggest, that to bring the original longhand manuscript into the record, instead of by a copy of the bill of exceptions, it must appear to have been filed. We must accept, however, the clerk's certificate as conclusive that the bill of exceptions is in the transcript by copying the original, and we are not permitted to take the statements of counsel that the transcript contains the original and not a copy. As to the second objection to the bill, counsel are mistaken. It clearly appears in the certificate of the judge that the bill contains all of the evidence given in the cause. The petition for a rehearing is overruled.

(144 Ind. 1)

WILKEN et al. v. YOUNG et al.

(Supreme Court of Indiana. Oct. 18, 1895.)

APPEAL—RETAXATION OF COSTS.

Costs involved in bringing up the transcript will not be retaxed on motion of appellee, after reversal, where it appears that appellant paid the whole expense of bringing it up.

Appeal from circuit court, Allen county.

Action by John H. Wilken and others against Mary M. Young and another. Judgment for defendants, and plaintiffs appealed. The judgment was reversed, and appellees moved for a modification of judgment and a retaxation of costs. Denied.

S. M. Hench and Homer C. Hartman, for appellants. W. G. Colerick and M. V. B. Spencer, for appellees.

PER CURIAM. And afterwards, to wit, on the 16th day of October, 1895, the court, being advised in the premises, overruled the motion to modify judgment and retax costs, with an opinion per curiam, as follows: It being shown to the court that Herman Wilkins, coappellant herein, paid the costs of the transcript in the appeal of said cause to this court, and he having secured a reversal of the judgment, so far as the same affected his interest to the real estate involved, and it further appearing that, in order for said appellant to obtain the relief sought in this appeal, it was necessary for him to have certified to this court the transcript of all proceedings of the lower court, it is therefore ordered that appellees' motion to modify the judgment and retax the costs herein be, and the same is hereby, overruled, at their costs.

(143 Ind. 329)

BEATTY v. COBLE.

(Supreme Court of Indiana. Oct. 18, 1895.)

CONTRACT NOT TO PRACTICE MEDICINE—INJUNCTION—PLEADING—APPEAL—MOTION TO DISMISS.

1. Where a physician contracts with another physician to "retire from the practice of medicine and surgery" in a certain city, and ceases to practice for several months, injunction will lie to restrain subsequent practice by him in such city, though the contract contains no express provision against a resumption of practice, or any provision as to the length of the retirement.

2. The complaint in an action to enjoin violation by a physician of a contract not to practice medicine within certain territory need not show that the contract was based on adequate consideration.

3. In an action to enjoin a physician from practicing in a certain city, where the complaint set up a contract not to practice, in consideration of the purchase by plaintiff of defendant's residence for a certain sum, an answer averring that at the time the contract was made defendant was not the owner of such residence, that it belonged to defendant's wife, and that defendant did not receive the consideration paid for the deed, is insufficient as a plea of want of consideration.

4. The fact that pending appeal by a physician in an action to restrain another physician from practicing in a certain city appellant moved to another city, is no ground for dismissing the appeal, where it appears that the two cities are in neighboring counties, and appellant has also retained his practice in the former city.

Appeal from circuit court, Owen county; James H. Jordan, Judge.

Action by William H. Beatty against Jacob Coble for an injunction. From an order overruling a demurrer to the answer, and from a judgment for defendant, plaintiff appeals. Reversed.

Fowler & Spangler, for appellant. Willis Hickam, for appellee.

McCABE, J. The appellant and appellee are practicing physicians and surgeons. The appellant sued the appellee to enjoin him from a violation of the following contract: "Spencer, Indiana, Nov. 2, 1891. Whereas, I am

contemplating removing from Spencer, and whereas, William H. Beatty, a practicing physician of Morgan county, is desirous of locating in Spencer, Indiana: Now, therefore, in consideration of the purchase of my property by said William H. Beatty, I hereby agree that within a reasonable time, and as soon as I can arrange my business and conveniently leave my said field of practice, I will retire from the practice of medicine and surgery at Spencer, Indiana. Jacob Coble." There was a demurrer to the second paragraph of the answer, for want of sufficient facts, overruled. A trial of the issues formed resulted in a finding and judgment for the defendant over appellant's motion for a new trial. Error is assigned on the action of the court in overruling said demurrer and in overruling the motion for a new trial. The sufficiency of the complaint is called in question by the appellee, as he may, in his defense of the ruling on the demurrer to the second paragraph of the answer, as a bad answer is good enough for a bad complaint. Appellee also questions the sufficiency of the complaint by assigning for cross error that the circuit court erred in overruling a demurrer thereto for want of sufficient facts.

The material facts alleged in the complaint are: That both parties were practicing physicians and surgeons, the defendant in Spencer, Ind., and the plaintiff in Morgan county, Ind. And in consideration that plaintiff would purchase of said defendant his residence in Spencer, in Owen county, Ind., for the sum of \$1,500, said defendant agreed with plaintiff that he would leave his field of practice which was coextensive with said county, and retire therefrom, and leave the same to the plaintiff, making the written contract above set out an exhibit and a part of the complaint. That, in pursuance of said agreement, he did purchase of said defendant said property for \$1,500, and paid said defendant said sum. That said contract was entered into, and said purchase made, with the design and intention of plaintiff engaging in the practice of his profession at said town of Spencer, and in the former field of practice of said defendant, and without having the competition of said defendant therein. That defendant did, within a reasonable time thereafter, to wit, August 15, 1892, retire from his field of practice at said town of Spencer, and did remove from said town and county to a distant part of the state. That plaintiff has ever since been engaged in the practice of his profession, and is now so engaged in the former field of practice of said defendant. But that defendant, wholly disregarding his said contract and agreement with said plaintiff, and in violation thereof, did, on February 1, 1894, remove back to the town of Spencer, and opened an office, and has ever since been engaged in the practice of his profession at said town of Spencer, and in his former field of practice. That such violation of said contract is likely to and will result in great and irreparable

damage to plaintiff in his future practice, the defendant being wholly insolvent. That the plaintiff has duly performed all the conditions of said contract. Prayer for an injunction.

The objection urged to the complaint is that the contract on which it is founded contains no express provision that the appellee shall not afterwards resume his practice as formerly. Appellee's counsel cite us to many authorities in support of this objection, the substance of all of which is summed up in one of them, namely, High, Inj. § 1169. It is there said: "Some conflict of authority exists upon the question whether, in the absence of an express agreement against resuming business in a given locality upon the sale of a business with its good will, equity should interfere by injunction to prevent defendant from so resuming. The better doctrine, however, is that to warrant a court of equity in interfering by injunction in such cases there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good will of a trade or business not to carry on the same trade or business in that locality. It follows, therefore, that where one has sold the good will of his trade without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it." It will be found that this principle is the outgrowth of sales of stock in trade in an established house or place of business, with the good will of customers in the habit of doing business at that place. In such a case the sale of the stock in trade and entire business, with the good will attached, puts an end to the business of the seller, at least for the time being, without any other agreement or stipulation than the transfer of the property, both tangible and intangible. It had often been contended that such a sale carried with it an implied agreement that the seller would not resume the same business, or again engage therein, in that locality, and thereby take away from the purchaser that which he had sold to him,—the good will of the habitual customers of such business. It finally became settled that the mere sale of the goods, stock in trade, and good will attached, without any express stipulation not to resume or again engage in the business in that locality on part of the seller, were not sufficient to warrant a court of equity in restraining the seller from again engaging in such business in the same locality. 10 Am. & Eng. Enc. Law, 945-947, and authorities there cited; 3 Pars. Cont. 368; Wat. Spec. Perf. § 35; Rawsom v. Pratt, 91 Ind. 9; Beard v. Dennis, 6 Ind. 203; High, Inj. §§ 1169, 1180; Eisel v. Hayes (Ind. Sup.) 40 N. E. 119. But the contract before us, aside from the stipulation in relation to leaving and retiring from appellee's field of practice, caused no interruption of his business, as in case of a sale of an entire stock in trade. That contract must be construed or interpreted from the language employed therein, and from the circumstances

surrounding the contracting parties, and thus get at their intention as expressed in the instrument. It is conceded by the appellee that the express stipulation of the contract required him to retire from the practice at Spencer. But he thinks a good-faith retirement for a year and a half was a sufficient compliance with that stipulation. So that both parties construe the contract to be and contain an express agreement by appellee to leave and retire from that field of practice. The plain meaning and import of that is that the appellee agrees not to engage in the practice in that field, without limitation as to time. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802. The want of such definite limit is no objection to such a contract. *Eisel v. Hayes*, supra. If that express stipulation is complied with by a good-faith retirement for eighteen months, then it would be complied with by one month's retirement, and, if one month, then one day, or even a shorter period. So that it is clear that such a construction destroys the stipulation entirely, and defeats the expectation and intent of both parties. Contracts should be so construed as to uphold rather than defeat them. *Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650. The stipulation here means that the appellee will not practice his profession in the territory named. Such contracts have been uniformly enforced by injunction. *Cook v. Johnson*, 47 Conn. 175; *Mallan v. May*, 11 Mees. & W. 653; *Clark v. Crosby*, 37 Vt. 188; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78; 10 Am. & Eng. Enc. Law, 945, 946, and authorities there cited. It is contended that the complaint is bad because it does not disclose an adequate consideration. It seems to be the settled law now in such cases that the adequacy of the consideration will not be inquired into. It is sufficient if some legal consideration appears. *Duffy v. Shockey*, 11 Ind. 70; 22 Am. Law Rev. 887, 888, and authorities there cited; *Eisel v. Hayes*, supra; *Greenh. Pub. Pol.* 718, 719, and authorities cited. The complaint was therefore sufficient.

The material facts alleged in the second paragraph of the answer are that the appellee, at the making of said contract, was not the owner of the property conveyed to the plaintiff, but the same was the sole and separate property of defendant's wife, Marietta Coble, which was built for and used as a residence, and not a physician's office; and no part of the consideration for said conveyance was ever received by defendant, and that no consideration ever passed between plaintiff and defendant for the execution of the agreement sued on. This pleading does not state facts enough to show a want of consideration, for which it was evidently and confessedly pleaded. *Laundry Co. v. Lockwood* (Ind. Sup.) 40 N. E. 677, and authorities there cited. A motion is made to dismiss this appeal on the ground, made to appear in affidavits, that since the appeal was taken the appellant has located in the town of Worthington, in Green county,

to practice his profession, which reaches into portions of Owen county, the appellee's former field of practice, in which parts appellant still continues to practice. These facts do not deprive the appellant of the right to continue to prosecute his appeal. No authority is cited to support the motion, and we know of none. The circuit court erred in overruling the demurrer to said answer. The judgment is reversed, with instructions to sustain the demurrer to the second paragraph of the answer.

JORDAN, J., took no part in this decision.

(144 Ind. 196)

HARLESS v. HARLESS et al.¹

(Supreme Court of Indiana. Oct. 16, 1895.)

COMPETENCY OF EVIDENCE—PRIVILEGED COMMUNICATIONS—OBJECTIONS TO EVIDENCE.

1. The fact that a husband is a party defendant to a suit by his wife to enforce a lien for taxes paid under a void tax deed does not render inadmissible evidence of an agreement made by him as her agent with the holder of the legal title, by which she was to receive the rents and profits, and out of them repay sums paid by her for the tax deed and other taxes.

2. An answer by a witness, responsive to a question put to him, cannot be objected to by the questioner.

3. Under Burns' Rev. St. 1894, § 505 (Rev. St. 1881, § 497), making confidential communications between attorney and client privileged matter, the fact that the relation of attorney and client once existed does not preclude such attorney from giving evidence of nonprofessional communications subsequently made to him by such client.

4. Where the objections on which a motion to strike out all the evidence given by a witness do not cover the entire evidence, the motion is properly denied.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

Action by Elizabeth Harless against Wesley Harless and others to recover taxes paid under a void tax deed. From a judgment for defendants, plaintiff appeals. Affirmed.

Diven & McMahan, for appellant. F. B. Easter, for appellees.

MCCABE, J. The appellant sued the appellees in a complaint of two paragraphs to quiet her title to certain real estate in Madison county. The issues formed upon the complaint and a cross complaint were tried by the court, resulting in a finding and judgment for the defendants over a motion for a new trial. Overruling the motion for a new trial is the only error assigned here. The errors complained of in the motion for a new trial are that the finding is contrary to law and the evidence, and is not sustained by sufficient evidence, and that the court erred in "permitting Henry C. Ryan, a witness for the defendant, to testify, over objection of plaintiff, as to a conversation he had with Adam Harless * * * in the absence of the plaintiff, and while said Ryan was attorney for said Harless, and considering matters and

¹ Rehearing denied.

things about which he was consulted as an attorney by said Harless. * * * The appellant was the holder of a tax deed to the land in controversy, she being the wife of Adam Harless. The sole object of the suit was to enforce the lien in her favor for the taxes for which the land had been sold, and subsequent taxes paid by her while she held the tax certificate and deed, the tax title being confessedly invalid. The land was owned by one Wesley Harless, a brother of appellant's husband, Adam Harless. Wesley had been adjudged a person of unsound mind by said circuit court. Wesley's estate in the lands was for and during his life, with remainder over to his children, or the survivors of them. He had been married and divorced, having three children by the marriage, one of which only survives. That was Evan Harless, an infant defendant in this action. In the divorce proceedings there was a judgment for alimony against Wesley, upon which his interest in the land was sold to his divorced wife, and, she having assigned the certificate to the defendant Daniel P. Bricker, and the land not having been redeemed at the expiration of one year from said sheriff's sale, a sheriff's deed was executed to said Bricker.

The only controversy here is whether the evidence justified the court in finding against the plaintiff as to the existence of her claim and lien for taxes. There is no dispute about the fact that she held a tax title, and that it was invalid, and that she had paid subsequent taxes on the land. But the theory of the defense as to such lien for taxes is that appellant had possession and the rents, issues, and profits for several years, which were more than all that was due her on account of such taxes, penalty, interest, and costs. On the other hand, it is claimed on her behalf that she was not in possession, and did not receive any of the rents, issues, and profits at all. The report of the evidence by the official stenographer as incorporated in the bill of exceptions is very imperfect, and very much confused. The decree assumes to declare a deed by Wesley to Andrew M. Harless, son of appellant, and Adam Harless, void, and a mortgage by said Wesley to one Samuel Harless void, which are not embraced in the evidence. But no question is made about these instruments. Andrew M. Harless was single, and only about 20 years of age, when his mother got her tax title, and lived with his parents. The appellant testified that he (her son) had a deed for the land, and took the rents, and that she did not get any of them. But there was evidence from which the court might have reasonably and logically inferred that it had been agreed that Andrew M. was to apply the rents to the payment of his mother's tax lien, and that he and his father, Adam, received more than enough to discharge the same, and that his said father, husband of the appellant, acted as her agent in the matter.

The following question by the appellees to v.41N.E.no.19—38

their witness was asked: "State, Mr. Ryan, what was said and done there. A. Well, as I stated, Wesley Harless and Adam Harless came there [to his office], and I am not sure, but I think, Andrew M. Harless, the grantee of the deed. They came there for the purpose of fixing up the title to the land. They agreed between themselves there that the land was to be deeded, as I remember, to Andrew M. Harless; and there was to be a written contract made between Wesley Harless and either Adam or the wife, Mrs. Elizabeth Harless,—I don't remember which,—by which they were to take the land, and out of the proceeds of the farm reimburse Mrs. Elizabeth Harless." In answer to another question the same witness stated: "The land was conveyed to Andrew M. Harless with the understanding that the income and profits arising from the farm would be applied for payment of the taxes to reimburse Elizabeth Harless, and to pay the accruing taxes." There was other evidence from which it might have been fairly inferred that the appellant consented to this arrangement, and either got the rents from her son, or allowed him to keep them as a gift. Such rents are shown to be of much greater value than the appellant's claim for taxes. It is true, the appellant denies in her testimony that she ever had possession or received any of the rents. But we cannot weigh conflicting evidence, and determine where the preponderance is. Aside from the testimony of appellant and her husband, there is sufficient evidence to warrant the court in drawing the inference that the rents passed under appellant's control in an amount more than sufficient to pay her claim for taxes. The foregoing conversation detailed by the witness Ryan was objected to by the plaintiff's attorney as follows: "We object to it on the part of Adam Harless, because he is made a defendant here. * * * We further object on the part of the plaintiff because Mrs. Harless wasn't present. Court: Do you know for whom Mr. Adam Harless was acting in that matter? A. Adam acted for his wife in all of these matters, as far as that is concerned. Q. Was he acting at that time for his wife? A. My impression is—my recollection is—he was. He was buying this certificate [the certificate of tax sale] for her." There was no available error in overruling the objection on the ground that Adam was a defendant. These were not self-serving declarations. It was but evidence of a contract made between Wesley, Andrew M., and Adam Harless for the benefit of Elizabeth Harless, Adam's wife, not binding on her unless her husband was authorized to act for her, or unless she afterwards ratified his acts. On cross-examination the witness Ryan was asked: "Who did you learn it from?" (that he was acting for his wife). He answered, "If I learned it, I learned it from the parties there." Appellant's attorney then said: "I object. It isn't competent to prove agency. Mrs. Harless wasn't there." To say the least

of it, this objection is so indefinite as to render it impossible for the trial court to know what to do with it. It was an objection to the answer of the witness to a question put to the witness by the objector. The answer was responsive to the question, and was much more intelligible than the objection. It does not lie in the mouth of a party to object to an answer which he himself calls for. Before the witness proceeded to state what had occurred in his office between Wesley, Andrew M., and Adam Harless, the plaintiff's counsel asked him certain questions, which, together with his answers, are as follows: "But were you acting for Adam Harless? A. Well, I don't know hardly how to explain that. They came there to make a transaction, or to make some disposition of this real estate. Q. Hadn't you been Adam Harless' attorney in litigations before this? A. I had been his attorney; that is, in other litigations. Q. With reference to this same matter, had you not been his attorney? A. I think it is possible. Adam Harless talked to me about the purchase of the tax certificate * * * either on that day or other days. I suppose it was talked of though on that day." Now, these questions were asked by the plaintiff's attorney, and their answers were objected to by her attorney on behalf of Adam Harless because Adam was made a defendant, and on the part of the plaintiff because Mrs. Harless was not present. These objections fall under the same condemnation to which those already mentioned are subject. The questions were asked by the objector. The answers were responsive to the questions put to the witness. If the learned counsel did not desire answers to the questions, he should have refrained from asking them, or have withdrawn them. The objection did not admonish the court of any misstep it had taken, so as to correct it. In fact, the court had nothing whatever to do with the production of the answers to which objection was made. That was wholly owing to the fault of appellant's counsel. If these answers, in the opinion of counsel, revealed that any part of the testimony of the witness was incompetent, and which had not before appeared in his testimony, the proper remedy was to move to strike out such parts of his testimony as were thus shown to be incompetent. Counsel afterwards did make a motion to strike out as follows: "I now move to strike out all the gentleman's testimony in the matter, for the reason it is sought to charge plaintiff in her absence, that her presence had no connection with it, and witness details conversations had while acting as attorney for Adam Harless." This last objection is very vague and indefinite. The fact that the relation of attorney and client has once existed between a witness and a party does not disqualify such witness to testify as to the statements or declarations of such par-

ty so long as it is not proposed to prove by such witness confidential communications made to such witness in the course of his professional business. Burns' Rev. St. 1894, § 505 (Rev. St. 1881, § 497), and cases there cited. Besides, there is no communication made to the witness by Adam Harless, whether confidential or otherwise, that is testified to by such witness. The court rightly overruled this motion, if it be conceded that certain parts of the witness' testimony were subject to the objections made, because there were parts of his testimony to which such objections did not apply at all; for instance, that part relating to the agreement made between Wesley, Andrew M., and Adam Harless there that day. The motion asked the court to strike out all the testimony of the witness. The court did not err in overruling the motion for a new trial. Judgment affirmed, but we do not mean to affirm the judgment for \$300 in favor of the guardian ad litem against the infant defendant Evan Harless, or to recognize its validity by this decision.

(142 Ind. 323)

GOWEN et al. v. GILSON et al.

(Supreme Court of Indiana. Oct. 18, 1895.)

PLEADING—AMENDMENT—EFFECT.

The filing of an amended complaint after a demurrer to the original has been sustained waives any error in the ruling.

Appeal from circuit court, Lawrence county; F. B. Buskirk, Special Judge.

Action by George D. Gowen and another against John W. Gilson and another. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Duncan & Batman and Z. A. Zaring, for appellants.

HACKNEY, J. The only assignment of error in this case is upon the action of the lower court in sustaining the appellees' demurrer to the appellants' complaint. The record discloses that after the ruling upon demurrer to the complaint the appellants filed an amended complaint upon which further steps were taken. That the filing of an amended pleading takes out of the record the original pleading, and waives any error in the ruling upon such original pleading, is well settled. Kennedy v. Anderson, 98 Ind. 151; Conley v. Dibber, 91 Ind. 413; State v. Hay, 88 Ind. 274; Barghoff v. McDonald, 87 Ind. 549; Eshelman v. Snyder, 82 Ind. 498; Miles v. Buchanan, 36 Ind. 490; Johnson v. Conklin, 119 Ind. 109, 21 N. E. 462; Earp v. Commissioners, 36 Ind. 470; Aiken v. Bruen, 21 Ind. 137; Patrick v. Jones, Id. 249; Elliott, App. Proc. §§ 595, 683. The record presenting no available error, the judgment of the circuit court is affirmed.

(142 Ind. 233)

SMITH v. STATE.

(Supreme Court of Indiana. Oct 16, 1895.)

CREDIBILITY OF WITNESS — INSTRUCTIONS —
MANSLAUGHTER.

1. An instruction that, if the jury believed that any witness had made statements out of court materially different from those made by him on the stand, "then the jury are instructed * * * that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony," etc., does not invade the province of the jury, as to the weight to be given to evidence.

2. When the court has given full instructions, it is not necessary to instruct upon each separate item of evidence, or to direct the jury to determine between the different theories of the state and the accused.

3. In the absence of exceptional circumstances, a person is not justified in repelling a blow with the fist by stabbing his assailant.

Appeal from circuit court, Marion county; Frank J. F. McCray, Judge.

Winifred E. Smith was convicted of manslaughter, and appeals. Affirmed.

McCullough & Spaan, Van Vorhis & Spencer, and Duncan & Smith, for appellant. Wm. A. Ketcham, Atty. Gen., John B. Elam, and Chas. S. Wiltse, for the State.

HOWARD, C. J. The appellant was indicted for murder in the first degree, for the killing of Western B. Thomas. On the trial he was found guilty of manslaughter, and was sentenced to imprisonment in the state prison for 18 years. The only error assigned on this appeal is the overruling of the motion for a new trial.

Under this assignment, it is first contended that the court erred in giving to the jury, of its own motion, instruction No. 20. The instruction reads as follows: "If you believe from the evidence that any witness, before testifying in this case, has made any statements out of court, concerning any of the material matters, materially different and at variance with what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony; and, if the jury believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of such witness or witnesses." It is objected that "in giving the first part of the instruction the court clearly invaded the province of the jury, as to the weight to be given to evidence, by telling the jurors, as a matter of law, what certain evidence tended to prove." And a dictum is quoted from *Guettig v. State*, 63 Ind., at page 282, to the effect that: "What evidence

proves, or tends to prove, after it has gone to the jury, is a question solely for the jury to decide. It is error for the court to interfere with their decision upon the weight of evidence by an instruction." In the *Guettig* Case there was evidence introduced at the trial which tended to prove that the appellant was subject to attacks of epilepsy. There was in that case, also, evidence tending to show that epilepsy is a disease which tends to produce insanity. The insanity of the appellant was urged as his main defense. Under these circumstances, the court instructed the jury in that case that "this evidence would not be sufficient to raise a reasonable doubt of [appellant's] sanity at the time of the alleged commission of the homicide." The instruction was condemned by this court "because it directly states that certain evidence, which is legitimately before the jury, is not sufficient to prove a certain fact, or to raise a reasonable doubt of a certain fact." There can be no question that the ruling so made was correct. The instruction directly charged the jury as to what weight they should give to the evidence. That is a matter exclusively within the province of the jury. The decision in that case, however, goes no further, and we do not think it is authority on the point now before us. The evidence referred to in the instruction in the case at bar was concerning statements made by a witness, out of court, materially different from those made by the witness in court. As to such evidence of statements made out of court, the words objected to in the instruction are, "The jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony." We think the plain intent of this clause of the instruction was to inform the jury as to the character or tendency of the evidence in question, namely, that it was impeaching; in other words, that its introduction was allowed because it tended to impeach the witness, and not because it tended to establish any issue in the case. The manifest purpose of the instruction was, therefore, to point out the nature of the evidence, and to limit the consideration to which it was entitled by the jury. This was strictly the province of the court. Indeed, the court, in the very act of permitting the introduction of any item of evidence, must, of necessity, pass upon its tendency. If the evidence offered does not tend to prove any material issue in the case, or to impeach a witness, or to serve any other legitimate purpose of the trial, the court must exclude it. This is not weighing the evidence, but it is passing judgment upon the tendency, character, or purpose of the evidence. While the jury are the sole judges of the facts, and also have the right, in criminal cases, to determine the law (clause 5, § 1892, Rev. St.

1894; section 1823, Rev. St. 1881), yet, by the same statute, it is required that the court charge the jury as to the law, and also that "In charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict." It was certainly necessary for the information of the jury that they should be told the nature of the testimony referred to, namely, that it was impeaching; that it was not introduced to prove any issue in the case, but solely tended "to impeach either the recollection or the truthfulness of the witness." Otherwise, and had the instruction not been so given, the jury might have thought it their duty to apply the evidence to the issues in the case. It was thus in the interest of appellant himself, as well as of the state, that the jury should be informed that the tendency or purpose of such evidence was solely to discredit a witness, and not to establish any issue either for or against either party.

It is also claimed to be error that the court charged that "the jury should consider" the impeaching evidence introduced, in estimating the weight which ought to be given to the testimony of a witness, and should also, for the same purpose, take into consideration the fact, if they should so find it, that the moral character of any witness had been successfully impeached. We do not think that in making this charge the court invaded the province of the jury. It cannot be doubted that under the law it is the duty of the jury to consider all evidence introduced on the trial, and not withdrawn by the court. The evidence is introduced for that very purpose, namely, that it may be considered for what it is worth. What weight, if any, the jury may give to any item of evidence, is for them to say. But they are not justified in failing to give consideration to the evidence brought before them. And surely, if it is their duty to consider the evidence, it cannot be error for the court to so tell them. The very purpose of the instructions of the court is to inform the jury of their duty. *Newport v. State*, 140 Ind. 99, 39 N. E. 926; *Deal v. State*, 140 Ind. 354, 39 N. E. 930. It has been sometimes said that the word "should," in such a charge, is of too imperative a character; that the expression ought to be, "It is the duty of," or "It is the province of the jury," or "The jury ought to," or "The jury may," consider, etc. *Lynch v. Bates*, 139 Ind. 206, 38 N. E. 806. And we are inclined to think that it might be better to use such permissive form, rather than the seemingly imperative word here used. It would be better that there should not be even the appearance of error. Yet it is but a matter of expression, and the essential meaning is not changed. In any of the forms used, the jury are told only what is their duty, namely, to consider the evidence adduced on the trial. What weight, if any, ought to be given to such evidence, is for the

jury alone to say, and the instruction does not trench upon that right. Neither is it true that the instruction singles out or discredits any witness, or class of witnesses. The language used by the court is general in form, and applies to all the witnesses who may be affected by it, without specifically pointing out any. It is next insisted that the court erred in refusing to give instruction No. 17 asked by the defendant, which is as follows: "And at this point the court instructs you as to the defense set up by the accused,—that he killed Thomas in self-defense,—that, in order for the defendant to succeed under that plea, it is not required that the evidence should satisfy that the killing was justifiable under the doctrine of self-defense, as hereinbefore given. Under this plea the defendant cannot be convicted if, upon the whole evidence, you, or one of you, entertain a reasonable doubt whether the killing was not done under such circumstances as rendered it justifiable." The contention here made is that nowhere is there any instruction given which covers the point covered by this instruction, namely, that the rule of reasonable doubt applies to the defense of self-defense. We do not think this contention is justified. It is not doubted that the only defense shown in the record is that of self-defense. The time, place, and circumstances of the killing are not in dispute, nor is the fact that the killing was done by the appellant. The sole issue on the trial was whether the killing was excusable on the plea of self-defense. With that condition of affairs, we think the instructions given by the court fully covered that here requested. In two instructions (the tenth and the thirteenth) the court fully advised the jury as to the rights of the appellant under his plea of self-defense,—the only plea made by him. In the eleventh instruction the presumption of innocence is dwelt upon, and the jury are admonished that the appellant cannot be convicted of even the lowest degree of crime covered by the indictment until the evidence satisfies them, and each one of them, of the existence of every ingredient of the crime charged. In the twelfth instruction the jury are fully informed on the doctrine of reasonable doubt, as applied to the case; and they are told that, before conviction, they must be convinced beyond a reasonable doubt, "by the evidence, of whatever class it may be, and considering all the facts and circumstances in the evidence as a whole." Even more than this, the court, in its first instruction, after stating the charge as made in the indictment, sets forth the appellant's defense; making, also, specific allusion to the plea of self-defense,—the only excuse urged, or that could be urged, by him for the killing. "To this indictment," says the court, "the defendant enters the general plea of 'not guilty.' Upon the issue thus joined, the burden is upon the state to prove, beyond all reasonable doubt, every material allegation of the indictment,—that he actually kill-

ed Western B. Thomas in manner and form and at the time charged in the indictment, and that such killing was done under such circumstances as the law will not excuse." Had the killing been done in self-defense, the law would have excused it; and that the killing was not so done—that such excuse does not exist—must be proved by the state, says the instruction, "beyond all reasonable doubt." We think, therefore, that the jury were in fact fully informed that the rule of reasonable doubt applied to the whole case, and to every specific part of it, including the defense of self-defense. Consequently, there was no error in refusing to give instruction 17, as requested.

Complaint is next made that the court refused to give instruction No. 23 asked by the appellant, and in which the facts claimed to have been proved by him, with the law applicable thereto, are stated. These facts, and the law claimed to apply thereto, relate to appellant's plea of self-defense. The court gave 21 carefully prepared instructions, in which the jury were very fully and fairly informed of their duty as to the whole case, and also as to the rules of law applying thereto. The instructions relating to self-defense were most favorable to the appellant. As said in *Koerner v. State*, 98 Ind. 7, "when the court has put the whole case to the jury by proper and full instructions, as was done in this case," it is not necessary to instruct upon each separate item of evidence, nor to direct the jury to determine between the different theories of the state and the accused. The tenth instruction given by the court was as follows: "The defendant insists that the killing of Western B. Thomas was done in self-defense, and this requires the court to instruct you as to the doctrine of self-defense. One man may kill another under such circumstances as that the homicide constitutes no crime, but is justified by the law. The doctrine of self-defense, as applied by the evidence in this case, may be thus defined: Where a person, being without fault, and is in a place where he has a right to be, so far as his assailant is concerned, is violently assaulted, he may, without retreating, repel force by force; and he need not believe that his safety requires him to kill his adversary, in order to give him right to make use of force for that purpose. When, from the acts of his assailant, he believes, and has reasonable ground to believe, that he is in danger of losing his life, or receiving great bodily harm from his adversary, the right to defend himself from such danger or apprehended danger may be exercised by him, and he may use it to any extent which is reasonably necessary; and if his assailant is killed, as a result from the reasonable defense of himself, he is excusable. The question of the existence of such danger, the necessity or apparent necessity, as well as the amount of force necessary to employ to resist the attack, can only be determined from the stand-

point of the defendant at the time, and under all the existing circumstances. Ordinarily, one exercising the right of self-defense is required to act upon the instant, and without time to deliberate and investigate; and, under such circumstances, the danger which exists only in appearance is as real and imminent as if it were actual." With this instruction, so full and complete on the law of self-defense, and so favorable to the appellant, and with others on the subject of reasonable doubt and on the presumption of innocence, and with still another on self-defense as an excuse for the killing of an adversary, we cannot see that the appellant suffered any harm by the refusal of the court to give instruction 23 as requested.

It is contended that the verdict is not supported by the evidence. The verdict was for manslaughter. There is no question that the deceased was unarmed, and that the appellant cut his throat with a knife, causing death in a few moments. We think that from the evidence of those present—even from that of the appellant himself—the jury might conclude, without any reasonable doubt, that the appellant unlawfully killed the deceased, voluntarily and upon a sudden heat, and that he had not the excuse of self-defense for his act. It is uncertain, from the evidence, whether the deceased simply laid his hand upon appellant, in a sort of maudlin familiarity, or whether he struck at appellant with his fist after they began quarreling. It is certain, however, that the deceased was unarmed, and, at most, that in their scuffle he struck appellant with his fist. But, as a general rule, the law will not excuse one who repels a blow with the fist by stabbing his assailant. *Presser v. State*, 77 Ind. 274; *Floyd v. State*, 36 Ga. 91; 21 Am. & Eng. Enc. Law, 1059. And the jury might well find, from the evidence, that there were no circumstances why the case at bar should form an exception to this general rule.

A like contention is made as to whether two of the jury had not expressed opinions as to the merits of the case before they were selected to try it. The court tried this question by bringing together the two jurors and the witnesses who had filed affidavits against them, and all were questioned under oath, when the court found that the charge was no sustained. There being evidence to support this decision, we cannot, under the well-established rule, disturb it on this appeal. There appearing no available error in the proceedings, the judgment is affirmed.

(142 Ind. 324)

GALLOWAY et al. v. CAMPBELL.

(Supreme Court of Indiana. Oct. 17, 1895.)

APPOINTMENT OF RECEIVER—BOND FOR COSTS.

1. Where it was alleged, in an action to compel defendants to assign to plaintiff a certain lease to oil land in possession of defendants, that defendants were nonresidents, and had

only a small amount of property in the state, and it appeared that neither parties owned the land, but only claimed a leasehold right therein, the court was justified in appointing a receiver to take charge of and superintend the production of the oil.

2. Though a nonresident, under Rev. St. 1894, § 598 (Rev. St. 1881, § 589), must file a bond for costs, under penalty of a dismissal of the action, the failure to do so will not render invalid an order, made in the action, appointing a receiver to take charge of the property in controversy.

Appeal from circuit court, Wells county; E. C. Vaughn, Judge.

Action by Frank Campbell against John Galloway and others for specific performance of a contract to assign a certain lease. From a judgment appointing a receiver, defendants appeal. Affirmed.

Sharpe & Sturgis, for appellants. C. W. Kimran and Watson, Mock & Simmons, for appellee.

HOWARD, C. J. This is an appeal from an order appointing a receiver to take charge of the oil produced from certain oil wells, and to take care of and superintend the production of the same, under the terms of a grant or lease, the ownership of which is in controversy between the parties. The original action was for specific performance, brought by the appellee to require the appellants to assign to him said grant or lease for the oil and gas, and the right to operate therefor, in and under certain lands described in the complaint, in pursuance of the terms of an alleged contract. From the verified application for the appointment of a receiver, which was filed by the appellee in vacation of court, it appears that the appellants have possession of the land in question, and, by their employes, have sunk one well thereon, and are preparing to sink others; that the well now operated produces daily 30 barrels of oil, which is run into a tank for the purpose of being shipped and sold; that the appellants are nonresidents of the state, and have no property therein, save the machinery upon said land, and, if they are permitted to sell or dispose of the oil taken from the wells, the appellee will suffer irreparable injury.

There was an answer to the application, and numerous affidavits were filed for and against the appointment. It was for the judge to whom the application was made to determine the probable facts from these several pleadings and affidavits. If the statements in the complaint and application, and in the affidavits in their support, are correct, it would seem that the appointment was justified. In case the claim made by the appellee to the oil and gas, and the right to operate therefor, should be established, it might be that, without a receiver to care for the oil or gas, and the proceeds of its sale, great loss would be occasioned to appellee, if, as said by him, the appellants are nonresidents, and are without property in the state. Neither of the parties owns, or claims to own, the land from

which the oil is taken, but only the grant or lease of the right to take oil or gas therefrom. In *McCaullin v. State*, 44 Ind. 151, quoting from the statute (clause 3, § 1236, Rev. St. 1894; clause 3, § 1222, Rev. St. 1881) which authorizes the appointment of a receiver "in all actions when it is shown that the property, fund or rent and profits in controversy is in danger of being lost, removed, or materially injured," the court said, "There seems to be no room to doubt that the cutting down and removing of valuable timber from the land in controversy, and especially where the defendant only claimed the title and possession of such land under a title bond, the purchase money being unpaid, and it being alleged and proved that the defendant was insolvent, would be such material injury as would justify the court in appointing a receiver to take charge of and preserve such land during the litigation." In *Bitting v. Ten Eyck*, 85 Ind. 357, which was an action in ejectment, the appointment of a receiver "to take charge of and sell the crops on the land, and hold the proceeds under the order of the court," was approved. In that case it was said by Woods, J., that: "The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. * * * The principle, in ordinary practice, is to appoint a receiver, with the sole view of preserving the property, and not to inquire into the merits." In *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976, it was held that a court may appoint a receiver to take charge of personal property in litigation, and within its jurisdiction. In the case at bar the action was concerning the ownership of a grant or lease of the right to mine and dispose of certain gas and oil, and the receiver was appointed to take charge of the oil, and the production and sale of the same. The judge, in making the appointment, is presumed to have acted on the truth of the statements made in the application and affidavits of the appellee; and therefore, and in view of the foregoing authorities, we cannot say that the appointment of the receiver was not proper. The case seems to be one showing the "peculiar and urgent circumstances" named in 5 Wait, Act. & Def. 355, as necessary to justify the appointment of a receiver.

It is also claimed as error that the judge overruled a motion to require the appellants, as nonresidents, to file a bond for costs. We are inclined to think that this motion should have been sustained, inasmuch as a bond for costs should be filed by a nonresident before the bringing of his action. Rev. St. 1894, § 598 (Rev. St. 1881, § 589). We are not of opinion, however, that for this reason the appointment of the receiver was invalid. The bond for costs should be filed in the case itself, and not simply as a condition to the appointment of a receiver, and the penalty for the refusal to file such a bond is a dismissal

of the case. The statute (section 1236, Rev. St. 1894; section 1222, Rev. St. 1881) fixes the conditions for the appointment of a receiver. These conditions, including the filing of a receiver's bond, were complied with in the case before us. The judgment is affirmed.

(142 Ind. 555)

MOORE v. HARMON.*

(Supreme Court of Indiana. Oct. 17, 1895.)

DEFECT OF PARTIES—WAIVER—RENEW—DEED—CONSTRUCTION.

1. Where a married man sues alone for the value of the number of acres of land deficient in a tract conveyed to himself and wife, and it is agreed that defendant shall be allowed all competent defenses under a general denial, the objection that plaintiff's wife is not a party to the action will be waived if not taken by plea in abatement, the stipulation referring to defenses made.

2. A judgment on conflicting evidence will not be disturbed.

3. The expression "more or less," qualifying the number of acres conveyed by a deed, will not control when it appears that the deed was accepted by the grantee on express representations of the grantor that the tract contained a certain number of acres.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by John M. Harmon against Robert E. Moore for the balance due on the purchase price of land. From a judgment for plaintiff, defendant appeals. Affirmed.

F. M. Butler and Urmston & Warrum, for appellant. Tippen & Purvis, for appellee.

JORDAN, J. Appellee commenced this action in the Tipton circuit court to recover a money judgment against the appellant for the sum of \$868, and to enforce a vendor's lien upon certain described lands in Tipton county, Ind., alleged to have been sold and conveyed by the former to the latter. The complaint is in three paragraphs. The first is based upon the alleged facts that the land was sold to appellant for the price of \$7,200; that a certain named sum of the purchase price had been paid, leaving a portion thereof due and unpaid. The second alleges the sale, etc., and avers that the appellee accepted as part payment for the land sold by him a certain described tract of real estate in Greene county, Ind., which was represented by appellant to contain 156 acres, when in truth and in fact it was short some 23 acres and over, and judgment is demanded for the alleged value of this deficiency, and that a vendor's lien be declared. The third is based upon the alleged fraud of the appellant, arising out of misrepresentations as to the number of acres in the Greene county tract. Issues were finally joined between the parties by a general denial and agreement "that the defendant be permitted to have all competent defenses under the general denial." Upon a change of venue the cause was tried in the Howard circuit court, and a special verdict returned by the jury; and over a motion by appellant for judgment thereon in

his favor, and also his motion for a new trial, the court, upon the special finding of facts set forth in the verdict, adjudged the law to be with the appellee, and rendered judgment accordingly for \$743.56, and decreed a lien as prayed for by appellee.

The only questions argued by appellant's counsel are those said to arise out of the third and fourth errors assigned. The third is that "the court erred in overruling the motion by appellant for judgment on the special verdict." The fourth error is based upon the action of the court in overruling the motion for a new trial. The sole reasons presented and argued by the learned counsel for appellant under the third assignment are that appellant was entitled to a judgment on the verdict, because from the facts therein it appeared that the Greene county land, which was a part of the consideration for the Tipton county tract, owned by appellee at the time of the sale, was conveyed by appellant to appellee and wife, and it is insisted that therefore she had an interest in the subject of the action, and should have been joined as a coplaintiff, as provided by section 262, Rev. St. 1881 (section 263, Rev. St. 1894). We cannot consider this question as here presented, for the reason that it could not properly arise upon the motion for judgment in appellant's favor upon the special findings of the jury. If Mary E. Harmon, wife of appellee, were a necessary party plaintiff in the action, as contended by appellant,—a point which we do not decide,—the omission to make her a party plaintiff or defendant would result in a defect of parties; and if the fact that she was a necessary party by reason of her interest in the action and the relief sought to be obtained thereby was not apparent upon the face of the complaint, then appellant would be compelled to interpose his objections by way of a plea in abatement; otherwise they would be deemed to be waived. *Bledsoe v. Irvin*, 35 Ind. 293; *Cleaveland v. Vajen*, 76 Ind. 146; *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217; *Talmage v. Bierhause*, 103 Ind. 270, 2 N. E. 718; *State v. Ruhlman*, 111 Ind. 17, 11 N. E. 793. An answer in abatement must be verified, and precede an answer in bar, and cannot be pleaded therewith, and the issue thereon must be tried first and separately. Rev. St. 1881, § 365 (Rev. St. 1894, § 368); *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680. It cannot be held that under the agreement mentioned appellant might avail himself of the objections in question, as that agreement must be construed to embrace only such defenses as were competent in bar of the action. Especially must this be so, for, as we have seen, pleas in abatement are forbidden by the Code to be joined with those in bar. It follows, therefore, that the question upon the point involved was not properly raised upon the motion for judgment on the verdict, and the court did not err in overruling the same.

* Rehearing denied.

Appellant strenuously insists that the court erred in overruling the motion for a new trial for the reason that the special finding of the jury is not sustained by the evidence. We have carefully examined the evidence, and, while it is true that there is a conflict therein to the extent that certain material facts are testified to by some witnesses and denied by others, nevertheless there is evidence sustaining the judgment, which the jury and trial court apparently considered creditable.

The point is raised by appellant that, as the written contract for the sale or exchange of the lands contained the words "one hundred and fifty-six acres, more or less," referring to the Greene county land, therefore the clause "more or less" was controlling as to the quantity of the land. But appellee testified upon the trial in the court below that his attention was not called to this clause when he signed the contract, and that he was relying upon the express representations of appellant to the effect that the tract contained 156 acres. Where it appears by words of qualification, as "more or less," that the statement of the number of acres is a mere matter of description, and not of the essence of the contract, the buyer assumes the risk of the quantity, provided that there is no intermixture of fraud. *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600, and authorities there cited. The evidence, however, shows, and the jury so found, in effect, that the appellee was induced to enter into and execute this contract for the sale of the land in question through and by the fraudulent representations of appellant leading up to said contract; consequently the clause, "more or less," therein, under the facts, is not alone controlling, but it was a question for the jury, under all the circumstances and facts in the case, to determine whether or no the appellee assumed the risk as to the quantity of land in the Greene county tract. Fraud arising out of the negotiations leading up to the execution of a written contract is not merged therein; and, when fraud is the issue, evidence tending to prove the same is admissible, although it may vary, add to, or contradict the terms of the written contract. The doctrine, therefore, of merger of all antecedent negotiations and representations in such cases, has no application. *Johnson v. Miln*, 14 Wend. 195; *Hines v. Driver*, 72 Ind. 125, and authorities there cited; *Tyler v. Anderson*, supra. Finding no available error, the judgment is affirmed.

(44 Ind. 189)

WENNING et al. v. TEEPLE et al.¹

(Supreme Court of Indiana. Oct. 16, 1895.)

ACTION TO SET ASIDE WILL—PLEADING—BILL OF EXCEPTIONS—VALIDITY OF MARRIAGE—INSTRUCTIONS.

1. In an action to set aside a will, a complaint containing the general allegation "that said will was unduly executed" is sufficient on

1 Rehearing denied.

demurrer, though followed by a statement of facts which are insufficient to avoid the will.

2. The fact that the reputed wife of testator, to whom he left his property, had, at the time of her marriage to testator, a husband living, from whom she had never been divorced, is not, of itself, sufficient ground for avoiding the will.

3. A bill of exceptions, though signed by the judge, is not a part of the record until it is filed.

4. It is not enough, for one seeking to impeach the validity of a marriage duly consummated, to show that one of the spouses has a husband or wife still living, but he must also overcome the presumption of law that the former marriage has been legally dissolved.

5. The giving of a fatally erroneous instruction can only be cured by expressly withdrawing it from the jury.

6. The giving of two or more instructions, which are inconsistent, and calculated to mislead the jury, or leave them in doubt as to the law, is cause for reversal.

7. Though the evidence is not in the record, a judgment will be reversed, if an instruction complained of would not have been correct under any evidence that might have been given under the issues.

Appeal from circuit court, Owen county; George W. Grubbs, Judge.

Action by Caroline Teeple and others against Mary A. Wenning and others to set aside the probate of a will. From a judgment for plaintiffs, defendants appeal. Reversed.

D. E. Beem and Willis Heckam, for appellants. I. H. Fowler and W. A. Pickens, for appellees.

MONKS, J. This was a proceeding to contest and set aside the last will of John Wenning, a deceased, and the probate thereof, instituted by appellees against appellants. It is alleged in the complaint: "That appellees and Jane Shreese were the only heirs of, and entitled to inherit the estate of, John Wenning at the time of his death, September 26, 1892. That a certain instrument in writing, purporting to be his last will and testament, had been admitted to probate. That Mary Thalle (known as Mary Wenning) and Charles E. M. McCreary are made the sole legatees and devisees, and are given thereby the whole of the estate of said deceased, of the value of ten thousand dollars, to the entire exclusion of said appellees and Jane Shreese, who are the children of the deceased, and entitled to the whole of his estate. That said pretended will is invalid for the following reasons: That said will was unduly executed. And appellees say that said appellant Mary Thalle (known as Mary Wenning) is claiming and asserting that she was, at the time of the death of John Wenning, his lawful wife by virtue of a pretended marriage entered into between her and said John Wenning at said county of Owen on the 16th day of April, 1884. That at the time of said pretended marriage of said Mary to John Wenning, she, the said Mary Thalle (known as Mary Wenning) was married to and was the lawful wife of one Herman Thalle, having married him on November 27,

1883, in the territory of Dakota, in accordance with the laws of said territory in force at the time of said marriage. That at the time of the pretended marriage of said appellant Mary Thalle (known as Mary Wenning) to John Wenning her said husband, Herman Thalle, was living, and no divorce had ever been granted dissolving said marriage to said Herman Thalle. That said Mary Thalle (known as Mary Wenning) abandoned her said husband, said Herman Thalle, in North Dakota, April 1, 1884, and came to Owen county, Indiana, where she has remained ever since said abandonment, and pretended to be married to said John Wenning on the 16th day of April, 1884, without said marriage to said Herman Thalle in any manner having been dissolved." The complaint sets forth the will in controversy, and also the laws of Dakota concerning marriage and divorce. A demurrer to the complaint for want of facts was overruled. The cause was tried by jury, and a verdict returned in favor of appellees, and over a motion for a new trial judgment was rendered setting aside said will. The only errors urged call in question the sufficiency of the complaint and the action of the court in overruling the motion for a new trial.

Appellants admit that it is sufficient, under the decisions of the court, to allege the cause of contest in the language of the statute, but insist that, as the allegations which follow the averment "that said will was unduly executed" constitute the charges of fraud or undue influence relied upon, the court should apply the law to these specific allegations, and, if these are insufficient, a demurrer to the complaint should be sustained. If the allegations referred to are to control the general averment of undue influence, and are intended to be a specific statement of facts constituting such undue influence, then a demurrer to the complaint should have been sustained. The mere fact that Mary A. Wenning was married to one Thalle at the time she was married to Wenning on the 16th day of April, 1884, and that she had never been divorced from Thalle, would not be sufficient ground for avoiding the will. Schouler, Wills, §§ 224, 238, 239. It would be proper to prove such facts, if they exist, at the trial of the cause, under the general allegation that the will was unduly executed; but, if proven, they alone would not establish the allegation of undue execution. We think, however, that said allegations concerning the marriage of appellant Mary A. Wenning and her not being divorced and the laws of Dakota are not stated in such a manner as to limit or control the general averment that the will was unduly executed. Such allegations are mere surplusage, and could have been stricken out on motion. If, however, the same had been stated with other allegations in such a way as to show that the execution of the will had been procured by fraud or duress, or had been un-

duly executed for any other reason, it would be proper to overrule a motion to strike out such allegations. The complaint containing the general allegation that the will was unduly executed was sufficient to withstand the demurrer. *Kenworthy v. Williams*, 5 Ind. 375; *Reed v. Watson*, 27 Ind. 443; *Bowman v. Phillips*, 47 Ind. 341; *McDonald v. McDonald* (this term) 41 N. E. 336.

Appellees earnestly insist that what purports to be a bill of exceptions containing the evidence is not a part of the record, for the reason that it was never filed, and that, therefore, no question is presented by the motion for a new trial. There is nothing in the record showing that what purports to be a bill of exceptions containing the evidence was ever filed in the court below. It is well settled that a bill of exceptions, although signed by the judge, is not a part of the record until it is filed. *Downey v. Head*, 138 Ind. 503, 38 N. E. 169, and cases cited; *Ayers v. Armstrong* (this term) 41 N. E. 522; *Elliot, App. Proc.* § 805, and cases cited. Under these authorities the evidence is not in the record, and cannot be considered in the determination of this cause. It does not follow, however, that all the causes specified for a new trial will fail for this reason.

It is assigned as a cause for a new trial that the court erred in giving instruction 10 to the jury of its own motion, and also that the court erred in giving instruction 17 asked by appellees. These instructions are in regard to the presumptions and burden of proof as to the marriage to Thalle and the dissolution thereof, and as to the legality of the marriage to Wenning. It is settled law in this state that when a marriage has been consummated in accordance with the forms of law it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the prima facie legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage. *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Yates v. Houston*, 3 Tex. 433; *Dixon v. People*, 18 Mich. 84; *Harris v. Harris*, 8 Ill. App. 57; *Greensboro v. Underhill*, 12 Vt. 604; *Rex v. Inhabitants of Twynning*, 2 Barn. & Ald. 386; *Squire v. State*, 46 Ind. 459; *Klein v. Laudman*, 29 Mo. 259; 1 Bish. Mar. & Div. § 457. In instruction 17 asked by appellees it is stated that, if appellant was legally married to Thalle, "then, if the jury find from the evidence that said marriage had never been legally dissolved or annulled by death or decree of divorce or otherwise, the burden of proof is on the appellant Mary Thalle, to show by a preponderance of the evidence that said marriage had been legally dissolved." This was clearly erroneous. Ap-

pellant, under the law, as heretofore stated, was not required to prove that she had been divorced from Thalle. The burden of proving that the marriage had not been dissolved by a court or the death of Thalle was upon the appellees. If the evidence as to this question was evenly balanced or did not preponderate in favor of appellees, then the jury must consider and determine the case upon the presumption that she was not the wife of Thalle in April, 1884, when it is alleged in the complaint she married Wenning. In instruction 10 the court informed the jury, referring to the marriage of Thalle to appellant Mary Wenning, "that when a marriage is once established it is presumed to exist during the life of the parties, or until it is shown by the evidence that it has been dissolved in some one of the ways known to the law." No such presumption existed in this case. On the contrary, the presumption was that Thalle was dead or divorced, and that there was no impediment to the marriage to Wenning. *Boulden v. McIntire*, supra. It is true that, when the evidence is not in the record, instructions will not be held erroneous if they would be correct under any evidence that could be given under the issues. *Rapp v. Kester*, 125 Ind. 79, and cases cited on page 82, 25 N. E. 141. The instructions 10 and 17 given in this case would not have been correct under any evidence that might have been given under the issues, and for this reason the cause must be reversed. *Id.*; *Lindley v. Dempse*, 45 Ind. 246.

It is claimed, however, by appellees, that these instructions, if erroneous, were corrected by another, which correctly stated the law. If such an instruction was given, it would not cure the error. This could only be done by plainly withdrawing the instructions named from the jury, which was not done in this case. *State v. Sutton*, 99 Ind. 300, and cases cited 307; *Bitting v. Ten Eyck*, 82 Ind. 421; *Railway Co. v. Shuckman*, 50 Ind. 42; *McCrory v. Anderson*, 103 Ind. 12, 2 N. E. 211; *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630. Besides, if two or more instructions are inconsistent, and calculated to mislead the jury, or leave them in doubt as to the law, it is a cause for reversal. *Bitting v. Ten Eyck*, 82 Ind. 421, 425; *Somers v. Pumphrey*, 24 Ind. 231, 237; *Summerlot v. Hamilton*, 121 Ind. 87, 90, 22 N. E. 973; *State v. Sutton*, 99 Ind. 300, and cases cited on page 307.

There are many other questions discussed in the briefs of the able and learned counsel for appellants and appellees, but the same either depend on the evidence, which is not in the record, or are such as may not arise at another trial, and are therefore not considered. Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

JORDAN, J., did not participate in the decision of this cause.

(13 Ind. App. 335)

LEAK v. THORN.

(Appellate Court of Indiana. Oct. 18, 1895.)

ACTION ON DITCH ASSESSMENT — DEMURRER — GROUNDS — PAROL EVIDENCE.

1. The fact that the complaint shows a separate action against each of the defendants is no ground for demurrer for want of facts.

2. The improper joinder of two causes of action is no ground for a demurrer for want of facts.

3. Where a contract for sale of land showed that the vendee did not assume payment of a ditch assessment against the land as part of the price, parol evidence to show such assumption was properly excluded.

Appeal from circuit court, Warren county; J. M. Rabb, Judge.

Action by John O. Thorn against Gideon Leak and another on a ditch assessment. From orders overruling separate demurrers by defendant Gideon Leak to the complaint and to an amended complaint, he appeals. Affirmed.

W. P. Rhoda, for appellant. Hanley, Stansbury & Stephens, for appellee.

REINHARD, C. J. Thorn sued Leak and his wife to recover \$800 for a ditch assessment alleged to be a lien on property purchased by Thorn of Leak and wife, and conveyed to him by them by deed of general warranty. Parmelin Leak, appellant's wife, demurred separately to the complaint, and her demurrer was sustained. The appellant also filed a separate demurrer to the complaint, but it was overruled, and he excepted to the ruling. The appellee, Thorn, then filed a second paragraph of complaint against both defendants. To this paragraph each of said defendants demurred separately, which demurrers were overruled, and exceptions reserved to the ruling. The appellant has assigned as error the overruling of each of his separate demurrers. The separate demurrer of the appellant to the first paragraph of complaint, or the complaint before the second paragraph was added, contains but one ground of demurrer, viz. that the complaint does not state facts to constitute a cause of action. It is not claimed by appellant that the complaint fails to show that the plaintiff (Thorn) is entitled to recover something against Gideon Leak. The demurrer is, therefore, not well taken. The fact that the complaint shows a separate action against each of the defendants is no ground for demurrer for the want of facts. The appellant's demurrer to the second paragraph of the complaint contains two grounds, viz.: (1) Want of sufficient facts; (2) because two causes of action are improperly joined. The improper joinder of two causes of action is urged in support of both grounds of demurrer. It is no cause for demurrer for the want of facts that two or more causes of action have been improperly joined. The first ground of demurrer was, therefore, not well assigned. The second cause of demurrer is not such as could lead to a reversal in

any event, granting that the ruling was erroneous. Rev. St. 1894, § 344 (Rev. St. 1881, § 341); *Carnahan v. Chenoweth*, 1 Ind. App. 178, 27 N. E. 332; *Carger v. Fee* (Ind. Sup.) 39 N. E. 93. At the trial the appellant offered to prove by parol, by himself and wife, that the appellee had assumed the payment of the ditch assessment as part of the purchase money. A written agreement then exhibited to the court showed that the entire contract of sale had been reduced to writing, and was in direct contradiction to the proposed parol evidence. The court excluded the proposed testimony, and, we think, correctly so. Judgment affirmed.

(13 Ind. App. 308)

STATE ex rel. CECIL v. CHRISTIAN et al.

(Appellate Court of Indiana. Oct. 16, 1895.)

CLERK OF COURT — BOND — BREACH — WHAT CONSTITUTES.

Rev. St. 1881, § 2512 (Burns' Rev. St. 1894, § 2673), provides that the court having probate jurisdiction in each county, in term time, or the clerk in vacation, shall appoint guardians of minors in such county, or having estates therein. *Held*, that where a county clerk issues letters of guardianship in term time, without the appointment having been made by the court, and by reason of the issuance of such letters the person appointed gets possession of and squanders the ward's property, the clerk and the sureties are liable, on his bond, to such ward.

Appeal from circuit court, Hamilton county; L. J. Kirkpatrick, Judge.

Action by the state of Indiana, on the relation of May Cecil, against James R. Christian and others, on the bond of Christian as clerk of the circuit court of Hamilton county. From a judgment for defendants, plaintiff appeals. Reversed.

Wm. Booth, for appellant. Christian & Christian, Kane & Kane, and Fertig & Alexander, for appellees.

ROSS, J. This was an action upon a county clerk's bond given by the appellee James R. Christian, as principal, and the other appellees, as his sureties. A separate demurrer by the appellee Christian, and a joint demurrer by his codefendants, for want of facts, were filed to the complaint, and sustained by the court. Upon these rulings of the court are predicated the specifications of error assigned on this appeal.

The material allegations of the complaint are that the defendant James R. Christian, as clerk of the Hamilton circuit court, on the 23d day of September, 1883, issued to one Archibald Knapp letters of guardianship over the person and property of the plaintiff, May Cecil, a minor, without said Knapp's having been appointed by the court, and that, by reason of the issuing of said letters of guardianship, said Knapp collected \$550 belonging to said minor; that in October, 1893, Knapp was removed from his trust as guardian, and

an action brought against him and his sureties, William A. Sheward and Sarah Knapp, on his guardian's bond, to recover the funds belonging to his ward's estate, which it was alleged he had converted to his own use, and for which he had refused to account; that a judgment was recovered against said Knapp and the surety William A. Sheward, on the bond, and as to the other surety, Sarah Knapp, it was found that she was a married woman, and not liable. It is also alleged in the complaint that both Knapp and the surety on his bond, William A. Sheward, were insolvent at the time the appellee Christian appointed Knapp, and issued the letters of guardianship to him; that an execution had been issued on the judgment against Knapp and Sheward, but that the sheriff had been unable to collect the same. All the necessary allegations as to the election and qualifications of Christian as clerk, and the execution of the bond sued on, were made in the complaint.

The complaint before us is very loosely drawn, and cannot be considered a model pleading, in that many of its allegations are indefinite and uncertain; but, taking all of the allegations together, we think it seeks to show a breach by appellee of his bond, in wrongfully issuing to Archibald Knapp letters of guardianship, which, on their face, certified that he had been appointed in term time, when in truth and fact he had not been appointed by the court, and that, by reason of such wrongful act, appellant's property was lost. The statute (section 2512, Rev. St. 1881; section 2673, Burns' Rev. St. 1894) provides that "the court having probate jurisdiction in each county, in term time, or the clerk thereof in vacation, shall appoint guardians of minors resident in such county or having estates therein." The language of the statute is that in vacation the clerk of the court shall appoint guardians of minors, but such appointments are subject to the future approval of the court. Appointments made in vacation authorize the person appointed to act until the next succeeding term of the court, when the act of the clerk in making the appointment should be submitted to the court for its approval. When the court is in session, or, as in the language of the statute, "in term time," the court alone is empowered to make such appointments. No greater or more important responsibility is cast upon the courts than that of looking after the welfare and preserving the estates of minors. The natural parent having been taken away, the law makes the court their protector, not only to look after their care and education, but to see that their property is preserved. Guardians of minors are but the servants of the court, and for the administration of their trust they must answer to the court. As heretofore stated, the facts alleged are somewhat indefinite and uncertain; but if appellee Christian issued letters of guardianship in term time, without the appointment hav-

ing been made by the court, and, by reason of the issuance of such letters, Knapp got possession of and squandered appellant's property, he is liable on his bond. We are of opinion that the complaint states a cause of action, and that the court below erred in sustaining the demurrers thereto; but, in reversing the cause, direct that appellant be allowed, if she request it, to amend her complaint. Judgment reversed.

DAVIS, J., did not participate in the consideration or decision of this case.

(13 Ind. App. 315)

STANDARD & ACCIDENT INS. CO. v. STRONG.

(Appellate Court of Indiana. Oct. 17, 1895.)

LIFE INSURANCE POLICY—PERFORMANCE OF CONDITIONS—NOTICE.

In an action on an insurance policy issued on the life of S., the jury found that S. was injured, and died within 90 days afterwards; that "plaintiff procured a blank form, and executed proofs of the death of said S., and forwarded the same to the defendant, and that said proofs were accepted and retained by said defendant"; and, also, "that immediate written notice of the death of said S. was given by plaintiff, or by some one in her behalf, to the defendant." *Held*, that the findings failed to show compliance with a condition in the policy that written notice should be given the company "of any accident or injury for which a claim is to be made, with full particulars thereof, and the full name and address of the insured."

Appeal from circuit court, Elkhart county; H. D. Wilson, Judge.

Action by Pirsa Strong against the Standard & Accident Insurance Company on a life insurance policy. From a judgment for plaintiff, defendant appeals. Reversed.

Chamberlain & Turner, for appellant. James S. Dodge and O. Z. Hubbell, for appellee.

REINHARD, C. J. This action is on a policy of insurance on the life of Otho Strong, deceased, of which the appellee was the beneficiary. The cause was tried by a jury, resulting in a special verdict, upon which the court rendered judgment in favor of the appellee for \$600.

The first error assigned and discussed is the overruling of the appellant's motion for judgment on the special verdict. Many defects are urged against the verdict, but the most serious one, as we regard it, is the finding with reference to the proof of death. The policy provides that "immediate written notice is to be given said company, at Detroit, Michigan, of any accident or injury for which a claim is to be made, with full particulars thereof, and the full name and address of the insured." No waiver is pleaded in the complaint. The seventh finding is "that immediate written notice of the death of said Otho Strong was given by the plaintiff, or by some one in her behalf, to

the defendant." Obviously, this is but a mere conclusion of the jury, rather than a fact. The finding should have given the date of the notice, or something near the date when the same was served. The ninth finding shows "that on or about the 1st day of February, 1894, the plaintiff procured a blank form, and executed proofs of the death of said Otho Strong, and forwarded the same to the defendant, and said proofs were accepted and retained by said defendant." The injury occurred, as found in another place, on the 18th day of November, 1893, and the death within 90 days of that time, though it is not shown on what day, or in what month. Assuming that the notice was given in time, it is not shown that it conformed to the requirements of the policy in other respects. Proof of the death of the insured was not what was stipulated for in the contract. Not a word is found as to the contents of the notice. It may have referred to the injury from which it is found Otho Strong died, or it may not. That the appellant ever received any notice of the injury for which the claim was made, is not found; nor is it shown that any of the particulars of the injury were given in such notice, as required by the policy. An attempt is made to find a waiver, but unsuccessfully so, we think. It is found that the appellant "refused to acknowledge any liability on the policy, when notified as aforesaid," and "refused to send to the plaintiff, or to any one for her, any blank forms upon which to make out the proofs of death of said Otho Strong." The mere fact that the appellant "accepted and retained" the proofs of death, or failed to furnish blanks to enable the appellee to make proof, does not constitute a waiver of such proof. The contract does not provide that the company will furnish blanks for that purpose. If the proofs were furnished too late (and there is nothing in the finding to show the contrary), the mere fact that they were retained does not revive the company's liability. *Insurance Co. v. Pickel*, 3 Ind. App. 335, 29 N. E. 432; *May, Ins. § 507*; *Commercial Union Assur. Co. v. State*, 113 Ind. 331, 15 N. E. 518; *Insurance Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213. There is no finding that the appellant ever denied any liability. The mere fact that it refused to acknowledge such liability cannot be taken as a waiver of proof of the injury. We think the finding is fatally defective in respect of proof of notice of the injury. In furtherance of justice, a new trial is directed. Judgment reversed.

(13 Ind. App. 314)

BERKEY v. CITY OF ELKHART.

(Appellate Court of Indiana. Oct. 17, 1895.)

PLEADING—DEMURRER TO ANSWER—HARMLESS ERROR.

1. It is harmless error to sustain a demurrer to a special answer, where the defense

sought to be set up by the special answer can be shown under the answer of general denial.

2. Defendant, who has filed a general and special answer, cannot make a ruling sustaining a demurrer to the special answer reversible error by subsequently withdrawing the general answer.

Appeal from circuit court, Elkhart county; J. H. Vanfleet, Judge.

Action by the city of Elkhart against Chauncey E. Berkey to recover the penalty for the violation of an ordinance. From a judgment for plaintiff, defendant appealed to the supreme court. Transferred to the appellate court 40 N. E. 1081. Affirmed.

Henry C. Dodge, for appellant. Perry L. Turner, for appellee.

ROSS, J. The appellee brought this action against appellant to recover a penalty for the violation of a city ordinance. The action was commenced in the court of the city of Elkhart, and on appeal to the circuit court appellee recovered judgment against appellant. From the judgment of the circuit court an appeal was taken to the supreme court, and the cause was transferred by the latter court to this court. *Berkey v. City of Elkhart* (Ind. Sup.) 40 N. E. 1081.

The specifications of error assigned in this court are as follows: First, the court erred in overruling the appellant's demurrer to the complaint; second, the court erred in sustaining appellee's demurrer to the second paragraph of appellant's answer.

We think the complaint is not subject to the objections urged against it. It is also shown that after the court had sustained the demurrer to the second paragraph, or special answer, the appellant withdrew the first paragraph, which was a general denial. A city court is governed by the same rules in making issues as justices of the peace; hence all defenses in that court, except the statutes of limitations, set-off, and matter in abatement, are available under the general denial. On the appeal of this case to the circuit court the appellant was entitled, under his answer of general denial, to make the defense which he sought to set up in his special answer; hence it would not be error to sustain the demurrer to the special answer, while appellant had the benefit of his answer of general denial. *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350. It was a harmless error to sustain the demurrer to the second paragraph of the answer at the time the ruling was made, and appellant could not, by withdrawing his answer of general denial, change the legal effect of the ruling. As said by this court in *Wickwire v. Town of Angola*, 4 Ind. App. 253, 30 N. E. 17: "One against whom a harmless ruling has been made cannot voluntarily change the issues so that it shall become harmful, and thus bring into the record a reversible error." We find no reversible error in the record before us. Judgment affirmed.

(18 Ind. App. 311)

BOARD OF COM'RS OF WASHINGTON COUNTY v. MENAUGH.

(Appellate Court of Indiana. Oct. 16, 1895.)

COUNTIES—LIABILITY ON CONTRACT OF THE ELECTION COMMISSIONERS—ELECTION TICKETS.

3 Rev. St. 1894, §§ 6214, 6215, 6222, 6231, provide that the board of election commissioners shall "prepare and distribute ballots for the election officers," "cause to be printed on the respective ballots the names of the candidates nominated," "cause all the names of all candidates of their respective jurisdictions to be printed on one ballot," and cause to be printed on cards instructions for the guidance of electors, etc. Section 6224 prescribes a penalty if any person employed in printing the same shall give or knowingly permit to be taken any of such ballots by any person other than a member of the board of election commissioners, "for which such ballots are being printed," etc. *Held*, that the county is liable for election tickets, cards of instruction, and sample ballots, furnished at the request of the board of election commissioners, though they are not contracted for by the board of county commissioners.

Appeal from circuit court, Washington county; Samuel B. Voyles, Judge.

Action by Calvin O. Menaugh against the board of commissioners of Washington county on a claim for tickets for a general election, cards of instruction, and sample ballots. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Masterson, D. A. Jennings, and Elliott & Hostetter, for appellant. Mitchell & Mitchell and Harvey Morris, for appellee.

DAVIS, J. For the general election of 1894 appellee, at the request of the board of election commissioners of Washington county, furnished and delivered to said board tickets, cards of instruction, and sample ballots, of the value of \$94.03. The board of commissioners refused to allow the claim, and on appeal to the circuit court judgment was rendered against appellant for the amount. Counsel for appellant contend that the board of commissioners alone has the power to contract for such supplies, and that the county is not liable for any supplies furnished on the order of the board of election commissioners. They insist that the act of 1875 (Reg. Sess. p. 31, § 1) makes the board of county commissioners the purchasing agent of the county for the purchase of all books, stationery, and all other articles necessary for conducting the business of the county officers, circuit court, and inferior courts of the state, and that the board of election commissioners is a county officer. Section 6214, 3 Rev. St. 1894, prescribes that the clerk of the circuit court and two persons of opposite politics, appointed by him, shall constitute the county board of election commissioners. A part of this section reads: "It shall be the duty of such board to prepare and distribute ballots for election officers," etc. Section 6215, 3 Rev. St. 1894, prescribes the duties of such board, and reads thus: "The said board of election commis-

sioners shall cause to be printed on the respective ballots the names of the candidates nominated," etc. Section 6222, 3 Rev. St. 1894, reads: "The board of election commissioners shall cause all the names of all candidates of their respective jurisdictions to be printed on one ballot," etc. Section 6231, 3 Rev. St. 1894, sets forth the duty of the county board of election commissioners as to printing in large type on card for the instruction of voters. This section reads: "The county board of election commissioners shall cause to be printed in large type on cards, in English, or such other language as they may deem necessary, instructions for the guidance of electors," etc. Section 6224, 3 Rev. St. 1894, prescribes the duty of the printer, fixes the penalty for violation of the law, and states for whom the printing is done. The section reads: "If the printer of such ballots or any person, employed in printing the same, shall give or deliver, or knowingly permit to be taken, any of said ballots by any person other than a member of the board of election commissioners, for which such ballots are being printed," etc. Whether the county officers referred to in the act of 1875 are those mentioned in the constitution, namely, the clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor, we need not determine. Rev. St. 1894, § 152 (Rev. St. 1881, § 152). The county board of election commissioners is not a county officer, within the purview of the constitution or of the act of 1875. In any event, the printing which is the basis of this claim was required to be done by the county board of election commissioners, which, under the statute, had the authority to order the work. The work was done in the interest of the people of the county. In this case the board of election commissioners acted within the scope of their authority, and the county is liable for the reasonable value of the work and supplies so performed and furnished. Judgment affirmed.

(15 Ind. App. 19)

STUCKEY et al. v. HARDY et al.¹

(Appellate Court of Indiana. Oct. 17, 1895.)

ASSUMPSIT—WHEN LIES—PLEADING.

1. One for whose benefit an advertisement was published must pay therefor, where he had knowledge of the publication, and made no objection thereto.

2. A recovery may be had under the common counts on a special contract that has been executed.

Appeal from circuit court, Cass county; D. B. McConnell, Judge.

Action by Rufus J. Stuckey and another against Alexander Hardy and L. D. Norris to recover for advertising done in a newspaper. From a judgment against Norris only, plaintiffs appeal. Reversed.

Magee & Funk, for appellants. Justice & Lairy, for appellees.

¹ Rehearing denied.

LOTZ, J. This suit was instituted by the appellants against the appellees to recover the agreed price for advertising done in a newspaper. It appears from the special finding of facts made by the court that in 1891, Neil & Stuckey, a copartnership, were the owners and proprietors of a weekly newspaper called the Western Horseman, printed and published in the city of Indianapolis. In 1893, Neil retired from said firm, and McMahon became a member under the firm name of Stuckey & McMahon, the new firm succeeding to all the property rights of the old firm. Prior to December 25, 1891, Stuckey solicited Norris for an advertisement in said paper, and Norris afterwards prepared and sent a draft of an advertisement, which was afterwards printed and published in said paper for the period of six months, the agreed price for that period being \$100. This advertisement gave the qualities and pedigrees of four stallions, together with price of service of said stallions for breeding purposes. This advertisement or notice contained this direction: "Apply to Alex. Hardy or L. D. Norris, Logansport, Indiana." Two of the horses advertised belonged to Norris and two to Hardy. One of Norris' horses was kept in Hardy's stable in Logansport, and Norris paid Hardy for his keeping; and one was kept on a farm near Logansport. Hardy's two horses were kept in his stable in said city. Hardy had no interest in the proceeds of the Norris horses, and Norris had no interest in the proceeds of the Hardy horses, and Hardy and Norris were not partners, nor were there any business relations between them other than the keeping of the Norris horse in Hardy's stable. At the expiration of the six-months advertisement, the appellant Stuckey met the appellee Norris, and requested a continuation of the advertisement for another period of six months on the same terms. Norris suggested a change in the advertisement, but none was made, and the advertisement was continued for another period of six months. Norris prepared a draft for the advertisement, and made the contract on his own motion, wholly without consultation with Hardy. It was also agreed that, in addition to said advertisement, there should be an editorial "write up" of the horses. The advertisement was printed and published in said paper for two terms of six months each, and the editorial "write up" was published as agreed. Both Norris and Hardy were subscribers to said paper, and received copies of it, and knew that the advertisement was being made in the paper, and at no time requested that the advertisement should not be made, but allowed it to be published without objection. Stuckey presented a bill for the amount of the advertising to Hardy, and Hardy proposed to pay his part, but desired to consult Norris as to its accuracy before he paid it. The plaintiffs also made a draft on Hardy and Norris for the amount of the bill, viz, \$200, through a bank at Logansport, and Har-

dy indicated his willingness to pay his part of the draft, but wanted Norris to pay his part. This draft was not paid. The court stated its conclusions of law that the plaintiffs should recover judgment against Norris for \$200, but as to the defendant Hardy there should be no recovery, and rendered judgment accordingly. The appellants excepted to the conclusions of law, and have made it the basis of an assignment of error in this court.

We think it clear upon this finding of facts that, if Norris is liable, Hardy is also liable. Hardy received the benefit of the advertisement, and he should pay what it was worth. The appellees, however, insist that there is a variance between the findings and the allegations of the complaint; that the complaint, and each paragraph, declares upon a special contract; and that, as to Hardy, if there can be any recovery at all, it must be upon a common count for services rendered. While it is true that each paragraph of the complaint refers to the contract, still this is an action on a common count for money due. It is well settled that, when a special contract has become executed, and nothing remains to be done but to pay the money agreed to be paid under it, a recovery may be had upon a common count, and the recovery measured by the contract price. *Electric Co. v. Branham* (Ind. Sup.) 41 N. E. 448; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199; *Shilling v. Templeton*, 66 Ind. 585.

The appellees have assigned cross errors questioning the sufficiency of each paragraph of the complaint, and ask an affirmance on these cross errors. These cross errors we do not consider, because the judgment would not, under the circumstances of the case, be affirmed, even if well assigned. *Town of Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454. We think it clear that Hardy was liable for at least one-half of the claim. The cause is reversed, with instructions to grant the appellants a new trial if asked for in 90 days.

(14 Ind. App. 312)

McFADDEN et al. v. ROSS et al.¹

(Appellate Court of Indiana. Oct. 18, 1895.)

CHATTEL MORTGAGE—VALIDITY—DELIVERY—EXECUTION SALE OF MORTGAGED CHATTELS—RIGHTS OF PURCHASER—SECONDARY EVIDENCE—APPEAL—HARMLESS ERROR.

1. A chattel mortgage, executed without the knowledge of the mortgagee, delivered to a third person, and by him recorded, is void, for want of delivery, as against a subsequent purchaser of the goods on execution against the mortgagor.

2. Where a chattel mortgage was executed, and recorded without the mortgagee's knowledge, and the property covered was afterwards sold on execution against the mortgagor, the acceptance of the mortgage after such sale by the administrator of the mortgagee cannot affect the rights of the purchaser.

¹ Rehearing denied.

3. Error in excluding testimony is harmless, where such testimony is subsequently admitted.

4. Parol evidence of the contents of a letter is inadmissible, in the absence of evidence that the letter itself was lost or beyond the jurisdiction.

5. The credibility of a witness is a question to be determined in the trial court.

6. The purchaser at an execution sale of mortgaged chattels has a lien thereon for the excess remaining after satisfaction of the mortgage.

Appeal from circuit court, Shelby county; F. S. Swift, Special Judge.

Action by James R. Ross and others against James B. McFadden and others on a replevin bond. Judgment for plaintiffs, and defendants appeal. Affirmed.

For prior reports, see 8 N. E. 161, and 26 N. E. 78.

Love & Morrison and J. B. McFadden, for appellants. Hord & Adams, for appellees.

LOTZ, J. This is the third appearance of this cause in an appellate court. See *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161, and *Id.*, 126 Ind. 341, 26 N. E. 78. It is an action on a replevin bond, brought by the appellees, as plaintiffs, against the appellants, as defendants. The plaintiffs recovered a judgment below. Only two assignments of error are presented for our consideration, viz.: (1) That the court erred in its conclusions of law on the special finding of facts; and (2) the overruling of appellants' motion for a new trial. The main and controlling question on this appeal, as we view it, arises on the first assignment.

The facts necessary to the determination of this question, and as found by the court, are substantially as follows: On the 26th day of March, 1890, James B. McFadden, as administrator of the estate of Joseph Nichols, deceased, instituted in the Shelby circuit court an action in replevin against the plaintiffs, to recover the possession of certain personal property, consisting of whisky, brandy, wines, and gin, of the value, at that time, of \$401.90, and the defendants gave an undertaking conditioned that the administrator should prosecute said action with effect and without delay, and make return of the property, if return thereof should be adjudged against said administrator, and pay the plaintiffs in this action all damages which they might recover in that action. By virtue of that action and undertaking, the administrator obtained from these plaintiffs the custody and possession of all of said property. The administrator, contrary to the conditions of said bond, did not prosecute said action in replevin with effect and without delay, and did not return the property or any part thereof to the plaintiffs, but dismissed his said cause on the 15th day of January, 1891, and continued to hold the property, and converted the same to his own use and purposes, notwithstanding the order and judgment, upon the dismissal, that the

property be returned to these plaintiffs. On the 26th day of February, 1879, the property involved in the replevin action, together with other personal property, was owned by one George D. Nichols, and on said day the plaintiffs purchased the property involved in the replevin action at execution sale, upon an execution issued upon a valid judgment rendered by a court of competent jurisdiction in favor of these plaintiffs, and against said George D. Nichols; and by virtue of such purchase the plaintiffs came into the possession of said goods, and were so in the possession at the time the replevin suit was instituted against them. At the time of the purchase under the execution sale by the plaintiffs, there existed, of record in the county where the property was situated, and where the sale was made, a certain chattel mortgage, of the date of January 9, 1879, purporting to be made by the said George D. Nichols to one Joseph Nichols, to secure two promissory notes aggregating the sum of \$550, payable to the said Joseph Nichols; that the mortgage described and included the property purchased by the plaintiffs at said execution sale, together with other property of George D. Nichols, all of the property included in the mortgage being of the aggregate value of \$1,263.74. The mortgage and notes, which it purported to secure, were made by George D. Nichols, and by him placed in the custody of McFadden, without the knowledge or consent of Joseph Nichols, and the mortgage was placed of record by McFadden without the knowledge of, or any authority from, Joseph D. Nichols. The said Joseph then resided in the state of Rhode Island, and was at no time present in Shelby county, Ind., where the notes and mortgage were made, and the mortgage recorded, and no delivery of the notes and mortgage was ever made to the said Joseph Nichols, or any other person acting for him or by his authority. McFadden received and converted, sold and otherwise disposed of, portions of the property covered by the mortgage, of the value of \$963.74, including the property so taken in replevin from the plaintiffs, and permitted other persons to take and convert to their own use, of the property so covered by the mortgage, and in addition to that converted by him, of the value of \$300. The several conversions were made immediately after securing the possession in the replevin proceedings. At the time of the conversion, the principal and interest of the two notes made by George D. Nichols was \$601.83, and the value of the property converted by McFadden exceeded the principal and interest of the notes in the sum of \$362.41, and the whole property so converted exceeded the amount of the notes in the sum of \$662.41. Upon these facts, the court stated, as conclusions of law, that the plaintiffs had suffered (1) damages, by reason of taking the property under the replevin bond, in the sum of \$362.41, and of accrued interest in the sum

of \$282.62, in all in the sum of \$645.03, for which they were entitled to judgment; (2) that the mortgage to Joseph Nichols was ineffectual, as against the plaintiffs.

The appellants only make one objection to the conclusions of law. If any others exist, they are waived for failure to present them. It is insisted that the last conclusion is erroneous, for the reason that the facts found show that the acts of McFadden, in bringing suit to recover the possession of the goods, are equivalent to a ratification of his act in placing the mortgage on record for Joseph Nichols. The action in replevin, however, was not brought until after the execution sale. Whatever rights the appellees acquired by virtue of the execution sale, they secured before any ratification or acceptance took place. If the mortgage was a nullity before it was accepted by Joseph Nichols, or his administrator, it conferred no rights upon anybody, and could be rightfully ignored by the appellees and the officer who made the sale under the execution. The delivery of a deed or mortgage is absolutely essential to its execution. Delivery is the final act in its execution. Until delivered it has no force or validity, for until then it is an act or contract only in process of formation or completion. It is true that a delivery may be made to a third person for the grantee or mortgagee, and that, too, without the knowledge of the latter, and when accepted by the grantee or mortgagee become valid. It is also true that, in some instances, the law will presume an acceptance, from the fact that the grantor has caused the deed to be recorded, where the grantees are infants or persons under legal disabilities; but such instances are exceptions to the general rule, and we are not concerned with the exceptions here. There is much similarity between the case at bar and that of *Woodbury v. Fisher*, 20 Ind. 387. That was a proceeding by a judgment creditor to reach certain equities in real estate. The facts, briefly stated, were: That John C. Fisher, the judgment defendant, was indebted to his mother, Sarah Fisher, in the sum of \$800. He made his note and mortgage to her to secure the debt. He caused the mortgage to be recorded, and took it from the recorder's office. Sarah Fisher, the mortgagee, was a resident of Pennsylvania, and the mortgage was not delivered to her, in person or by agent. The only evidence of acceptance by her is that she claimed the benefit of it in her answer. The complaint alleged the making of the mortgage, but that it had never been delivered. The trial court found that the mortgage was valid. In speaking of this finding, the supreme court said: "In this respect we think the court erred. A deed or mortgage must not only be delivered to, but must be accepted by, the grantee or mortgagee; otherwise, the title does not pass. To be delivered, it would seem that the deed must

pass under the power of the grantee, or some person for his use, with the consent of the grantor.' *Dearmond v. Dearmond*, 10 Ind. 191. With proper evidence of an acceptance by the grantee, perhaps, the delivery of a deed by the grantor would be sufficient delivery. *McNeely v. Rucker*, 6 Blackf. 391. We have seen, in the case before us, that there was no acceptance shown by Mrs. Fisher until she filed her answer, even supposing that could amount to an acceptance; and this was after the plaintiffs had acquired a lien by instituting their suit to reach their property. *Butler v. Jaffray*, 12 Ind. 504. An acceptance then could not relate back so as to defeat the lien thus acquired by the plaintiffs. This view is fully sustained by the case of *Goodsell v. Stinson*, 7 Blackf. 437, and cases there cited, and a further examination is deemed unnecessary." In the case at bar there was no acceptance, such as could defeat the appellees' purchase under the execution sale. At the time that was made, the mortgage was a nullity. The court did not err in its conclusions of law.

The first cause for a new trial is that the court erred in refusing to permit the defendant McFadden to testify that, at the time the chattel mortgage was made, George D. Nichols stated to McFadden that he had borrowed \$550 of Joseph Nichols, and had promised to secure the loan by mortgage. The record shows that McFadden was subsequently permitted to state all that George D. Nichols said to him on that occasion. This ruling, if error at all, is not reversible error, under these circumstances.

The second ground for a new trial is that the court erred in refusing to permit the defendant McFadden to testify to the contents of a letter which he had written, mailed, and addressed to Joseph Nichols, at Providence, R. I., on the 9th day of January, 1879, informing Joseph that George D. had on that day executed a note for \$550, payable to Joseph and secured by mortgage on personal property in Shelbyville, and that the note and mortgage were then in McFadden's office and possession, and inquiring of said Joseph as to what he desired to have done with them. There was no error in the exclusion of this evidence. There was no proof of loss, nor was there any proof that the letter was beyond the jurisdiction of the court at the time of the trial, or that it could not be produced; nor was there a showing that any effort whatever had been made to procure the original. There may be cases where parol evidence of the contents of written documents is admissible, when the document is beyond the jurisdiction and cannot be produced; but no proper showing was made in this instance to entitle parol evidence of the contents to be given.

There are several other causes for a new trial, relating to the admission of evidence, discussed by counsel. We have examined

them all carefully, and deem it unnecessary to discuss them in detail. The evidence complained of was admissible as tending to show what had become of the goods, and as tending to rebut McFadden's testimony that the mortgage had been accepted by Joseph Nichols, or by his administrator. If the mortgage had been accepted in good faith, it is not probable that the administrator would have permitted the property to become squandered or lost. His conduct in relation to the property, and the disposition made of it, was proper evidence, when considered in connection with his own testimony.

It is, lastly, contended that the finding is contrary to the law, and not supported by sufficient evidence. If the mortgage was not accepted before the levy and sale, the finding is certainly not contrary to the law. The appellants, however, insist that the undisputed evidence shows that the mortgage was accepted. It is true that one of the appellants testified to having received a letter from Joseph Nichols, accepting the mortgage shortly after it was made. But the question of the genuineness of this letter was a matter for the trial court. The credibility of this witness was also a matter for the trial court. The trial court found that the mortgage was not accepted. It must have discredited this testimony. The credibility of the witnesses is a matter for the trial court, and not for this court.

The equities of this case are all with the appellees. Even if the mortgage was valid, the appellees had a lien on the goods by virtue of the levy of the execution. The administrator was in duty bound to account to the lienholders for the excess, after the payment of the mortgage. The finding shows that he received from the goods, not only enough to satisfy the mortgage, but a large amount in excess thereof, enough to satisfy the appellees' demand in this action; and in a proper proceeding he could be compelled to account to them for the excess. We find no reversible error in the record. Judgment affirmed.

(13 Ind. App. 337)

LOUISVILLE, N. A. & C. RY. CO. v.
LANGE et al.

(Appellate Court of Indiana. Oct. 18, 1895.)

RAILROAD COMPANIES—DESTRUCTION OF HAY BY FIRE—ACTION BY JOINT PLAINTIFFS—PLEADING—EVIDENCE—JUDGMENT—HARMLESS ERROR.

1. A complaint which does not show a cause of action in all the joint plaintiffs is subject to demurrer for want of facts.

2. Where the fact that all the joint plaintiffs are not entitled to recover is not apparent on the face of the complaint, but appears from the evidence, those plaintiffs in whose favor a cause of action is shown are entitled to judgment, under Rev. St. 1894, § 577 (Rev. St. 1881, § 568), providing that judgment may be given for or against one or more of several plaintiffs.

3. Error in entering a judgment for two joint plaintiffs, in a stated sum, for the destruction of hay by fire,—it appearing that but one had a cause of action as owner of the hay,—is harmless, since it is immaterial to defendant whether it pays the sum to one or both, and the owner would be estopped by the judgment from again recovering on the ground of individual ownership.

4. Error in rejecting evidence is harmless where the question to which the evidence was directed was, by special finding, determined in favor of the party offering it.

5. In an action for the destruction of hay by fire from defendant's engines, evidence that other fires were started along the line of the road by such engines about the time of the burning of the hay in question is admissible. Ross, J., dissenting.

Appeal from circuit court, Lake county; J. H. Gelleth, Judge.

Action by Fritz Lange and another against the Louisville, New Albany & Chicago Railway Company for the value of hay destroyed by fire from defendant's engines. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. C. Field, W. S. Kinnan, and E. D. Crumpacker, for appellant. J. Kopelke and A. L. Jones, for appellees.

GAVIN, J. Appellees, Lange and Gross, sued appellant to recover for the loss of a lot of hay belonging to them, and destroyed by fire negligently set out by appellant. The averments of ownership are sufficient, and are not in the nature of mere conclusions from the antecedent facts set forth. They are direct and unequivocal.

It is earnestly insisted by counsel that the judgment should be reversed because the complaint avers a joint cause of action in both plaintiffs, while the proof establishes a several right of action in one only. Conceding, without deciding, the fact to be as claimed, we do not think the result sought necessarily follows. The authorities in Indiana establish that, where several plaintiffs join in a complaint, it must show a cause of action in all, or it will be liable to demurrer for want of facts. *Peters v. Guthrie*, 119 Ind. 44, 20 N. E. 536; *Brown v. Oritchell*, 110 Ind. 31, 7 N. E. 888, and 11 N. E. 486; *Berkshire v. Shultz*, 25 Ind. 523; *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 97. In these, however, and in all the other cases cited by counsel, the question arose as one of pleading, and not upon the evidence.

Both the statute and the authorities are against the further proposition advanced by counsel,—that where the fact that all are not entitled to recover does not appear upon the face of the complaint, but is developed by the evidence, then none of the plaintiffs can recover. Section 577, Rev. St. 1894 (section 568, Rev. St. 1881) provides, "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Our decisions uphold the statute. *Nicodemus v. Simons*,

121 Ind. 564, 28 N. E. 521; *Rush v. Thompson*, 112 Ind. 158, 18 N. E. 665; *Hamilton v. Browning*, 94 Ind. 242. When Mr. Pomeroy, in his *Code Remedies* (sections 213 and 215), classes our state among those holding a contrary doctrine, he is in error. It is clear, then, that if it appeared that Lange alone was technically and strictly the owner of the hay, as a tenant in possession, judgment might properly, and ought to, have been rendered in his favor. Should the erroneous verdict and judgment for both be reversed? It is a cardinal principle of appellate jurisprudence that the error for which a cause may be reversed should be such as, at least, might have been hurtful to the appellant. *Elliott*, App. Proc. § 632. The learned counsel for appellant have in no way indicated how appellant could be prejudiced by this error. Admitting, for the purpose of considering this question, that it negligently destroyed the hay, and is legally bound to pay for it, it is, to the appellant, a matter of utter indifference whether it pays one or both. By the issues the appellant was advised that it must be ready to meet the claim, whether the hay was owned by one or both. By the judgment Lange is undoubtedly forever barred and estopped from again recovering for the hay upon the plea that it belonged to him individually. *Earnest v. Barrett*, 6 Ind. App. 371, 33 N. E. 635; *Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154. As we have said, counsel have not indicated, nor are we able to perceive, any contingency upon which harm could result to the appellant by the error, if error there was. While we concur in the statement of counsel that the proceedings of courts should be in methodical manner, and according to established rules, we are unwilling to say that either justice or the law requires that we should reverse a cause for a departure from correct procedure by which the appellant neither was nor could have been injured.

Since the question to which appellant's rejected evidence was directed was, by the special findings of the jury, shown to have been determined in its favor, it was not injured by the court's ruling. *Keller v. Reynolds* (Ind. App.) 40 N. E. 77.

The evidence of other fires started along the line of the road by appellant's engines about the time of the occurrences in controversy was properly admitted, under the authority of *Railway Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296. Judgment affirmed.

ROSS, J. (dissenting). For the reasons stated in dissenting opinion in *Railway Co. v. Keith* (Ind. App.) 35 N. E. 296, I cannot concur in that part of the opinion of the majority holding that it was not error to permit appellees to prove that other engines of appellant set other fires about the same time it is charged this fire was set.

(157 Ill. 141)

BEST BREWING CO. OF CHICAGO v. DUNLEVY.¹

(Supreme Court of Illinois. May 15, 1895.)²

TRIAL — INSTRUCTIONS — DAMAGES — HARMLESS ERROR.

1. In an action for damages for personal injuries, an instruction allowing plaintiff damages "for prospective suffering and loss of health," while the declaration does not allege a permanent injury, is not reversible error where the evidence of the plaintiff's injuries up to the commencement of the action fully justifies the amount of the verdict.

2. Where the jury are told in one instruction that the measure of damages would be compensation for actual injuries, it is proper to refuse as cumulative an instruction that only compensatory damages can be recovered.

Appeal from appellate court, First district.

Action on the case by Patrick Dunlevy against the Best Brewing Company of Chicago. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 96. Defendant appeals. Affirmed.

Blum & Blum, for appellant. J. F. Waters, for appellee.

BAILEY, J. This was an action on the case, brought by Patrick Dunlevy against the Best Brewing Company of Chicago to recover damages for a personal injury. It appears that the plaintiff, at the time of his injury, was a passenger on a cable car on one of the streets of Chicago, and that a team of horses belonging to the defendant, attached to one of their beer wagons, was standing unhitched and unattended on one side of the street. As the car approached the team, the latter became frightened, and turned suddenly, so as to thrust the pole of the wagon into the open car on which the plaintiff was riding, striking him on the knee, and severely injuring him. A trial was had on a plea of not guilty, resulting in a verdict and judgment in favor of the plaintiff for \$1,000. That judgment has been affirmed by the appellate court on appeal, and the record is now brought here on appeal from that court.

The counsel for appellant state in their brief that the only questions they desire to present to this court relate to the giving of the only instruction asked by the appellee, and to the refusal of the court to give the seventh instruction asked on behalf of the appellant. The instruction given for the appellee is as follows: "If you find for plaintiff, you will be required to determine the amount of his damage. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances before them; the nature and extent of plaintiff's physical injuries, if any, testified about by

the witnesses in this case; his suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case he has sustained, or will sustain, by reason of such injury; his loss of time and services and inability to work and earn a living for himself, resulting from such injuries; and may find for him such sum as, in the judgment of the jury under the evidence, will be a compensation for the injuries." The only criticism made upon this instruction is that it allows damages "for prospective suffering and loss of health," while the declaration fails to make claim as for a permanent injury. The declaration alleges a severe injury, continuing in its effects up to the time that pleading was filed, and the evidence seems to support those allegations. But we are of the opinion, as was the appellate court, that, even if the instruction is obnoxious to the criticism made, the jury could not have been misled by it, as the evidence of the plaintiff's injuries up to the time of the commencement of the suit seems to fully justify the damages awarded him, without any reference to any prospective suffering or loss of health.

The appellant's seventh instruction, which was refused, was merely to the point that the case was not one for the imposition of punitive or vindictive damages, and that only compensatory damages could be recovered. In another instruction given for the appellant it was held that the measure of damages which the plaintiff would be entitled to recover in case of a verdict in his favor would be compensation for his actual injuries, as shown by the evidence. That instruction being given, the one refused was wholly unnecessary, and its refusal was not prejudicial to the appellant. We find no prejudicial error in the ruling of the court upon the instructions, and the judgment of the appellate court will be affirmed. Judgment affirmed.

(157 Ill. 165)

BROWN et al. v. HOLZMAN.¹

(Supreme Court of Illinois. May 15, 1895.)²

DEED—ACTION TO SET ASIDE.

Where the only evidence showing a deed to be a forgery is that of the husband of the grantor, and he is shown to have admitted that the deed was genuine, and to have permitted it to be used for his profit, and his testimony is directly contradicted by the notary before whom the deed purports to have been acknowledged, a finding that the deed is a forgery is not supported by the evidence.

Error to circuit court, Cook county; M. F. Tuley, Judge.

Bill by Katie Holzman, by her next friend, against Elias Brown and Bernhard Behrend,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

to set aside certain deeds. Complainant obtained a decree. Defendants bring error. Reversed.

M. Salomon, for plaintiffs in error. J. M. Young and Woolfolk & Browning, for defendant in error.

MAGRUDER, J. This is a bill filed by Katie Holzman, a minor, by her next friend, to set aside the following deeds, to wit: A deed dated May 13, 1890, alleged to have been executed by Lipman Holzman and Olga Holzman, the father and mother of complainant, both of Chicago, in Cook county, to Sallie Behrend, of the same place, conveying lot 7, etc., known as "No. 259 West Fourteenth Street" in Chicago, and lot 8, etc., known as "No. 75 Liberty Street" in said city; a deed dated August 20, 1890, executed by Sallie Behrend (unmarried) to Elias Brown, of said city, conveying said lot 7; a deed dated February 6, 1891, executed by Sallie Behrend to Celle Holzman, of said city, conveying said lot 8. After answers were filed as hereinafter stated, the cause was referred to a master in chancery, who took evidence, and made a report finding that the deed to Sallie Behrend was a forgery. The circuit court confirmed the report of the master, and entered a decree setting the deeds aside. The present writ of error is sued out for the purpose of reviewing said decree.

On February 27, 1889, one Charles A. Kessel, in consideration of \$2,250, conveyed said lot 7 to Olga Holzman, the wife of Lipman Holzman. At this time there was a frame cottage upon the lot, which Lipman Holzman moved to the rear, and he subsequently erected a brick building thereon. On April 17, 1889, Lipman and Olga Holzman executed a trust deed upon lot 7 to Francis B. Peabody to secure \$5,000. Shortly after the conveyance of lot 7 to Olga Holzman, there was also conveyed to her said lot 8. On May 6, 1890, she executed a trust deed upon said lot 8 to one Peter Popp to secure \$500, which trust deed appears to have covered lot 7 also, as well as lot 8. Theretofore, on June 27, 1889, she had executed a trust deed upon said lot 8 to said Popp to secure \$2,000. The two incumbrances for \$500 and \$2,000 represented money borrowed of two building and loan associations for the purpose of improving lot 8. The agent and representative of these associations who made these loans was the plaintiff in error, Bernhard Behrend, the father of Sallie Behrend. On May 13, 1890, when the deed of lots 7 and 8 is claimed to have been made by Lipman and Olga Holzman to Sallie Behrend, the legal title was in Mrs. Holzman, subject to the incumbrances above mentioned. Mrs. Holzman died on July 28, 1890, having received such severe burns from the accidental explosion of a gasoline stove that she lost her life. The deed to Sallie Behrend, who acted as clerk for her father, Bernhard Behrend, in

his office, he being a real-estate and loan agent, purports, as is shown by the record of it, to have been acknowledged by Lipman and Olga Holzman before the said Bernhard Behrend on the day of its date, but was not recorded in the recorder's office of Cook county until July 30, 1890, two days after the death of Mrs. Holzman. Lipman and Olga Holzman were born in Poland, were illiterate persons, and spoke English very imperfectly, if at all. They could not write, and made their marks in signing their names. The original of the deed to Sallie Behrend had been lost, and was not produced on the hearing, but it purports upon the record to have been signed by the marks of the grantors. Mrs. Holzman died intestate, leaving her husband, the said Lipman, and six minor children, including complainant. The plaintiff in error, Elias Brown, came to Chicago on July 14, 1890, from New York City, where he had lived for many years. It appears that he also was a foreigner, as he does not seem to have understood the English language very well. He was at that time 70 years old, and in delicate health. He had \$500 in money. He stayed a few days with his son-in-law, Abraham Levy, who lived on the second floor of the building at 259 West Fourteenth street, being a tenant of the Holzmans, and then, leaving there, went to live with his son, Ascher Brown, who lived in the neighborhood. Lipman Holzman had been trying to sell lot 7 for some time before Elias Brown came to Chicago. Ascher Brown and Levy had talked with him about it, and, after Elias Brown came, the latter had some negotiations with him and with his wife about buying the property, but no agreement was reached as to the price. After the death of Mrs. Holzman, and on August 20, 1890, a written contract was entered into between Lipman Holzman and Elias Brown, one of the plaintiffs in error here, by which the former agreed to sell to the latter lot 7 for \$8,500, of which \$3,500 was to be paid in cash and the balance by assuming the payment of the mortgage for \$5,000. In a few days the abstract of title was completed, and submitted for examination to Mr. Surine, Brown's lawyer, who pronounced the title good in Sallie Behrend. Thereupon a deed was executed by Sallie Behrend to Elias Brown conveying lot 7 to the latter, subject to the incumbrance for \$5,000; and a release deed of the mortgage for \$500, releasing lot 7 from the lien thereof, was also executed. Holzman and Bernhard Behrend went together to the office of Brown's lawyer, and there met the latter and Brown. Up to this time Brown had never seen Bernhard Behrend or his daughter, and knew nothing about the title. Brown had previously paid \$100 of the \$3,500 when the contract was made. At the meeting in question a portion of the \$3,400 was applied to the payment of the interest then due on the mortgage for \$5,000 and to the payment of some taxes and insur-

ance on the property, and Brown gave his check for the balance, \$3,116.16, payable to the order of Bernhard Behrend, who acted for Lipman Holzman in that transaction, and had acted for him in previous transactions. The deed to Brown was dated back as of August 20, 1890, the date of the contract, and was recorded on August 26, 1890. A few days after the delivery of the deed and the payment of the money, Lipman Holzman went with Brown to the premises, and delivered the possession of the buildings to him, and introduced him to the tenants as owner, and shortly thereafter moved out. Brown has been in possession ever since, occupying one of the buildings upon the premises and renting the other. The sum of \$3,116.16 was deposited by Behrend in his own name, and subsequently some trouble seems to have taken place between him and Holzman in reference to the money; Holzman demanding its payment, and Behrend delaying the payment. It would appear that small amounts had been paid to Holzman from time to time, and finally an arrangement was made as to the balance on February 6, 1891. On that day Bernhard Behrend conveyed lot 8, being No. 75 Liberty street, to Cella Holzman, a second wife of Lipman Holzman, whom he had married in about six weeks after the death of his first wife. Lot 8 was thus conveyed to Cella Holzman free from incumbrance, Behrend having paid off the two trust deeds for \$2,000 and \$500 out of the money received from Brown. Subsequently, on April 26, 1891, Lipman and Cella Holzman executed a trust deed upon lot 8 to Sigmund Zeisler to secure a loan of \$2,600.

The plaintiffs in error in this case are Elias Brown and Bernhard Behrend. The controversy relates chiefly to lot 7, which was sold to Brown, although the decree of the circuit court, in holding the deed of May 13, 1890, to be a forgery, strikes at the title to lot 8 as well as to lot 7. It is claimed by the defendant in error that Olga Holzman never executed the deed to Sallie Behrend; that Olga Holzman was the owner of the lots in her lifetime, and owned them at the time of her death, and that her minor children are now the owners thereof as her heirs. On the other hand, it is claimed on the part of the plaintiffs in error that the deed from Olga Holzman and her husband to Sallie Behrend was a genuine deed, duly executed and delivered by the grantors therein on the day of its date; that Elias Brown was a purchaser in good faith, holding under that deed; that he paid \$3,500 in money, and assumed an incumbrance of \$5,000, without any notice of any defects in the title, and since he has been in possession has expended between \$1,200 and \$1,500 in improving the property.

The questions involved are, for the most part, mere questions of fact. The first is; was the deed to Sallie Behrend a forgery? It was not until the amended bill was filed

that any charge of forgery was made. In the original bill, filed on March 24, 1892, and being under oath, the complainant below alleged that her mother was illiterate, and unable to write her own name, or to read the English language, and had been fraudulently induced by her husband and by Bernhard Behrend and his daughter and Elias Brown and others to make said deed upon the representation that she was thereby providing for the support of her minor children in the event of her death; that on her deathbed said Olga Holzman had declared to the complainant that she had made deeds and provided for her children. The original bill, which was read over to the complainant before she signed and swore to it, proceeded upon the theory that Olga Holzman made the deed relying upon the false representations made to her. But in the amended bill, filed on November 11, 1892, complainant shifted her ground, and alleged that on July 29, 1890, after the death of her mother, Bernhard Behrend, under the fraudulent pretext that he would fix the title to the land so as to enable her father to dispose of the same, and co-operating with her father to that end, prepared a bogus deed, purporting to be signed by her father and mother on May 13, 1890, thereby conveying said property, for a pretended consideration of \$10,000, to Sallie Behrend, and falsely and fraudulently wrote the names and forged the marks of her father and mother, and himself witnessed and acknowledged said deed, and filed it for record on July 30, 1890. The only affirmative evidence to support the charge of forgery is that of Lipman Holzman, who simply states that he and his wife never made a deed to Sallie Behrend. The reliability of his testimony is seriously shaken by a number of circumstances. His statements upon the subject have varied with the variations in the pleadings of his daughter, the complainant. In an answer filed by him to the original bill he stated that he bought the property from Kessel with money loaned to him by Bernhard Behrend; that he and his wife, "by warranty deed dated May 13, 1890, recorded July 30, 1890, in Book 3186, on page 30, conveyed said lot 7, with other property, to Sallie Behrend, for the stated consideration of \$10,000, which deed was duly acknowledged by the grantors on May 13, 1890, before Bernhard Behrend, notary public in and for said county of Cook; that said Olga Holzman knew the purport of said deed, and joined therein of her free will and accord; and that in the making of said deed no wrong or fraud was practiced on said Olga Holzman, and she fully knew the reason and purpose of said conveyance to Sallie Behrend aforesaid." Mr. Adolph Moses, an attorney at law, swears that he drew the answer of Lipman Holzman to the original bill, and had an interview with him before doing so, to wit, on March 9, 1892; that he took memoranda of the interview; that that interview was the one upon which the answer to the original bill was based;

that Holzman did not then mention anything about the deed being a forgery; that he said that Brown was innocent; that "the answer was based upon the statements he made to me" (Moses). Mr. Sigmund Zeisler, also an attorney at law, swears that in April, 1891, he examined the title to the property in question, and while doing so called Lipman Holzman's attention to the lapse of time between the date of the deed made by him and his wife to Sallie Behrend and the date of the recording of the same, "and asked said Holzman if said record was made after the death of his wife Olga, and said Holzman replied that it was. Affiant then asked said Lipman Holzman if said deed to Sallie Behrend was in fact executed and delivered before the death of said Olga Holzman, and said Lipman Holzman replied that it was so executed and delivered by them before her, said Olga's, death." Bernhard Behrend swore that he had been in the real-estate business for 10 years, and loaned his own money and the money of others on real-estate security; that he had known Lipman Holzman since 1885; that said Lipman was a tailor, but also engaged in real-estate operations; that he (Behrend) had advised him in his purchases and sales of lots, and had procured loans for him from building societies; that Holzman took the title to lot 7 in his wife's name because he owed debts, but that the purchase money was his own, earned in buying and selling real estate; that he (Behrend) acted for him when he bought the West Fourteenth street property, and procured for him from building associations the two loans of \$2,000 and \$500, secured by the trust deeds to Popp; that he had all the deeds of Holzman to his property in his safe in his office; that several months before the death of his wife, Holzman had been talking about selling lot 7; that the property on Liberty street was a wretched looking place, and, as he (Behrend) was responsible to the building associations for the loans of \$2,500, and there was a first mortgage of \$5,000 on lot 7, he wanted more security, and requested Holzman and his wife to deed the lots to him as additional security; that he told them they could collect the rents, and when they made a sale he would deed to the purchaser; that they came to his office one evening, and as to what took place Behrend swears as follows: "I drew the deed in their presence, and they signed the warranty deed to my daughter for both properties, which was acknowledged before me. * * * I drew the deed and delivered it to them to sign, and they came up and signed the deed. She made her mark. * * * I acknowledged and delivered the deed to my daughter. * * * I told Holzman I would hold the deed; would put it on record; * * * would attend to everything. I gave the deed to my daughter, and she put it in the safe with other deeds, and I didn't think of it any more, and let it lay for some time, until I recorded it with others. * * * Lipman and Olga Holzman signed

the deed of May 13, 1890, by making their mark, and I wrote their names on each side of their mark. * * * I claimed to be the owner of the property until the indebtedness of \$2,500 was paid. It was taken as security. * * * I didn't consider the security enough; that is why I took the deed. Having the title to the property, I could take care of the Peabody mortgage, if necessary. I would not have paid off the Peabody mortgage unless I had title, * * * when I simply held a second mortgage." In addition to this testimony, the conduct of Lipman Holzman was such as to indorse the deed to Sallie Behrend and recognize its validity. He was present when the deed from Sallie Behrend to Brown was delivered to the latter, and permitted Brown to pay over \$3,500 of his money in reliance upon a title obtained through that deed. When he and Behrend and Brown were present in the office of Surine, Brown's lawyer, he heard Behrend's explanation of the fact that the title was in Sallie Behrend, as that explanation was there made to the satisfaction of Surine. He gave no information at that time as to any forgery of the deed. On the contrary, he allowed such of Brown's money as was not paid directly into his own hands to be used by Behrend in paying off the mortgages upon lot 8, and allowed his wife Celie to receive a deed of lot 8 free of incumbrances from Sallie Behrend, thereby again receiving a benefit from that deed, and recognizing the validity of a title acquired under it. It was not until after he and his wife Celie had procured \$2,600 by mortgaging the title acquired through that deed to Zeisler that his daughter, the present defendant in error, filed an amended bill charging forgery, and he came forward to support the charge by testimony wholly inconsistent with his previous statements and conduct. In saying that the deed in question was a forgery, Lipman Holzman is contradicted by Bernhard Behrend, is shown to have made admissions to Moses and Zeisler to the effect that the deed was genuine, and not a forgery, and has permitted it to be used as a means of obtaining money and property for himself and his second wife. In view of these considerations we are unable to concur with the conclusion reached by the circuit court upon this subject. The issue made by the amended bill and the answers thereto was upon the question whether the deed was a forgery or not, and we are of the opinion that the deed was not a forgery.

There is, however, a second question suggested by the findings of the decree, and that is whether Brown can be regarded as having bought the property with notice of any such facts as should postpone his rights to those of the complainant and her brothers and sisters. It is undoubtedly true that Olga Holzman held the legal title to lot 7 when the deed was made to Sallie Behrend. But whether the property was hers, or whether it belonged to her husband, she holding title for him, is a matter about which there is conflicting

testimony; some witnesses mentioning circumstances tending to show that the wife regarded herself as owner, and others testifying to ownership by the husband. But, whatever may be the fact in this regard, Mrs. Holzman united with her husband in putting the title in Sallie Behrend as security for the indebtedness of her husband, and with authority to Sallie Behrend to make a conveyance of the title upon a sale of the property; and while some of the proof tends to show that Brown or his son or son-in-law talked on one or more occasions with Mrs. Holzman, as well as with her husband, about the purchase of the property, yet we do not think that Brown had any such notice, or was put upon inquiry in any such way, as to require him to lose his money, which was invested in good faith in the purchase of this property. If Sallie Behrend held the title in trust to any extent for Mrs. Holzman in the lifetime of the latter, or for the children of Mrs. Holzman after her death, Brown had no notice of that fact. Whether or not Bernhard Behrend and his daughter and Lipman Holzman, or either or any of them, improperly disposed of property, or of proceeds resulting from the sale of property, belonging to these children, is a matter which does not affect the plaintiff in error Brown, and with which he has no concern. He should be protected in his purchase. The decree of the circuit court is reversed, and the cause is remanded to that court, with directions to dismiss the bill as to the plaintiff in error Elias Brown, but with leave to the complainant to amend her bill, if she shall so desire, and to proceed otherwise, as she may be advised. Reversed and remanded.

(167 Ill. 35)

FISHER v. PEOPLE ex rel. KERN, County Collector.¹

(Supreme Court of Illinois. April 1, 1895.)²

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENT — TAXATION.

A property owner, who has appeared in proceedings to confirm a special assessment for a local improvement, which proceedings have resulted in a judgment of confirmation, cannot, in the absence of fraud, afterwards object to the collection of the assessment on the ground that the improvement was not made in accordance with the ordinance ordering it.

Appeal from Cook county court; Frank Scales, Judge.

Application by the people, on the relation of Charles Kern, county collector of Cook county, for judgment for delinquent taxes. Lucius G. Fisher filed objections, which were overruled, and he appeals. Affirmed.

On March 14, 1892, the city council of the city of Chicago passed an ordinance providing that Cottage Grove avenue, from Seventy-Fifth street to Ninety-Fifth street (except 16

feet in the middle thereof), be curbed with wooden curbing, filled, and macadamized. The first section of the ordinance provided the kind and quality of posts and planks to be used in the curbing, and "that said Cottage Grove avenue (excepting a space 16 feet wide in the middle of said Cottage Grove avenue between said points) be, and the same is, hereby ordered filled to within nine inches of the grade of the pavement with sand. * * * Upon this roadway was to be spread a layer of broken limestone, etc., which was to be rolled and puddled. Commissioners were appointed to make the estimate, and a petition was filed in the county court upon which commissioners were appointed to assess benefits, who returned the assessment roll into court, and thereafter the roll was confirmed—First, as to property not objected for; and, second, at another term of court, as to all property objected for, including appellant's. The case, as docketed in the said county court, was numbered 13,620, and the judgment warrant was numbered 15,883. In due course, the judgments were certified to the city collector, and by him to the county collector, who made application to the county court for judgment against appellant's property as delinquent. Appellant appeared, and filed objections to the entry of judgment as to his property, urging irregularities in the proceedings, and a failure upon the part of the city of Chicago to do the work in accordance with the ordinance. These objections were heard, overruled, and judgment entered. An appeal was taken from that judgment, and the record is brought to this court for review.

Ullmann & Hacker, for appellant. W. J. Donlin and N. M. Jones, for appellee.

PHILLIPS, J. (after stating the facts). The appellant insists the ordinance is void, because it failed to state the proposed improvement lies within the city of Chicago, and that two or more judgments were entered, and the court was without jurisdiction to enter more than one judgment on the proceeding for special assessment. Both these questions were passed upon by this court in *Wisner v. People* (filed at Ottawa, April 1, 1895) 40 N. E. 574, and determined adversely to this contention. It is further urged that the improvement has not been made in accordance with the ordinance, and but a part of Cottage Grove avenue in front of appellant's property has been macadamized and graded under the ordinance. The appellant was a party to the proceeding for special assessment, appeared, and filed his objections thereto, which were subsequently withdrawn, and judgment was entered, and the assessment duly certified, and the contract for the improvement let by the city. Appellant had his day in court, and is bound by the adjudication as to the special assessment on the particular real estate, in the absence of fraud. The assessment being valid and binding, the certifica-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 11, 1895.

tion for collection followed, as a part of the judgment, in pursuance of the statute. The city owed the duty to owners of property assessed to perform the work for which the assessment was adjudged, in pursuance to the terms and provisions of the ordinance. For its failure to comply with that duty, the law provides adequate remedies to compel performance, or prevent a material departure from the plan and character of the work, as proposed by the ordinance. With the contract for the improvement let, and the work performed, a liability has been incurred, which was to be paid by the money derived from the levy so made, and in the absence of fraud in the estimate, or in the manner of the work done, the appellant cannot be heard, in a proceeding to collect the tax, as here shown, to say that the work was not done as contemplated. It is not a defense to an application for judgment on the delinquent list to say that the ordinance was invalid, or the work not in accordance therewith. It is said, in *Clark v. People*, 146 Ill. 348, 35 N. E. 60: "It is the general rule that, where the court has jurisdiction of the parties and the subject-matter in a particular case, its judgment, unless reversed or annulled in a direct proceeding, is conclusive, and is not open to collateral impeachment by the parties thereto or their privies. 1 Black, Judgm. § 345. This rule has been applied by this court to judgments confirming special assessments. *People v. Brislin*, 80 Ill. 423; *Lehmer v. People*, Id. 601; *Prout v. People*, 83 Ill. 154; *Chicago & N. W. Ry. Co. v. People*, Id. 467; *Andrews v. People*, Id. 529; *Gage v. Parker*, 103 Ill. 528; *Blake v. People*, 109 Ill. 504; *Riverside Co. v. Howell*, 113 Ill. 256; *Schertz v. People*, 105 Ill. 27; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090."

With the validity of the assessment determined adversely to appellant, no question can arise on the objection to judgment on the delinquent list arising from the manner in which the work was done and performed. *Clark v. People*, supra; *Schertz v. People*, supra. The judgment is affirmed. Affirmed.

(157 Ill. 218)

HAWLEY v. SIMONS.¹

(Supreme Court of Illinois. May 15, 1895.)
LIMITATIONS — EFFECT OF AMENDMENT — EQUITY PRACTICE.

1. Where an original bill to reform a deed and obtain possession of land contains no claim for mesne profits, but mesne profits are claimed in an amendment to the bill, the statute of limitations bars all profits accruing more than five years before the amendment was filed, since an amendment setting up a new cause of action does not relate back to the original bill.

2. The error of taking testimony before a master without any order of reference cannot

be cured by subsequently entering an order of reference nunc pro tunc.

Appeal from appellate court, Second district.

Bill by Paul G. Hawley against John R. Simons and Edward Simons to correct a deed. Complainant obtained a decree, which was reversed by the appellate court on error brought by John R. Simons. 53 Ill. App. 287. Complainant appeals. Affirmed.

Chas. Wheaton, for appellant. Hopkins, Aldrich & Thatcher and S. J. Lumbard, for appellee.

WILKIN, C. J. This was a bill in equity filed May 8, 1871, by defendant in error against the plaintiff in error and Edward Simons, seeking correction of a sheriff's deed, and praying for the execution of a new deed to 60 acres of land. The original bill was filed against Edward Simons, the defendant in the execution under which the land was sold; and the bill averred, against plaintiff in error, that he claimed some interest in the land. The original bill only claimed relief to the extent of the land, and correction of the defective sheriff's deed. There was no claims for rents and profits that had accrued to the time it was filed, or those to accrue. On the 1st day of July, 1885, the bill was amended so as to claim rents and profits. The final decree in the case for the recovery of the land was June 14, 1888. On the 29th of May of the last-named year the defendant amended his answer, setting up the five-years statute of limitations as to all rents and profits due on the land prior to July 1, 1880; it being five years preceding the filing of the amended bill claiming, for the first time, rents and profits. The record shows that the cause was referred to the master July 13, 1888, but the master had been taking proofs prior to June 7th, the day on which he filed his report, and the court made an order of reference to the master, nunc pro tunc as of May 29, 1888. There were exceptions taken to the master's report, which found due defendant in error \$4,426.44; and the court reduced it to \$3,869.44, and entered a decree in favor of defendant in error for the latter amount, allowing rent from November 12, 1886,—the date of the expiration of the time of redemption under the sheriff's sale,—to June 14, 1888. Upon appeal to the appellate court upon the foregoing statement of the facts, the decree of the circuit court was reversed, and the cause remanded. The grounds of reversal sustained in that court were (1) the amendment to the bill, filed July 1, 1885, upon which the decree is based, set up a new cause of action from that alleged in the original bill, and therefore the five-years statute of limitations was a bar to the recovery of all the rents and profits claimed which accrued more than five years prior to the filing of such amendment; and (2) that

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

the circuit court erred in ordering the entry of the reference to the master nunc pro tunc as of a prior date. See 58 Ill. App. 287.

Complainant below prosecutes this appeal, and assigns for error that judgment of reversal. Appellee has filed cross errors alleging that the appellate court erred in finding him liable for rents and profits from July 1, 1880, being five years prior to filing the amendment, instead of for only five years next preceding the rendering of the decree. It is only necessary to say, as to this cross error, no such claim as is here set up is made by the answer, which is that he did not "within five years before the filing of the amended bill," etc. Solicitors for appellant contend that, "under the prayer for general relief, any special relief consistent with the case made by the bill can be granted," and, "when a bill in chancery presents a proper case for an accounting of rents and profits of lands against defendant, such account may be properly taken under the general prayer for relief;" citing *Haworth v. Taylor*, 108 Ill. 275, and a number of other authorities. This statement, of the law is not objectionable, but it does not cover appellant's case. No attempt was made in the original bill to charge the defendant with rents and profits of the land. It only sought to recover the land itself, and to have the defective sheriff's deed corrected. A decree for rents and profits would have found no support in the allegations of that bill. *Brockhausen v. Bochland*, 137 Ill. 552, 27 N. E. 458, and cases there cited. The amendment was not a restatement of any claim made in the bill previously filed, but set up an entirely new and distinct cause of action. In *Railroad Co. v. Cobb*, 64 Ill. 140, in holding a plea of the statute of limitations good as to additional counts to a declaration, it was said: "Counsel for appellee cite various authorities for the purpose of showing that courts should be liberal in allowing amendments for the purpose of avoiding the running of the statute. These authorities, however, are cases where the amendment was for the purpose of restating the cause of action in the pending suit, and not for the purpose of introducing a wholly new and different cause of action." See, also, *Phelps v. Railroad Co.*, 94 Ill. 548. In *Ringhouse v. Keener*, 63 Ill. 230, on suggestions claiming mesne profits in an action of ejectment, the question was "as to the period at which the statute of limitations becomes a bar,—whether it is five years before the commencement of the action of ejectment, or five years before the rendition of the final judgment therein, or five years before the filing of the suggestions for the recovery of mesne profits"; and it was held that all rents and profits which accrued more than five years before the filing of suggestions claiming mesne profits are barred by the statute of limitations, and that in a proceeding to re-

cover such profits, under the ejectment statute, a plea that the cause of action did not accrue to the plaintiff at any time within five years next before the filing of the suggestions was a good plea. The complainant below had the right to recover rents and profits upon his amendment to the bill, but, as said by the appellate court, he was not bound to do so, but might, after obtaining possession under his decree for the land, have brought his action at law for the same. If he wished to recover mesne profits upon his bill in equity, and avoid the running of the statute of limitations against them, so far as not then barred, he need only have made that claim in his original bill. Having seen fit to make such claim a new and distinct cause of action, there is no reason why the statute of limitations should not operate as a bar to the same extent and in the same manner as though the proceeding was by suggestions for mesne profits in an action of ejectment. "When courts of equity have concurrent jurisdiction with courts of law, and the party proceeds in equity, if barred at law, he will also be barred in equity." *Manning v. Warren*, 17 Ill. 267, and cases cited. We concur in the decision of the appellate court, in holding that the circuit court erred in not allowing the bar of the statute of limitations set up in the answer.

It is also clear that the order referring the case to the master was erroneous. It is called an order nunc pro tunc as of May 29, 1888. But no order whatever was made of that or any other date prior to the taking of the testimony by the master. That an order referring a cause to a master to take the testimony can only be binding upon the parties when made prior to the action of the master, is too clear for argument. Of course, if there is an appearance and participation in the taking of evidence without an order, parties cannot question the authority of the master to act, but the subsequent entry of an order of reference would amount to nothing. The argument of counsel proceeds upon the assumption that the order of reference in this case had been previously made, but not entered, whereas it was, as a matter of fact, not entered because it was not made. The judgment of the appellate court will be affirmed. Affirmed.

(157 Ill. 258)

MUMFORD v. TOLMAN.¹

(Supreme Court of Illinois. June 15, 1895.)²

ACTION ON NOTE—PLEADING—VARIANCE—NEGOTIABILITY—USURY—ATTORNEY FEE—FRAUD.

1. Pleading a note as "On demand I promise to pay," etc., when the note in fact reads, "On demand after date I promise to pay," etc., does not constitute a substantial variance.

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

² Rehearing denied October 21, 1895.

2. The fact that a note provides for attorney's fees does not render it usurious on its face, or destroy its negotiability.

3. A parol agreement that a note given in payment for bank stock shall be paid for only out of the dividends on such stock, cannot be set up as a defense to an action on the note, since that would be an attempt to vary a written instrument by parol evidence.

4. Statements by the seller of bank stock to the buyer, who is a director in the bank, that the stock is worth 130 per cent., and will soon be worth 200 per cent., do not constitute fraud, even though the stock soon afterwards becomes worthless.

Appeal from appellate court, First district.

Confession of judgment by Daniel H. Tolman against William R. Mumford. Defendant moved to vacate the judgment. The motion was overruled, and this order was affirmed by the appellate court. 54 Ill. App. 471. Defendant appeals. Affirmed.

The facts in this case, as stated by the appellate court, are as follows: "On January 29, 1894, there was entered in the circuit court of Cook county a judgment by confession for \$8,612.96 and costs in favor of appellee against appellant. The cognovit and judgment included \$395 attorney's fees. The note upon which judgment was entered was given for 100 shares of the Chicago Trust & Savings Bank stock, in this language: 'Chicago, Oct. 1st, 1892. On demand after date, for value received, I promise to pay to the order of myself, eighty-five hundred dollars, with interest at the rate of seven per cent. per annum.' Attached to the note was the statement that the maker of the note had deposited with the legal holder thereof, as collateral security, a certificate for 100 shares of the Chicago Trust & Savings Bank stock, etc. Also power of attorney to confess judgment. The note was indorsed, 'W. R. Mumford.' On the same date the judgment was entered the defendant moved to set it aside, and for leave to plead. The court granted leave to the defendant to file affidavits in support of his motion. Thereupon he presented his own affidavit, setting forth that on November 1, 1886, and prior thereto, Daniel H. Tolman was, and had been, the president, manager, and owner of the majority of the stock of the Chicago Trust & Savings Bank, and conducted its business in his own way; that November 1, 1886, he induced affiant to purchase 100 shares of the capital stock of the bank at the price of \$13,000, and persuaded him to give said note, with the stock purchased as collateral security; that at this time he, Mumford, was a stockholder of the bank and also a director; that this note was reduced between the time it was given and June 21, 1889, to \$10,000, and on that date was renewed for that amount; that between said date and October 1, 1892, it had been reduced to \$8,000, and was renewed for that amount, and \$600 had since been paid; showing that since November 1, 1886, the date of the original note, he, Mumford, had paid Tolman \$5,100 and all accrued interest on said note. It was further

alleged in his affidavit that at the time Mumford made the purchase of the stock and gave the original note Tolman represented to him that the bank was increasing its business and profits very rapidly, and that by reason of the earning capacity of the stock it was then worth \$180 per share, and in a short time would be worth \$200 per share; that he told Tolman that he did not have any more money to invest, no matter how valuable the stock might be; that thereupon Tolman, to induce him to take the stock, guaranteed he should not lose anything on account of the purchase; that he (Tolman) would carry the note along until it should be paid by dividends out of the stock, and that he (Mumford) should never be called upon to pay the indebtedness except out of the dividends; that it was by reason of this assertion and the guaranty of Tolman that he was induced to purchase the stock. He further stated in his affidavit that Tolman, by his fraudulent actings and doings in the management of the Chicago Trust & Savings Bank to his own personal interest, and by means of the conversion to his own use of the funds, property, and money of the bank, has rendered the stock practically worthless; that in September, 1893, he decided to have the bank wind up its affairs, and ever since that time it has been so engaged, and in November, 1893, he told the stockholders he did not think they would get much for their stock; that this state of affairs was brought about by the mismanagement, misappropriation, and conversion of the funds of the bank by Tolman, and upon a just and true accounting between himself and the bank it would be found that he is indebted to it for moneys and property misappropriated, and liabilities incurred on account of his fraud and mismanagement, upwards of the sum of \$500,000, for which a bill in chancery is now pending; that the status of the chancery suit had been established by order of court, entered by agreement of all parties, and Tolman had given bond to pay the bank and Mumford as intervening petitioner any sum that may be found due them on a final decree; that an accounting, not only between the bank and Tolman, but between Mumford as intervening petitioner and Tolman and said bank, is involved in that proceeding, and that the alleged controversy here is but part and parcel of that accounting. All the allegations of this affidavit were denied in a counter affidavit filed by Tolman. It also appears from the record that on October 27, 1888, the directors of the Chicago Trust & Savings Bank applied \$26,000 of the earnings of the bank towards the unpaid subscriptions of stockholders for the increased stock made in 1886, of which the stock sold to Mumford was a part; that on September 27, 1889, they appropriated \$24,000 more of such earnings for the same purpose, and July 19, 1890, \$50,000, and on November 3, 1891, \$100,000; making in all \$200,000. Both Mumford and Tolman

were directors, and assisted in passing these resolutions, and Mumford received the benefit of each of these dividends as credits on his note to Tolman."

The motion to vacate the judgment being overruled, Mumford appealed to the appellate court of the First district, and there insisted that the circuit court erred in denying his motion, because: (1) "There is a fatal variance between the note declared on and the document offered in evidence, which contains the power to confess judgment; and therefore the judgment is void;" (2) "that the document offered in evidence as the basis of this proceeding is not a negotiable instrument, and therefore a nullity;" (3) "that the document offered in evidence as the basis of this proceeding is usurious on its face;" (4) "that courts of law exercise an equitable jurisdiction over judgments entered by confession for the purpose of doing justice, and will vacate the same upon motion or open the case and give the defendant leave to plead;" (5) "that the affidavit of Mumford if true together with the admitted facts shows an absolutely good defense." The appellate court affirmed the order of the circuit court. 54 Ill. App. 471. The same grounds of reversal are urged here.

Wetgley, Bulkley, Gray & Eastman, for appellant. Moses, Pam & Kennedy, for appellee.

WILKIN, J. (after stating the facts). The alleged variance is that the declaration in setting out the note used the language, "On demand I promise to pay," etc., whereas the note read: "Chicago, October 1st, 1892. On demand after date,"—the declaration omitting the words "after date." This did not constitute a substantial variance. It was sufficient for the declaration to describe the note according to its legal effect, and this it did. The note was not due until after October 1st. After that date it was due, not because the words "after date" were added, but because it stated it was due on demand. To set aside the judgment in this case because of the variance insisted upon would not only be to ignore all rules of equity, but trifling with justice. What possible injury has appellant suffered by the so-called variance? That the instrument sued on is negotiable is too clear to be made the subject of serious controversy. The appellate court properly disposed of this point. We know of no sufficient reason for saying the instrument was a nullity, even if it had not been negotiable. We also concur in the views of the appellate court on the point of usury. The note is not usurious on its face. If the provision for attorney's fees was intended as a cover for usury, that fact should have been shown. In the argument of counsel for appellant on the first three objections to the judgment they seem to lose sight of the fourth, viz. that courts passing on such motions exercise an equitable juris-

diction; and argue the case as though this was an appeal from the judgment itself. The question on motion to vacate a judgment entered by confession is not whether the judgment shall be set aside for errors of law, but whether there are equitable reasons why it should be opened up to let in a defense. *Knox v. Bank*, 57 Ill. 330; *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718.

The final contention, that the affidavit of appellant, together with the admitted facts, show an absolutely good defense to the note on which the judgment was confessed, cannot, in our opinion, be maintained. The affidavit attempts to set up two defenses: First, the note was obtained by fraud; and, second, by the terms of a contemporaneous parol agreement it was to be paid only out of dividends realized on the stock for which it was given. As to the alleged parol contract, it is clear that under well-understood rules of law it cannot be used to vary, alter, or change the terms of the note. The position that the parol agreement and the note together make a contract partly in writing and partly by parol is clearly untenable. Moreover, the affidavit does not show that the alleged agreement was continued in force by the parties upon the renewals of the note. For anything appearing in the affidavit, that agreement had ceased to be available as a defense to the note by limitation, long before the judgment by confession was entered. And again, admitting all that is stated in the affidavit to be true, it fails to establish a valid contract for a consideration that the note should not be paid. The same is true as to the charges of fraud; all that Tolman said, according to the affidavit, amounting to no more than the expression of an opinion as to the value of the stock, and the profits it would yield. The affidavit does not say the stock was not in fact worth \$130 per share, when purchased, nor that, being a director of the bank, affiant did not know its real value as well as did Tolman. The facts show that it was at the time of the purchase, and long afterwards, valuable stock, paying by its dividends a large part of the consideration agreed to be paid for it. The conduct of appellant in renewing the note from time to time without limitation or qualification as to his liability to pay it, is wholly inconsistent with either defense attempted to be set up in his affidavit. Therefore, without reference to the counter affidavit of Tolman, directly and positively contradicting each of the facts alleged in that of appellant, no substantial ground for setting aside the judgment was shown, and there was no error in the refusal of the motion.

Since the submission of the case, counsel for appellant have called our attention to *Bank v. Perry* (decided by the United States circuit court of appeals for the Eighth district) 14 C. C. A. 273, 66 Fed. 887, as an authority sustaining their contention here. We have examined the case, and are unable to

see that it has any bearing whatever on the questions herein involved. The judgment of the appellate court will be affirmed. Affirmed.

(157 Ill. 9)

HART v. WASHINGTON PARK CLUB.¹
(Supreme Court of Illinois. April 1, 1895.)²

DECLARATION—NEGLIGENCE—RACE GROUNDS.

In an action on the case, the declaration averred that defendant conducted a horse race on its race course and thereto invited the public, that plaintiff attended and paid admission, and that defendant so carelessly and negligently kept the said race course that a horse drawing a vehicle ran unattended through the spectators and injured plaintiff. *Held*, that the declaration was demurrable because it did not show that the horse was under defendant's management or control, and did not show whether plaintiff, at the time of the accident, was in the space reserved for pedestrians or that reserved for vehicles.

Error to appellate court, First district.

Action on the case by David M. Hart against the Washington Park Club. Defendant obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 480. Plaintiff brings error. Affirmed.

Rosenthal, Kurz & Hirschl, for plaintiff in error. Cratty Bros. and MacLaren, Jarvis & Cleveland, for defendant in error.

MAGRUDER, J. The action below was trespass on the case, brought by plaintiff in error against defendant in error. The declaration avers as follows: "For that whereas, heretofore, on the day commonly known as 'Derby Day,' on, to wit, the 25th day of June, 1893, said defendant, in said county, on the certain race course then and there in its possession, gave and conducted a public exhibition of horse racing, and thereto invited the public at large, charging and receiving an admission fee. Plaintiff paid said fee, and attended said exhibition, and was then and there, and at all times thereabouts, in the exercise of all reasonable and ordinary care, and lawfully in and upon the ground in defendant's possession and control, set aside by defendant for the use of the spectators at said races. And plaintiff alleges that it then and there became and was the duty of defendant to use all reasonable and ordinary care to keep said grounds in a reasonably safe and suitable condition for the said spectators, and therein defendant made default, and so carelessly and negligently kept said grounds that a horse drawing a vehicle ran, unguarded, unattended, and unhindered, from a cause or causes which, upon diligent inquiry, plaintiff has not been able to learn, but which are to defendant well known, through and among the spectators, and in so doing ran upon and against the plaintiff,

whereby he was violently thrown to the ground, and was thereby and then greatly bruised, hurt, and wounded," etc. The declaration was demurred to. The demurrer was sustained. Plaintiff stood by his declaration. Judgment was rendered for defendant, and has been affirmed by the appellate court. The present writ of error is sued out for the purpose of reviewing the judgment of the appellate court.

The question is whether the declaration was good on general demurrer. It is urged, in favor of the sufficiency of the declaration, that proof of the injury as alleged will give rise to a presumption of negligence on the part of the defendant, and so establish a *prima facie* case, under the application of the maxim, "*Res ipsa loquitur*." It is claimed that the declaration avers all that is necessary, by stating that defendant invited plaintiff into its racing course, and accepted an admission fee from him, and that plaintiff was lawfully upon the ground set apart by the defendant for spectators, and, while there, was in the exercise of ordinary care, and that it was the duty of defendant to exercise reasonable care to keep the space set apart reasonably safe, and that plaintiff was struck by a horse and vehicle running unattended through such space. It is contended that the space reserved for spectators was not safe when a horse and vehicle thus ran through it, and that the fact of such running indicated negligence, and devolved upon the defendant the burden of showing how the accident happened, and that it had used all reasonable care to prevent such an occurrence. On the other hand, it is urged, against the sufficiency of the declaration, that it does not state facts sufficient, if proven, to create a reasonable presumption of negligence on the part of the defendant, or to justify an allegation that defendant owed a duty to plaintiff, or to support an averment that the defendant had knowledge of the cause or causes of the running away of the horse. It is claimed that the declaration is objectionable as not stating whether or not the plaintiff was in the grand stand, or in the space occupied by visitors in carriages or other vehicles drawn by horses, or in that occupied exclusively by pedestrians, and in not stating whether or not the horse which ran away belonged to the defendant, or was in the keeping of the defendant. It is contended, by the defendant in error, that the running away of a horse creates no presumption of negligence, except as against those whose duty it is to guard against such an occurrence, and that no fact is alleged in the declaration showing the duty of the defendant in this respect.

If an owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 11, 1895.

which the invitation was extended. *Railway Co. v. Bodemer*, 189 Ill. 596, 29 N. E. 692; *Camp. Neg.* § 43; 16 Am. & Eng. Enc. Law, 413; *Davis v. Society*, 129 Mass. 367. In *Currier v. Association*, 135 Mass. 414, it was held that the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation, and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. In the case at bar, the declaration avers that the defendant was in possession of the race course, and conducted an exhibition of horse racing thereon, and invited the public at large to attend, and charged an admission fee, and that plaintiff paid the fee and attended the exhibition. These facts are sufficient to impose the same obligation upon defendant which rests upon any other owner or occupier of premises who invites people to come upon the same. Out of these facts necessarily arises the duty of the defendant to keep the grounds in a reasonably safe and suitable condition for the spectators. Counsel for defendant in error refer to a number of authorities in support of the proposition that a mere general allegation in the declaration, that it became the duty of the defendant to do that which the plaintiff complains of his omitting to do, is not sufficient, and that the sufficiency of the declaration in this regard will depend upon whether the facts stated show that the defendant was bound in law to do that which he is charged with having omitted to do. No fault can be found with the doctrine of the authorities thus referred to. Tested by the rule laid down in them, the declaration here, by averring defendant's occupancy of the grounds, and its invitation to the plaintiff to come thereon, states such facts as give rise to the general duty which the defendant is charged with failing to perform.

The question next arises whether the declaration makes such averments as show a breach of the duty arising out of the facts stated; or, in other words, whether negligence can be presumed from the running away of the horse within the space reserved for spectators. There are cases where the maxim, "*Res ipsa loquitur*," is applicable. The meaning of this maxim is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford a sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. Where negligence is thus presumed from the occurrence of the injury, the defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury. *Cooley, Torts*, marg. pp. 661, 662; 16 Am. & Eng. Enc. Law, 449. Perhaps it may be more accurate to say that

the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions, and in connection with certain circumstances. 2 *Thomp. Neg.* p. 1228. Negligence has been presumed, so as to throw the burden of explanation upon the defendant, where a plaintiff was passing along a highway under a railway bridge, and a brick fell from one of the pilasters upon which an iron girder of the bridge rested, and injured him (*Kearney v. Railroad Co.*, L. R. 5 Q. B. 411, and 2 *Thomp. Neg.* 1220); where a plaintiff, walking in the street, was struck and injured by a barrel of flour falling from the window of a warehouse belonging to the defendant (*Byrne v. Boadle*, 2 Hurl. & C. 722); where a building adjoining a street fell into the street, and injured a plaintiff upon the sidewalk (*Mullen v. St. John*, 57 N. Y. 567); where the plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case, propped against the wall of the house and belonging to the defendant, and the packing case then fell upon and injured the plaintiff (*Briggs v. Oliver*, 4 Hurl. & C. 403). In *Scott v. Docks Co.*, 3 Hurl. & C. 596, it was said by the court: "There must be reasonable evidence of negligence. But, when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." This passage was quoted with approval in *Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. In 1 *Add. Torts*, § 33, the rule is thus stated: "When the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of defendant, * * * the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose upon the defendant the onus of rebutting it." Upon the basis of these authorities the case of *The William Branfoot*, in 43 Fed. 914, holds that, "when an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession, or control, the accident speaks for itself, is itself a witness,—*Res ipsa loquitur*,"—and, in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part."

In the present case it sufficiently appears from the declaration that the race course and the grounds connected therewith were under the exclusive management and control of the defendant. But it is not alleged that the "runaway" horse, which caused the injury,

was under the management and control of the defendant or its servants. It is matter of common knowledge that these race courses are visited by invited spectators, who drive into the grounds in their own carriages or other vehicles, under the control of themselves or their own drivers. The averments of the declaration do not negative the idea that the injury may have occurred through the negligence of one of these spectators in failing to properly control his horse. It was the duty of the defendant to provide sufficient barriers and watchmen and hitching posts, but a performance of this duty might not in all cases prevent accidents arising from the carelessness of those coming into the grounds with teams of their own. Moreover, the declaration does not sufficiently specify in what place the plaintiff was when he was injured,—whether in the space reserved for pedestrians, on what is called the “grand stand,” or in the space reserved for spectators visiting the race course in their own vehicles. While the question of the sufficiency of the declaration is not altogether free from doubt, we are inclined to think that its allegations are not specific enough, either as to the place of the injury, or as to the defendant’s control over the immediate cause of the injury. In *Conradt v. Clauve*, 93 Ind. 476, there was a demurrer to the first paragraph of a complaint alleging that defendants were the owners and managers of inclosed fair grounds, charging an admission fee, and while an agricultural fair was in progress, allotted a part of the grounds for shooting with a target gun, but gave no notice thereof to plaintiff, who attended the fair with his horse and buggy, and being ignorant of the location or existence of the gun, or that the portion of the ground reserved for target shooting had been so reserved, hitched his horse where others were hitched, and his horse was shot and killed. The demurrer was overruled; but it appeared from the complaint itself that the target shooting was a part of the exhibition or entertainment carried on at the fair, and so under the supervision and control of its managers, and that, although those engaged in the shooting were not strictly servants of the defendants, yet they were acting under the license and permission of the defendants, and bore such a relation to them as made the defendants liable for injuries resulting from their negligence in not properly controlling the management of that part of the exhibition. In *Unger v. Railroad Co.*, 51 N. Y. 497, it appeared that the plaintiff was run over in a public street by a team of horses, running away, with a pole and whiffletree attached to them, and that the horses had become detached from a street car which they had been drawing, and it was there held that the fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant; but it also appeared that the

horses belonged to the defendant, the street-railroad company, and had broken away from one of its cars, while driven by one of its employes. In *Strup v. Edens*, 22 Wis. 413, plaintiff’s daughter was injured by horses running away, and it was said that “the fact that the horses got loose and ran away is some evidence of negligence.” But the horses belonged to the defendant, and there was evidence tending to show that they were not properly hitched. So, also, in *Hill v. Scott*, 38 Mo. App. 370, it appeared that the “runaway” horse causing the injury belonged to the defendant, and had been securely hitched before he ran away. It was there said that “a horse does not ordinarily get loose if carefully hitched.” While, in the case at bar, it might be presumed that the horse injuring the plaintiff would not have run away if he had been carefully hitched, yet the declaration does not state such facts as would lead to the conclusion that the horse belonged to the defendant, or was under its control, or that, if it belonged to a visitor to the race course, the defendant had neglected such precautions, in the way of hitching posts, or barriers, or watchmen, as would affect it with responsibility for the accident. The fact that a horse is running away unattended affords some evidence that the horse has been left unfastened, or improperly and negligently secured, but does not necessarily indicate by whom he was so left, in the absence of proof as to what person had control of him. *Button v. Frink*, 51 Conn. 342. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 62)

BAYOR v. AMERICAN TRUST & SAVINGS BANK.¹

(Supreme Court of Illinois. April 1, 1895.)
BANKS AND BANKING—INSOLVENCY—PREFERENCES.

A depositor who receives an ordinary certificate of deposit, and whose money is mingled with the other funds of a bank, is not entitled, on the insolvency of the bank, to any preference over other creditors, even though the banker promised him to keep his money separate from the other funds.

Appeal from appellate court, First district.

Petition of Susan M. Bayer against the American Trust & Savings Bank, assignee of the firm of Herman Schaffner & Co., insolvents, for an order directing the assignee to pay, as a preferred claim, the amount of a certain certificate of deposit given by said insolvents to said petitioner. The petition was dismissed for want of equity, and this decree was affirmed by the appellate court. 51 Ill. App. 180. Petitioner appeals. Affirmed.

The firm of Herman Schaffner & Co. was engaged in the banking business in Chicago for a considerable period, and on June 3, 1893, made an assignment for the benefit of its

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 11, 1895.

creditors to the American Trust & Savings Bank, the appellee herein. At the time the assignment was made, Susan M. Bayor, the appellant, was the holder of a certain certificate of deposit issued to her by said banking firm, of which the following is a copy:

"Certificate of Deposit.

"\$2,700.00. Herman Schaffner & Co.
"No. 6,501. Chicago, June 1, 1893.

"Susan Bayor has deposited in this bank twenty-seven hundred (\$2,700) dollars, payable to the order of herself on the return of this certificate.

"Countersigned, Herman Schaffner & Co.
"A. Schwartz, Teller."

That certificate was the last one of eight certificates of deposit, precisely alike in form, and varying only in dates and amount, which had been issued by the firm to appellant. The first certificate was for \$3,350, and was issued and bore date on April 26, 1893. The circumstances under which the first certificate was issued were substantially as follows: Mr. W. B. Cunningham was a depositor and kept a general account with said banking firm. Being indebted to the appellant for moneys received for her in the sale of some real estate, Mr. Cunningham drew his check on said firm, in favor of the appellant, for the sum of \$3,400, and accompanied her and her husband to the bank. Arriving at the bank, Cunningham asked appellant if she wanted the money, or wanted to leave it in the bank. No suspicions existed at that time of the solvency of the banking firm. Appellant replied that she did not want the money, but would prefer to leave it there temporarily. Expressing a further wish not to open an account with the bank, against which she could check, Mr. Cunningham referred her to the teller to arrange matters in accordance with her wishes, and went away. It was thereupon arranged between her and the teller of the bank that she should receive \$50 in cash, and a certificate of deposit for the balance of the check, \$3,350, payable to her order on demand, dated that day (April 26, 1893); and it was so done, and such certificate was delivered to her by the teller, with the remark, "If you want any of this money, come down and surrender this certificate, and I will give you another." Three days later, on April 29th, the appellant surrendered that first certificate, drew \$200, and took a new certificate of deposit, for \$3,150. The same conduct was repeated on May 2d, when appellant drew \$50; on May 11th, when she drew \$50; on May 17th, when she drew \$50; on May 19th, when she drew \$50; and on May 27th, when she drew \$50,—the appellant, in each instance, taking a new certificate of deposit for the reduced amount, the last one, issued May 27th, being for the sum of \$2,900. After the first transaction (resulting, as stated, in the giving to appellant of the first certificate of deposit, for \$3,350), the appellant does not appear to

have been personally present in the bank, but was represented there by her husband, whom she had authorized to draw the sums mentioned, and take new certificates payable to her order. On the 1st day of June, 1893, John M. Bayor, the husband of appellant, again went to the bank, and took with him the certificate for \$2,900, that had been issued on May 27th. He went there, at the request of appellant, to get \$200; and the certificate was only indorsed by appellant, as had been the case with all the previously surrendered certificates. The controverted question of fact presented by the record is as to what occurred between the husband of appellant and Mr. Schaffner on the 1st of June, when the former was in the bank with the certificate of deposit for \$2,900. Mr. Schaffner died shortly afterwards, and in consequence his testimony was never heard upon the question. Appellant introduced her husband and one W. C. Scott as witnesses, and they testified in regard to the conversation and occurrence that took place at that time. The substance of their testimony is that when Mr. Bayor went into the bank, on June 1st, for the purpose of surrendering the \$2,900 certificate, and getting \$200 in cash, and a new certificate for \$2,700, he observed a condition of things which made him suspicious of the soundness of the bank, and that he then partly concluded to withdraw all the money represented by the certificate; but, before becoming fully decided upon what he should do, he had a conversation with Mr. Schaffner, in which it was agreed between himself and Mr. Schaffner that he should draw out \$200, and take a certificate of deposit for the remaining \$2,700, and that the \$2,700 so left should be put away in a separate package, and kept until he should come again for it, as he needed it. The evidence is conclusive that neither the \$2,700, nor any part of it, was ever separated from the other funds of the bank, or put away in a separate package for the appellant or her husband, but remained just as it always had existed,—as a mere credit to appellant on the books of the banking firm. The present appeal grows out of a petition that was filed in the county court of Cook county, which asked that the assignee of Herman Schaffner & Co. should be required to pay to her, out of the funds in his hands, as a preferred claim, the sum of \$2,700. At the hearing the court found that the petitioner was neither legally nor equitably entitled to the return of the money to her, and dismissed the petition for want of equity. And that judgment and decree was afterwards affirmed in the appellate court of the First district.

W. B. Cunningham and Stiren & King, for appellant. Moran, Kraus & Mayer, for appellee.

BAKER, J. (after stating the facts). We are satisfied that Schaffner did not agree to put the \$2,700 away in a separate package,

and that John M. Bayor made no request that he should do so. In our opinion, the statements of the husband of appellant and of the witness Scott are unworthy of belief, and that in no event could a decree of court safely be based on them. Waiving all questions of contradictions and inconsistencies in the stories that they tell, the theory of fact upon which appellant's contention is founded is, when considered in the light of the surrounding circumstances, wholly improbable and unreasonable. If Bayor had been suspicious of the soundness of the bank, he would have drawn out the whole of the \$2,900, instead of merely getting the \$200 that his wife had sent him for, and taking a certificate of deposit, as always theretofore, for the residue. It is equally improbable that he made a request that the money still left in the bank should be placed in a separate package for a few days. He was wholly ignorant and uninformed in regard to banking business; had never done any business with a bank, other than that connected with the transaction in question; and manifestly did not know the difference between special deposit and a general deposit in a bank, or that the relation between the bank and the depositor would be different in the one case from what it would be in the other. And occupying this standpoint, and Schaffner being almost or quite a stranger to him, is it creditable that he was suspicious of the soundness of the bank, and yet satisfied when he received a certificate exactly like those given on all prior occasions, and a vague and indefinite assent from Schaffner to his request to put the money in a package by itself? To our minds, it is suggestive that the original petition filed by appellant on June 10, 1893, proceeded upon the theory that the bank was insolvent on June 1, 1893, the date of the last certificate of deposit; that Schaffner & Co. knew at that time that they were insolvent, and misrepresented to appellant that the money would be safe in their hands, and that, therefore, the title to the money did not pass to the bank, but remained in the petitioner; and that on the 25th of June the petition was so amended as to charge that the fund "was, by the terms and conditions of said deposit, to be kept in a separate and distinct package, and was not to be mingled with the general funds of the bank." And it is also significant that prior to the amendment the husband of appellant had read in a newspaper an interview with one of the attorneys for the assignee of the bank, in which such attorney had said that if appellant was a depositor, and the \$2,700 had been mingled with the general funds of the bank, then she had lost it.

But even if we should assume that the husband of appellant requested Schaffner to put the \$2,700 away in a separate package, and that the latter promised so to do, yet the evidence shows that such promise never

was complied with, and that said money never was separated from the general funds of the bank, and that no steps whatever were ever taken to effect such separation, by either placing the money in a distinct parcel, or by making any entry upon the books of the bank indicating a withdrawal from the general funds of the firm, or by giving a receipt containing even an intimation of a special deposit. On the contrary, an ordinary certificate of deposit was given for the money not drawn from the bank, just as had been done on all former occasions. It has frequently been announced as the law of this state that even in a case where a definite and actual trust fund, which possesses all the attributes of a separate and distinct identity, has been so mixed and mingled with other funds as to render identification impossible, the *cestui que trust*, in the event of the insolvency of the trustee, is remitted to the position and the rights of a general creditor. And where the relation between the parties is primarily that of debtor and creditor, and there is a mere unperformed agreement on the part of the debtor to create a specific fund, which shall possess a separate identity, and to hold the same in trust, it would be illogical, and inconsistent with these adjudications, to hold that such creditor occupies a stronger position than one who is primarily the beneficiary of a distinct and identified trust fund. We regard the cases of *Trustees of Schools v. Kirwin*, 25 Ill. 73; *Otis v. Gross*, 96 Ill. 612; *Bank v. Goetz*, 138 Ill. 127, 27 N. E. 907; *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904; and *Association v. Jacobs*, 141 Ill. 281, 31 N. E. 414,—as conclusive against the contention urged herein by appellant. We think that no different rule than that to be formulated from the cases above mentioned is held in *Kirby v. Wilson*, 98 Ill. 240, which is cited by appellant, and largely relied on. That case was first before the court in *Wilson v. Kirby*, 88 Ill. 566. A portion of the proceeds of the sale of certain cattle was in the hands of Alexander, the deceased, at the time of his death, and was paid over to Kirby, his executor. It was there said: "These proceeds stood in the place of the cattle sold, as their substitute or representation, and were the property of the Wilsons, as the cattle were, under the contract, and can be traced and identified as their particular property, and may be followed into the hands of the executor, and they have a preferable claim thereto over general creditors." And it was upon the theory that there had been a sufficient identification of \$12,143.88 of the \$20,500 found upon the person of Alexander, at his death, as a part of the proceeds of the Wilson cattle disposed of by Alexander, that the judgment was affirmed in *Kirby v. Wilson*.

We find no substantial error in the record. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 186)

GOODYEAR SHOE-MACH. CO. v. SELZ, SCHWAB & CO.¹(Supreme Court of Illinois. Oct. 29, 1894.)²

CONSTRUCTION OF CONTRACT—PENALTY—DEMURRER.

1. Where the lease of patented machines provides for royalty at certain rates, payable monthly, but declares that, if paid before the 15th of each month, a discount of 50 per cent. will be allowed, royalty can only be collected at half the specified rates, it being evident that the other half is merely a penalty for delay. 51 Ill. App. 390, affirmed.

2. Where, in an action for such royalty, the lease is set out in full in the declaration, the right to collect the penalty may be raised by demurrer.

Appeal from appellate court, First district.

Assumpsit by the Goodyear Shoe-Machinery Company against Selz, Schwab & Co., a corporation. Defendant obtained a judgment, which was affirmed by the appellate court. 51 Ill. App. 390. Plaintiff appeals. Affirmed.

Defrees, Brace & Ritter, for appellant. Moran, Kraus & Mayer, for appellee.

WILKIN, J. Appellant leased to appellee certain machines, upon which it held letters patent, for sewing shoes and boots. The third paragraph of the lease is as follows: "Third. The following is the schedule of rents and royalties hereinafter referred to, and which it is understood and agreed is to be paid on each pair of shoes or boots, respectively, made by the aid of these machines, or any of them, or by the use of the said patents, or any of them, viz." (then follows a schedule of rates for different kinds of shoes, varying from two to eight cents per pair). By the fourth paragraph the lessee agreed to keep a daily account of the number and kinds of pairs made each month, and render a statement of the same to the lessor on or before the 10th of the month following. The fifth paragraph is in the following language: "Fifth. The lessee agrees to pay unto the lessor, as rent for the machines hereby leased, and as royalty for the use of the patents hereby licensed, the rent or royalty specified in the schedule forming part of the third section herein, on each pair of boots or shoes of the respective kinds mentioned or described in said schedule, made by the aid of said machines, or any one of them, or by the use of the said patents, or any of them; the rents and royalties for such boots and shoes made as aforesaid during one calendar month to be due and payable on the first day of the calendar month next following, and to be paid within one month from that day. But the lessor hereby agrees that, if the rents and royalties due on the first day of any month shall be paid on or before the fifteenth day of that month, it will, in consideration thereof, grant a discount of fifty per cent. from the rents and royalties speci-

fied in the schedule aforesaid; and the lessee further agrees to pay, while it shall retain possession of the machines hereby leased, all taxes thereon, to whomsoever laid or assessed." The contract denied lessee the right to sell the machines, and provided that the lease should continue until the expiration of the letters patent, and the lessee should then have the right to purchase the machines for the sum of one dollar. Appellant brought this action in assumpsit against appellee in the circuit court of Cook county, setting up in the several counts of the declaration the foregoing terms and provisions of the lease, and averring that during the month of September, 1891, the defendant manufactured, by the aid of the leased machines, certain numbers and kinds of shoes, which, according to the schedule prices, amounted to the sum of \$1,198.53, "which was payable by the defendant on the 31st day of October in the year aforesaid, with the privilege to the defendant of paying the same on or before the 15th day of October in the year aforesaid, and thereby become entitled to said discount of fifty per cent. upon the amount of said indebtedness," and concluding as follows: "And the plaintiff says that afterwards, to wit, on the day and year last aforesaid, the defendant, in consideration of its liability aforesaid, then and there promised and faithfully undertook to pay to the plaintiff the said sum of \$1,198.53 when it should be afterwards thereunto required, but the defendant did not, on or before the 15th day of October in the year aforesaid, pay the said sum of money, or any part thereof, to the plaintiff, but neglected and refused so to do for a long space of time thereafter, to wit, until the 24th day of November in the year 1891, at and upon which said last-mentioned date the defendant paid to the plaintiff the sum of \$599.27, and no more; and from thence hitherto the defendant has, at all times, wholly neglected and refused, and still neglects and refuses, to pay the balance of said sum of money, or any part thereof, although often required so to do, whereby," etc. The lease was attached to, and made part of, the declaration. The circuit court sustained a general demurrer to the declaration, and each count thereof, and gave judgment for the defendant for costs. That judgment being affirmed by the appellate court, this appeal is prosecuted.

Appellant's construction of the instrument sued on, applied to the facts alleged in the declaration, is that on the 1st day of October, 1891, the defendant owed and was liable to pay the plaintiff \$1,198.53 (the full schedule rates named in paragraph 3), payable on the 1st day of November, with the provision that if the defendant chose to pay in advance, any time between October 1st and 15th, it should be allowed to discharge the debt by paying one-half of it. Appellee insists that the debt on October 1st was \$599.27,—50 per cent. of the schedule rate; the other 50 per cent. being by way of damages, if payment of the

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 8, 1895.

sum actually due was not made on or before October 15th. The following propositions seem to be sustained by the authorities: "Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a lesser sum, which is the actual debt, such large sum is always a penalty. But the rule is otherwise where a less sum is to be taken for a greater, if paid at a certain time." 5 Am. & Eng. Enc. Law, p. 26. "Where the larger sum mentioned is the actual debt, and a smaller sum has been agreed upon as a release, if paid under stated conditions, the failure to comply with the easier terms gives the creditor the right to enforce payment of the larger sum." In doubtful cases, courts are inclined to treat the stipulation as a penalty. *Id.* p. 27.

The controlling question in the case, then, is, what did the parties intend should be the actual rental for the machines,—which sum was to be the actual debt? Manifestly, the draftsman of the lease intended it to be susceptible of the construction placed upon it by appellant; but it by no means follows that the parties who executed it so understood it, or should be bound by that construction. We cannot construe the fifth paragraph as providing for a discount for prepayment of the debt. That a discount of 50 per cent. should be made on the debt for a prepayment of but 15 days is contrary to all business experience, and most unreasonable. The rent accruing for one month became due and payable on the 1st day of the calendar month following. Certainly, the parties did not intend that there should be then due and payable more than 50 per cent. of the schedule rate. Only that amount was payable at any time between the 1st and 15th of the month. It is to be presumed that it was the intention of the parties to secure to the lessor the payment of reasonable compensation for the use of its machines, and no more. That compensation could not be one dollar if paid on the 15th, but double that amount if paid the next day. Therefore, to hold that it was intended, in a case like this, that the rent should be \$599.27 one day, and \$1,198.53 the next, except as an inducement to prompt payment of the lesser sum, is unreasonable. Our conclusion is that the fifth clause of the instrument should be construed as requiring the payment of 50 per cent. of the rent or royalty specified in the schedule for all boots and shoes made during one month to be due and payable on the 1st day of the next, and, if not paid on or before the 15th of that month, the whole amount of the schedule rates to become payable. In other words, by the terms of the contract, properly construed, the actual debt was the \$599.27, and the agreement to pay double the amount is in the nature of a penalty to insure the prompt payment of the sum actually agreed to be

paid. *Longworth v. Askran*, 15 Ohio St. 370, is an authority sustaining this construction of the lease. This court said in *Scofield v. Tompkins*, 95 Ill. 190: "The fact that the parties fix a sum to be paid, and call it 'liquidated damages,' does not always control the question as to the measure of the recovery for the breach of the contract. Courts will look to see the nature and purpose of fixing the amount of damages to be paid, and, if the clause fixing the amount of damages appears to have been inserted to secure prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered." In *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805, it is again said: "First, where, by the terms of a contract, a greater sum of money is to be paid upon default of payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty. Second, where, by the terms of a contract, the damages are not difficult of ascertainment, according to the terms of the contract, and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty." See, also, *Sedg. Dam.* 421; *Suth. Dam.* 478; *Jaquith v. Hudson*, 5 Mich. 123; *Davis v. Freeman*, 10 Mich. 188; *Mason v. Callender*, 2 Minn. 350 (Gil. 302). Where, by an instrument in writing, the maker promised to pay "one thousand dollars with interest yearly till paid, and payable as follows: In two, three, four, five, six, seven, eight, nine, and ten years,—in equal installments, with interest as aforesaid, being the contract price of a lot; but if each and every payment is made punctually as due, or before due, or within ten days after each is due, as an inducement to punctuality, two hundred dollars of the amount will be released, and eight hundred dollars and its yearly interest accepted in full payment, but not otherwise,"—it was held that the real debt was \$800 and interest, and when that had been paid no action could be maintained to recover the remaining \$200. *Longworth v. Askran*, *supra*.

It is urged on behalf of appellant that the defense claimed cannot be raised on demurrer. The conclusion we reach follows from the construction given the contract, upon its face. It is set out in *hæc verba*, as an exhibit, and, by express reference, made a part of the declaration, as the basis of the recovery. The demurrer raises the entire question of the construction and legal force of the contract, and the extent of the liability thereunder; and, with the contract properly before the court, no plea or proof is necessary, and the question presented may be properly raised and decided upon demurrer. In the view we take of the case, the judgment of the appellate court is right, and will be affirmed. Judgment affirmed.

(157 Ill. 144)

HEBNER v. SUN INS. CO. SAME v. OAKLAND HOME INS. CO. SAME v. PALATINE INS. CO.¹

(Supreme Court of Illinois. May 15, 1895.)²

MARINE INSURANCE—TITLE—DAMAGES.

1. Where the owner of a half interest in property obtains insurance in his own name, the company supposing him to be the sole owner, such insurance does not cover the interest of his co-owner. 55 Ill. App. 275, affirmed.

2. Where a policy insuring a vessel against fire provides that if fire occurs the insured shall protect the property from further damage, and shall put it in the best possible order, and the vessel, on taking fire, is sunk, to extinguish the flames, it is the duty of the insured to raise the vessel; and where the vessel is raised by the insurer, at the request of the insured, the cost of raising may be deducted from the amount due on the policy. 55 Ill. App. 275, affirmed.

Appeal from appellate court, First district.

Three actions brought by Frank Hebner against the Sun Insurance Company, the Oakland Home Insurance Company, and the Palatine Insurance Company, respectively, on policies of insurance. Plaintiff obtained judgment in each action for part of his claim, and these judgments were affirmed by the appellate court. 55 Ill. App. 275. Plaintiff appeals. Affirmed.

The three actions were brought by Frank Hebner on three policies of insurance,—one against the Palatine Insurance Company, one against the Oakland Home Insurance Company, and one against the Sun Insurance Company. It appears that on or about the 12th day of April, 1893, Frank Hebner, through C. A. McDonald, applied to the three companies for insurance on his propeller, City of Concord. Three policies were written as they were ordered,—one in the Oakland Home Insurance Company, one in the Palatine, and one in the Sun,—insuring Frank Hebner against fire, upon his boat, for a period of one year, under what is known as the "New York Standard Form of Fire Policy." The Oakland Home's policy was for \$5,000; the Palatine's for \$3,500; and the Sun's, for \$1,000. The insurance companies did not know that Frank Hebner was not the sole and unconditional owner of the entire boat, nor did any of their agents know that he was not the sole and unconditional owner of that boat, until long after the fire occurred. On the 6th of December, 1893, the boat took fire at Toledo; and in order to extinguish the fire she was pumped full of water, and sunk in the river at Toledo. Capt. Hebner notified the companies, but did not inform them that any other person or persons had any interest in the boat, but telegraphed McDonald, who had placed the insurance for him, asking him to ascertain whether the companies desired to raise the boat, or whether they wished him to raise her, and also stated that he expected

some one representing the companies in Toledo, to arrange as to the raising of the boat. In another telegram he stated he had an offer to raise the boat for \$2,700, and asked that McDonald should have the insurance companies send a man there. In response to these telegrams, and at McDonald's solicitation, the appellees did, on December 12, 1893, send James A. Calbick to Toledo, to confer with Hebner regarding the raising of the boat; and, after conversation with Hebner on December 13th, Capt. Calbick, on December 14th, made a contract on behalf of the insurance companies with Harris W. Baker, of Detroit, Mich., to raise the boat, and place her cargo on dock at Toledo, for the sum of \$2,250, which, it is agreed, was a reasonable price. This contract was in writing, and signed by the three insurance companies and Harris W. Baker on December 14th; the three insurance companies signing by James A. Calbick, their agent. Baker immediately proceeded to raise the boat under the contract. Neither of the three companies had any notice that any person other than Hebner owned an interest in the propeller until December 20, 1893, when, for the first time, they learned that Hebner owned only one-half of the boat, and the other half was owned by W. F. & J. S. Botsford. Baker raised the boat under his contract, the expense of which amounted to \$2,331.40, which was paid by the insurance companies, as they had agreed to do by their written contract. After the insurance companies received notice that Hebner was not the sole owner of the propeller, they refused to take any further steps in regard to the adjustment of the loss until June 12, 1894, when Hebner agreed in writing that the loss might be adjusted and approved without the insurance companies waiving any of the rights under the policies. Under this agreement the total amount of the loss to the propeller was fixed at \$9,857.10. This would make Hebner's loss on his half of the boat amount to \$4,928.55, of which sum the companies had already paid, in raising the boat, \$2,331.40; leaving still due Hebner, if he was entitled to recover anything (providing the contract required him to raise the boat), the sum of \$2,597.15. The parties waived a jury, and submitted to a trial before the court, and the court entered judgment in favor of plaintiff for the amount last above named. This judgment was affirmed in the appellate court.

Robert Rae, for appellant. Bates & Harding, for appellees.

CRAIG, J. (after stating the facts). In the decision of this case, we do not deem it necessary to follow counsel in their long argument, or to enter upon an extended review of the many authorities which have been cited in the briefs. To do so would extend this opinion to an unreasonable length, and result in no substantial benefit to either of the parties. As has been seen, Frank Hebner

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

applied for insurance on the propeller, and the boat was insured in his name, as his property. The propeller was worth, at the time the loss occurred, \$15,000. The loss was fixed at the sum of \$9,857.10. At the time the policies were issued, Frank Hebner was not the sole owner of the propeller. He owned only one-half, and the other half belonged to W. F. & J. S. Botsford. But this fact was not disclosed to the insurance companies. It appeared, however, from the evidence, that at the time the insurance was effected the propeller was in the possession of, and under the control of, Hebner, and that he had agreed with the Botsfords to keep her insured. The policies contained the following provisions: (1) "This entire policy shall be void * * * if the interest of the insured be other than unconditional and sole ownership." (2) "This entire policy shall be void if the insured has concealed or misrepresented any material fact concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated therein." Notwithstanding these provisions in the policies, it is claimed on behalf of the appellant that he is entitled to recover the entire loss, less his proportionate share of raising the vessel. It may be conceded that it was entirely competent for Hebner, had he so desired when the contract of insurance was made, to not only insure his own interest in the propeller, but also the interest of the other two owners; but no language will be found in the policies indicating any intention whatever, of the contracting parties, to insure property owned or possessed by any person other than Hebner. It will be observed by going to the policies, which constitute the contract between the parties, that Hebner was not insured, as to any part of the vessel, as manager, trustee, or agent; nor was he insured against loss on property held by him as agent, in trust, or as manager for some other person, as he might have been; and the law which controls cases of that character can have no bearing here. The contracting parties (Hebner and the insurance companies) agreed that, if the interest of the insured be other than sole ownership, the policies should be void. This was the contract of the parties, deliberately made; and the question is whether that contract shall control, or shall some other contract, never made, be enforced. The law as laid down by the authorities, as we understand it, is: Where the policy contains a provision that the insured is the unconditional and sole owner of the property, and it turns out the insured was not the unconditional and sole owner, no recovery can be had, unless it appears there was a waiver or an estoppel, by which the insurance company is precluded from relying on the contract. May, Ins. (3d Ed.) § 287; Southwick v. Insurance Co., 133 Mass. 457; Brown v. Insurance Co., 86 Ala. 189, 5 South. 500; Insurance Co. v. Butler, 55 Md. 233; Fuller v. Insurance Co.,

61 Iowa, 350, 16 N. W. 273; Insurance Co. v. Weaver, 70 Md. 536, 17 Atl. 401, and 18 Atl. 1034; Finney v. Insurance Co., 8 Metc. (Mass.) 348. The case last cited is like the present case, except that the agent knew when the policy issued the condition of the title. It is there said: "The question here presented is not as to the competency of John S. Bates to effect an insurance for the benefit of all his associates who were interested in the property which was the subject of insurance, but whether, upon the face of this policy, and the terms of this contract of insurance, the legal effect is not to restrict the insurance to the sole interest of Bates. It may at once be conceded that it was competent for Bates to effect such insurance on the entire interest of all concerned, if either previously authorized by the co-owners or if they elected to ratify his act, even after the loss of the property. But the appropriate form of the policy, in such cases, is for himself and other owners, or 'for whom it may concern,' or other words indicating that the insurance is to embrace an interest beyond that of the party in whose name the policy is issued. * * * But the real question here is whether a policy made in the name of a particular person, who is the owner of a small proportion in interest of the property insured, without any words indicating an intention to insure beyond his own interest, can be made effectual to cover the interest of others, upon parol proof that the application for insurance was for such others as well as for the party named, and that this was well known to the insurers, and that it was the intention and understanding of all the parties that the policy was to cover the interests of all the owners. * * * When the parties have put their agreement into writing, and the terms of it are plain and direct, leaving no uncertainty as to the nature of it, we must treat it as the whole engagement of the parties. * * * The evidence proposed in the case at bar was incompetent, and the verdict for the defendant was properly ordered." The case in 61 Iowa and 16 N. W. is quite similar to the one under consideration. In the decision of the case it is, among other things, said: "It is contended that Ashem had an insurable interest in the property of plaintiffs. This proposition may be conceded, for the purposes of this case. We do not think it is material whether he had an insurable interest or not, because the fact remains that, according to the terms of this policy, he insured no property but his own; and, in order to include the property of the plaintiffs in the policy, it is necessary to show that it was included, either by proof of a waiver of the conditions of the policy, or by proof that a different contract was actually made than that which is expressed in the policy. There are many adjudged cases which hold that certain conditions of a policy of insurance may be waived by parol. These cases include such provisions as the time of the pay-

ment of premiums, the production of proofs of loss, the breach of any condition in the policy, as against the increase of risk, or the keeping of hazardous goods, or the like. See cases cited in Wood, Ins. 882. In this court it has been held that an increase of risk may be waived by an agent by parol (*Viele v. Insurance Co.*, 26 Iowa, 9); that the time for payment of the premium may be waived (*Young v. Insurance Co.*, 45 Iowa, 377). Other cases of waiver of conditions need not be stated. In the case at bar we are asked to go a step further than any case to which our attention has been called, and hold that the conditions of a policy as to the subject of the insurance, the property insured, and the ownership thereof, may be waived by parol. In other words, we are called upon to allow the plaintiffs to maintain an action upon a policy in which they are not named, and which, by its very terms, excludes all property except such as was owned by Ashem in his own right. * * * In the case cited from Alabama, *supra*, it is said: 'Where the true ownership is not required to be fully stated by the conditions of the policy, generally it will be sufficient if the assured has an insurable interest; but, when such requirement is the condition of the policy, it becomes a material part of the contract, and all rights under it are forfeited by noncompliance.' * * * By express stipulation, the parties make it material, and the validity of the contract is dependent on a compliance with the condition. The assured, by accepting a policy in which such condition is incorporated, becomes bound thereby; and, when he claims to enforce the contract and receive its benefits, he is estopped from denying his assent to the stipulation." There are many other cases where the same doctrine has been announced, but it is not necessary to make quotations from them. Indeed, this court, in *Insurance Co. v. Brennan*, 58 Ill. 158, in effect, laid down the same rule.

On the trial the defendants, through their attorneys, stated to the court that, although not liable, they were willing to pay plaintiff, as one-half owner of the vessel, one-half the amount of the loss, less the expense of raising the vessel and placing her in proper condition. Under this agreement a judgment was rendered for \$2,997.15,—one-half the loss, after deducting the amount paid by defendants for raising the vessel. It is, however, claimed that the court erred in deducting the cost of raising the vessel. The policies provide that if fire occur the assured shall protect the property from further damage; that he shall separate the damaged and undamaged personal property, and that he shall put the property in the best possible order; and that, within 60 days, he shall make proofs of loss. Under the policy, we think it was the duty of Hebner to raise the vessel at his own expense, and protect it from further damage. He applied to the insurance companies to raise the boat for him. This they did, at

\$400 less expense than he was able to do, and we see no reason why the amount should not be deducted. The judgment of the appellate court will be affirmed. Affirmed.

(157 Ill. 274)

CHICAGO CITY RY. CO. v. JENNINGS.¹
(Supreme Court of Illinois. June 15, 1895.)²
PLEADING—DECLARATION—NEGLIGENCE—STREET-CAR COMPANIES.

1. In an action against a cable-car company for injuries in a collision, a declaration which alleges that defendant was possessed of a motor or grip car, which it used to propel passenger cars along the street by a wire rope; that the motor and cars were under the care and management of drivers, servants of defendant, who were driving the same on a street, near its intersection with another street; and that "defendant then and there, by its said servants, so carelessly and improperly drove and managed the said motor and train of cars that, by and through the negligence and improper conduct of defendant, by its said servants in that behalf, the said motor then and there ran into and struck the said carriage,"—alleges the acts of negligence with sufficient certainty. 57 Ill. App. 376, affirmed.

2. Such declaration need not state whether the plaintiff was driving personally or by his servant, where it alleges that the collision occurred "while plaintiff, with all due care and diligence, was then and there riding in the said carriage."

Appeal from appellate court, First district.

Action on the case by M. C. Jennings against the Chicago City Railway Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 376. Defendant appeals. Affirmed.

Lee & Lawrence and W. J. Hynes, for appellant. M. C. Jennings, in pro. per.

MAGRUDER, J. This is an action brought by appellee, M. C. Jennings, against the Chicago City Railway Company, appellant, to recover damages for injuries to appellee's phaeton or buggy caused by a collision between it and a train of appellant's cars. The declaration avers: "Plaintiff was riding in a certain carriage, commonly known as a 'Goddard phaeton,' then and there drawn by a certain horse upon and along the said street, Cottage Grove avenue. And the defendant was then and there possessed of a certain motor or grip car, used by said defendant to propel certain passenger cars, known as 'street cars,' along and on said Cottage Grove avenue, by means of a wire rope or endless cable, and the said motor car had then and there attached thereto certain of said passenger cars, and which motor and train of said cars were then and there under the care and management of drivers, then servants of the defendant, who were then and there driving the same upon and along the said street, Cottage Grove avenue, near

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 25, 1895.

to or about where said Cottage Grove avenue intersects or meets Seventieth street of said city, as aforesaid, and while plaintiff, with all due care and diligence, was then and there riding in the said carriage along and on the said Cottage Grove avenue, at or near to where the latter meets Seventieth street, as aforesaid, upon the said public highway there; the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said motor and train of cars that, by and through the negligence and improper conduct of the defendant, by its said servants in that behalf, the said motor and train of cars then and there ran into and struck with great force and violence upon and against the said carriage, and did by said force and violence then and there crush and destroy the said carriage, and render the same of no value whatever to plaintiff." To this declaration a general and special demurrer was filed; grounds of special demurrer being that the allegation that the defendant carelessly and improperly drove and managed its train of cars is vague, uncertain, and indefinite, and fails to inform defendant wherein the negligence complained of consisted, and also that said declaration fails to set forth whether the plaintiff was driving personally, or whether his servant had charge of the carriage in question, and, if the said carriage was driven by a servant, whether the servant was free from negligence. The court overruled the demurrer, the defendant electing to stand by it. There was judgment by default for \$160, and an appeal to the appellate court, which rendered a judgment affirming the ruling of the court below. The appellate court granted a certificate of importance, and the case is here by appeal from the judgment of affirmance rendered by that court.

The charge which the special demurrer makes against the declaration is that of vagueness, uncertainty, and indefiniteness and failure to state wherein the negligence complained of consisted. We are inclined to think that the declaration is not justly subject to the criticism made upon it, and that, therefore, the trial court properly overruled the special demurrer to it. "A general statement of facts, which admits of almost any proof to sustain it, is objectionable." 1 Chit. Pl. p. 232. "Facts only are to be stated, and not arguments or inferences." Id. p. 213. But, in alleging a fact, "it is unnecessary to state such circumstances as merely tend to prove the truth of it." Id. p. 225. In other words, it is not only a rule of pleading that the statement of facts must not be so general as to admit of almost any proof to sustain it, but it is also a "familiar rule of pleading which forbids alleging the evidence." The two rules should be harmonized, and the two extremes which they respectively define should be avoided. Railroad Co. v. Dunlap, 29 Ind. 426. The facts must be set

forth with certainty; that is to say, there must be "a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." 1 Chit. Pl. p. 233.

We think that the declaration in the case at bar sufficiently fulfills the requirements of the definitions thus given. The declaration alleges that the defendant was possessed of a motor or grip car, which had passenger or street cars attached to it; that it used this grip car to propel the passenger cars along the street or avenue by means of a wire rope or endless cable; that the motor or grip and cars were under the care and management of drivers, servants of the defendant, who were driving the same upon the street near to the place where it intersected another street; that the defendant, by its said servants, so carelessly and improperly drove and managed the motor and train that, by the negligence and improper conduct of the defendant, by its said servants, the motor and train ran into the carriage of the plaintiff while the latter was riding with due care along the public highway near the intersection of the two streets. It is well known that the grip car is propelled, not only by the action of the driver on the car, who has his hand upon the grip, but also by the operation of the machinery with which the cable is connected at a distant part of the line. It was the duty of the company to see to it that these appliances were reasonably safe, and that they were under the management of competent servants. The driver of the car should have the mechanical power propelling it under his control, and should so exercise this control as to avoid injury, if possible. The company has not the exclusive right to the use of the public streets, but only to the use of them jointly with the balance of the public, and therefore its servants must take notice of the numbers of travelers liable to be on the streets at street crossings, and must exercise the care demanded by the increased danger at such points. Booth, St. Ry. Law, §§ 304-307; 23 Am. & Eng. Enc. Law, pp. 1019-1024. The declaration specifically charges, as the act of negligence for which the company was responsible, that the servants or drivers placed in control of the propelling power which moved the cars managed and drove the same carelessly and improperly, and that the collision at the crossing was due to their negligence "and improper conduct." Where a declaration charges that the employees of a railroad company carelessly and negligently run its train of cars over its road, it sufficiently states an act upon which the charge of negligence and carelessness is predicated. Railroad Co. v. Chester, 57 Ind. 297. The approved forms in the books of precedents seem to justify some generality in the aver-

ment of negligence; that is to say, they do not require an allegation of all the particular facts constituting the negligence. *Railroad Co. v. Dunlap*, supra. Although Chitty, in the first volume of his work on Pleading, deprecates a statement of facts which is too general in its character, yet, in the second volume, he prescribes a form of declaration which has been followed almost literally by the appellee in framing the declaration in the case at bar. 2 Chit. Pl. pp. 710, 711. The declaration of appellee not only conforms to the precedent in Chitty, but also to the precedents set forth in the following books: Yates, Pl. p. 396; 1 Har. Ent. p. 351; 2 Humph. Prec. 807, 808; 8 Went. Pl. p. 396.

Counsel say that the precedents referred to are cases where, in collisions between carriages on the highway, or between boats on the water, the driver of the horses fails to drive and manage them properly, or the pilot of the boat fails to steer it properly, but that such precedents have no application to the cars of a street-railroad company, which move upon fixed rails and within a prescribed track, so as to be unable to get out of the way by moving to the right or left. We do not regard the distinction as well founded. The driver of the grip car must be governed by established rules. He must know how to manage the motor. He must not drive it at an unreasonable rate of speed. He must keep a reasonably careful lookout ahead. He must respect the equal rights of others to the use of the public streets. How can the pleader know exactly what caused the failure of the company's servants to properly drive and manage the motor car? How can he know whether such failure resulted from the non-observance of one rule, or of another, or of all the rules? The failure may have been due to ignorance, or accident, or want of attention, or to some other cause known only to the company and its servants. It is a well-settled rule that the pleader is required to set out the particular facts constituting the negligence complained of, only so far as they appear to be properly within his knowledge. *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224, 5 Am. & Eng. Enc. Law, p. 351; *Railroad Co. v. Van Horn*, 38 N. J. Law, 133. If the particularity demanded should be required in a case like the one at bar, then the precedents referred to, instead of charging generally that the driver of the horse carelessly and improperly drove and managed him, or that the pilot of the vessel improperly managed or steered it, should set out particularly whether the driver of the horse pulled the wrong rein or not, and, if he did, whether he did it through accident or ignorance of the art of driving, or whether the pilot of the ship turned the wheel or the rudder the wrong way or not, and, if he did, whether it was done by accident or through ignorance of the art of navigation. No such particularity is demanded. Where the act upon which the negligence is predicated is of a simple character, an allegation of

an absence of care in its performance becomes reasonably intelligible, and hence it is not necessary to specify particularly the circumstances. For example, in the form in 2 Chit. Pl. 711, it is averred that the defendant's boat, by his "carelessness, mismanagement, and want of care," struck plaintiff's vessel; and by this averment the defendant was sufficiently advised to be able to understand the case to be made against him. So, in a suit against a railroad company for causing the death of the intestate by carelessly and negligently running over him with a locomotive, the general averment, that "the defendant, by her agents and servants, did carelessly and negligently run over," etc., was held to be sufficient, without stating the particular acts constituting such negligence. *Railroad Co. v. Keely's Adm'r*, 23 Ind. 133; *Railroad Co. v. Van Horn*, supra. In *Clark v. Railway Co.*, 28 Minn. 69, 9 N. W. 75, which was an action for damages, the complaint alleged that the defendant "by the culpable carelessness, negligence, unskillfulness, and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars thereto attached," against plaintiff's horse and wagon, while lawfully traveling along the public highway; and it was there held that, on demurrer, the complaint was sufficient, although it did not state the specific physical acts constituting the alleged negligence and carelessness. In the Minnesota case last referred to, which contains an able discussion of the subject, it is, among other things, said: "Therefore, it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact, allowed to be pleaded. Such a general form of pleading negligence seems to have been permissible in common-law pleading." In *Hawker v. Railroad Co.*, 15 W. Va. 628, the action was against a railroad company for negligently and wrongfully killing the plaintiff's cattle on its track. The declaration alleged that "the defendant negligently, carelessly, and wrongfully caused a train of cars on its railroad to be propelled and driven upon the fat cattle of the plaintiff, whereby three of them were killed, and seven others greatly bruised and injured," and it was held that this allegation was sufficiently certain to meet the requirements of pleading, the court saying: "There was no necessity for the declaration to specify the acts of omission or commission which constituted the negligence of the defendant which is the basis of the action. * * * It is neither usual nor necessary to specify the acts or omissions of the defendant which constitute the negligence. This is a matter of proof, and need not be specified in the declaration." See, also, *Berns v. Coal Co.*, 27 W. Va. 285; 5 Am. & Eng. Enc. Law p. 351, note 4; *Railway Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285. In *Fitts v. Waldeck*, 51 Wis. 567, 8 N. W. 363, where the complaint in

the action charged that the negligence of defendant's engineer caused the death of plaintiff's intestate, but did not state the precise act or omission which caused the boiler to explode, it was held that an averment "that the engineer so recklessly, negligently, and unskillfully managed the engine and boilers that one of the boilers exploded, and the intestate was thereby killed," was sufficient on demurrer; and it was also there said, that the plaintiff had only general knowledge or information on the subject, and made the averment as specific as he could.

It is claimed, however, that two decisions of this court sustain the contention here made that the declaration is insufficient upon special demurrer. One of these is *Railroad Co. v. Harwood*, 90 Ill. 425, and the other is *Ohio & M. Ry. Co. v. People*, 149 Ill. 663, 38 N. E. 989. In the *Harwood* Case, there were two counts in the declaration, and the general issue was pleaded to the whole declaration; so that the question here involved did not arise upon a demurrer to the declaration, and the remarks there made with reference to objections to the admissibility of proof, on the ground of variance from the cause of action set forth in the declaration, were not necessary to a decision of the case. As a plea was filed to the declaration, its sufficiency was thereby admitted, and the question whether the declaration would have been sufficient if it had been specially demurred to was not in the case. Independently, however, of this consideration, it will be found, upon a comparison of the declaration in the *Harwood* Case with that in the case at bar, that, while some of the phraseology is the same in both, yet they are materially different. The declaration here is much fuller in its allegations, and charges the collision directly to the carelessness and mismanagement of servants who were driving and managing the grip car, while there the charge in the declaration, as quoted in the opinion, is made against the company generally, without reference to the conduct of the servants employed by it. Moreover, in the *Harwood* Case the defendant was a steam-railroad company subject to special statutory regulations, a violation of which must be specially averred in the declaration. *Woodward v. Navigation Co.*, 18 Or. 289, 22 Pac. 1076. The other case of *Ohio & M. Ry. Co. v. People*, supra, has no application here. That was an action of debt, to recover a penalty for a failure or neglect to ring a bell or sound a whistle for a distance of at least 80 rods from a road crossing. There were four counts in the declaration, for four specific violations of the statute, and the declaration was held to be defective on special demurrer because it did not describe the engines or trains referred to, and failed to show whether they were freight or passenger trains, or the time when the engines or trains passed over the crossing, or in what direction they were running. The action there was not for negligence, and consequently there could be no question as to

whether an averment of negligence was too general or not.

The other ground of special demurrer, that the declaration fails to state whether the plaintiff was driving personally, or whether his servant had charge of the carriage, is without force. The declaration says: "While the plaintiff, with all due care and diligence, was then and there riding in the said carriage," etc. We regard this form of allegation as sufficient. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 267)

VALLENS v. HOPKINS.

(Supreme Court of Illinois. June 15, 1895.)¹

APPEALS FROM JUSTICES—JURISDICTION—PRACTICE.

1. Under Rev. St. 1893, c. 79, § 68, which provides that, "in case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment ten days before the commencement of the term of the court to which the appeal is taken, the appearance of the appellee may be entered in writing, and filed among the papers in the case; and if so entered ten days before the first day of the term of court, the case shall stand for trial at that term," the court has no jurisdiction to hear the cause on appeal, unless the transcript has been filed 10 days before the term, even in cases where the appeal is taken by filing the appeal bond with the justice. 51 Ill. App. 337, reversed.

2. Under a rule of court that only actions at issue may be noticed for trial on the "short-cause calendar," an appeal from a justice cannot be so noticed unless the appeal papers were filed 10 days before the term. 51 Ill. App. 337, reversed.

Appeal from appellate court, First district.

Action of forcible detainer by Fred P. Hopkins against Eugene Vallens. Plaintiff obtained judgment, which was affirmed by the appellate court. 51 Ill. App. 337. Defendant appeals. Reversed.

Appellee brought his action of forcible detainer before a justice of the peace against appellant, and the judgment was adverse to him, whereupon he appealed to the superior court of Cook county. His appeal bond was filed before the justice May 25, 1893, and on May 27th following the transcript, etc., was filed with the clerk of the superior court. The June term of the superior court commenced on the 5th of that month. On the 1st day of June, and during the May term, the appellee served notice on the attorneys who had appeared for appellant before the justice of a motion to have the cause placed on the short-cause calendar. The rule of court with reference to placing causes on the short-cause calendar is: "Rule 18. Monday of each week is set apart and assigned as the day for the trial of suits upon the short cause calendar, but any judge may postpone the call of his short cause calendar. No cause shall be noticed for trial on such calendar until the same is at issue. All notices to place a cause upon such calendar must be filed with the clerk within two days after

¹ Rehearing denied October 23, 1895.

service of the same, and not later than Thursday, eleven days before the Monday on which the cause is set for trial. The clerk shall place upon the short cause calendar of each judge for each week the causes assigned to such judge and noticed for trial upon the short cause calendar, except in cases when a judge is presiding in the criminal court, in which case his causes shall be distributed equally by the clerk among the other short cause calendars." On Monday, June 12th, the cause appeared on the short-cause calendar. On June 18th, the appearance of the defendant (appellant here) was entered by Adolph Ascher, who on that day entered his motion to strike the cause from the short-cause calendar—"First. Because said cause was not at issue on the date when the notice to place the same on the short-cause calendar, to wit, June 1, 1893, is alleged to have been given, as provided by rule 18 of the common-law rules of said court; that said cause was not at issue until Monday, the 5th day of June, A. D. 1893. Second. Because no notice was given to the defendant, his agent or attorney, of the placing of said cause on the short-cause calendar, as required by the statute in such case made and provided." This motion was denied the same day, to which defendant excepted. The cause was not reached until June 26th, when the motion was renewed, denied, and defendant excepted, and the cause tried, the appellant withdrawing from the court. A verdict and judgment for appellee (the plaintiff below) was entered, to which the defendant objected and excepted, and an appeal was prosecuted by the defendant to the appellate court of the First district, where the judgment was affirmed, and this appeal is prosecuted.

A. Ascher, for appellant. Coy & Brockway, for appellee.

PHILLIPS, J. (after stating the facts). This case presents for construction section 68, c. 79, Rev. St., and we are asked to determine whether, where an appeal bond is filed with the justice, it is necessary to the jurisdiction of the appellate tribunal that the transcript, etc., be filed in that court 10 days before the first day of the term. Sections 64, 65, c. 79, Rev. St. 1893, are substantially the same as sections 60, 61, c. 59, Rev. St. 1845. Under the act of 1845 it was held, in *Boyd v. Kocher*, 31 Ill. 295, when an appeal was perfected before a justice of the peace no summons was necessary to either party, and appellant and appellee alike are bound to follow up the appeal. In that case while the appeal was taken more than 10 days before the term of court to which the appeal was prosecuted, the transcript was not filed until after the term commenced, and on the same day on which the transcript was filed the appeal was dismissed on motion of appellee. At the time of that decision there was no statute in this state similar to section 68, c. 79, Rev. St., as now existing. Section 64 of chapter 79 provides for an appeal by

filing the bond with the justice of the peace who rendered the judgment, and section 65 provides for an appeal by filing the bond in the office of the appellate tribunal, in which case a supersedeas and summons to the appellee is issued. The provisions of section 64 require a transcript to be filed on appeal by filing the bond with the justice, and by section 68 of the same chapter provision is made for filing a transcript, etc., when the appeal is perfected by filing the bond with the clerk of the appellate tribunal. Section 68 is as follows: "In case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment ten days before the commencement of the term of the court to which the appeal is taken the appearance of the appellee may be entered in writing and filed among the papers in the case; and if so entered ten days before the first day of the term of court, the case shall stand for trial at that term." After that enactment the question whether its provisions applied to a case where the appeal was had by filing a bond with the justice of the peace was before this court in *Hayward v. Ramsey*, 74 Ill. 372, and it was held, after quoting the section, that: "The language of this section so plainly excludes a trial of such an appeal perfected before a justice of the peace unless there has intervened at least ten days before the first day of the term to which the appeal is taken, that we are unable to see how any one could mistake its meaning. * * * Although the parties are bound to follow their case to the circuit court where the appeal is perfected before the justice without further notice, still there must intervene ten days from the perfecting the appeal till the first day of the next term of the appellate court." The perfecting the appeal in such cases is the filing of the bond with the justice of the peace and the filing the papers and transcript of judgment 10 days before the commencement of the term to which the appeal is taken, with the clerk of that court. This is the clear meaning of the statute. Under that statute the transcript and papers on file with the clerk 10 days before the commencement of the term afford an opportunity to each party to prepare for trial. The contention of appellee that that section, with reference to filing transcripts, etc., only applies to cases where the appeal is taken by filing the bond with the clerk, cannot be sustained.

The clause of section 68 in reference to filing appearance in writing 10 days before the commencement of the term does, however, apply only to cases where a summons is necessary, as when the appeal bond is filed with the clerk of the appellate tribunal in the first place, for the purpose of appeal, and to cases where an appeal is taken by one of several plaintiffs or defendants, and others do not appeal, and summons is required to issue as provided by section 70 of chapter 79. In such cases appearance in writing, as provided by section 68, may be entered 10 days before the term. We do not hold, however, that

where there is waiver of both service of summons and time by a party so entering appearance, the court may not proceed to trial of the cause in the absence of objection by the opposite party, but the person so entering appearance less than 10 days before the commencement of the term does not thereby have the right to dismiss suit or appeal in the absence of the other party.

By the act entitled "An act to expedite the trial of certain suits at law in courts of record," approved June 1, 1889, it is provided: "That it shall be the duty of the clerk of each court of record in this state to prepare a trial calendar in addition to the regular trial calendar of such court to be known as the 'short-cause calendar.' Upon the plaintiff his agent or attorney in any suit at law pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days previous notice to the defendant, his agent or attorney, said suit shall be placed by the clerk upon the 'short cause calendar.'" By rule 18 of the superior court of Cook county it is provided that no cause shall be noticed for trial on such calendar until the same is at issue. This rule is in furtherance of the purposes of the act, and the term "at issue" has a well-defined meaning, and, as used in the rule, has reference to being ready for trial on a point affirmed on one side and denied on the other. For the purpose and within the meaning of rule 18, where the case stands for trial at that term without further pleadings, it is at issue. An appeal suit from a justice of the peace is tried de novo without written pleadings, and when the appeal is perfected as heretofore discussed such appeal is at issue so that it may be noticed for trial under rule 18 of that court. Until the appeal is perfected, it is not within the jurisdiction of the court to be placed on the short-cause calendar. The appeal not having been perfected 10 days before the June term commenced, it did not stand for trial at that term, and was not at issue for trial within the meaning of that rule, and could not properly be placed on the short-cause calendar for trial. The appeal not having been perfected to give the court jurisdiction of the case at that term, the motion to strike the cause from the short-cause calendar should have been allowed. It being reversible error to overrule the motion to strike the case from the short-cause calendar, it becomes unnecessary to discuss the effect of the entering appearance and motion. The judgment of the superior court of Cook county, and the judgment of the appellate court of the First district, are each reversed, and the cause remanded. Reversed and remanded.

BAKER, J. I do not concur. The appeal having been perfected by filing the bond with the justice more than ten days before the term, the court had jurisdiction of the cause and of the parties at that term. *Boyd v. Kocher*, 31 Ill. 295.

(157 Ill. 309)

CONDON v. BROCKWAY et al.¹(Supreme Court of Illinois. April 1, 1895.)²

CONTINUANCE — REVIEW ON APPEAL — LANDLORD AND TENANT — INSTRUCTIONS.

1. Overruling a motion for continuance because of the absence of counsel on account of illness is not an abuse of discretion where the case is not one requiring special preparation, and it is not shown that other counsel could not be retained. 50 Ill. App. 625, affirmed.

2. In the absence of objection at the trial, the admission of secondary evidence cannot be assigned as error.

3. A tenant for years, who holds over after expiration of his term, does not become a tenant for another year, unless the landlord so elects.

4. Where it does not appear from the record whether the instructions were oral or written, it will be presumed on appeal that they were written.

Appeal from appellate court, First district.

Action of forcible detainer by James W. Brockway and others against Sarah J. Condon. Plaintiffs obtained judgment, which was affirmed by the appellate court. 50 Ill. App. 625. Defendant appeals. Affirmed.

A. C. Story, for appellant. F. H. Trude, for appellees.

BAKER, J. This was forcible detainer, brought by appellees against appellant on May 8, 1893, before a justice of the peace, to recover possession of certain premises in the city of Chicago. On May 16, 1893, there was a trial, and judgment for appellees. On May 18th, appellant filed an appeal bond with the justice, and on May 22d perfected his appeal to the superior court of Cook county by filing therein the papers in the case. The following day, May 23d, and more than 10 days before the first day of the June term, 1893, of the superior court, appellees filed their appearance. On June 6th, it being the second day of the June term, affidavit and notice to place the cause for trial on the short-cause calendar were served on appellant. On June 7th, the cause was, by stipulation of parties, continued for one week, or until June 26, 1893. And on June 24th, Allan C. Story filed his written appearance in the case as attorney for appellant. The cause was reached for trial on July 10, 1893, and therefore Mr. Westover, an attorney at law, moved the court for a continuance of the case on account of Mr. Story's illness and inability to attend court. The motion was based on the affidavits of Mr. Story, of appellant, and Mr. William H. Condon, a brother of appellant, who is an attorney at law, and who appeared as attorney for her in the trial before the justice of the peace. The court denied the motion, and ordered the cause to proceed to trial. Thereupon Mr. Westover, as representative of Mr. Story, excepted to the ruling of the court, and filed an excep-

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

² Rehearing denied Oct. 15, 1895.

tion. He, however, refused to make any appearances during the trial of the cause, and refused to take any part therein. The cause was submitted to a jury, and the jury, after hearing the evidence, returned a verdict for appellees, who were the plaintiffs below. Then Mr. Westover again appeared, as representative of Mr. Story, and moved to set aside the verdict, and for a new trial. But the court overruled the motion for a new trial, and rendered judgment on the verdict, and for the restitution of the premises described in the complaint. The judgment was afterwards, on appeal, affirmed in the appellate court.

A motion for a continuance, except where it is based on a statutory cause, is addressed to the sound judicial discretion of the trial court; and the exercise of such discretion will not be interfered with by the appellate tribunals unless there has been a manifest abuse of such discretion. In *Jarvis v. Shacklock*, 60 Ill. 278, it was held that the motion for a continuance on account of the illness of counsel was properly overruled; and the decision was put on the ground that the evidence was in a small compass, and a few minutes' conversation between the defendant and counsel would have enabled any practicing lawyer to properly try the case. In *Graff v. Brown*, 85 Ill. 89, it was held that where there is but a single issue of fact to be tried, and it is not complicated, and no question of law requiring an average lawyer to spend much time in investigating, the absence of the principal counsel and the illness of the assistant counsel afford no sufficient ground for a continuance, where it is not shown that other competent counsel could not have been employed by reasonable effort. In the case at bar the affidavits of appellant and of William H. Condon were sworn to on the 10th day of July, 1893, before the clerk of the court, and so it must be presumed that they were both present in court when the cause was called for trial on that day. It does not appear that any effort was made to employ other counsel, or that such counsel could not easily have been secured. And no reason is perceived why appellant and her brother, who was an attorney, and had presented her defenses at the former trial, could not within a short time have advised such counsel in regard to the facts of the case, and the nature of the claimed defense to the action. It is not shown by the affidavits that the facts involved were either numerous or complicated, or that there was anything in them, or in the theory of the defense, that required examination or preparation for the adequate presentation of appellant's case. We are unable to say from the record that there was an abuse of the discretion with which the law clothed the trial court.

It is contended that incompetent evidence was permitted to go to the jury, and that the entire evidence introduced was insufficient

to support the verdict. One claim is that Brockway was improperly permitted to testify to the contents of the written lease to Patrick Condon, giving its terms, and the date of its termination, and also to testify to the assignments of the lease, and extension of the lease to April 30, 1893, and the payment of rent under such extension. The rule is that the action of the court in admitting evidence is open to review only when the record shows that an objection to the testimony introduced was taken and overruled. It is well settled that secondary evidence may always be received upon the trial of an issue, unless objected to on that ground at the time it is given or offered, so that the objection may be obviated by further testimony. *Brush v. Seguin*, 24 Ill. 254; *Walsh v. Wright*, 101 Ill. 178. Where no objection is made at the trial to proving a fact in a certain way, which may be incompetent, it cannot be urged on appeal or error. *Gillett v. Booth*, 95 Ill. 183. And in *Hannas v. Hannas*, 110 Ill. 53, it was held that where a party is duly served with process he is theoretically in court, although defaulted, and, where secondary evidence had been admitted against him in the trial court, without objection to such admission, it cannot be assigned as error in a court of review.

Appellant did not surrender possession upon the termination of the extension of the lease on April 30, 1893. This suit was not commenced until May 8, 1893. Her mere holding over after the expiration of her term did not have the effect of renewing her tenancy for another year. Where a tenant for a year or for years holds over after the term expires, without any new agreement, the landlord, at his election, may treat such tenant as a trespasser, or as a tenant for another year upon the same terms as in the original lease; but no such right of election belongs to the tenant. *Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. 14. And under the statute now in force (Rev. St. c. 57, § 2, cl. 4), a demand for possession, before bringing an action of forcible detainer against a tenant holding over, is not necessary.

It is claimed that the court, in disregard of the positive inhibition of the statute, instructed the jury orally. The record does not warrant this claim. All that therein appears in that behalf are certain statements found in the bill of exceptions, which are as follows: "The court instructs the jury to find the defendant guilty of forcible entry and detainer. Under the said instructions of the court, the jury, without retiring from their seats, rendered a verdict finding the defendant guilty of forcible entry and detainer of the premises described in the complaint." It does not appear whether "the said instructions of the court" were oral or in writing. If necessary to support the validity of the action of the court, it will be presumed that they were in writing. We find

no substantial error in the record. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 176)

POMEROY v. RAND, McNALLY & CO.¹

(Supreme Court of Illinois. May 15, 1895.)²

GARNISHMENT—JURISDICTION OF JUSTICE—JUDGMENT—RETURN OF PROCESS.

1. Under Rev. St. 1893, c. 11, par. 42, § 1, which declares that writs of attachment may be granted against the personal estate of the debtor by justices of the peace in all civil actions cognizable before them where the demand does not exceed their jurisdiction, and paragraph 47, § 6, which directs the constable to "summon as garnishees" all persons whom plaintiff may direct, a justice of the peace has jurisdiction to enter judgment against a garnishee whose indebtedness to the principal debtor exceeds the \$200 limit of justices' jurisdiction. 54 Ill. App. 522, reversed.

2. The judgment against the garnishee in such case should be only for the amount of the liability of the defendant to the plaintiff. Stahl v. Webster, 11 Ill. 511, distinguished.

3. A garnishee cannot object that the court did not hear evidence as to the indebtedness of defendant to plaintiff, since that does not affect the jurisdiction of the court.

4. The return of a constable in an attachment against a nonresident, that he served the notice of suit by posting three copies thereof at three public places in the neighborhood of the justice, and mailing a copy addressed to defendant at his place of residence, though defective in not stating "the places where he posted and mailed copies," as required by Rev. St. 1893, c. 11, par. 50, § 9, is sufficient to sustain a judgment.

5. A debt due to a nonresident may be garnished where the garnishee is a resident of the state in which the garnishment is issued.

Appeal from appellate court, First district.

Attachment by Daniel W. Pomeroy against the Kalamazoo Paper Company. Rand, McNally & Co. were brought into the case on garnishment proceedings. There was judgment against the garnishee, which was reversed by the appellate court. 54 Ill. App. 522. Plaintiff appeals. Reversed.

W. W. Ross, for appellant. Pease & McEwen, for appellee.

WILKIN, C. J. Appellant commenced an action by attachment against the Kalamazoo Paper Company of Kalamazoo, Mich., before a justice of the peace of Cook county, and recovered a judgment for \$36.10 and costs of suit. No appearance was entered by the defendant, and the only service upon it was by publication. Appellee, being summoned as garnishee, answered that it was indebted to the defendant in the sum of \$1,106.51, but stated in its answer that it did not submit to the jurisdiction of the court, nor consent to have its indebtedness to the defendant divided by the entry of a judgment by it, and insisted the court was without jurisdiction to enter judgment against it. The justice of

the peace gave judgment in favor of the defendant in attachment for the use of the plaintiff against the garnishee (appellee) for \$36.10 and costs. It appealed to the circuit court of Cook county, where, upon a trial before the court without a jury, a like judgment was rendered, and the garnishee took an appeal to the appellate court. On the errors assigned in that court four grounds of reversal were urged: First, there was no jurisdiction in the court to enter the judgment below, because the amount due from the garnishee to the defendant in attachment exceeded the jurisdiction of the justice of the peace; second, the circuit court heard no evidence as to the alleged indebtedness from the defendant to the plaintiff in the attachment suit; third, there was no jurisdiction of the defendant in the attachment for the reason that no sufficient service upon it by publication was shown; and, fourth, the court below had no jurisdiction of the debt due from the garnishee to the defendant in attachment because it was due in the state of Michigan, where the defendant resided. The judgment of the circuit court was reversed by the appellate court on the first of these grounds (no opinion being expressed on the other three), but the plaintiff below was allowed an appeal to this court on a certificate of importance.

The first question presented for our decision is, has a justice of the peace in this state jurisdiction in an attachment proceeding to enter judgment against a garnishee where it is shown that his indebtedness to the defendant in attachment exceeds the sum of \$200? By section 1, par. 42, c. 11, Rev. St. (section 1, par. 43, p. 328, 1 Starr & O. Ann. St.), "writs of attachment may be granted against the personal estate, goods, chattels, money, choses in action, credits and effects of the debtor by justices of the peace in all civil actions cognizable before them where the demand does not exceed their jurisdiction." The writ to be issued must command the constable to "summon as garnishees all persons who the plaintiff or his agent shall direct." Rev. St. c. 11, par. 47, § 6 (1 Starr & O. Ann. St. p. 329, par. 48, § 6). When it is served upon any person as garnishee after judgment is entered by the justice of the peace against the defendant in attachment, it is his duty to summon such garnishee, "to answer upon oath what amount he is indebted to the defendant in the attachment, or what property, choses in action or effects belonging to the defendant or in which he has an interest or he had in his possession at the time of serving the attachment." Rev. St. c. 11, par. 54, § 13 (1 Starr & O. Ann. St. p. 330, par. 55, § 13). The proceeding is thereafter to be "in pursuance to the act on garnishment." Rev. St. c. 11, par. 55, § 14 (1 Starr & O. Ann. St. p. 330, par. 56, § 14). Nothing is to be found in the language of either of these acts limiting the power of justices of the peace to enter judgment

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 18, 1895.

against garnishees to cases in which this indebtedness to the defendant is \$200 or less, and hence, if such a limitation is held to arise, it must be by construction. The plaintiff in attachment is given the right to summon garnishees, in order that he may have satisfaction of whatever judgment he may obtain; and, if it can be done consistent with the rights of all parties, the statute should be so construed as to give full effect to that right. We are unable to see how it can be said that the garnishee will be deprived of any legal right by maintaining the jurisdiction of the justice of the peace to give judgment against him for a part of his indebtedness to the defendant in attachment. It being shown by his answer of the proofs that he is indebted to the defendant more than \$200, to require him to pay that or a less sum to the plaintiff can result in no loss to him, because the judgment acquits him from all demands by the defendant for all goods, effects, and credits paid, delivered, or accounted for by the lien by force of such judgment. Section 16, c. 62, Rev. St. (1 Starr & C. Ann. St. p. 1226). The contention that he has a right to insist that his indebtedness to the defendant shall not be divided is without force as affecting the jurisdictional question here involved. There is a splitting up of the indebtedness due from a garnishee to the defendant in attachment in every case where that indebtedness exceeds the amount of the plaintiff's judgment. The garnishee in this case loses no legal right by the judgment entered against it which it would not have been deprived of if its indebtedness to the Kalamazoo Paper Company had been but \$200. In the latter case, after paying the judgment in garnishment (\$36.10), it would have been liable to pay the balance of its indebtedness (\$163.90) to that company. The only difference between that case and this is in the amount for which it remains liable to its creditor. It is equally clear that the construction contended for is not necessary in order to protect the rights of the defendant in attachment. The judgment in garnishment is not conclusive against him that the amount which the garnishee has been made liable to pay the plaintiff is the full amount due him. Drake, *Attachm.* § 707, and authorities cited; *Freem. Judgm.* § 167. Section 16 of the garnishment act is in harmony with this doctrine. It only acquits the garnishee as to payments made by force of the judgment.

It seems to be thought that a line of decisions by this court, in which it has been held that the proper practice in garnishee proceedings is to form the issue as to whether the garnishee is indebted to the defendant between those parties, and, if that issue is found against the garnishee, to enter judgment against him in favor of the defendant for the whole amount of indebtedness, "for the benefit of such attaching and judgment creditors as are entitled to share in its pro-

ceeds." All these decisions are based upon the case of *Stahl v. Webster*, 11 Ill. 511, and only lay down the above rules of practice for the guidance of circuit courts. It will be found upon an examination of the cases that the reason given for requiring the judgment against the garnishee to be for the whole amount due from him to the defendant in attachment is that effect may be given to that part of the act in regard to attachments in courts of record which provides that: "All judgments in attachment against the same defendant returnable at the same term and all judgments in suits by summons, *capias* or attachment against such defendant recovered that term * * * shall share pro rata according to the amount of the several judgments in the proceeds of the property attached either in the hands of a garnishee or otherwise." The section of the statute containing the provision when the *Stahl Case*, *supra*, was decided was 26, and in that case it was said: "All courts must have the power to give the effect to the orders that they are required to make, and in giving a practical application to the provisions of the twenty-sixth section of the act under consideration, the courts must, if necessary, depart somewhat from the usual mode of proceeding, in order to give effect to the law. The practice has been to enter the judgment against the garnishee in favor of the attaching creditor, and yet there is a manifest impropriety in entering a judgment, as in this case, in favor of the attaching creditor for a greater amount than he has recovered against the defendant in the attachment. How such a result is to be sometimes avoided, if the judgment against a garnishee is to be in favor of the creditor whose attachment has been served upon him, we do not well see. The proper practice would, therefore, seem to be to enter the judgment against the garnishee in favor of the defendant in the attachment for the benefit of such attaching and judgment creditors as are entitled to share in its proceeds. They would then have the right to control the judgment; and the money, when collected from the garnishee, would be liable to be distributed among the several creditors, according to the directions received from the clerk. By entering the judgment in favor of the defendant in the attachment, the objections which have been suggested in giving practical effect to the provisions of the twenty-sixth section are obviated; nor is any violence done to any other part of the attachment act by entering the judgment in this form. The statute declares that it shall be lawful to enter up judgment and award execution against a garnishee, but does not specify in whose favor the judgment shall be. There is a peculiar fitness in entering the judgment in favor of the party with whom the debt was contracted, and to whom it is due; and, if the judgment exceeds what is due the attaching and judgment creditors, the balance will be for his benefit." The

same provision is now found in section 37; and in *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401, after again approving the practice of entering the judgment against the garnishee in favor of the attachment or judgment debtor for the benefit of the attachment or judgment creditor, we said: "It is equally well settled the judgment must, in form at least, be for the whole amount due from the garnishee, and whatever surplus there may be after paying the creditors entitled under the statute to share in the distribution to be made belongs to the debtor in whose name the suit is prosecuted. That is necessary in order to hold the funds in the hands of the garnishee for whomsoever shall appear under the thirty-seventh section of the statute to be entitled to share in the proceeds of the property or funds attached. The principle is, the judgment against the garnishee in favor of the debtor in the attachment cause stands as security or as a fund in which the other attachment creditors may participate." It is scarcely necessary to say that this reasoning can have no application to proceedings under the statute authorizing attachments before justices of the peace where the plaintiff in the attachment is alone interested in the judgment against the garnishee, and it is clear that the cases referred to apply to the practice in courts of record only. To hold that justices of the peace are without jurisdiction to render judgment against a garnishee in every case where it appears that his indebtedness is more than \$200, would be to greatly impair the efficacy of a creditor's remedy by attachment in those courts. It is said this hardship may be avoided by bringing his suit in a court of record. Justices of the peace are given jurisdiction of certain inferior demands, so as to enable the creditor to have a speedy and inexpensive remedy for the collection of his debt. It cannot be seriously contended that that end can be attained in courts of record with stated terms, and often with crowded dockets. We think the appellate court erred in sustaining the first ground of reversal.

The law applicable to the second and third alleged errors is: If the proceedings in attachment are void, "they may be attacked by the garnishee; but, if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant in the original attachment proceeding." *Car-Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417. Whether or not the circuit court heard evidence as to the indebtedness claimed by the plaintiff in the attachment from the defendant is a matter of no concern to the garnishee. *Id.*

The objection that the justice of the peace had no jurisdiction of the defendant in attachment for want of sufficient service by publication is one which, under the foregoing rule, the garnishee can urge upon this appeal, and presents a question more difficult. There being no appearance by, or personal service up-

on, the defendant, jurisdiction of it could be obtained only by the mailing and posting of notice, as required by section 9, par. 50, c. 11, Rev. St. (section 9, par. 51; p. 329, 1 Starr & C. Ann. St.) By that section the required notice is to be delivered to the constable, "who shall post three copies of the same at three public places in the neighborhood of the justice at least ten days before the day set for trial. And if the place of residence of the defendant is stated in the affidavit for the attachment [he] shall, at the same time, mail one copy of the notice addressed to such defendant, at such place of residence; and on or before that day he shall return that notice delivered to him by the justice, with an endorsement thereon, stating the time when and the places where he posted and mailed copies as herein required." It is not denied that a proper notice was issued in this case, and delivered to the constable. The objection is that the constable's return does not conform to the requirements of the statute. That return is as follows: "Served the within notice by posting three copies thereof at three public places in the neighborhood of the within-named justice, and mailing a copy of the said notice, addressed to the within-named defendant at his place of residence, April 14th, 1893." While this return is defective in failing to state "the places where he posted and mailed copies," we do not regard that defect fatal to the jurisdiction of the court. The return shows that the constable did all that the statute made it his duty to do, viz. that he posted three copies of the notice at three public places in the neighborhood of the justice of the peace, April 14, 1893,—10 days before the day set for trial (April 25th). Also that he did at the same time mail a copy of the notice, addressed to the defendant at its place of residence. In other words, the defect in his return is not in failing to show service as required by the statute, but in failing to show how he performed that duty. He shows that he posted the notice in three public places, but fails to name them; that he mailed a copy addressed to the defendant, but fails to say what post office or mail box he dropped the notice into. We do not think these omissions of sufficient importance to render the judgment of the justice of the peace and circuit court absolutely void.

The fourth proposition insisted upon by counsel for appellant is also untenable. As stated in the argument, that proposition is that, "the debt being due in Michigan, its situs was here, and could not be reached in Illinois by garnishment." While it is true that for certain purposes the situs of a debt is at the residence of the creditor, it is certainly not true that the collection of the debt cannot be enforced in the state where the debtor resides. Under our statute a creditor may have an attachment against his debtor where he is a nonresident of this state, and have garnishee process against all persons indebted to such debtor; and we know of no

rule of law which limits that right to debts having their situs in this state. From the authorities cited by counsel the proposition under discussion seems to be confused with the question whether a nonresident corporation or individual can be made liable as garnishee. No such question is involved here. The garnishee is a resident of, and amenable to the process of, the courts of this state. On the whole record our conclusion is that the judgment of the circuit court should have been affirmed by the appellate court. Its judgment will therefore be reversed, and that of the circuit court affirmed. Reversed.

(157 Ill. 240)

MORRILL v. BAGGOTT.¹

(Supreme Court of Illinois. May 15, 1895.)²

GUARANTY—LEASE—ACCORD AND SATISFACTION—PLEA.

1. An agreement between landlord and tenant, that the latter should make certain improvements on the demised premises, and that the landlord should credit him therefor a certain sum in lieu of the rent, is not such an alteration of the terms of the lease as will release a guarantor of the rent who did not consent to such agreement.

2. A plea alleging that a creditor agreed to accept work at a fixed price in satisfaction of a much larger indebtedness, the amount of which was not disputed, is not a good plea of accord and satisfaction to the entire debt. Baker, J., dissenting.

Appeal from appellate court, First district.

Assumpsit by Edward Baggott against Charles A. Morrill. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 530. Defendant appeals. Affirmed.

Ashcraft, Gordon & Cox, for appellant. H. C. Bennett and W. A. Phelps, for appellee.

BAILEY, J. On the 20th day of April, 1890, Edward Baggott leased to Robert F. Berdie and Otto Richter, for the term of five years from May 1, 1890, certain premises in Chicago, reserving as rent the sum of \$17,500, payable in monthly installments of \$291.67 each. By a contract of guaranty indorsed upon the lease, Charles A. Morrill guaranteed the payment of the rent reserved by the lessees, and the performance by them of the covenants and agreements in the lease contained. This is a suit in assumpsit, brought by Baggott against Morrill upon the contract of guaranty. The defendant appeared and filed a number of special pleas in bar, to all of which a demurrer was sustained, and the defendant elected to abide by his pleas. Judgment was entered in favor of the plaintiff for \$1,541.69 and costs. That judgment has been affirmed by the appellate court on appeal, and this appeal is from the judgment of affirmance.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 17, 1895.

The defendant's counsel, in his argument in this court, seems to rely upon only two of the pleas, viz. the fifth and seventh, and therefore those pleas only need be considered. The fifth plea alleges, in substance, that before the lessees had occupied the demised premises under the lease, and before any rent had become due, to wit, on April 30, 1890, the plaintiff varied the terms and conditions of the lease, by agreeing in writing with the lessees, that they, the lessees, should do certain carpenter work and make certain improvements on the premises, in consideration of which the plaintiff agreed to allow and credit to the lessees \$700 in lieu of the rents reserved in the lease; that after the making of such agreement the lessees, or one of them, entered upon and occupied the demised premises, and did a large amount of carpenter work thereon in pursuance of the agreement; that the agreement was made by the plaintiff and the lessees without the consent of the defendant; and that, by reason of the premises, the terms of the lease were changed and altered without the consent of the defendant, by reason whereof the defendant was and is released and discharged from all obligation of liability upon his guaranty. The seventh plea alleges, in substance, that after the making of the lease and guaranty the lessees, or one of them, at the request of the plaintiff, on June 1, 1890, performed a large amount of labor and furnished a large amount of material in making certain improvements on the demised premises, at an agreed price of \$700, which material and labor were received and accepted by the plaintiff in payment of all promises and obligations of the defendant in the declaration alleged.

We are of the opinion that neither of these pleas presents a defense to the action. By the fifth plea the defendant seeks to invoke the rule of law that any material alteration in the contract which he has guaranteed, if made without his consent, has the effect of discharging him from liability on his guaranty. That such would be the legal effect of any material alteration in the terms of the lease, if made by the parties thereto without the defendant's consent, is not and cannot be questioned. But we think that no such alteration is shown. The agreement between the plaintiff and his lessees, which the defendant insists operated as an alteration of the lease, as that agreement is shown by the allegations of the plea, was simply that the lessees should put certain improvements on the demised premises, and that, in consideration thereof, they should be allowed a credit of \$700 on the rent to accrue on the lease. Such agreement would seem to be purely collateral to the lease. No provision of that instrument was altered, nor was any obligation growing out of it modified or suspended. The lessees, notwithstanding the agreement, remained liable to pay each installment of rent as it matured by the terms of the lease. It is not pretended that the \$700 credit was to be applied in satis-

faction of any particular installment of rent, or that any installments were to await the performance by the lessees of their contract in relation to the improvements on the premises. The only effect upon the lease of the agreement alleged was to obligate the plaintiff to give the lessees a credit of \$700 on account of rent when the improvements contracted for should be completed.

The seventh plea attempts to set up, by way of accord and satisfaction, the acceptance by the plaintiff of certain labor and materials alleged to have been furnished by the lessees at an agreed price of \$700, in satisfaction of a much larger indebtedness owing from them to the plaintiff on account of rent and guaranteed by the defendant. The amount of the indebtedness on both sides being ascertained and fixed, we are disposed to hold that the \$700 due the lessees could furnish legal satisfaction for only the same amount of indebtedness due from them to the plaintiff. We are of the opinion that the demurrer to the pleas was properly sustained, and the judgment of the appellate court will accordingly be affirmed. Judgment affirmed.

BAKER, J. (dissenting). I think that the seventh plea is a good plea of accord and satisfaction, and that it was error to sustain the demurrer to it. *Neal v. Handley*, 116 Ill. 418, 6 N. E. 45; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, and cases there cited.

(157 Ill. 48)

CHICAGO & N. W. R. CO. v. TOWN OF CICERO.¹

(Supreme Court of Illinois. April 1, 1895.)²

EMINENT DOMAIN — STREET ACROSS RAILROAD — COMPENSATION.

Where a municipality extends a street across a strip of land owned by a railroad company and only used for it as a right of way, only nominal compensation is recoverable, since the company still retains the right to use the land as before, and the possibility of its using part of the land for other purposes is purely speculative.

Appeal from superior court, Cook county; Jonas Hutchinson, Judge.

Petition for condemnation by the town of Cicero against the Chicago & Northwestern Railroad Company. There was judgment of condemnation. Defendant appeals. Affirmed.

Lloyd W. Bowers and A. W. Pulver, for appellant. Farlin Q. Ball, Town Atty., for appellee.

WILKIN, C. J. The town of Cicero, having provided by ordinance for opening West Fifty-Third street across appellant's right of way, filed its petition in the superior court of Cook county for the ascertainment of the just compensation to be paid therefor, and for judgment of condemnation. The property is de-

scribed in the petition as "a strip of land sixty-six feet in width across the right of way of the Chicago & Northwestern Railway Company, there situate, included within the lines of said West Fifty-Third street, as proposed herein to be laid out, produced across said right of way." The compensation was fixed at one dollar, and judgment entered that upon the payment of that sum the town should have the right to take possession, and damage the property in respect to which such compensation should have been so paid. From that judgment this appeal is prosecuted.

The petitioner proved by several witnesses that the compensation which appellant should receive would be merely nominal. This testimony was based upon the theory that opening the street across the right of way would not give the municipality a right to the exclusive occupancy of the ground, but that it could only use the same jointly with the railroad company in the operation of its road. Appellant's right of way is 100 feet wide. At the time of the trial there were laid across the contemplated street two main tracks, the rest of the ground being vacant. The superintendent of the road testified that the company would not "have any need for more than four main running tracks across the land involved in this proceeding." A civil engineer in the employ of the company testified that four tracks would occupy 53 feet in width; or, rather, his testimony is to the effect that four main tracks could be properly laid so as to occupy no more than 53 feet of the right of way; and he says "that would leave of the portion unoccupied by any track forty-seven feet by sixty-six feet." Thirty feet of this 47 feet would be left on the north side of the tracks and 17 feet on the south. The only evidence offered by the company on the question of compensation was that of real-estate men acquainted with the property, location, etc., and the value of lands in its vicinity. The testimony of Charles E. Simmons, land commissioner for appellant, is substantially the same as that of each of the others of these witnesses. He was asked: "What, in your judgment, was the market value of this piece of land on the date of the filing of the petition in this proceeding? By 'this piece of land' I mean, of course, the piece of land the proposed street crosses, and which is involved in this proceeding?" He answered: "\$1,600. That is, the piece 66 by 100." To the question: "Q. How much less, if anything, in your judgment, was the piece of land involved in this proceeding worth, according to its fair market value on the day of the filing of this petition, with a street open across it, than without a street open across it?" "About \$1,200," he answered. He then gave the following explanation: "The price I have named of \$1,600 is twenty-five cents a square foot. I figure that the fifty-three feet,—or the twenty-seven feet in width, now occupied by railroad tracks, and an additional twenty-seven feet; but according to Mr. Evans it was twenty-six feet and a half. Twenty-six feet and a half more to be

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

occupied by two additional tracks makes fifty-three feet in all. It would be diminished one-half of the value, or twelve and one-half cents per square foot. That is, the part our four tracks, if they were put on, would cover, would be diminished one-half by reason of the division of the use between the railroad company and the public. There is no other possible way of figuring than to figure it as equally used by each. Then, as to the part left, I figure the entire market price of twenty-five cents per foot; the two together making the aggregate of \$1,212. The reason I figure the entire market price as to the part the four tracks would not cover is on the supposition that four tracks would be sufficient for the company's use, and that they would be deprived entirely of the use of the balance for any valuable purpose. These side pieces that the four tracks would not occupy were certainly valuable for many purposes at the time of the filing of the petition. It might be used for side tracks on which to make up trains and store cars, for freight platforms, for a passenger station even, for coal sheds, for the storage of lumber, and the handling of local freight, and a signal tower. I could think of a good many uses to which these side pieces could be put, if I had a little time, in connection with a railway." On this testimony counsel for appellant insist that the verdict of the jury is contrary to the evidence, and they attempt to apply to the case the same rule for the ascertainment of just compensation which obtains in the condemnation of individual property—i. e. the market value of the property taken. We have frequently decided that no such measure of compensation can be applied where, as here, a municipality seeks to, and can only acquire the right to a joint use with the railroad. The reasons for applying a different rule in such cases are manifest, and have been stated again and again in the decisions of this court. See *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, 103 Ill. 110; *Illinois Cent. R. Co. v. City of Chicago*, 138 Ill. 453, 28 N. E. 740; *Chicago & N. W. Ry. Co. v. Same*, 140 Ill. 309, 29 N. E. 1109; *Illinois Cent. R. Co. v. Same*, 141 Ill. 586, 30 N. E. 1044; *Lake Shore & M. S. Ry. Co. v. Same*, 148 Ill. 509, 37 N. E. 88; *Chicago, B. & Q. R. Co. v. Same*, 149 Ill. 457, 37 N. E. 78. In *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 314, 29 N. E. 1109, we said: "The city did not propose to condemn the land of the railroad companies, nor to prevent the use of the tracks and right of way by such companies. It merely proposed to extend a street across such tracks and right of way. The value of the land where the street was to cross could not, therefore, be the measure of just compensation for property taken in the condemnation proceeding; nor could the value of the use of the property for railroad purposes be the measure of such compensation. So far as the taking of the strip was concerned, the measure of the compensation would be the amount of decrease in the value of the use for railroad purposes which should be caus-

ed by the use for the purposes of a street, such use for the purpose of a street being subject to the use of the companies for railroad purposes. We cannot discover that there was any testimony to justify any more than a judgment for nominal damages, so far as the taking of property is concerned." Nor is this rule in any way affected by the fact that a railroad company may own the fee to its right of way. *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78. The land sought to be condemned is only a right of way, by whatever title held.

But an attempt is made to draw a distinction between so much of the land as it is said will be needed for tracks—53 feet—and the 47 remaining feet, which, it is assumed, may be used for other than railroad purposes, or put upon the market and sold for any legitimate business purpose. We think this contention is fully answered by what is said in *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill., on pages 461, 462, 37 N. E. 78. A railroad company can only acquire so much real estate for right of way as is reasonably necessary for the construction and operation of its road. It can compel the owner to surrender that much of his land, but no more. It can acquire necessary right of way by purchase, if it can agree with the owner, or, failing to agree with him, it can take it by condemnation under the eminent domain laws. Whether obtained by voluntary conveyance or condemnation, it is held for railroad purposes. And we said in *Chicago, B. & Q. R. Co. v. City of Chicago*, supra: "A railroad company can only acquire land, whether by voluntary purchase or otherwise, for railroad purposes, as defined in its charter. It does not hold land, as does the ordinary owner, with the right of using it for any purpose to which it may be adapted, or with the right to sell it at the highest price which it may bring in the market. Its capacity to acquire or hold lands is not general, like that of a natural person, but is limited to the uses of the railroad business. Being a creature of law, it possesses only those powers which are conferred upon it by its charter, either expressly or as incidental to the objects of its organization,"—citing *Railroad Co. v. Brownell*, 24 N. Y. 345; *Rumsey v. Railroad Co.*, 114 N. Y. 423, 21 N. E. 1066; *Railroad Co. v. Aldridge*, 135 N. Y. 83, 82 N. E. 50. A railroad company cannot obtain a strip of land 100 feet wide under a charter allowing it to acquire that much for right of way, and then convert a part of it to other than railroad purposes, or sell it as private property. To permit it to do so would be to allow private property to be indirectly taken for private use.

It may be that under the third clause of section 19, c. 114, Rev. St. (2 Starr & C. Ann. St. p. 1913), which gives railroad companies the power "to purchase, hold and use, all such real estate and other property as may be necessary for the construction and use of

its railway * * * and to convey the same when no longer required for the use of said railway," land acquired by voluntary purchase, for right of way, no longer required for that purpose, may be sold and conveyed for general business purposes; but, if it can, no such proof was made or offered in this case as would justify an estimate of compensation on that basis. It was not pretended on the trial that the defendant had ceased to use the 47 feet as right of way, or that it intended to do so. All that was shown, or attempted to be shown, was that the number of main tracks which the company would need, laid in a particular manner, would not occupy the whole 100 feet of right of way. It will not be seriously contended that the company may not lay other tracks than those which are now considered necessary, or that it may not lay the additional tracks which it is admitted it will need upon the 100 feet when it pleases. That is to say, notwithstanding this judgment of condemnation, it can at any time in the future place as many tracks upon the 47 feet mentioned as it deems proper in the operation and management of its road, and use the whole of its right of way as it chooses, consistent with the right of the public to use the street when opened across it. If the city had been required to pay the large sums claimed, the company would still have owned, and had the right to use, the right of way, whether occupied by tracks or not, subject only to the joint use by the public. Railroad companies need, and have the undoubted right, to use right of way for other railroad purposes than laying tracks. In no view of the case can it be said that appellant was entitled under the evidence to more than nominal compensation. As we said in *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, supra: In such cases "nothing should be allowed for imaginary or speculative damages, or such remote inappreciable damages as the imagination may conjure up, and which may or may not occur in the future." *Jones v. Railroad Co.*, 68 Ill. 380; *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, supra. "Possible or imaginary uses are to be excluded, nor can the owners show the probable future use of the property." *Chicago, B. & Q. R. Co. v. City of Chicago*, supra; *Pierce, R. R.* 217; *Lewis, Em. Dom.* 480. Whether appellant will cease to use 47 feet or any other portion of its right of way as necessary for the operation of its railroad, whether it will desire to use it for placing structures upon it for use in connection with the operation of its road, whether it will ever place side tracks upon it on which to make up trains and store cars, place freight platforms, passenger stations, coal sheds, or for any other purpose than that for which it is now used, is, under the evidence in this case, purely speculative. Such uses are only possible, and furnish no grounds upon which to base an estimate of just compensation. Without reference to the foregoing authorities in support of this propo-

sition, it seems so clear upon principle that it cannot be seriously questioned. What would be the measure of damages if a court should attempt to allow a railroad company for such future uses of its right of way as it might possibly at some time in the future desire to appropriate it to? Certainly it could not be the market value of the land, because, as before said, the railroad, notwithstanding the condemnation, continues to own it with the right to use it. Conceding that the vacant right of way is suitable for a passenger station, and that the company may possibly some time want to use it for that purpose, any attempt to estimate compensation for the loss of that right must be the merest guess or speculation. Just compensation "is the loss sustained in dollars and cents, and the loss must be shown, together with its amount; not necessarily with precision and accuracy, but approximately; and, if damage is shown, but the amount is not approximately proved, there can be no more than nominal damages allowed." *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, supra. What has been said discloses all the substantial questions raised on this record.

Upon the evidence the verdict of the jury was the only one which could have been properly returned under the law applicable to the case. Therefore, even though the instructions given do not accurately state the law (as some of those given at the instance of appellant certainly do not) the error must be treated as harmless. We are clearly of the opinion that no reason for a reversal of the judgment below is shown, and it will accordingly be affirmed. Affirmed.

(157 Ill. 89)

CHICAGO & N. W. R. CO. v. TOWN OF CICERO.¹

(Supreme Court of Illinois. April 1, 1895.)

Appeal from superior court, Cook county; Jonas Hutchinson, Judge.

Petition for condemnation by the town of Cicero against the Chicago & Northwestern Railway Company. There was judgment of condemnation, followed by an order for possession. From this order, defendant appeals. Affirmed.

L. W. Bowers and A. W. Pulver, for appellant. F. Q. Ball, for appellee.

PER CURIAM. This is an appeal by the Chicago & Northwestern Railway Company from an order of the superior court of Cook county, authorizing appellee, the town of Cicero, to take immediate possession of the strip of land, 66x100 feet, which was condemned by the judgment of said court in said cause on the petition of appellee for the purpose of a crossing of West Fifty-Third street over the tracks and right of way of the appellant company; appellant having, before the entry of said order, prosecuted its appeal to this court from the judgment of condemnation. Inasmuch as that judgment has been affirmed by this court (41 N. E. 640), this order will also be affirmed. Order affirmed.

¹ Rehearing denied October 15, 1895.

(157 Ill. 126)

GALT v. CHICAGO & N. W. RY. CO.¹(Supreme Court of Illinois. May 15, 1895.)²

EMINENT DOMAIN — RAILROAD COMPANIES—TRESPASS—STREETS.

1. The owner of land facing on a street, which street has been openly and exclusively in the possession of a railroad company all the time he owned said land, and for many years before he bought it, has no right of action against the railroad company for trespass, since the alleged trespass occurred before he bought, and it is presumed that the price of the land was adjusted with reference to the proximity of the railroad.

2. Where the company first fenced in the entire street, and maintained a single track thereon, the construction of a second track within the limits so fenced in does not constitute a new or distinct act of trespass.

Magruder, J., dissenting.

Appeal from circuit court, Whiteside county; John D. Orabtree, Judge.

Action of trespass by Thomas A. Galt against the Chicago & Northwestern Railway Company. Defendant obtained judgment. Plaintiff appeals. Affirmed.

This was an action of trespass *quare clausum fregit*, by appellant against appellee, in the circuit court of Whiteside county, to recover damages alleged to arise by reason of the entry upon, and construction of appellee's railroad in, the street along and in front of appellant's land; the declaration, which contained but one count, alleging "that the defendant on May 1, 1886, at," etc., "and on divers other times between that day and the commencement of this suit, with force and arms," etc., "broke and entered the close of the plaintiff, situated in the city of Sterling, in the county of Whiteside; that is to say, a certain close, being all of the northeast fractional quarter north of Rock river, of section 28, and the southeast quarter of section 21, and the southwest quarter of section 22, in township 21, range 7, in said county, lying south of a continuous and most direct line drawn on and across all of said premises, on the south line of the most southerly row of blocks thereon, in the city of Sterling," etc. Pleas of (1) not guilty; (2) *liberum tenementum*; (3) license from the plaintiff; (4) statute of limitations of five years; and (5) license from grantors of plaintiff,—were set up in defense of the action. Replications: (1) *Similiter* to first plea. (2) The several pleas of.—First, *liberum tenementum*; second, of license from the plaintiff; third, the statute of limitations; and, fourth, of license from plaintiff's grantors,—were specially traversed. And (3) a specific denial that the grantor of plaintiff was the owner, or had power to grant such license. A jury was waived, the case submitted to the court, and a finding and judgment entered for the defendant. Motion for a new trial was overruled, and the plaintiff prosecutes an appeal

to this court. Other necessary facts will be found in the opinion.

J. G. Manahan, for appellant. William Barge, for appellee.

PHILLIPS, J. (after stating the facts). The land or close in question, of which appellant became the owner on January 10, 1883, and has since been in possession, is bounded on the north by Front street, one of the streets of the city of Sterling, on the south by Rock river, and on the east and west, respectively, by certain other streets in said city. The right of way of the railroad, to the width of 100 feet, extends along the entire front of appellant's land, practically occupying the whole street, which, at that place, appears to have been originally 100 feet wide. It appears that the Galena & Chicago Union Railway occupied Front street in 1854-55, opposite and in front of the land, made excavations for its roadbed, and constructed a single track along the center line of said street, and continuously used the same for operating its road, until 1864, when it became consolidated with appellee, the Chicago & Northwestern Railway Company, which latter company has ever since used said track and right of way. In 1889,—some two years before the bringing of this suit,—appellee laid another track, parallel with the one already on said street, making necessary excavations, etc., and has since used the same for railroad purposes. It seems that switches and side tracks have also, during its occupation by the railroad company, been placed upon the street. The predecessor of appellee used the track thereon as early as the fall of 1855, and very soon thereafter that portion of Front street, or land to the width of 100 feet, 50 feet on each side of the center of the track, was inclosed by the railroad company with a fence, except at places on the south side, where the river rendered a fence impracticable or unnecessary. It is reasonably certain, from the evidence, that the railroad company was in actual possession of the entire street, opposite the land now owned by the plaintiff, as early as 1854, and the same has been continuously used for railroad purposes ever since, without question or objection by abutting owners, the city of Sterling, or the public, until the institution of this suit. The city of Sterling was first incorporated in 1855, although that village was laid out and platted as Chatham as early as 1839, and Front street (then River street) and others opened and dedicated to the public use, and have ever since been held and treated as public highways of the municipality. No express license or grant from the local municipal authorities for the location and construction of the railroad in the street, or permitting the railway company to appropriate the same for a right of way, was shown or appears to have been given. It is not pretended that any compensation was made by the railway company to the owner of the land for the damages that

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

would ensue by reason of its appropriation of the street for railway purposes, or which would be occasioned by the operation of the road. In fact, the condition of the law was such at that time that damages sustained by the abutting owner because of the construction and operation of a railroad in the street were not recoverable, except in cases of direct or actual physical injury to the land itself, so that its appropriate use and enjoyment by the owner was materially interrupted, and its value substantially impaired. *Rigney v. City of Chicago*, 102 Ill. 64. And not until the adoption of the constitution of 1870 was redress afforded the abutting landowner for damages of the character here sought to be recovered, to land not taken. Under the provision of the present constitution, damages ensuing by reason of the construction and operation of a railroad along and upon a street, which impairs the right of use and enjoyment of adjacent property, may be compensated for and recovered in an action on the case by the owner. *Rigney v. City of Chicago*, supra; *Railroad Co. v. Ayers*, 106 Ill. 511; *Culbertson & Blair Packing & Provision Co. v. City of Chicago*, 111 Ill. 651; *City of Chicago v. McDonough*, 112 Ill. 85. This doctrine has no special application, however, in the present case. The plaintiff brought trespass *quare clausum fregit* to recover damages to his land by reason of the alleged unauthorized invasion and use by the defendant of the abutting and contiguous street. Counsel for appellant claims that the portion of said premises which is in the exclusive possession of plaintiff was not invaded by the defendant, and that the part actually invaded (i. e. the public street) was in possession of the public, and only subordinately in the possession of the plaintiff; that is, he has such possession as the law recognizes as being in an owner under the circumstances,—such possession as is not inconsistent with the public easement.

The important question first presented, and naturally arising upon this record, is whether the action, for the purposes for which it was brought, may be legally maintained. We are cited to no case—nor, indeed, do we think any can be found—where this action of trespass has been invoked and sanctioned for the recovery of damages of the character here claimed. It is conceded that, in respect of the premises in the exclusive possession of the plaintiff, there was no invasion or breaking of the close, unless the alleged unauthorized entry upon the street abutting, by the railroad company, can be construed to amount to such breaking. The plaintiff, it may be said, was not in the actual possession of the close; yet, being the owner of the paper title, he was, as against a wrongdoer, or third parties not in actual adverse occupancy, in the constructive possession, which is uniformly held to be sufficient, in such cases, to enable the owner to maintain the action. 2 Greenl. Ev. § 614, note A. It is not pretended that the plaintiff was the owner or in possession of the premises at the time

of the original entry upon and appropriation of the street by the railroad company. And his possession can have relation only to the time when he became owner, and to injuries to his possession occurring thereafter, unless, as appears to be supposed, by reason of the acquisition of title, he also acceded to the right, if any, to complain for injuries to the close occasioned by the unauthorized original entry of the railroad company upon the street while the grantor of plaintiff was owner and in possession. In other words, this case is predicated upon the theory that in respect of damage to the possession, ensuing by reason of the alleged trespass, the plaintiff has the right to maintain *quare clausum fregit* for injuries to the close prior to his acquisition of title or possession. It is practically undisputed that the railroad company entered upon and constructed its road in Front street, then known as "River Street," in the years 1854-55, and that the plaintiff never had or claimed possession or ownership of any part of the abutting premises until January 10, 1883, when the land was conveyed to him by deed. The act of trespass, or breaking of the close, was therefore committed, if at all, long before the plaintiff became the owner of the premises, and while his grantor was in possession as owner. The action of trespass *quare clausum fregit*, and the principles which govern it, are well established, and generally understood. Possession by the plaintiff, either actual or constructive, is indispensable. The foundation of the right to bring the action is the invasion or disturbance of the plaintiff's possession. It matters not that one be not the owner of the paramount or other paper title; for, as against a stranger or wrongdoer having no right of possession in himself, nor authority from the lawful owner, mere proof of possession by the plaintiff will suffice to support the action. 2 Greenl. Ev. § 618. In *Cook v. Foster*, 2 Gilman, 652, this court, in defining the action, among other things, said: "The basis of the action is an injury to the possession. No person is entitled to recover damages for the injury, but the one who has the actual * * * or constructive possession of the land. A party having the actual and lawful possession may maintain the action. The real owner, where there is no adverse possession, can maintain the action, on the principle that the possession, in such case, follows the ownership. When there is an adverse possession, the owner is not allowed to bring this kind of an action." And the elementary principles here stated have found expression in very many subsequent cases in this court, among which see *Halligan v. Railroad Co.*, 15 Ill. 558; *Dean v. Comstock*, 32 Ill. 173; *Winkler v. Meister*, 40 Ill. 349; *Barber v. School Trustees*, 51 Ill. 396; *McCormick v. Huse*, 66 Ill. 315; *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272. According to Blackstone, possession was, in the eyes of the law, esteemed sacred and inviolable,

whether the land be set apart and inclosed by a material and visible boundary, as a fence, or by an ideal, invisible one, existing only in contemplation of law. In either case, every unauthorized entry upon the soil of another, or unwarrantable invasion of his peaceable possession, with force, however slight, was a breaking of the close, from which the common law regarded some damage to necessarily ensue; and whatever loss or injury the plaintiff suffered, special or otherwise, his damages by reason thereof were recoverable under this form of action. 3 Bl. Comm. 209. It is unnecessary to dwell upon this branch of the inquiry. That the action must be brought by the party whose possession has been disturbed or invaded is too rudimental and familiar to warrant further discussion.

It is exceedingly difficult to conceive how, on principle, trespass *quare clausum fregit* can be maintained by an abutting owner, where, as here, the alleged entry was upon a public street, regularly platted, laid out, and dedicated to public use. As before said, the street in question, then known as "River Street," was platted as one of the streets of the village of Chatham in October, 1837, which plat was subsequently recorded in February, 1839. The village of Chatham was afterwards replatted as the city of Sterling, the plat duly recorded, and the street in question shown thereon as on the old plat of Chatham, except that its name had been changed to that of "Front Street"; and so it was at the time the city of Sterling was incorporated, in 1855, and has ever since been treated as one of the streets of that city. The making and recording of the plat was a statutory dedication of the street to the public use. The fee did not remain in the adjacent proprietors, but became at once vested in the municipality (City of Quincy v. Jones, 76 Ill. 242; Zinc Co. v. City of La Salle, 117 Ill. 411, 2 N. E. 406, and 8 N. E. 81; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866), and the possession and right of use of the street were in the public. This being so, it became manifest that the entry upon and the occupation of a street by the railroad company did not constitute a breaking of the close which plaintiff subsequently acquired. And the case of Railway Co. v. Hartley, 67 Ill. 439, and other like cases, where the dedication was one only at common law, the fee in the street remaining in the abutting proprietors, can have no application. It is a misapprehension of counsel to suppose that the street was "subordinately" in the plaintiff's possession.

But in any event, whether the fee in the street was in the municipality, or in the abutting proprietor, as contended, the injury was one to be complained of by the person who at the time was in possession; and he was the party, if any one, who became entitled to recover the damages, once for all, occasioned

by the alleged trespass, if any was committed by the railroad company. The entry upon and the occupation of the street by the railroad were permanent in character. And appellant, when he purchased, took the land with the street in front of it thus occupied and used, and presumably had the benefit of the consequent depreciation in the price of the land he bought, if it was depreciated by such use of the street. Insurance Co. v. Heiss, 141 Ill. 35, 31 N. E. 138; Loeb's Case, 118 Ill. 203, 8 N. E. 460. That the cause of action for the trespass is not transferable with the land, and does not inure to the benefit of the grantee, even if assigned in writing, has been held by this court in a number of well-considered cases. In Railroad Co. v. Maher, 91 Ill. 312, an action of trespass was brought by the grantee to recover damages to certain dock property. The injury—occasioned by the erection of a bridge pier in the river—was committed while the property was owned by the grantor. And it was contended there, as it is here, that the injury was a continuing one, for which the grantee might recover damages accruing since she became owner. On the other hand, it was insisted that the injury was permanent, depreciating the price of the land, and that for all damages, past and future, the grantor may have sued and recovered; that the trespass was on the grantor's land, and the damage, if any, was sustained by him; and that he could not and did not assign his cause of action to the grantee by the conveyance of the land. The court there said: "We are not aware that any court has ever held that a mere trespass to land, giving a right of action, can be assigned by an instrument in writing for the purpose, or by conveying the land. Such a right of action is not appurtenant to the land, nor does it, like a covenant for title, inhere to or run with the land. It, when accrued, is a personal right, and is not transferable. It then follows that appellee did not acquire the right of action which accrued to her husband by the construction of this protection to the bridge. The action for that wrong was vested in him, and she can recover nothing on account of a placing of the obstruction in front of the dock." And this doctrine was held to apply, and defeat recovery by the grantee of damages sustained by the continuance of the obstruction after she became owner. The right of recovery for all damages was in her husband, and not susceptible of assignment to her.

It would seem to follow, as a necessary corollary, that if, as we have seen, the right of action in the grantor to bring trespass or trespass on the case for such damages is not transferable to, and cannot be maintained by, his grantee, even where expressly assigned to him, a fortiori, he would not be entitled to bring trespass *quare clausum fregit*. Trespass on the case is maintainable to recover damages occasioned by an act committed without force, actual or implied, or, having been the result

of force, where the injury was not immediate, but consequential, or the matter affected not tangible (1 Chit. Pl. 132); while the action of trespass *quare clausum fregit* necessarily involves and implies direct force, and is brought to recover damages thus occasioned by reason of the wrongful invasion and disturbance of the possession of the person at the time in the enjoyment of the close. Ordinarily, this action is maintainable by the person who is owner of, or had property in, the soil, or is in actual possession by entry. The right of action is personal to the individual whose possession has been wrongfully invaded or disturbed, and no authority is shown which holds that this right of action can be transferred by conveying the land, or by an instrument of writing executed between the parties for that purpose. So, in *Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, which was an action on the case, brought by appellee, grantee of certain lots in Chicago, to recover damages by reason of cinders, ashes, smoke, etc., thrown upon the premises by the operation of appellant's road along and upon the adjacent street, counsel for the defendant submitted at the trial, as a proposition of law to be held by the court, that the plaintiff, having purchased the property after the railroad was built and in operation, was not entitled to maintain the suit, for the reason that the entire cause of action for which he was suing was in his grantor, and that it made no difference whether his grantor had sued for the same, or not. This court, after an extended discussion, stated, in conclusion, "that, as the former owner could have sued and recovered for the depreciation in the value of the property caused by the railroad, the right of action was in him for a recovery of all damages that were or might be caused by the operation of the railroad, and that there is no right of recovery in his assignee, the appellee." The court below rejected the proposition offered, and this was held to be error. For that reason the judgment was reversed. Among other cases wherein this doctrine has found express approval may be cited *Railway Co. v. McDougall*, 118 Ill. 229, 8 N. E. 678; *Railway Co. v. Morgan*, 72 Ill. 155; *Railway Co. v. Wachter*, 123 Ill. 440, 15 N. E. 279; *Insurance Co. v. Helss*, supra. As observed in the Wachter Case, this principle can have no application where redress is sought for injuries arising from negligence of construction, or for the careless and willful maintenance or operation, of the road, whereby damage is occasioned to adjacent property. In all such cases the owner may unquestionably maintain his action; and the Wachter Case, supra, serves as an appropriate example of that class of cases, and sharply defines the distinction between it and the class of cases within which the present case falls. In the latter class, all special damages—present and prospective—to the owner of the land, which are occasioned, or which may be reasonably anticipated to result, from the proper construction, maintenance,

and operation of a railroad, in compliance with the laws of this state, "constitute, as to such landowner, one single, indivisible cause of action, which may be enforced under the eminent domain act, or any other appropriate form of action." Wachter's Case, supra. But aside from the consideration that the right of action for trespass to land is not susceptible of assignment so as to enable the assignee or grantee to enforce the same, the decisions of this court recognize and adhere to the doctrine, also, that in cases of this character, where the structure is permanent, and the injury therefore continuing, a recovery may be had once for all, by the owner, of all damages thereby occasioned, and if he sells or conveys the land to another the latter takes it with its surroundings, and at the decreased price. The grantee, in respect of the damages caused by the railroad, having been compensated in the reduced price at which he bought the land, on account of the permanent location and proximity of the railroad in relation to it, would be receiving pay for his damages a second time, if his present claim be allowed. *Railway Co. v. Morgan*, 72 Ill. 155; *Railroad Co. v. Loeb*, supra.

In the case at bar, appellant became the owner of the land long after the street in front of it had been entered upon, occupied for railway purposes, and inclosed as a right of way, with a fence, by the railroad company. The breaking of the close, if any was thereby committed, was an injury, not to the possession of appellant, but to that of his grantor, who was then the owner. Such grantor seeing fit not to complain of any trespass by the railroad, we are unable to perceive any legal principle which renders appellant competent to do so in his stead. Appellant bought the premises with the street along and in front of them occupied and in use by the railroad company as its right of way, and, by reason of the depreciation in the value of the land presumed to have been thereby occasioned, had the advantage of the decreased price. Presumably, at least, the damages, as to him, have been once paid, and to allow him to maintain this or any other action for the same cause would be to pay him such damages twice. The right of action, if any existed, was in the owner, immediately upon the commission of the injury, or construction of the road, to recover all damages,—past, present, and future. *Loeb's Case*, supra. But such owner was silent, and the railroad company had the open, exclusive, visible, notorious possession and use of the street, without interruption, as its right of way, for all purposes connected with the operation of the road, for practically 40 years.

While the declaration alleged the time of the commission of the trespass to be May 1, 1886, the evidence was not restricted, nor was the cause tried, upon the theory of any special injury at that particular time; and if it can be said that the construction of a

second or double railway track in 1889 was an additional burden placed upon the street, for which the plaintiff would be entitled to recover his damages thereby occasioned, it cannot avail in this suit. The railroad company, long anterior to that time, having been in the exclusive occupation of the street as and for its right of way, it is too manifest to admit of serious controversy that the laying of another track therein could not, in the nature of things, constitute a new or other breaking of the plaintiff's close. The gist of the action, or the invasion or disturbance of the plaintiff's possession, was committed, if at all, when the railroad company entered upon and occupied the street; and having continued its occupancy openly, notoriously, and exclusively ever since, the extent thereof being evidenced by the erection and maintenance of a fence to inclose its right of way, it is clear that the construction of a second track, parallel with the first one, cannot be regarded as amounting to a second entry, or a new and subsequent breaking of the close in question, and invasion of plaintiff's possession. The plaintiff, as has been said, bought the land with the railroad in front of it, along and in the street, and with all the indicia of permanency, and a proprietorship by the railroad company, incident to a right of way and the operation of a railroad upon it. The most that could be said in respect of this matter, under the declaration, is that, if it be conceded that there was a breaking of the close by the original entry upon the street, the subsequent building of a second track therein would amount to nothing more than matter of aggravation, which by new assignment, not attempted in this case, might be converted into a substantive cause of action. Gould, Pl. (5th Ed.) pp. 338, 339, §§ 109, 110, and note 14; Chit. Pl. 627 et seq. There being, therefore, no new assignment, and the plea of liberum tenementum, or freehold in the defendant, having been interposed to the declaration, the effect was to exclude any trespass other than that committed by the act of the defendant when it entered upon the street. The plea of liberum tenementum put in issue the title or ownership in respect of the particular close or land entered upon. And the trespass, by breaking and entering the plaintiff's close as alleged, in the absence of a new assignment alleging another and different close, or another and different trespass, would necessarily relate to the act of the defendant in breaking or entering upon the particular close described, committed at the time such entry was made. And this must be so, as there has been one entry, under which the railroad company has ever since occupied the street; and it would seem to have committed no new trespass, but only aggravation of the one already committed by the original entry many years before.

If this be not so, it is a sufficient answer to this contention that the laying of an ad-

ditional track parallel to the one already laid was not an improbable use which might be made of the right of way; such double or parallel tracks, then as now, being common and usual in the construction and operation of a railroad. Within the 100 feet in width constituting the right of way, everything essential and convenient to the safe and proper operation of the road might reasonably be expected to be placed. And the laying of an additional track is of such common occurrence and experience as to have been fairly anticipated and considered in the estimation of damages to which the owner of the land would have been entitled. This being, therefore, an element tending to enhance the damages which the grantor of appellant would have been entitled to recover by reason of the entry upon and occupation of the street by the railroad company, had he brought an action for that purpose, it follows necessarily, within the doctrine of the Maher and other cases, supra, that appellant would not be entitled to maintain an action to recover such damages, whether his grantor did so or not. Damages of this character were prospectively recoverable by the grantor. The laying of an additional track constituted an element as natural and probable on which to predicate prospective damages as ordinarily exists in those cases where such damages are allowable. The damages likely to flow from the entry upon and occupation of the street by the railroad must be presumed to have been anticipated, and they, together with all other damages directly ensuing, constituted an entirety, for which a recovery, once for all, might be had. 1 *Suth. Dam.* § 116. And it is as fair to presume that appellant received the benefit of it, in the reduced price of the land, as of any other element of damage entering into the calculation.

It is unnecessary to further prolong the discussion by a consideration of other points made, as they are practically disposed of by what has been said. We are satisfied that the action brought by appellant is not maintainable, and the judgment of the circuit court will be affirmed. Affirmed.

MAGRUDER, J., dissents.

(164 Mass. 338)

COMMONWEALTH v. NEWHALL et al.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 16, 1895.)

ITINERANT PEDDLERS—LICENSE TAX—CONSTITUTIONAL LAW—REGULATION OF COMMERCE.

1. A traveling troupe, consisting of a physician, a comedian, and others, who hired a hall for two weeks, and held entertainments therein, to advertise a patent medicine, and sold bottles of such medicine during the entertainment and afterwards, are itinerant vendors, within St. 1890, c. 448, defining such vendors to be those "who engage in a temporary or transient business in this state, either in one locality or in traveling from place to place selling goods, wares and merchandise and who for the pur-

poses of carrying on such business hire, lease or occupy any building or structure for the exhibition and sale of such goods, wares and merchandise."

2 St. 1890, c. 448, requiring itinerant vendors to pay a license tax, having been passed as an exercise of the police power of the state, and not for revenue, the enforcement of the tax against vendors of goods imported by a foreign corporation, the goods being sold in the form in which they were imported, is not a taxation of interstate commerce.

Report from superior court, Berkshire county; F. A. Gaskill, Judge.

Ira E. Newhall and James P. Campbell were convicted of engaging in itinerant peddling without a license, and the case was reported to the supreme court. Verdict sustained.

C. L. Gardner, Dist. Atty., for the Commonwealth. H. C. Joyner, for defendants.

BARKER, J. By the statute definition, all persons "who engage in a temporary or transient business in this state, either in one locality or in travelling from place to place selling goods, wares and merchandise and who for the purposes of carrying on such business hire, lease or occupy any building or structure for the exhibition and sale of such goods, wares and merchandise," are itinerant vendors. St. 1890, c. 448, § 1. The defendants' first contention is that they are not within this definition. They are part of a traveling troupe, which is composed of Indians, a comedian, and a physician, and which gives entertainments consisting of songs, dances, farces, Indian ceremonies, and lectures. The purpose of the troupe, and of their entertainments, is to advertise certain proprietary medicines. The troupe hired and occupied for two weeks a public hall in Great Barrington, and there offered for sale and sold, both during the entertainments, which were in the evenings, and during the daytime, bottles of the medicines, to such parties as called for them. Without considering whether the statute was meant to include all traveling troupes which, in the course of some entertainment to which the public are admitted, sell books explanatory of the entertainment, refreshments, or like wares, we are of opinion that upon the evidence the defendants were clearly engaged in the business of selling merchandise, and were for that purpose temporarily hiring and occupying a building for the exhibition and sale of their goods, and so within the statute. Whether St. 1890, c. 448, and St. 1894, c. 525, are open to objection as imposing a tax prohibited by the constitution of the commonwealth, is a question not raised, and upon which we express no opinion.

The defendants also contend that because they were employed by a foreign company, and had in their possession its goods, imported into this commonwealth for sale, and offered for sale here by the defendants in the same form and shape in which the goods were imported, the defendants were not liable for not having licenses as itinerant vendors.

This contention is not put upon the ground that the goods offered for sale were in the original packages, but upon the ground that the statute is a revenue statute, and that in the case of the present defendants the licenses required were merely for revenue, and their requirement void, as a tax upon interstate commerce, under the doctrine of *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829. But in that case the license, the requirement of which from the soliciting agent of a foreign manufacturer was held invalid, was a license which was not exacted, and did not purport to be exacted, in the exercise of the police power, but of the taxing power, of the state; being for general revenue purposes, as stated by the ordinance imposing it, and which ordinance was made by the municipality under a grant of authority to levy and collect license taxes. On the other hand, our statutes now under consideration purport to be, and are, passed under the police power of the commonwealth, for the purpose of preventing and punishing fraud in sales by itinerant vendors; and an examination of the statutes makes it appear that such is their real design, and that the provisions for state and local licenses are merely incidental means of compensating the state and the localities in which the itinerant vendors ply their business for the expenses of necessary state and local supervision. See *Com. v. Crowell*, 156 Mass. 215, 30 N. E. 1015, and cases cited.

Sentences having been imposed upon the defendants in accordance with the provisions of St. 1895, c. 469, the verdict and sentences are to stand. So ordered.

(184 Mass. 335)

PIXLEY v. PIXLEY et al.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 16, 1895.)

TAX DEED—SUFFICIENCY—RECITALS AS TO CAUSE OF SALE.

A tax collector's deed, reciting that the sale was made for unpaid taxes, after demand for payment, and the expiration of 14 days after demand, and the giving of proper notice of sale, is a sufficient compliance with Pub. St. c. 12, § 38, requiring such deed to state the cause of the sale.

Exceptions from superior court, Berkshire county; Elisha B. Maynard, Judge.

Action of trespass by Levi Pixley against Edward Pixley and another. There was a verdict for defendants, and plaintiff excepts. Exceptions overruled.

M. Wilcox, for plaintiff. W. O. Spaulding and H. C. Joyner, for defendants.

KNOWLTON, J. The only question in this case is whether the collector's deed is fatally defective, for want of a sufficient statement of the cause of the sale of the real estate. Such a statement is required by Pub. St. c. 12, § 38, and this requirement has been construed with considerable strictness. *Harrington v.*

Worcester, 6 Allen, 576; Reed v. Crapo, 127 Mass. 39; Langdon v. Stewart, 142 Mass. 576, 8 N. E. 605. But the deed before us differs materially from any of those which have been held to be void for want of proper recitals. While it does not follow the exact words of the legislative form for a collector's deed of St. 1888, c. 390, it contains language which amounts, in substance, to a statement that the sale was made because the taxes remained unpaid after a demand duly made for the payment of them, and the expiration of 14 days from the time of the demand, and the giving of proper notices of the time and place of sale by advertising in a newspaper and by posting. As was said in Adams v. Mills, 128 Mass. 278, 281, "No one reading this deed could fail to understand that the sale was made because the tax remained unpaid, after demand, for more than 14 days before the land was advertised, and was still unpaid when the sale was made." In this particular the deed is informal, and less specific than is desirable, but it is intelligible, and it conveyed the title which it was intended to convey. Exceptions overruled.

(164 Mass. 350)

**CHELSEA DYE-HOUSE & LAUNDRY CO.
v. COMMONWEALTH.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 16, 1895.)

**CONDEMNATION OF LAND FOR SEWER—DAMAGES—
EASEMENTS—ADDITIONAL SERVITUDE.**

1. Under St. 1889, c. 439, § 4, as amended by St. 1890, c. 270, § 1, relating to the Metropolitan sewer, and providing that the commonwealth shall pay all damages sustained by reason of the taking of land for sewer purposes, one who used the waters of a natural pond on his land, in his business, could not recover for the temporary drying up of the same, caused by the work of constructing a part of the sewer under a highway.

2. The construction and maintenance of a sewer under a public highway imposes no additional servitude on the land under the highway.

Case reserved from superior court, Suffolk county.

Petition by the Chelsea Dye-House & Laundry Company against the commonwealth. Judgment for defendant.

Eugene P. Carver and Edward E. Blodgett, for petitioner. Wm. D. Turner, for respondent.

HOLMES, J. The petitioner seeks to recover for the temporary drying up of its pond, caused by the work of constructing a part of the Metropolitan sewer in a public highway. After the work was finished the water returned to the pond. The statutes under which the work was done and the damages are claimed are St. 1889, c. 439, and St. 1890, c. 270. By section 1 of the latter act, amending section 4 of the former, the commonwealth is to pay "all damages that shall be sustained by any person or corporation by

reason of such taking or entering as aforesaid." The entering referred to is the entering of existing sewers, as authorized earlier in the section. With that we have nothing to do in this case. The petitioner's case must stand on the word "taking." But as the sewer was built under a highway, and as the board of sewerage commissioners only purported to take "the right to carry and conduct under the following described land [viz. the highway], and therein to construct, operate, and forever maintain an underground main sewer," etc., no additional servitude was imposed upon the land under the highway. Lincoln v. Com. (June 12, 1895) 41 N. E. 112. No right of any sort was taken in the plaintiff's land.

But we do not need to decide that no damages can be recovered in any case, under this act, where property not taken in terms is injured in a permanent way. The question is one of construction, and may be left open until it is necessary to decide it. It is enough to say that it is not disposed of by any authority which has been called to our attention. There are further considerations in the case at bar. So far as appears, nothing has been done which would have been actionable if no statute had been passed. It is true that some statutes have been interpreted as giving damages for harm for which no action could have been maintained at common law. But the fact mentioned is a circumstance to be considered. The damage in this case not only would have been *damnum absque injuria* at common law, but it was temporary in its nature. It is not a permanent consequence of maintaining the sewer, but was merely a temporary interruption, caused by the work upon it. Whatever latitude may be given to the statute, it does not extend to damages of this sort. As has been held in Lincoln v. Com. (decided since the argument) 41 N. E. 489, such temporary damage is left by the statute to lie where it falls. See Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9.

It follows that, in the opinion of a majority of the court, the judgment must be for the defendant. Judgment for defendant.

(164 Mass. 341)

SCAMMELL et al. v. CHINA MUT. INS. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 17, 1895.)

MARINE INSURANCE—UNCERTAIN AMOUNT—VALIDITY OF CONTRACT.

1. Where, on application for insurance on a cargo soon to be shipped, facts necessary to determine the amount of insurance and premiums are not known, a memorandum agreement for insurance to a certain amount, at a reasonable premium, and providing for a policy when the facts are found out by the applicant and made known to the insurer, is a valid contract.

2. Where a contract is made to insure a cargo to a certain amount, at a reasonable rate of premium, till the facts necessary to determine premium to be charged, and the amount for which a policy will be issued, can be determined

by the applicant, and sent to the insurer, failure of the applicant to send such information without unreasonable delay to the insurer, after receiving it, avoids the contract.

Report from superior court, Suffolk county; James R. Dunbar, Judge.

Action by John W. Scammell and others against the China Mutual Insurance Company, for insurance. A verdict was directed for defendant, and the case reported to this court, judgment to be entered on verdict if the ruling was correct; otherwise, to stand for trial. Judgment on verdict.

Chas. Theo. Russell, for plaintiffs. L. S. Dabney and J. D. Bryant, for defendant.

KNOWLTON, J. The memorandum relied on by the plaintiffs as a contract is in the form of an application for insurance, containing a brief statement of particulars, and is marked "binding." At the bottom are the words, "Send policy to Walker & Hughes, 63 Wall street, New York." On its face it purports to be a preliminary and temporary arrangement, which contemplates the making of a full and definite contract in the form of a policy covering the same subject, with additional provisions. The premium which is to be paid as the consideration for the insurance, and which is, perhaps, the most important of the terms of the contract, is not fixed, but is left to be agreed upon when further information is obtained. At the time of the application the only information which the parties had in regard to the freight which was the subject of the insurance was derived from a very brief telegraphic message. Several of the particulars given in the application are stated in the most general terms, and against the word "premium" are written the words, "open for particulars." It is contended with much force by the defendant that the memorandum lacks the essential features of a contract, in its failure to fix exactly the amount of the insurance, or to state the rate of premium, and authorities are cited which go far towards sustaining this contention. *Hartshorn v. Insurance Co.*, 15 Gray, 240, 244, 247, 249; *Insurance Co. v. Wright*, 23 How. 401, 408, 409; *Insurance Co. v. Ewing*, 92 U. S. 377-381; *Kimball v. Insurance Co.*, 17 Fed. 625; *Hamilton v. Insurance Co.*, 5 Pa. St. 389; *Strohn v. Insurance Co.*, 37 Wis. 625-631. In order to bind the parties by a contract of insurance, all the essential elements of the contract must be agreed upon, but in a case like this, where it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. The memorandum, applied to the admitted facts in this case, shows plainly that the parties desired to enter into a definite contract of insurance, in the form of a policy which should clearly state their rights and obligations. They had not sufficient facts in their possession to enable them to determine what

would be a reasonable rate of premium, and the defendant declined to fix the premium until further information could be obtained. The risk was to commence soon, and the plaintiffs desired to be protected from the inception of it. The defendant was willing to give them this protection on reasonable terms, and both parties doubtless expected that the additional information necessary to enable them to make the final contract for the voyage would soon be obtained. They therefore agreed that the insurance should be binding, to the amount of \$3,000, temporarily, at a rate of premium which should be fair and reasonable, until such time as the rate could be fixed and the contemplated contract entered into. Each doubtless thought the other would act reasonably, by agreeing to a fair rate of premium, when the time should come for making the final contract, and each was willing to trust the other to that extent. Plainly, neither of them expected this to be anything more than a temporary arrangement to meet the emergency until further particulars could be obtained. We think this was a binding contract for the purpose for which it was made. If the vessel had sailed, and had been lost at sea, before the plaintiffs had a reasonable opportunity to furnish the further particulars, the defendant would have been bound to pay the insurance, and the plaintiffs would have been bound to pay a premium, at a reasonable rate, for the risk as it was when the contract was made. If the plaintiffs, when they received the charter party, had communicated the additional information obtained from it to the defendant, the parties would probably have agreed upon a rate of premium, and have embodied their contract, as then made, in a policy. But, if they had then been unable to agree upon the premium, their temporary contract would have been terminated by its own limitation; the plaintiffs would have been at liberty to seek insurance elsewhere, and would have been liable to pay the defendant, at a reasonable rate, for the time the insurance had continued. The legal effect of the memorandum is the same as if it stated, in terms, that the insurance should continue, at a reasonable rate of premium, until the plaintiffs had an opportunity to furnish the further particulars; that the plaintiffs would furnish them, and that both parties would then endeavor to agree upon a premium, and make a contract in the form of a policy. The plaintiffs were bound by their implied agreement to furnish the particulars without unreasonable delay, and upon their failure to do so the preliminary contract of insurance came to an end. This is in accordance with the decision in *Baker v. Assurance Co.*, 162 Mass. 358, 38 N. E. 1124, although in that case the agents who made the agreement had their offices side by side in the same building; and it was held, upon the conflicting testimony, that there might have been a finding either that the parol contract was for insurance to continue

temporarily, for a short time, until one of the agents should terminate it, or that it should continue only until the expiration of a reasonable time to enable the plaintiffs to ascertain in what terms they wished to take policies in writing. It was held that there was no evidence which would warrant a finding that there was a contract of insurance for a year.

In the present case all the additional facts necessary to enable the parties to complete their contract, and to put it in the form of a policy, were known to the plaintiffs as soon as they received the charter party. This was sent them by the master of the vessel, and they received it about September 12, 1890. The memorandum sued on bears date July 30, 1890. The vessel did not sail on the voyage by which the freight was to be earned until September 22, 1890. The two particulars of which the parties were ignorant, which were important in determining the rate of premium to be paid, were the nature of the cargo and the port of destination. The cablegram which furnished their only information on the subject was in these words: "The vessel is fixed to load on the spot. Wood, forty francs. Queenstown, etc. for orders. U. K. or continent." The charter party shows that the cargo was to be Quebracho wood, in logs, and contains stipulations in regard to their length, and how they should be loaded. The charter party also shows that the vessel was to proceed to Queenstown, Falmouth, or Plymouth for orders, and was liable to be ordered to any port in the United Kingdom, or on the continent between Hamburg and Havre, Rouen excepted. It also contains provisions in regard to the mode of giving the orders. There was uncontradicted testimony that this kind of wood was very heavy, and was considered an undesirable risk. There was also evidence, which was not disputed, that the language of the cablegram and of the memorandum, "on the continent," might include St. Petersburg and ports on the North Sea, for which rates of insurance for a vessel starting at that season of the year would be very high, and that the charter party included only the usual range of ports on the continent. The plaintiffs' agent testified, and it was not denied, that he tried to have the defendant's agent fix the rate of premium when the application was presented, but the defendant's agent said he would rather leave it open for particulars of the cargo. There is nothing in the circumstances to show that the rate of premium was to be kept open for any other particulars than those which were shown by the charter party, and these were in the possession of the plaintiffs, at their office in St. John, 10 days before the vessel sailed. It was the duty of the plaintiffs to communicate these facts to the defendant at once, upon their receipt of them. Instead of doing so, they made no communication to the defendant until February 11, 1891, when they made a claim for a total loss. They broke their implied contract when they

neglected to communicate these facts within a reasonable time after the receipt of the charter party. Even if they were justified in waiting for the letter from the master of the vessel, which showed the exact quantity of the cargo, they failed to furnish the particulars to the defendant within a reasonable time, for they received this letter on October 27, 1890. This was almost two months before they got information of the loss of the vessel, which came by telegraph on December 16th. The vessel was abandoned at sea by the captain and crew on November 16th. There is no ground for the contention that the contract contemplated a delay in fixing the premium until the voyage should be made to Queenstown, Falmouth, or Plymouth, and orders should be received there to proceed to the port of discharge. To wait for the receipt of these orders, and the communication of them to the defendant in the ordinary way, would be to postpone the making of the contract of insurance until after the termination of the risk. Upon the conceded facts of the case, the plaintiffs failed to furnish the defendant, within a reasonable time, with the facts which were to be the foundation of the contemplated substantive contract of insurance, and the incidental and temporary arrangement made at the time of the application expired by the limitation which was one of its implied terms. The construction which we put upon this preliminary arrangement, in regard to the undertaking of the plaintiffs to furnish additional facts without unnecessary delay, accords with the testimony of all the experts as to the usage in similar cases. This usage almost necessarily results from the fact that the essence of a contract of insurance is to provide indemnity upon the payment of an agreed sum, and not to insure for a price to be determined upon a quantum valebat after the termination of the risk.

We see no error in the exclusion of certain answers in the depositions offered by the plaintiffs. Only one or two of those answers, if received, would have had any tendency to show that the contract made in this case was to continue after the time when the plaintiffs should have furnished additional particulars to the defendants, and these were statements of the understanding of insurers, which were not competent to affect the interpretation which the law gives to such a contract. *Odiorne v. Insurance Co.*, 101 Mass. 551-553; *Haskins v. Warren*, 115 Mass. 514, 535, 536. A majority of the court are of opinion that there should be judgment on the verdict.

(164 Mass. 398)

COMMONWEALTH v. BOUVIER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

PERJURY—INDICTMENT.

1. Under Pub. St. c. 205, § 5, providing that an indictment for perjury in a criminal case

shall be sufficient if it set out the substance of the offense charged against the defendant, such an indictment need not allege that the court trying the case was then held for criminal business.

2. An averment in an indictment for perjury, that defendant swore that he did not sign the complaint in a criminal case, and that the name subscribed as complainant was not in his handwriting, is equivalent to an averment that defendant denied having signed the complaint as complainant.

Exceptions from superior court, Worcester county; Justin Dewey, Judge.

Victor A. Bouvier was indicted for perjury. From a verdict of guilty, defendant brings exceptions. Exceptions overruled.

The indictment in this case charged that the defendant, to procure the acquittal of George H. Dumas, on trial for selling liquor without a license, falsely swore that he did not sign the complaint against him.

Herbert Parker, Dist. Atty., for the Commonwealth. Charles Haggerty and J. R. Kane, for defendant.

ALLEN, J. 1. The act charged in the complaint against Dumas was a crime under the laws of this commonwealth, and the indictment alleges that this complaint was tried in the First district court of Southern Worcester, before the justice of that court. The indictment clearly alleges that the perjury was committed in the trial of a crime, and it was not necessary to allege that the court was then held for criminal business. Pub. St. c. 205, § 5; Com. v. Hatfield, 107 Mass. 227, 230.

2. The indictment sets forth that the defendant swore that he did not sign said complaint, and that the name which was subscribed to it as complainant was not in his handwriting. This includes an averment that he denied having signed the complaint as complainant. Exceptions overruled.

(164 Mass. 380)

WELLINGTON et al v. BOSTON & M. R. R.
(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 17, 1895.)

CONDEMNATION PROCEEDINGS—DAMAGES.

In an action for damages for the taking of land for railroad purposes, it is improper to allow damages to a parcel of land used for other purposes than the land actually taken, and separated from it by a street.

Exceptions from superior court, Middlesex county; Albert Mason, Judge.

Petition by James E. Wellington and others against the Boston & Maine Railroad Company for damages for taking of land. On motion before the superior court for acceptance of the report of damages made by the sheriff and jury, the court directed an acceptance of the report, and defendant excepts. Exceptions sustained.

The petition in this case asked for, and the report of the sheriff and jury allowed, dam-

ages for land, the use of which was separate and distinct from that actually taken by the railroad, and separated from it by plat lines and a street wrought and in use.

John D. Long and B. E. Perry, for petitioners. Solomon Lincoln and Sigourney Butler, for respondent.

BARKER, J. When this case was first here, we saw nothing to indicate that any recoverable damages were caused to lands of the petitioners not taken, save to their lots immediately adjoining the parcels taken or abutting on the same street with the railroad. Wellington v. Railroad, 158 Mass. 185, 33 N. E. 393. In the opinion of a majority of the court, no reason to change this intimation is shown by the present bill of exceptions, and we think the defendant was entitled to the ruling requested to that effect. Upon the evidence, all the other lands of the petitioners had been made separate and distinct parcels by transforming the locality into a village with wrought and traveled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons, and each of which then owned by the petitioners was held for the distinct purpose of independent sale. Whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all in one ownership, and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets, wrought and in use for travel, and by recorded paper lines, and there is no evidence that any two of the lots are used together, or are held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel. Exceptions sustained. Verdict set aside.

(164 Mass. 391)

ROGERS v. COY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 17, 1895.)

LANDLORD AND TENANT—ACTION FOR RENT—LIABILITY OF WIFE.

1. In an action for rent it is only necessary to prove the contract and possession, not the beginning or termination of the tenancy.

2. A married woman, living with her husband, and occupying the premises as tenant with his assent, is liable on her agreement to pay the rent.

Exceptions from superior court, Suffolk county.

Action for rent by Rogers against Coy. Defendant had judgment, and plaintiff excepts. Exceptions sustained.

Foster Rogers, for plaintiff. J. W. Keith, for defendant.

MORTON, J. This is an action for use and occupation by the defendant of a certain tenement belonging to the plaintiff. The defense is that, at the time when the plaintiff testifies that the defendant became his tenant, her husband was tenant at will of the premises, and that no termination of his tenancy was shown. The action, however, does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter. *Cobb v. Arnold*, 8 Metc. (Mass.) 398, 402; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901; *Henwood v. Cheeseman*, 3 Serg. & R. 500; *Barron v. Marsh*, 63 N. H. 107; *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50; *Dolby v. Iles*, 11 Adol. & E. 335, 2 Dane, Abr. 442, 446; *Tayl. Landl. & Ten.* (7th Ed.) §§ 641, 654; 2 *Wood, Landl. & Ten.* § 1332. The plea "nil habuit in tenementis" would not constitute a defense. *Tayl. Landl. & Ten.* (7th Ed.) § 654.

In the present case there was evidence of admissions on the part of the defendant from which the jury might have found that she was in occupation of the tenement during the time claimed by the plaintiff, as his tenant, with her husband's assent. The fact that she was a married woman, and living there with her husband, would not affect her liability, if the jury found that she was occupying as a tenant with her husband's assent, under an agreement to pay the rent herself. If the defendant contended that her agreement was merely collateral to her husband's alleged liability, that was a question of fact for the jury, under suitable instructions. Exceptions sustained.

(164 Mass. 393)

MACK v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 17, 1895.)

INJURY AT RAILROAD CROSSING—NOTICE.

Pub. St. c. 112, § 124, provides that at highway crossings a railroad company shall so protect its rails by plank or otherwise as to secure a safe passage across its road. Pub. St. c. 52, § 19, provides that a person injured through a defect in the highway "shall within 30 days thereafter, give to the * * * persons by law obliged to keep said highway in repair, notice of the time, place, and cause of said injury." *Held*, that a railroad company is entitled to notice of an injury caused by the insufficient planking of the tracks at a highway crossing.

Exceptions from superior court, Berkshire county; Ellisha B. Maynard, Judge.

Action by John H. Mack against the Boston & Albany Railroad Company for personal injuries. A verdict was directed for de-

fendant, and plaintiff excepts. Exceptions overruled.

M. E. Couch and O. J. Parkhurst, for plaintiff. Marshall Wilcox, for defendant.

LATHROP, J. This is an action of tort for personal injury sustained by the plaintiff while traveling upon a public highway in the town of Adams, at a place where the highway crosses at grade a railroad operated by the defendant under a lease. The crossing was covered with planks. The plaintiff, who was driving at night in a carriage drawn by a span of horses, so guided his horses that the left forward wheel of his carriage did not touch the planks, but struck one of the rails of the railroad. This caused the wheel to break; the horses ran; and the plaintiff was thrown out and injured. We assume, in his favor, without deciding, that there was evidence which would warrant a jury in finding that the planks did not correspond with the traveled part of the way, so that there was evidence of a defect in the way caused by the defendant. We are of opinion, nevertheless, that the presiding justice of the superior court rightly ordered a verdict for the defendant. The declaration does not allege that any written notice of the time, place, and cause of the injury was given to the defendant, and the bill of exceptions states that no such notice was served upon it. By Pub. St. c. 52, § 1, highways are to be kept in repair at the expense of the town, city, or place in which they are situated, "when other provision is not made therefor so that the same may be reasonably safe and convenient for travellers, with their horses, teams and carriages, at all seasons of the year." Section 18 of the same chapter gives a right of action to a person injured through a defect or want of repair in a highway, town way, causeway, or bridge, against the county, town, place or persons by law obliged to repair the same. Section 19 provides that "a person so injured shall, within thirty days thereafter, give to the county, town, place or persons by law obliged to keep said highway, town way, causeway or bridge, in repair, notice of the time, place and cause of the said injury or damage"; and by section 21 such notice is required to be in writing. The duty of keeping a highway in repair where it is crossed by a railroad is imposed upon a railroad corporation by Pub. St. c. 112, § 124, which provides that it shall "so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road." That the railroad corporation is entitled to a notice, under sections 19 and 21, for an injury caused by a failure on its part to perform the obligation imposed upon it by law, is settled by the case of *Dickie v. Railroad Co.*, 131 Mass. 516. Exceptions overruled.

(164 Mass. 422)

MELANEFY v. O'DRISCOLL.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)**GUARDIAN AND WARD—PAYMENT FOR MINOR'S
SUPPORT.**

The guardian of a minor who has property, may, without leave of court, pay to his ward's widowed mother reasonable charges for the child's support; the reasonableness of the payments to be determined on the guardian's accounting.

Report from supreme judicial court, Worcester county; James M. Barker, Judge.

Appeal from a decree of the probate court allowing the first account of James Melanefy, guardian of Margaret M. O'Driscoll, a minor. Heard on report. Affirmed.

J. E. Sullivan and D. F. O'Connell, for plaintiff. Francis M. Morrison, for defendant.

ALLEN, J. Even if it were assumed that a widowed mother is under the same obligation to support her minor children as a father would be, an allowance may nevertheless be made to her, towards such support, from the estate of a child who has property; and, if she herself were the guardian, such allowance might be made in the settlement of her accounts. *Dawes v. Howard*, 4 Mass. 97. In this instance, another person was appointed guardian, and the reasonableness of his payments to his ward's mother may be determined on his accounting. It is a question of fact, and has been found in his favor, provided such finding was warranted upon the evidence. It was not necessary to obtain an order of court before making the payments. The amount of property of the mother is not stated. Upon the facts reported, we cannot say that the allowance was unreasonable. The appellant suggests that the mother did not originally intend to charge anything against her daughter. But this does not so appear by the report. Decree affirmed.

(164 Mass. 419)

FOSTER et al. v. CITY OF WORCESTER.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)**ERECTING BUILDING ON COMMON — LEAVE OF
LEGISLATURE.**

1. St. 1885, c. 139, authorizing the city of Worcester to acquire all the title and interest of a certain parish in the common on which its church stood "for the purpose of a public park or for the purpose of a city hall," authorizes the erection on the common of a city hall of sufficient size for the needs of the city, thereby, by necessary implication, giving the leave contemplated by Pub. St. c. 54, § 16, providing that no building with a ground area of more than 600 square feet shall be erected on a common without leave of the legislature.

2. Since Pub. St. c. 54, § 16, forbidding the erection of a building with a ground area of more than 600 square feet on a common or public park without leave of the legislature, does not limit the time within which such leave must be exercised, the fact that the city of Worcester, after

obtaining such leave (St. 1885, c. 139), removed buildings from the common, graded it, and used it for a time as a common before commencing the erection of the building, does not require the granting of a new legislative leave.

Report from supreme judicial court, Worcester county; Charles Allen, Judge.

Action by Calvin Foster and others, as taxpayers, against the city of Worcester, to restrain the erection of a city hall. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

Thomas G. Kent, Frank P. Goulding, and George T. Dewey, for petitioners. W. S. B. Hopkins, for defendant.

BARKER, J. The erection of the proposed city hall is forbidden by the provisions of Pub. St. c. 54, § 16, unless the legislature has given leave to place it upon the common. The respondent contends that St. 1885, c. 139, gives such leave, and the case turns upon the construction to be given to that statute. The common is oblong, nearly rectangular, containing about 7 acres of land, with a frontage upon Main street of about 344 feet. Nearly in the center of this frontage, and some 50 feet back from the street, formerly stood the Old South Meeting House, which in the year 1885 was the place of worship of the First parish of Worcester. This building was about 55 feet wide and about 120 feet long. In the corner of the common, between the meeting house and Front street, was the present city hall, a brick building of about the same size as the meeting house, and about 60 feet from it, and quite near to Front street, and nearer to Main street than the meeting house. The city hall and the meeting house were so placed that the longer axis of the former was at right angles, and that of the latter parallel with Main street. St. 1885, c. 139, gave no express leave in terms to build a city hall upon the common, but authorized the city to acquire by purchase, or to take, all the title and interest of the First parish in the common "for the purposes of a public park, or for the purposes of a city hall." In the exercise of this authority all the title and interest of the First parish were taken by the city in the year 1886, "for the purposes of a public park and for the purposes of a city hall." Some \$115,000 were paid to the parish as compensation for its title and interest in the common. The meeting house was sold by the city to a purchaser, who removed it the next year, after which the city removed the foundation walls. Since the year 1882 the common has been under the supervision and control of the city's park commissioners, and since the meeting house has been removed the land taken from the parish has been in the control of the commissioners, and has been graded and turned into greensward on a level with the surrounding common, and it so remains. So far as leave from the general court was necessary, St. 1885, c. 139, must be held to have given per

mission to use the common for any purpose for which the statute gave authority to take the title and interest of the First parish. If the words, "or for the purposes of a city hall," in the first section of the statute, mean the erection of a new city hall, leave to place it upon the common is included in the enactment. A city hall must have an area upon the ground of more than 800 square feet, and leave to erect the building is an essential accompaniment of the authority to take the title and interest of the parish, without which the authority to take for the purposes of a city hall would be useless, if not invalid. It is clear from the plan, the pleadings, and the agreed facts that the legislature did not authorize the city to take the old meeting house in order to use it for a city hall, and that neither the old meeting house, nor the land under it, nor the interest of the parish in the old common were in any way essential to the use of the present city hall. Yet the statute was one which authorized the exercise by the city of the right of eminent domain, and for each of the purposes specified the legislature must have found a public necessity sufficient to call for the passage of such a statute. The erection of a new city hall upon ground which was at once an old common and a public park would be such a public use as would justify the passage of the statute. In our opinion, the reasonable construction of St. 1885, c. 139, is that by it the legislature gave to the city authority to acquire the title and interest of the parish in the common for the purpose of building there, in a public park, a new city hall, suitable in size, location, and construction for the needs of the city, and in so doing by a necessary implication gave the leave contemplated in Pub. St. c. 54, § 16. The statute contains no limit of time within which the leave thus impliedly given must be availed of, and we see nothing in the control of the common by the park commissioners of the city, nor in the removal of the meeting house and its foundations, and the grading of the ground and using it as part of the common or park, to require the granting of a new leave. The giving leave to withdraw when the city asked express leave of the legislature may well have been upon the theory that no further permission was required, and cannot be treated as a withdrawal of leave previously given. Decree affirmed.

(164 Mass. 347)

CLARKE v. SCHWARZENBERG et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 16, 1895.)

MUTUAL BENEFIT INSURANCE—CREDITOR AS BENEFICIARY—PAYMENT OF ASSESSMENT BY BENEFICIARY—EFFECT—NEW CONTRACT—WAIVER OF FORFEITURE.

1. Payment of assessments on a benefit certificate by a beneficiary who is merely a creditor of the insured will not entitle him to recover on the certificate.

2. In an action by the beneficiary, a creditor of insured, on a benefit certificate issued when the designation of a mere creditor as beneficiary, was unauthorized by statute, it appeared that the insured had repeatedly forfeited his membership, for nonpayment of assessments, and was reinstated on plaintiff's payment thereof. It was also shown that after the passage of acts permitting such designation, but not validating certificates issued prior to their passage, defendant's soliciting agent told plaintiff that the certificate would be ample security for his claims against insured. There was also evidence that defendant's secretary pinned a memorandum to the certificate, reciting that plaintiff ought to be protected, and that the certificate should not be assigned without his consent. When the last overdue assessment was paid, the insured furnished the company a health certificate reciting that his membership certificate had lapsed, that he desired to renew the same, and that his representations in the "original application" were true, and still applicable. The old certificate was not surrendered, and no new certificate was issued. *Held*, that the evidence failed to show a new contract, as distinguished from a waiver of forfeiture and a reinstatement under the old contract.

Report from supreme judicial court, Suffolk county; James M. Barker, Judge.

Action by Barnabas Clarke against Rachael A. Schwarzenberg, individually and as executrix of the estate of Moses H. Schwarzenberg, deceased, and the Massachusetts Benefit Association, to compel payment to plaintiff of the amount due on a benefit certificate. The defendant association answered, offering to pay to the one found by the court to be entitled to payment. The case was reserved for the full court, and a decree entered in favor of defendant Schwarzenberg, as executrix. A new trial was then had on amended pleadings, and a judgment rendered in favor of plaintiff, and the case was again reported to the full court. Reversed.

For prior report, see 38 N. E. 17.

Bumpus, Trask, Simes & Adams, for plaintiff. Alfred Hemenway and W. N. Buffum, for defendant.

ALLEN, J. It was held in 162 Mass. 98, 38 N. E. 17, that under the statutes in force when the certificate in this case was issued a member could not designate one who was merely a creditor as a beneficiary, and that there was nothing in the subsequent legislation which made the designation of Clarke valid, and that, therefore, as the case then stood, the plaintiff was not entitled to recover any part of the proceeds of the certificate of membership. After that decision the plaintiff was allowed to amend his bill by introducing certain new grounds upon which he sought to recover. At the trial it appeared that the member, Schwarzenberg, failed 16 times to pay assessments seasonably, and, upon his application, was reinstated after each failure, but no new certificate was issued. On some of these occasions the overdue assessments were paid by the plaintiff, but this does not entitle him to recover upon the certificate. *Commandery v. Merrick*, 163 Mass. 374, 40 N. E. 183, and cases there cited. The justice be-

fore whom the case was tried found that in these several instances the reinstatement was by way of a new contract, and not by way of a waiver of the forfeiture; subject, however, to the question of law whether the evidence warranted that conclusion. Upon an examination of the evidence a majority of the court is brought to the conclusion that it is not sufficient for that purpose. The eighth condition in the certificate provides that after a forfeiture "said party may again renew his connection with the association by a new contract made in the same manner as the first, or, for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated by paying assessment arrearages." This seems to imply that when the reinstatement is by a new contract a new certificate shall be issued, and that unless this is done the reinstatement is merely by way of waiver of the forfeiture.

The supposed new contract relied on by the plaintiff consisted of oral assurances of Olney, the defendant's soliciting agent, to the plaintiff, which were to the general effect that the policy would be ample security for what Schwarzenberg might owe him, and the pencil memorandum made by Litchfield, the secretary and assistant treasurer of the association, upon a small piece of paper, which was pinned to the original application of Schwarzenberg. This was as follows: "Mr. Olney says Clarke ought to be protected. So do not assign policy without Clarke's consent. March 4, 1892. E. S. Litchfield." This was made by Litchfield in consequence of Olney's telling him that Clarke was a creditor, and ought to be protected. Litchfield had the custody of the papers of the association. Nothing else was done in respect to the matter. So far as appears, Schwarzenberg took no part in this transaction. He did not surrender the original certificate, nor request a new one, nor know of what was done by Olney and Litchfield. His applications to the association are more consistent with the theory that he sought a reinstatement under his existing certificate, than that he expected to have a new and independent contract of membership. Even if it be assumed that it would be possible to make a new contract, within the meaning of the eighth condition, without issuing a new certificate, yet in that case it is obvious that it must be one which is understood by the parties to supersede the old contract, and take its place. The facts in evidence show no intention on the part either of Schwarzenberg or of the association to supersede the old contract by a new one. When an overdue assessment was paid, on April 13, 1893, a conditional receipt was taken, which expressly recited that the money was received for an assessment on the policy, and it implies throughout that membership under that policy or certificate was reinstated. When the last overdue assessment was paid, on June 12, 1893, Schwarzenberg furnished a

health certificate setting forth that his certificate of membership or policy of insurance had lapsed and become void for nonpayment of assessments, and desiring that the same might be renewed; warranting that his health was then good, and that his answers and representations in his original application were true, and still applicable; and adding that this warranty was made a part of the certificate or policy above referred to. This all goes to show that both Schwarzenberg and the association acted on the basis of a reinstatement under the old certificate. The payments above referred to were both made long after the date of the memorandum by Litchfield. That memorandum was not in the form of a contract, and was not delivered to anybody, but was pinned to the application which remained with Litchfield, and seems to have been merely a memorandum for the use of the association. Olney had no power to bind the association by a new contract, even if he had attempted to do so. He was merely a soliciting agent. It seems probable that all parties acted under the mistaken supposition that the original assignment of the certificate by Schwarzenberg to Clarke was valid. However that may be, we see no sufficient evidence to warrant a finding that a new contract was made, as distinguished from a waiver of the forfeiture and a reinstatement under the original certificate, and the plaintiff is therefore not entitled to recover any part of the proceeds of the certificate.

The question of the plaintiff's right to be reimbursed out of the proceeds of the certificate for the premiums paid by him has not been argued, and is not now before us. Ordered accordingly.

(164 Mass. 402)

FORBES v. AMERICAN INS. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

INSURANCE POLICY—CONSTRUCTION.

Subsequent to the erection of a three-story brick building used exclusively as a pottery, a two-story brick structure was joined thereto; the lower part being used as a boiler room, from which power was furnished for the pottery, and for a box shop and a yarn factory in adjoining buildings, while the upper part was used, to some extent, as a storage room for the pottery company. This addition had a separate roof, and there was no access to it from the pottery building. *Held*, that a policy of insurance on a "three-story brick building occupied as a pottery, * * * known as the 'Pottery Building,'" did not cover the boiler house.

Appeal from superior court, Worcester county; Franklin G. Fessenden, Judge.

Action by Eleanor M. Forbes against the American Insurance Company to recover on a policy of fire insurance. From a judgment for a part of his claim, plaintiff appeals. Affirmed.

Following are the material facts agreed upon:

"It is agreed that the defendant company

issued to the plaintiff the policy of insurance mentioned in plaintiff's declaration, and that at the time of the fire hereinafter mentioned said policy was in full force; that on the date of said policy, and at the time of said fire, the plaintiff was the owner of the following described buildings in East Brookfield, Mass.: The main building was built in 1877, of brick, three stories high, with slate roof, and about forty feet wide by sixty feet long. Said building was first used as a pottery about two years after it was completed. One or two years after the completion of said building, a boiler house of brick, one story high, and about thirty feet wide by sixteen feet long, was built on the west end of said building, and four or five years later this addition was extended sixteen feet further west, and built up another story, making it about thirty feet wide by thirty-two feet long and two stories high, all of brick. At or about the same time a two-story frame building was attached to the west end of this addition, and sheathed on the outside with brick. At the time the policy attached, and at the time of the fire, the three-story brick building was, and for a long time had been, leased to parties carrying on the business of manufacturing pottery, and used for that purpose. They also used a frame kiln, with iron roof, attached to the east end of said three-story building, and, for storage, a frame building attached to, or standing near, said kiln. The second floor of said brick addition on the westerly end of said main building was used, to some extent, by the pottery company, and in its said business, for storage, but not for manufacturing. The first floor of said brick addition was used exclusively as an engine and boiler room. The two-story building on the west of said brick addition was occupied by other tenants, as a box shop on the first floor, and as a yarn factory on the second floor. Power was furnished from said boiler room, and the engine therein, to the box shop, the yarn factory, and the pottery, by the owner of the buildings. A door through the brick partition connected the box shop with the boiler room, through which shavings were passed to feed the boilers. On the 11th day of December, A. D. 1891, a fire broke out in said box shop, and consumed the same, and damaged said two-story brick addition and the three-story main building to the amount of four hundred forty-eight and 30-100 dollars. Said damage was itemized by the appraisers as follows: 'Boiler house, \$440; main building, \$8.30.' It is agreed that this policy applies to the three-story brick building, called in the appraisers' report 'main building,' and the only controversy between the parties is whether said policy, by its terms, also covers the damages done to said two-story brick addition, called in the appraisers' report 'boiler house.' All the requirements of said policy are to be considered as complied with on the part of the plaintiff."

v.41N.E.no.19—42

The policy stated that "the American Insurance Company, of Boston, Mass., in consideration of twenty-two and 50-100 dollars to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Mrs. E. M. Forbes, of Palmer, Mass., and her legal representatives, against loss or damage by fire, to the amount of fifteen hundred dollars, on her three-story brick building, occupied as pottery, situate in East Brookfield, Mass., known as the 'Pottery Building.'"

B. W. Potter and H. W. Aiken, for appellant. Henry E. Cottle, for appellee.

BARKER, J. We are of opinion that the finding, awarding damages for the loss on the three-story brick building only, must stand, and that the judgment on the finding must be affirmed. The adjoining two-story brick building, which the plaintiff contends was also covered by the policy, was a building subsequently built on the end of the three-story building, with a separate roof; and it is not stated that there was access from one building to the other, through the walls. The three-story brick building was exclusively occupied as a pottery, while one-half of the other building was not so occupied. The policy purports to cover only one building, and the words, "known as the 'Pottery Building,'" do not, of themselves, nor does anything in the policy, indicate that any other structure was intended to be covered by the risk than the one building explicitly designated. If the words, "known as the 'Pottery Building,'" would justify a finding that all which was so known was covered by the policy, there is nothing which requires a finding that the two-story brick building was so known. The statement is merely that a portion of five buildings, including the three-story building, had been so known, and it is not stated that the portion so known included the two-story building. Judgment affirmed.

(164 Mass. 406)

HILL v. COMMERCIAL UNION INS. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

INSURANCE — PERMIT TO REPAIR — COMPROMISE — ESTOPPEL.

1. In an action on a fire policy, it appeared that the agents who procured the insurance for plaintiff had authority to grant permits for vacancies, and also for repairs, by attaching them to policies, and sending copies thereof to defendant company. Such agents had already granted a permit allowing the building to remain unoccupied, and had said to plaintiff, "When the mechanics begin work, we will put on a mechanics' permit." *Held*, that this was not a permit, nor an agreement for a permit, unless upon further notice to the agents that the mechanics had begun work; and the fact that defendant's agents, who were also agents of the plaintiff in respect to caring for and leasing the property, had the policy in their hands, was immaterial.

2. Permission by an insurance company that a building may remain vacant does not impliedly include a permit for repairs.

3. An unaccepted offer of compromise by an insurance company, after a loss, will not estop it from defending a suit on the policy.

Report from superior court, Worcester county; Justin Dewey, Judge.

Action by Calvin H. Hill against the Commercial Union Insurance Company to recover on a policy of fire insurance. Upon facts found by the court, the case was reported for the consideration of the supreme judicial court. Judgment for defendant.

Thatcher B. Dunn, for plaintiff. Frank P. Goulding and Frank Dean, for defendant.

ALLEN, J. The risk was increased under circumstances which would avoid the policy, unless this defense is cut off by the acts of the defendant's agents. The agents had authority to grant permits for vacancies, and also for repairs, by attaching written or printed permits to policies, and sending copies thereof to the defendant. They had already granted such a permit for allowing the building to remain unoccupied, and one of them had said to the plaintiff, "When the mechanics begin work, we will put on [to the policy] a mechanics' permit." But it was never, in fact, done, and the agents had not been informed and did not know that the mechanics had begun work. There is nothing to show that the agents had authority to bind the defendant by an oral agreement to grant a permit (*Parker v. Insurance Co.*, 162 Mass. 479, 39 N. E. 179, and cases cited); and, moreover, their promise as made implied that notice should be given to them before the permit should be attached to the policy. It was no present permit, and no agreement for a future permit, unless upon further notice. The fact that the defendant's agents, who were also agents of the plaintiff in respect to caring for and leasing the property, had the policy in their hands is immaterial. The plaintiff contends that adding the permit for repairs to the permit for vacancy would not change the grade of risk, and that the permit for vacancy therefore includes the permit for repairs, and that the assent of the defendant thereto is to be presumed. If that were so, the plaintiff, on getting leave to do one of the things provided against in the policy, might do all the rest without permission. That cannot be. The unaccepted offer of compromise creates no estoppel, and shows no waiver on the part of the defendant. Judgment for defendant.

(164 Mass. 382)

HARNDEN v. MILWAUKEE MECHANICS' INS. CO.

(Supreme Judicial Court of Massachusetts. Essex. Oct. 17, 1895.)

INSURANCE — FURNISHING PROOFS OF LOSS — DUE DILIGENCE — QUESTION FOR JURY.

1. Where a fire policy provides that the insured in case of loss shall "forthwith" render

to the company a statement of the value of the property, the question whether the statement was forthwith rendered is one of fact for the jury.

2. Where, in suit on a fire policy, requiring a statement of the value of the property in case of loss to be "forthwith rendered," it appears that such statement was rendered two months after the loss, evidence that the fire was so extensive as to throw the affairs of the plaintiff into entire confusion; that the plaintiff was sick for three weeks after the fire, and was delayed in getting his books, and had to take accounts of stock for three years; that it was customary for the adjusters to finish their work before the statement was sent, and that the statement, after being prepared, had to be printed,—is sufficient to justify a finding that such statement was "forthwith rendered."

3. In an action on a policy requiring proofs of loss to be "forthwith rendered," certain evidence of plaintiff's diligence in rendering such proofs was admitted, subject to the defendant's exception. Subsequently the defendant, without reserving his rights as to such exceptions, agreed that the jury might find for the plaintiff if the first proof of loss was delivered to their agent with the promise on his part to forward it. The jury returned a verdict for plaintiff. *Held*, that the agreement and finding waived the exceptions.

4. The fact that local agents of an insurance company are not authorized by their commission to receive proofs of loss will not prevent a delivery to them of proofs of loss being a delivery to the company, where the policy issued does not notify the policy holder that they are agents of limited powers, and it appears that they had apparent authority by custom to receive proofs of loss.

Exceptions from superior court, Essex county; Edgar J. Sherman, Judge.

Action by George W. Harnden against the Milwaukee Mechanics' Insurance Company on a fire policy. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

Wm. H. Niles and Geo. J. Carr, for plaintiff. Hurlburt & McCarthy, for defendant.

MORTON, J. The policy in this case provided that, "in case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured," etc. The fire occurred on the 26th day of November, 1889. The first statement under the above provision was rendered in the latter part of January, 1890. It is contended that it was not rendered "forthwith." But we think that it was rightly left to the jury, with instructions to which we see no objection, to say whether, under all of the circumstances, that was or was not done. The property described in the policy was situated in Lynn, and was destroyed in a great fire, which occurred on the date above stated. The fire was so extensive that it fairly may be presumed to have caused confusion, not only in the affairs of the plaintiff, but in those of the entire community. In such a state of things delay would naturally arise in relation to matters affecting insurance losses, and would make it impossible to render a statement forthwith in the sense of at once. Besides these consid-

erations, there was testimony tending to show, among other things, that the plaintiff, by reason of impaired health, was unable to enter upon an examination of his affairs for upwards of three weeks; that he could not get at his books for a week; that he had to take an account of stock for three years, and it took two weeks to get at the footings; that it was customary to wait for the committee of adjusters to finish their work; and that, after the proofs of loss were prepared, they had to be, or were, printed, and he then swore to them, and gave them to the broker through whom the insurance was effected, who testified that he gave them, when ready, to Pitman & Breed. Whether the statement was "forthwith rendered" depended on whether, taking all of the circumstances and considerations into account, the plaintiff used due and reasonable diligence. If he did, then it was "forthwith rendered," within the fair meaning of the policy. And whether he did or did not was a question of fact for the jury. *Carpenter v. Insurance Co.*, 135 N. Y. 298, 302, 31 N. E. 1015; *Insurance Co. v. Davis*, 93 Pa. St. 280; *Edwards v. Insurance Co.*, 3 Gill, 176; *Donahue v. Insurance Co.*, 56 Vt. 374. We think that there was testimony which justified the jury in finding, as they must have found, that the statement was "forthwith rendered."

Certain evidence was admitted, subject to the defendant's exception, on the question of the plaintiff's diligence in rendering the statement. Subsequently the defendant, reserving its rights only as to certain rulings which it had requested, and which the court had refused, agreed that, if the first proof of loss was delivered to Breed with a promise on his part that he would forward it, the jury might find for the plaintiff. Since the jury returned a verdict for the plaintiff, they must have found that the first proof of loss was delivered to Breed with a promise by him to forward it. And we think that the effect of this agreement and of the finding was to render immaterial the exceptions which had been taken regarding the admissibility of the evidence. It would seem as though counsel for the defendant did not care to argue that, under the circumstances, due diligence had not been used by the plaintiff in rendering the statement, if one was rendered the last of January, but preferred to rest on the contention that the first proof was not delivered to Breed at all.

The remaining question is whether the delivery of the statement or proof of loss in the latter part of January, 1890, to Pitman & Breed, the local agents of the company, constituted a delivery to the company. Under the instructions it is possible that, notwithstanding the testimony of Walton, the jury may have found that the proof was not only received by Breed, but was forwarded by him to the company, and actually received by it. But the request of the defendant asked for a ruling that delivery of the proof of loss to the

local agents, which was not forwarded to the defendant, was not a delivery to the defendant of the statement in writing required by the policy, unless the plaintiff showed that the local agents were authorized by the company to receive the proof. This was refused by the court, and the jury were permitted to find that a delivery to the local agents would constitute a delivery to the company; and it thus becomes necessary to consider the ruling requested by the defendant. The commission issued to Pitman & Breed by the defendant gave them "full power to receive proposals for insurance against loss or damage by fire in Lynn and vicinity, to receive moneys, and countersign, issue, renew, and consent to the transfer of policies, * * * subject to the rules and regulations of said company and to such instructions as may from time to time be given to its officers." The policy contained no notice of this limitation of authority on the part of Pitman & Breed, and this case is thus distinguishable from many of those relied on by the defendant, some in stock companies, and some in mutual, when the policy on its face gave notice of the scope of the agent's authority. The only reference in this policy to the matter of agency is in the last line, where it is provided that "this policy shall not be valid until countersigned by the duly-authorized agent of the company at Lynn, Mass.," and which, so far as it signifies anything, implies that the agent at Lynn is a general agent. At any rate, it does not notify the policy holder that he is an agent with limited powers. Neither does the policy contain any promise as to the manner in which the proofs of loss shall be delivered to the company. If, therefore, the local agents had apparent authority, by custom or otherwise, to receive the proofs of loss, we think that a delivery to them would constitute a delivery to the company, even if they had not authority, from the nature of their agency, to receive them, or if, also, in the absence of custom, a delivery to them, under the circumstances, would not have been a reasonable mode of sending the proofs of loss to the company,—neither of which do we pass upon. See *Bishop v. Eaton*, 161 Mass. 496, 500, 37 N. E. 665; *Wheeler v. Insurance Co.*, 131 Mass. 1; *Eastern R. R. v. Relief Ins. Co.*, 105 Mass. 570; *Markey v. Insurance Co.*, 103 Mass. 92; *Fogg v. Griffin*, 3 Allen, 1; *Gloucester Manuf'g Co. v. Howard Fire Ins. Co.*, 5 Gray, 497; *Arff v. Insurance Co.*, 125 N. Y. 51, 25 N. E. 1073. The instruction requested omitted any reference to this element of the case, but rested on the proposition that a delivery to the local agents was not effectual unless they were actually authorized by the company to receive proofs of loss, and it was therefore rightly refused. There was testimony tending to show that it was the universal custom among insurance companies for local agents to prepare proofs of loss, and send them to the company, when it was not done by the adjusters, which was the case here. Apparent author-

ity on the part of the local agents to receive proofs of loss would be implied from such a custom. A considerable portion of the instructions as reported seems to have been directed to the consideration of the meaning of "forthwith," and to the question whether the proof was delivered to Breed. But we think that it sufficiently appears from the charge and from the colloquy between the court and the counsel for the defendant that the effect of custom upon the matter of delivery was called to the attention of the jury. No exception was made to this portion of the charge for insufficiency or otherwise, counsel for the defendant apparently being content to rest upon the refusal of the court to give the request in the precise form in which it was made. A majority of the court think that the exceptions should be overruled, and it is so ordered. Exceptions overruled.

(164 Mass. 410)

BROSNAN v. TRULSON.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

MECHANIC'S LIEN—ERROR IN STATEMENT.

Pub. St. c. 191, § 6, providing for the filing of a statement to perfect a mechanic's lien, does not require that the name of the persons with whom the contract was made be stated; and therefore a mistake in the name of such person is harmless, and a petition containing the same mistake may be corrected by amendment.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Petition by Thomas Brosnan against Hans Trulson to enforce a mechanic's lien. A verdict was directed for defendant, and plaintiff excepts. Exceptions sustained.

Marvin M. Taylor, for petitioner. Wood & Wood, for defendant.

KNOWLTON, J. The petitioner, in filing his statement in the registry of deeds, as required by the statute, for the purpose of preserving his lien, and in making his petition on which the hearing was had, alleged, by a mistake, that the contract under which he performed the labor for which he claimed the lien was made with the firm of Harris & Beford, when in fact Beford was not a partner, and the contract was made with Harris alone. The judge ruled that, if the petition were amended by striking out the name of Beford, the error in the statement would be fatal to his claim, and declined to allow the proposed amendment to the petition, not in the exercise of his discretion, but on the ground that such an amendment could do the petitioner no good. We think this ruling was erroneous. The Public Statutes (chapter 191, § 6), which require the filing of the statement, do not require that the particulars of the contract shall be set out, except in those parts which are important in determining the rights of the parties, and the name of the person

with whom the contract was made is not required to be stated. If it is stated, and if there is a mistake in it, innocently made, it does not affect the right of the petitioner to recover upon a petition which is correct in this particular. Section 13 of this chapter of the Public Statutes provides that the petition shall contain a brief statement of the contract on which the petition is founded, with the amount due thereon. Under this section, it may be necessary to set forth in the petition the name of the party with whom the contract was made. But the language differs materially from that of section 6. Pub. St. c. 191, § 8, and St. 1892, c. 191, are intended to preserve the validity of the lien when the petitioner has made an innocent mistake in his statement in regard to any of the matters particularly specified which are required by the statute to be stated. It would be without warrant in the statute, and contrary to the spirit of the law, to hold that an inaccuracy in stating a part of the contract not particularly required to be set out is fatal to the lien claimed. Practically, such a holding would often work great injustice, as apparently it would in the present case; for it is very proper to give the names of the contractors in the statement, and workmen often have no means of knowing the precise relations of the persons connected with the different departments of a business. If the petitioner is permitted to amend his petition, the error in the statement will not preclude him from recovering. Exceptions sustained.

(164 Mass. 327)

COMMONWEALTH v. BROOKS.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 17, 1895.)

CRIMINAL LAW—DIRECTING VERDICT.

Where the weight of the evidence tended to establish the allegations of the indictment, it was not error to refuse to direct a verdict for defendant.

Exceptions from superior court, Hampden county; Henry K. Braley, Judge.

William H. Brooks was convicted of burning the dwelling house of another, and excepts. Exceptions overruled.

O. L. Gardner, Dist. Atty., for the Commonwealth. Daniel E. Leary, for defendant.

KNOWLTON, J. The building which the defendant was found guilty of burning was a dwelling house standing on land of Mary A. Burt. She and the defendant were not married, but they lived together as husband and wife, in this house, with their children. The only exception in the case is to the refusal of the presiding justice to direct a verdict for the defendant on the ground that there was no evidence to sustain the allegation of property in Mary A. Burt. The great weight of the evidence was in favor of the

commonwealth's contention that she owned the building, and it is doubtful whether there was any evidence which would have warranted a finding that the defendant owned it. It is entirely clear that the judge could not properly give the instructions requested. *Webster v. Potter*, 105 Mass. 414; *Madigan v. McCarthy*, 108 Mass. 376; *Westgate v. Wilton*, 128 Mass. 304; *Howard v. Fessenden*, 14 Allen, 124; *Poor v. Oakman*, 104 Mass. 309. Exceptions overruled.

(164 Mass. 412)

BAKER v. TIBBETTS.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

ACTION FOR INJURIES — DANGEROUS PREMISES — AUTHORITY OF AGENT — EVIDENCE.

In an action for injuries caused by an explosion on defendant's premises, which he had leased to another on the ground that defendant's agent, who made the lease, invited plaintiff to go on the premises, knowing they were dangerous, without warning him of the danger, it appeared that the explosive was stored in the basement before the lease was made, that such agent had authority to make the lease, that he denied that he agreed with the lessee to remove such explosive, and that the explosion occurred while he and plaintiff were on the premises to determine what articles might remain. *Held*, that evidence of such agent's conduct, after as well as before the explosion, was competent, as tending to show his relation to the business of removing such explosive, in connection with evidence of ratification by defendant.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action by Peter Baker against Henry L. Tibbetts for personal injuries caused by an explosion on defendant's premises, as the result of the negligent acts of defendant's agent. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

Webster Thayer and Hollis W. Cobb, for plaintiff. John C. Burke, William S. Marshall, and James F. Corbitt, for defendant.

KNOWLTON, J. At a former hearing of this case, it was held that there was evidence tending to charge the defendant with liability for the accident which happened to the plaintiff. *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350. At a second trial before a jury, at which these exceptions were taken, there was evidence for the plaintiff upon each of the points referred to in the opinion of this court as grounds of recovery against the defendant. While there was much contradiction in regard to the question whether Stearns, the defendant's agent, invited the plaintiff to the place of danger immediately before the accident, there was direct evidence to warrant answering it in the affirmative. It was undisputed that Stearns rightly acted as agent for the defendant in making the lease, and there was evidence tending to show, on the grounds stated in our former opinion, that in a legal sense he represented

the defendant in what he said and did in regard to the removal of the bisulphide of carbon. The evidence of his conduct subsequently to the accident, as well as before it, taken in connection with his admitted authority to execute the lease, and with the evidence of ratification by the defendant, and with his denial that he made an agreement with Sherman to remove any articles from the basement, was competent, as tending to show his relation to the business of removing the bisulphide of carbon. Exceptions overruled.

(164 Mass. 401)

BANCROFT v. FITCH et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

WILL — CONSTRUCTION.

Testatrix gave personality to her son F., "to be held in trust by my said daughter H. and her husband, B., for the support and maintenance of F. Anything remaining at his decease shall be equally divided among my three daughters." H. died after testatrix; and F., after H. *Held*, that the trust property not used for the support of F. should be distributed one-third to each of the two remaining daughters of testatrix, and one-third to the legal representatives of H.

Case reserved from supreme judicial court, Worcester county; W. A. Field, Judge.

Petition by Andrew J. Bancroft, trustee, against Andrew L. Fitch and others, for instructions under the will of Sophronia W. Fitch, deceased. From the decree of the probate court, defendants appealed. Case reserved for consideration of the full court. Affirmed.

W. S. B. Hopkins and Frank B. Smith, for appellants. Henry F. Harris and Charles M. Thayer, for appellee Bradbury M. Bailey.

BARKER, J. The testatrix died in the year 1884, leaving three daughters (Louisa M. Brigham, Harriet L. Wheeler, and Helen S. Bailey, the wife of Bradbury M. Bailey) and two sons (Francis G. Fitch and Andrew L. Fitch). Helen Bailey has died since the death of the testatrix, and Francis G. Fitch has died since the death of Helen S. Bailey. After making several bequests, not now material, the testatrix disposed of the residue of her property in these terms: "I give, devise, and bequeath to my son Francis G. Fitch all the rest of my property that I die possessed of, both real and personal. The same to be held in trust by my said daughter Helen and her husband, Bradbury M. Bailey, for the support and maintenance of the said Francis G. Fitch. Anything remaining at his decease shall be equally divided among my three daughters." The decree appealed from ordered that the trust property not used for the support and maintenance of Francis G. Fitch should be distributed one-third each to the daughters, Louisa M. Brigham and Harriet L. Wheeler, and one-third to the legal

representatives of the deceased daughter, Helen S. Bailey. This decree was clearly right. The amount of the fund which might ultimately pass to the daughters of the testatrix was wholly uncertain, but such an uncertainty does not prevent the vesting of the right to share in the distribution. That the testatrix did not intend to treat her daughters as a class, the survivors only of which should share in the distribution, is evident, not only from the words used, "shall be divided equally among my three daughters," which, under the circumstances, is equivalent to naming them, but also from the absence of any further disposition of the fund in case none of her daughters should survive the son for whose support the fund was first given. We assume that the decree dealt only with personality. If any portion of this residue was realty, the interest of Helen S. Bailey in it would, of course, go to her heirs by the statute. Decree of probate court affirmed.

(164 Mass. 287)

O'NEIL v. O'LEARY.

EARLEY v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 17, 1895.)

**INJURY TO EMPLOYEES—EVIDENCE OF NEGLIGENCE—
VICE PRINCIPAL.**

1. In an action for personal injuries received while blasting rock, it was error to refuse to charge that there was no evidence of negligence in the selection of a superintendent or workmen employed on the work, where the only testimony on that point was given by the superintendent, who stated that, though he had never had charge of dynamite blasting, he knew how it ought to be done.

2. Where plaintiffs were drilling a blasting hole, and a charge which plaintiffs did not know was there exploded, it was error to refuse to charge, in an action for the injuries sustained, that there was no personal negligence on the part of defendant, where the only testimony was that defendant had requested plaintiffs to commence work at 5 o'clock on the morning of the accident, had directed two men to manipulate the drill, because it was too heavy for one, and sent the workman in charge of the blasting to sharpen tools, supposing that the charge in said hole had been exploded.

3. One whose duty it was to superintend blasting in a quarry, but who spent most of his time in attending to the fires under the boilers, in sharpening tools, and doing other acts of manual labor, is not a person whose sole or principal duty was that of superintendence, within the meaning of St. 1887, c. 270, § 1, cl. 2, relating to fellow servants.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Separate actions by John O'Neil and William Earley against Thomas O'Leary for personal injuries. Plaintiffs had judgment, and defendant excepts. Exceptions sustained.

These actions were brought to recover for personal injuries sustained while plaintiffs were engaged in drilling out a blasting hole on defendant's premises, and caused by the explosion of a charge of dynamite which plaintiffs did not know was in the hole, and

which they asserted was permitted to remain in the hole through the negligence of one McDonald, who was an employee of defendant. At the conclusion of the evidence, defendant asked the court to instruct the jury, *inter alia*, as follows: "(1) There is no evidence which will authorize a verdict for plaintiff in either case. (2) There is no evidence of negligence on the part of the defendant in the selection and employment of a superintendent, or of workmen employed on this work, which contributed to cause the accident." "(4) There is no evidence of personal negligence on the part of the defendant in reference to the accident, which contributed to cause it. (5) There is no evidence that McDonald was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of McDonald." The court declined to give said instructions, to which ruling defendant duly excepted.

Charles T. Gallagher and Frank N. Nay, for plaintiff Earley. Wm. H. Brown, for plaintiff O'Neil. Robert M. Morse, Charles G. Keyes, and Charles D. Keyes, for defendant.

LATHROP, J. The first request for instructions we pass for the present, as it depends in part upon other requests, which we shall consider at length.

The third request, we are of opinion, should have been given. An examination of the evidence shows no negligence on the part of the defendant in the selection or employment of a superintendent or workmen which contributed to the accident. There was no evidence of negligence in employing McDonald, and it is now conceded that no claim was made at the trial that he was incompetent. As to the employment of Lyons, there was no evidence that he was incompetent to have charge of any part of the work. The testimony as to his competency comes from the cross-examination of himself, in which, while he admitted that he had never done any wiring of holes which were loaded with dynamite, and had not had charge of deep drilling, and dynamite blasting with electricity, he also testified that he knew how it ought to be done.

The fourth request should also have been given. We find no evidence of personal negligence on the part of the defendant in reference to the accident. It was not negligence to request McDonald and Earley to begin the work of blasting at 5 o'clock in the morning, nor to send McDonald to sharpen drills, when all concerned supposed that the charge in the hole, from which he and Earley were removing the tamping, had been exploded, the defendant having no knowledge which should have led him to suppose that it was possible that the hole had not been fired; nor was it negligent for him to send O'Neil to assist in manipulating the churn

drill, which was too heavy for one man to work alone. In these matters he acted as any prudent man would act under the circumstances, there being nothing to indicate to him that any explosion could be caused by the removal of the tamping. McDonald's unwillingness to leave the work of removing the tamping which he was engaged on with Earley when the defendant asked him to sharpen drills does not appear to have been for any reason except to get the special work of blasting these two holes finished as soon as possible, and there is nothing in the evidence to indicate that the defendant supposed, or ought to have known, that McDonald's remaining at the work of removing the tamping was of importance to the safety of any one.

While the fifth request does not follow the words of the statute, the question which has been argued, and which was doubtless intended to be covered by it, is covered by the first request, and we proceed to consider whether there was any evidence which would warrant the jury in finding that McDonald was a person in the service of the defendant, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, within the meaning of these words in St. 1887, c. 270, § 1, cl. 2. That he was intrusted with and exercising the duty of superintending the blasting, might properly have been found by the jury. On the evidence it clearly was not his sole duty. Can it be said that it was his principal duty? On the evidence in the case put in by the plaintiffs it is clear that he worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes, and in clearing them out, and in other acts of manual labor. One of the witnesses testified: "Sharpening the tools occupied part of his time, and he attended to the fire to make the steam. He spent most of the time in sharpening the tools and keeping up steam. Whenever the steam drill was going, he had to keep the steel sharp; and, if the drill would not be running, he would have leisure to come out on the ledge, and talk, and see what was necessary to be done. But most of the time he was working, sharpening tools, keeping up steam, and coming out to place these holes." There was also other evidence that his manual labor occupied the most of his time, and there was no contradiction as to this. In a sense, it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words, "whose sole or principal duty is that of superintendence."

These words must have a reasonable interpretation given to them, and a majority of the court is of opinion that it cannot be said of a person who works at manual labor to the extent shown in this case that his principal duty is that of superintendence. See *Cashman v. Chase*, 158 Mass. 352, 31 N. E. 4; *Shepard v. Railroad Co.*, 158 Mass. 174, 33 N. E. 508; *O'Brien v. Rideout*, 161 Mass. 170, 36 N. E. 702; *Dowd v. Railroad Co.*, 162 Mass. 185, 38 N. E. 440. In *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83, the evidence was conflicting as to the work done by the alleged superintendent, and the case, therefore, was left to the jury. In the cases at bar we have considered only the evidence for the plaintiffs. If the evidence in the case shows anything more than a pure accident, it shows negligence on the part of McDonald, who, as his principal duty was not that of superintendence, was but a fellow workman with the plaintiffs. On these considerations it follows that the defendant was entitled to have the first instruction requested given, which was, in substance, that the jury would not be authorized to find a verdict for the plaintiff in either case. It is unnecessary to consider the other instructions requested. Exceptions sustained.

(164 Mass. 448)

HOGAN v. METROPOLITAN INS. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 18, 1895.)

LIFE INSURANCE—APPLICATION—MISREPRESENTATIONS.

1. An answer, in the proofs of death, that the insured had had "kidney trouble," is not inconsistent with an answer, in an application, that he never had "disease of the kidneys."

2. Under St. 1887, c. 214, § 21, providing that no misrepresentation made in the negotiation of insurance shall avoid the policy, unless such misrepresentation was made with intent to deceive, or the matter misrepresented increased the risk or loss, a misrepresentation, in an application for insurance, that the applicant did not have a certain disease, will not avoid the policy, if the jury find that such misrepresentation did not increase the risk, and was not made with intent to deceive.

Exceptions from superior court, Hampden county; John Hopkins, Judge.

Action by Eliza Hogan against the Metropolitan Life Insurance Company on a policy of insurance. Plaintiff had judgment, and defendant excepts. Exceptions overruled.

J. B. Carroll and W. H. McClintock, for plaintiff. E. H. Lathrop, for defendant.

KNOWLTON, J. The defendant set up in its answer that the assured, in his application, which was a part of the contract of insurance, in reply to the question, "Has the life proposed now, or ever had, disease of the kidneys?" answered "No," and that this answer was guaranteed by the assured to be true, when in fact it was false. Upon the issue thus presented, the plaintiff intro-

duced the testimony of witnesses tending to show that the answer was true. The defendant objected and excepted to the introduction of the testimony, on the ground that in the proofs of death furnished in accordance with the requirements of the policy, and signed by the plaintiff, were this question and answer: "What sicknesses, previous to the last one, did the deceased have? Give particulars of each sickness, with dates." "Kidney trouble, two years ago." The defendant contended that, by this answer in the proofs of death, the plaintiff was estopped to show that the deceased did not have kidney disease at the time of making the application, which was less than two years before the proofs were filed. Its counsel relies on *Campbell v. Insurance Co.*, 10 Allen, 213, in which it is said that corrections of mistakes in proofs of death "are not for the first time to be made known to the insurers at the trial of the action to recover for the loss, by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover." This case has not been generally followed in other jurisdictions. *McMaster v. Insurance Co.*, 55 N. Y. 222; *Parmelee v. Insurance Co.*, 54 N. Y. 193; *Insurance Co. v. Lodel*, 95 U. S. 232; *Waldeck v. Insurance Co.*, 53 Wis. 129, 10 N. W. 88; *Bentz v. Association*, 40 Minn. 202, 41 N. W. 1037; *Smiley v. Insurance Co.*, 14 W. Va. 33. In this commonwealth it has never been treated as enunciating a doctrine of universal application, nor extended to facts differing from its own. *Oluff v. Insurance Co.*, 99 Mass. 317; *City Five Cents Sav. Bank v. Penn Fire Ins. Co.*, 122 Mass. 165; *Little v. Insurance Co.*, 123 Mass. 380. But, if it is given full effect as an authority, the plaintiff was rightly permitted to introduce her testimony. In the first place, if the answer given in the proofs is true, it cannot be said, as matter of law, that the answer in the application is untrue. It is conceivable that there might have been a "kidney trouble," from accident or from some other temporary cause, such as to produce sickness, when it could not properly be said that there was "disease of the kidneys."

Even if the assured had had disease of the kidneys, and his answer was therefore untrue, it does not necessarily defeat the action upon the policy. If we treat the statements contained in the application as warranties, it is held that St. 1887, c. 214, § 21, re-enacted in St. 1894, c. 522, § 21, is applicable to them. *White v. Society (Mass.)* 39 N. E. 771; *Levie v. Insurance Co.*, Id. 792. This section is in these words: "No oral or written misrepresentation made in the negotiation of a contract or a policy of insurance by the assured, or in his behalf, shall be deemed material, or defeat, or avoid the policy, or prevent its attaching, unless such

misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss." However it may be in regard to warranties in terms fully written out on the face of the policy, it is held that the statute was intended to apply to statements in the application called "warranties." Falsity of statement would therefore be a defense only if the matter misrepresented increased the risk, or if the statement was made with intent to deceive. In the present case, if the answer in the proofs of death were to be interpreted as the defendant contends, it would not show that the defendant was not liable. The jury might find that the matter misrepresented did not increase the risk, and that the statement was not made with intent to deceive. Apart from the questions of fact involved in this defense, the proofs showed that the plaintiff was entitled to be paid in accordance with the provisions of the policy. *Campbell v. Insurance Co.*, ubi supra, has never been extended to a case where the matter stated in the proofs did not, if true, show a valid defense to a claim under the policy. The evidence was rightly admitted. Exceptions overruled.

(164 Mass. 450)

MULLEN v. SPRINGFIELD ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampden, Oct. 18, 1895.)

STREET RAILROAD — DEATH OF BOY ON TRACK — CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, a boy about 10 years old, and R., another boy near the same age, were riding, in the daytime, along a street, on the rear end of a wagon, with their feet hanging over the tailboard, without the driver's knowledge, when the wagon was met by defendant's electric car. The boys jumped from the wagon as the car was nearly opposite the horse's head, and deceased went on the car track just forward of the car, and was killed. R. testified that, just before they jumped, he told deceased to look out for the car, and that deceased heard him. *Held*, that deceased's want of due care precluded a recovery.

Exceptions from superior court, Hampden county; John Hopkins, Judge.

Action by Mullen, administrator of the estate of Robert J. Mullen, deceased, against the Springfield Street-Railway Company to recover for the death of plaintiff's intestate, caused by defendant's negligence. There was a verdict for plaintiff, and defendant excepts. Exceptions sustained.

J. B. Carroll and W. H. McClintock, for plaintiff. William H. Brooks, for defendant.

KNOWLTON, J. The plaintiff's intestate, Robert J. Mullen, a boy nine years and seven months old, with Joseph Rivers, another boy a little older, with whom he was not acquainted, was riding at the hind end of a grain dealer's business wagon along Chestnut street in Springfield. A single track of the defendant's electric railway was laid through

the middle of the street. The driver sat on a seat at the forward end of the wagon, driving a single horse, and he had no knowledge of the presence of the boys, who got upon the wagon without the permission of anybody. The plaintiff's intestate was on the wagon when Rivers first saw it, and they afterwards sat with their backs to the driver, and their feet hanging over the tailboard. Mullen was on the left-hand side of the wagon, next the track, and there were empty boxes between the boys and the driver. As the team was going at an ordinary rate of speed, on the right-hand side of the street, it met an electric car. The distance between the curbstone and the nearest rail of the track is given by estimate as eight or ten feet. Both boys were intending to go up Franklin street, Mullen to a school which he attended, and Rivers to the house of his uncle on that street. They met the car at Greenwood street, which is the next street to Franklin street and very near it. The horse, which was not much accustomed to electric cars, shied a little, but was easily controlled. Either because they were so near the place where they were to turn from Chestnut street, or for some other reason, the boys jumped out, and the driver went on, without knowing, until long afterwards, that they had been upon his wagon. When they jumped, the electric car was very nearly opposite the horse's head. Rivers jumped on the right-hand side, of the wagon, and ran along to the right of the horse on the sidewalk, or between the curbstone and the wagon. Mullen jumped to the left of the wagon, went upon the track just forward of the car, and was run over and killed.

The action is brought under St. 1886, c. 140, and the plaintiff contends that his intestate's life was lost through the negligence of the defendant, or the gross negligence of its servants or agents. There is hardly more than a scintilla of evidence to sustain this part of the case. To show negligence of the corporation, he relies upon the fact that there was no fender upon the car; but the accident happened on June 2, 1893, and the evidence tended to show that, of the numerous corporations in the different parts of the state that had begun to run cars by electricity, the West End Street-Railway Company, in Boston, was the only one that had then used any fenders upon its cars, and the defendant offered to show that the use of fenders by that corporation was then only experimental. It is hard to see how the motorman was in fault. The great weight of evidence was that the car was going at about four to six miles an hour, and there was nothing to indicate that it was going very much faster than that. The testimony was that the motorman did not see Mullen while he was on the wagon, and there is nothing to indicate that he did. He certainly had no reason to expect that anybody would jump from the hind end of a

wagon just as it was about to pass the car, and step upon the track. Even if he was negligent, the defendant is not liable for his conduct in this action, unless he was grossly negligent. But if we assume that there was evidence for the jury on this part of the case, we find no evidence of due care on the part of the plaintiff's intestate. Rivers testifies that, just before they jumped off, he told Mullen to look out for the car, and that Mullen heard him. If, being warned to look out for the car, he immediately stepped upon the track before it, he certainly was careless. He was a trespasser upon the wagon, and his conduct in stealing a ride, and in getting on and off the wagon when it was in motion, gives color to his conduct in going upon the track immediately before the coming car. When he left his father's house he was sent to school, and when he was next seen riding with this team he was at a considerable distance from the line of travel to the schoolhouse, coming from a point further off. In going upon the track at midday without looking to see whether a car was coming, when the view was unobstructed, and he could easily have heard the car, he was far more negligent than was the plaintiff in *Messenger v. Denie*, 187 Mass. 197, and *Id.*, 141 Mass. 335, 5 N. E. 283. *Messenger* was a boy of about the same age as the deceased, and was riding upon a sleigh runner, and stepped off before an approaching team without looking, and it was held as matter of law that he was negligent. There are also other authorities which require us to hold that there was no evidence in the present case that the plaintiff's intestate was in the exercise of due care. *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Casey v. City of Malden*, 163 Mass. 508, 40 N. E. 849; *Thompson v. Railway Co.*, 145 N. Y. 196, 39 N. E. 709; *Railway Co. v. Connell*, 88 Pa. St. 520.

Exceptions sustained.

(184 Mass. 444)

McDOWELL v. AETNA INS. CO. SAME
ROYAL INS. CO. SAME v. PHOENIX
INS. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 17, 1895.)

BEST AND SECONDARY EVIDENCE—INSURANCE—
ARBITRATION—WAIVER.

1. In a suit against an insurance company, on proof of written notice received by defendant, in due course of mail, from plaintiff, to produce at the trial of the suit against it by plaintiff all letters received by it from plaintiff relating to the subject-matter of the suit, from the date of the fire to the date of notice,—a period of 16 months,—secondary evidence of such letters is admissible, if the originals are not produced.

2. Under St. 1891, c. 291, making the failure of an insurance company to act within 10 days on a written request of the insured, requiring it to name three referees, or select one of three named therein, for arbitration, the failure of an insurance company to pay any attention to a request duly made is a waiver of arbitration.

Exceptions from superior court, Franklin county; J. B. Richardson, Judge.

Actions by Brice W. McDowell against the Aetna, Royal, and Phoenix Insurance Companies, respectively, on fire policies, consolidated. There were findings for plaintiff in each case, and defendants bring exceptions. Exceptions overruled.

Conant & Conant, for plaintiff. Wm. G. Bassett, for defendants.

MORTON, J. The principal question in these cases relates to the admission of secondary evidence of the contents of certain letters which the court found were duly sent, postage paid, by the counsel for the plaintiff, to the defendants and their attorneys of record in these suits, and which, according to the well-settled rule in such cases, were prima facie received by the persons to whom they were sent. *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71; *Briggs v. Hervey*, 130 Mass. 186; *Huntley v. Whittier*, 105 Mass. 391. Neither of the originals was presented by the defendants. But there is nothing tending to show that they were not in fact received by them, or were not in their possession at the time of the trial. The notice to produce, which was dated, "Greenfield, April 18, 1895," and which was received by the attorneys of record of the defendants in regular course of mail, notified them "to produce at the coming trial of the cases of Brice W. McDowell v. Aetna Ins. Co., Royal Ins. Co., Phoenix Ins. Co., in our superior court the present term here, all proofs of loss, written schedules, letters, and communications or written memoranda of every kind, received by the above-named companies defendant, or by you as their attorneys, each and all of them, received from the said plaintiff or from his attorneys at any time since the fire mentioned in the several declarations in said suits." The notice required the production, therefore, among other things, of all letters, relating to the subject-matter of the suits, received by the defendants or their attorneys from the plaintiff or his attorneys between January 1, 1894, and its date.

It is objected, in substance, that the letters called for were not described in the notice with sufficient particularity. But we think that they were sufficiently described by the subject to which they related. *Bemis v. Charles*, 1 Metc. (Mass.) 440; *Bogart v. Brown*, 5 Pick. 18; *Jones v. Parker*, 20 N. H. 31; *Jacob v. Lee*, 2 Moody & R. 33; *Morris v. Hauser*, Id. 392; *Rogers v. Custance*, Id. 179; *Vasse v. Mifflin*, 4 Wash. C. C. 519, Fed. Cas. No. 16,895. The time covered by the notice was only about 16 months. There is nothing to show that the correspondence between the parties and their counsel was so extensive as to render it reasonable that the notice should describe the portions of it that were wanted, or that the letters were so mingled with others as to render it difficult to separate them. The ob-

ject of requiring notice to produce the original before secondary evidence of contents can be given is to afford an opportunity to the opposite party to produce it, and thereby secure, if he desires, the best evidence of its contents. *Dwyer v. Collins*, 7 Exch. 639. In the present cases the defendants did not object that they were taken by surprise, or that they did not understand what letters were meant, or that they wanted delay in order to enable them to produce originals. See *Bogart v. Brown*, supra. We think that the ruling admitting the letters from copies was right.

The defendants further contend that there was not sufficient evidence that, before the actions were commenced, they had waived the provisions in the policies requiring the amounts of the losses to be determined by arbitration. But by St. 1891, c. 291, § 1, it is expressly provided that an insurance company shall be deemed to have waived its right to arbitration, under a policy in the standard form provided in this commonwealth (which these policies were), if it does not, within 10 days after a written request to appoint referees under the provision for arbitration, name three men, or if it does "not, within ten days after receiving the names of three men named by the insured under said provision make known to the insured its choice of one of them to act as one of such referees." The copies of letters put in by the plaintiff show that a request was made in writing, by him, of each of the defendants, to appoint referees to determine the loss under its policy, and that the names of three persons to act as such referees were submitted. Neither of the defendants appears to have paid any attention to the requests thus made, and these actions were not brought till more than 10 days after the requests were made. The defendants must be held, therefore, to have waived their right to have the amounts of the losses determined by arbitration. Exceptions overruled.

(164 Mass. 434)

CLARK v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 18, 1895.)

ACCIDENT AT RAILROAD CROSSING—QUESTION FOR JURY—STRIKING OUT EVIDENCE.

1. In an action against a railroad company for injuries at a public crossing with a down-grade approach, an instruction that plaintiff was negligent if he approached the crossing with a heavy load, at a trot, though the gates were up, is properly refused where there is evidence that the gateman, by nodding to the plaintiff, invited him to cross.

2. In an action for injuries at a public crossing, the question of what the object of a red flag placed on the track below the crossing was, and the effect it should have had on those in charge of the train and the gateman, is one of fact.

3. Where, in an action against a railroad for injuries from negligent running of one of its trains, after plaintiff has put in evidence rules under which defendant operated its trains, as

he claims, at the time, the defendant puts in evidence later rules, which it states were in force at the time of the accident, plaintiff may withdraw those put in evidence by him, and have evidence given under them stricken out.

Exceptions from superior court, Hampshire county; Elisha B. Maynard, Judge.

Action by Isaac Clark against the Boston & Maine Railroad for personal injuries. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

The plaintiff claimed that the defendant was negligent because the gates were not closed when a train was about to cross the highway, because the engineer gave no seasonable warning signals, because the gatekeeper nodded to him, which he took to be an invitation to cross, and because the company had by its employes put out a red flag on the easterly side of the gatekeeper's tower, at a point about nine feet from the ground, and by the side of and over the track on which the train passed, which flag was a signal to the engineman of the incoming train to proceed slowly, or stop his train, and this signal was not observed and obeyed, but the train approached the crossing at a rapid rate of speed, and at the same time the gateman, relying upon this red flag to stop the train, did not attempt to put down the gates. After plaintiff had put in evidence rules under which he claimed defendant was operating its road at the time of the accident, the defendant put in evidence rules of later date, which were in force at the time of the injury, and plaintiff's counsel thereupon applied to have the rules first put in evidence withdrawn, and the evidence given under them stricken out, and the jury directed to disregard it.

J. B. O'Donnell and Hammond & Field, for plaintiff. Wm. G. Bassett, for defendant.

MORTON, J. The instruction requested by the defendant, that if the plaintiff, without stopping to look or listen, approached the crossing at a trot, with a heavy load, on a highway descending for more than a hundred feet from the tracks, he would be negligent, even if the gates were up, was properly refused. A railroad crossing is a place of danger, and a traveler approaching one is bound to exercise that degree of care which the dangerous character of the place requires of a person of ordinary prudence. But there is no absolute rule of law which obliges him, under all circumstances, to stop to look and listen. Generally he must look and listen, and in such a manner that the looking and listening will enable him to see or hear an approaching train with reasonable certainty, if one is within the range of his sight or hearing. *Fletcher v. Railroad Co.*, 149 Mass. 127, 21 N. E. 802; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. 227; *Connolly v. Railroad Co.*, 158 Mass. 8, 32 N. E. 937. But it cannot be said as matter of law that there may not be circumstances which will excuse him from

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looking and listening, and especially from stopping to look and listen. In the present case there was evidence tending to show an invitation on the part of the gateman to the plaintiff to cross. The fact that the plaintiff approached the crossing at a trot, with a heavy load (if it was a fact), would not of itself render his conduct negligent, there being nothing to show that he could not have stopped if he had had reasonable notice of the coming train.

It was for the jury to say what the object of the flag was, and whether its presence had or should have had any effect upon the conduct of those in control of the train or of the gateman. It appearing that the rule in force at the time of the accident was the one put in by the defendant, it was competent for the court to permit the plaintiff to withdraw the one put in by him, and to direct the evidence in relation to it to be stricken out, and to be disregarded by the jury. *Costello v. Crowell*, 133 Mass. 352; *Smith v. Whitman*, 6 Allen, 562. It is to be presumed that the jury followed the instructions of the court, and it does not appear that the defendant was harmed by the course which the trial took. Exceptions overruled.

(164 Mass. 440)

MERRITT v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 18, 1895.)

CONDUCT OF TRIAL—READING EVIDENCE TO JURY WHILE CONSIDERING THEIR VERDICT.

Where the jury, after deliberation for a time, ask the judge as to the evidence of certain witnesses, and he has the stenographer read it, without comment by any one, *held*, that plaintiff had no legal ground of objection, under Pub. St. c. 170, § 42, providing that, when a jury, after due consideration on a case, returns into court without having agreed, the judge may state anew the evidence, or any part of it, and explain to them anew the law, etc.

Exceptions from superior court, Hampshire county; John Hopkins, Judge.

Action by Alpheus Merritt against the New York, New Haven & Hartford Railroad Company for personal injuries caused by defendant's negligence, in which there was a verdict for defendant. There was an order overruling plaintiff's motion for a new trial, and he excepts. Exceptions overruled.

The bill of exceptions, except the copy of the evidence of Heil and Cushion, referred to in and annexed to the bill, is as follows:

"Action of tort, tried to jury at this sitting to recover for personal injuries to plaintiff by being thrown to a station platform while, as a passenger, he was alighting from defendant's train at Port Chester, N. Y. The declaration is made a part of the case. The answer is a general denial. The plaintiff was a passenger on a way train from South Norwalk, Conn., to said Port Chester on the evening of December 20, 1892, and rode, with his nephew, in a seat, facing forward,

near the middle of the car. As the train approached Port Chester, the brakeman called the station, and passed out at the rear of the car plaintiff was in, leaving the door open. The plaintiff introduced evidence tending to show that he left his seat just as the car came to a stop at the station, and that he proceeded rapidly to the rear door, and to the platform of the car, to alight, when, as he was stepping off to the platform of the station, the car started suddenly, with a jerk, and without warning to him, and threw him violently to the platform of the station. The defendant introduced evidence tending to show that the plaintiff did not rise from his seat until the train started to leave the station, after having stopped a reasonable time to allow passengers to get off and others to get on, and that he then passed to the platform of the car, and got off the train while it was in motion, and against the warning of the brakeman, and in so doing fell and was hurt. One issue in the case was as to the due care of plaintiff, and the evidence was conflicting as to whether he started to descend from the platform of the car to the station platform when the train was at rest, or after it had started. Before the trial commenced the defendant moved to continue the case on the ground of the absence of two of its material witnesses, Jacob Hell and James F. Cushlon, residents of Connecticut. The motion to continue was not in writing, but defendant's counsel stated the facts with reference to the absence of these witnesses, the materiality of their testimony, the efforts of defendant to secure their attendance, that they had promised to attend this trial, and defendant, relying on such promise, had not taken their deposition, that they would have attended had not their employer told them they would be discharged by him if they did so, that they had testified in court at a previous trial of the case, and that he had a typewritten copy of their testimony then given, made by the official stenographer of the court who was then present, not the stenographer now. The court ruled that the defendant made out a case for continuance, and that, upon putting the motion in form of an affidavit, under rule 34, the motion would be allowed, and the case continued, unless plaintiff admitted that the said absent witnesses would testify, if present, as stated, and would agree that their testimony should be received and considered as evidence on the trial in like manner as if the witnesses were present and had so testified. The plaintiff agreed to admit all this, and, to save defendant's counsel the trouble of putting the motion in form, that the testimony of said Hell and Cushlon as given at said former trial might be used, with the same effect in all respects as if given on the stand in this trial, and that he might read the same from said typewritten copy. Upon the trial, the testimony in full of said

Hell and Cushlon was read by defendant's counsel while putting in defendant's case, and no objection was made thereto by the plaintiff. In the charge to the jury, the court said: 'It is further claimed by the defendant that there were other persons in the car who observed what happened, and that comes before you in the shape of testimony delivered at a former trial. The circumstances under which that has been put before you have been stated by counsel, and you must take that testimony precisely as though the persons were here upon the witness stand, and the claim, so far as their testimony is concerned, is this: that they observed the fact that the train had come to a standstill, and that this man was sitting in his seat, and as the train began to move this man rose from his seat, and started out while the car was in motion, and that the train continued on, and made no stop until the next station.' After the jury had been out deliberating upon their verdict, the following question in writing was sent by the jury to the presiding justice, namely: 'Was the testimony of Cushlon and Hell, that they saw Merritt standing in the aisle of car when the car started, in their cross-examination?' Whereupon the presiding justice sent for the jury, and upon their coming into court directed the present stenographer, in the absence of counsel of both parties, to read to the jury the cross-examination in full of said Hell and Cushlon, from the same copy from which defendant's counsel had read in open court the testimony of said witnesses upon the trial, which she did. The presiding justice made no comment thereon, and gave no further instructions in the case. The jury again retired, and found a verdict for the defendant. Plaintiff seasonably filed a motion for a new trial, a copy of which is hereto annexed. Upon the hearing of said motion plaintiff requested the court to rule that it was erroneous to have the cross-examination of the witnesses Cushlon and Hell read to the jury, in response to their inquiry, while they were deliberating on their verdict, and a new trial should be granted by reason thereof, which requested ruling the court declined to give, subject to plaintiff's exception, and overruled the motion for a new trial. A copy of the testimony of said witnesses, Hell and Cushlon, as read to the jury by defendant's counsel upon the trial, and as read by the stenographer as aforesaid, is annexed."

Wm. G. Bassett, for plaintiff. Robinson & Robinson, for defendant.

KNOWLTON, J. Under Pub. St. c. 170, § 42, "when a jury, after thorough and due consideration upon a case, returns into court without having agreed upon their verdict, the judge may state anew the evidence, or any part of it, and explain to them anew the law applicable to the case." See, also,

chapter 153, § 5. The jury asked the judge this question: "Was the testimony of Cushion and Hell, that they saw Merritt standing in the aisle of the car when the car started, in their cross-examination?" An answer to the question might aid the jury in their deliberations, and it was proper for the judge to bring them into court and give them an answer by stating anew that part of the testimony to which the question referred. See *Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528. This testimony had been taken stenographically at a former trial, and by agreement of the parties had been presented to the jury at this trial by reading a typewritten copy of it. Inasmuch as the evidence to which the question of the jury related was all in writing, the best way of stating it was to read it. The judge, therefore, directed the official stenographer to read the whole cross-examination of each of the two witnesses, which was done without comment by any one. There was no fairer or better way of giving a perfect answer to the question than by reading the whole cross-examination of each witness, which was not very long. It was immaterial whether the reading was by the judge, or by some one else appointed by him to do it. While the judge might, in his discretion, have adopted some other way of answering the question, or have refused to answer it, the plaintiff has no legal ground of objection to what was done. Considering the nature of the inquiry and of the evidence to which it related, we hardly see how the judge could have acted more discreetly. See *Alexander v. Gardiner*, 14 R. I. 15; *Atchison v. State*, 13 Lea, 278. The reading of the stenographic notes in open court, by an official stenographer, at the request of the judge, is expressly authorized by St. 1892, c. 133. It is not contended that the absence of the counsel in any way affected the right of the judge to answer the question in open court. *Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528. Exceptions overruled.

(164 Mass. 394)

McDOWELL v. CONNECTICUT FIRE INS. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 18, 1895.)

INSURANCE—FIRE SET BY INSURED—EVIDENCE.

In an action on a fire policy, defendant alleged that the fire was set by plaintiff, and offered to prove that two fires had before occurred, in which plaintiff had met with losses for which he had recovered insurance, and that nine other fires had also previously occurred, in each of which some relative of plaintiff had met with losses covered by insurance. There was no offer to show that any of these fires were set by plaintiff, or by his procurement. *Held*, that the evidence was properly excluded.

Exceptions from superior court, Franklin county; Elisha B. Maynard, Judge.

Action by Brice W. McDowell against the

Connecticut Fire Insurance Company to recover on a policy of insurance. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled.

Conant & Conant, for plaintiff. John A. Aiken, for defendant.

BARKER, J. The issue upon which the excluded evidence was offered was raised by the defendant's allegation that the fire was set by the plaintiff, and by his procurement, and with his consent. The offer was to show that two fires had before occurred, in which the plaintiff and his brother, who the jury might have found had some interest in the loss for which this suit was brought, had met with losses for which they had received insurance, and that nine other fires had also previously occurred, in each of which some relative or relatives of the plaintiff had met with losses covered by insurance, and for which they had received payment of insurance. There was no offer to show that any of these fires were set by the plaintiff or by his procurement. All of these fires, except the first two, were occurrences in which the plaintiff had no interest, and all of them were plainly *res inter alios*. The first two fires were independent of each other, one occurring in the year 1888 and the other in the year 1891; and neither of them was connected with the fire now in question, which occurred in the year 1893. If all the fires were parts of attempted frauds they were clearly independent frauds, and not parts of a system of fraud of which the fire in question was an essential step. None of the evidence excluded was admissible upon the ground stated in *Fowle v. Child* (Mass.) 41 N. E. 291, and the cases there cited. Exceptions overruled.

(164 Mass. 430)

MILLARD v. INHABITANTS OF EGREMONT.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 18, 1895.)

HIGH SCHOOLS—ATTENDANCE IN ANOTHER TOWN—REVOCATION OF APPROVAL.

1. There is nothing in St. 1891, c. 263, or in the substituted St. 1894, c. 436, which obliges a town that is not required by law to maintain a high school to provide for the attendance of children living therein at a high school in another town, or which obliges any city or town to receive into its high school, on payment of tuition, children living in a town where there is no high school.

2. Though the school committee of a town in which there is no high school, and which is not required by law to maintain one, has given its written approval of the attendance of a child living therein at a high school in another town, paying his tuition therefor, it may withdraw such approval at any time, on due notice to the parent on whose application the approval was originally granted.

3. Such approval, having been given, is presumed to continue till revoked by subsequent action, notwithstanding changes in the membership of the committee.

4. Plaintiff's daughter, with the written approval of defendant town, in which she lived, granted on plaintiff's application, attended the high school in a neighboring town, her own town paying her tuition. Subsequently the committee withdrew its approval, though not for any misconduct of the child, and notice of such withdrawal was given to plaintiff a few weeks later. Held that, if the tuition was payable by the term, and a new term had begun when plaintiff received such notice, the latter might recover from his own town the amount paid by him for that term; and, if the tuition was payable at a per diem rate, the amount to be recovered would be the sum payable at that rate from the time when the approval was withdrawn to the time when plaintiff received due notice thereof.

Appeal from superior court, Berkshire county; Ellisha B. Maynard, Judge.

Action by Elliza C. Millard, administratrix, against the inhabitants of the town of Egremont, for the recovery of money. The court found for plaintiff on an agreed statement of facts, and defendant appeals. Reversed as to the amount of damages.

Herbert C. Joyner, for appellant. A. Chalkley Collins, for appellee.

MORTON, J. This is an action brought by the plaintiff under chapter 263, St. 1891, to recover of the defendant money paid by him to the town of Great Barrington for tuition for his daughter in its high school after March 22, 1892, when the school committee of the defendant town passed a vote withdrawing the approval which it had previously given to the attendance of the plaintiff's daughter at said school. It is agreed that there was no misconduct on the part of the daughter. The plaintiff contends that the school committee, having once given its approval, could not withdraw it, except for misconduct on the part of the pupil; and that the daughter of the intestate was entitled to pursue the studies on which she had entered until her graduation in due course, which is said in the plaintiff's brief to have been in June, 1895. She further contends that, if that is not so, the defendant is liable for the amount paid for tuition for the term on which the daughter had entered at the time when her intestate first learned of the action of the school committee, or, at least, that it is liable for the amount paid down to such time. The object of the statute appears to be to provide a way in which a child living in a town which is not obliged to maintain, and which presumably does not maintain, a high school, may attend one in a neighboring city or town at the expense of the town where he resides, and it seems to be an extension of Pub. St. c. 47, §§ 6, 8. There is nothing in the act of 1891, or in the substituted act of 1894 (chapter 436), which obliges a town that is not required by law to maintain a high school to provide for the attendance of children living in it at a high school in another city or town, or which obliges any city or town to receive into its high school, upon the payment of reasonable tuition, children living in a town where there is no high

school. There is no such provision elsewhere. Cities and towns are bound to furnish, within their respective limits, "schools for the instruction of all children who may legally attend public schools therein" (Pub. St. c. 44, § 1); but they are not obliged to provide for the attendance of such children at schools elsewhere. In certain cases two adjacent towns, or two or more contiguous districts in adjoining towns, may unite, and maintain a school for the common benefit of children in said towns or districts; or children living remote from any public school in the town where they reside may be allowed to attend school in an adjoining town, under such regulations, and on such terms, as the school committees of said towns agree upon; or they may, with the consent of the school committee, attend schools in towns or cities other than those in which their parents or guardians reside. Pub. St. c. 44, §§ 3, 10; Id. c. 45, §§ 51, 52; Id. c. 47, §§ 6, 8. But these matters are left to the decision of the school committee or of the towns and districts interested. St. 1894, c. 436, remedies an omission in St. 1891, c. 263, by providing that no member of a school committee, except in a certain case, shall refuse his approval if a child is qualified to enter the high school in another city or town; and that, if a school committee unreasonably refuses to grant its approval, the town shall be liable to the same extent that it would have been if the approval had been obtained. But, as already observed, neither this statute nor that of 1891 imposes on towns where there is no high school an obligation to provide for the attendance in a high school elsewhere of such of its children as are qualified to attend a high school. To hold, therefore, even though St. 1891, c. 263, made no provision for the withdrawal of an approval, the town would be obliged, when it was once given, to pay for the attendance of the pupil until the course on which he or she had entered was completed, would be giving to the statute, we think, a construction which could not have been intended by the legislature. The approval would be presumed, no doubt, to continue till withdrawn. Although the members of the board might change, the board itself, from the manner in which it was constituted,—one member being elected annually,—would be a continuing body, and its approval well might be assumed by all interested to continue till revoked by subsequent action. *Fairbanks v. Mayor, etc.*, 132 Mass. 42, 44; *Collins v. Holyoke*, 146 Mass. 296, 15 N. E. 908. It manifestly would be for the school committee, under the general powers vested in it by statute, and not for the town, to say whether the approval should or should not be withdrawn, or whether any further approval should be given. Pub. St. c. 44, § 21; *Kimball v. Salem*, 111 Mass. 87. When, in case of the withdrawal of the approval, that should take effect, and when, and to whom, notice of the withdrawal should be

given, are matters in regard to which there is no provision either in the act of 1891 or in that of 1894. In the present case notice was given immediately by the school committee of Egremont to that of Great Barrington; but no notice was given to the plaintiff's intestate till a few weeks later, and, as we infer, not until after his daughter had entered upon a term in the Great Barrington high school. It was reasonable that notice of its action should be given by the school committee of Egremont not only to the school committee of Great Barrington, but also to the parent of the scholar. It was only upon his application that the approval originally was granted. Under his application, and the approval given in consequence of it, the town became liable for the tuition. There was no liability resting upon him. Before he could be deemed liable for tuition, it should appear that he had had due notice of the withdrawal of the approval, and an opportunity, if he saw fit, to discontinue the attendance of his daughter. We also think that, if the tuition was payable by the term, the notice should have been given so as to take effect either at the end of a term or before the beginning of one, and that, if it was given after the daughter of the plaintiff's intestate had begun a term's attendance, the plaintiff can recover the amount paid for tuition for such term. If the tuition was payable at a per diem rate, then we think that the amount to be recovered would be the sum payable at that rate from the time when the approval was withdrawn to the time when the plaintiff's intestate received due notice from the committee of its withdrawal. The agreed facts are somewhat ambiguous as to the disposition to be made of the case. But we construe them as meaning that, if the plaintiff is entitled to recover at all, though for a less amount than that found due by the court, she is to have judgment accordingly. The finding of the court will therefore be set aside, and the case stand for hearing on the question of damages, to ascertain the amount due according to the rule above stated, and, when duly found, judgment will be entered therefor.

(164 Mass. 504)

TAFT v. CHURCH et al.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1895.)**PRACTICE — DISCONTINUANCE — ACTION AGAINST PARTNERS — JUDGMENT AGAINST ONE DEFENDANT.**

1. In an action on contract against two persons, as partners, the court may allow plaintiff to discontinue as to one of the defendants.

2. Under Pub. St. c. 171, § 5, providing that plaintiff in an action on contract against several defendants is entitled to judgment against such defendants as are found liable, judgment in an action on contract against two partners, only one of whom is found to be liable, may be entered against such defendant without an amendment of the declaration.

Exceptions from superior court, Worcester county; Robert R. Bishop, Judge.

Action by Nathaniel E. Taft against Herbert E. Church and Fred H. Goode, partners, on contract. To an order discontinuing the action against defendant Goode, and a judgment against defendant Church, defendants except. Exceptions overruled.

W. S. B. Hopkins and Charles M. Thayer, for plaintiff. Warren Ozro Kyle, for defendants.

FIELD, C. J. It was within the power of the superior court to allow the plaintiff to discontinue the action as to the defendant Goode. *Gray v. Cook*, 135 Mass. 189.

The contention of the defendants is that the finding should have been amended so as to show a finding against Church alone. In this case, as reported in 162 Mass. 533, 39 N. E. 283, it is said in the opinion: "Although the action is against two persons, as partners, and one only is held liable, judgment may be entered against him alone, under Pub. St. c. 171, § 5,¹ and no amendment of the declaration is necessary." See *Wiggin v. Lewis*, 12 Cush. 486; *Downing v. Coyne*, 121 Mass. 347; *Insurance Co. v. Abbott*, 131 Mass. 397, 407. We see no necessity of amending the finding. On the whole record, it sufficiently appears that the finding stands against Church alone. Exceptions overruled.

(164 Mass. 467)

RICHMOND v. AMES.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1895.)**BREACH OF COVENANT—INCUMBRANCES—RIGHT OF WAY—DAMAGES.**

1. In an action for breach of covenant against incumbrances, it appeared that land conveyed by defendant was subject to a right of way in favor of third persons, who recovered damages from plaintiff for encroaching on the way with buildings. Oral notice of the actions against plaintiff was given to defendant's husband, who had control of her land, but there was no evidence of notice to defendant. *Held*, that defendant was not bound by the assessment of damages in such actions.

2. Where the grantee in a deed with covenant against incumbrances is compelled to buy off a claim of a right of way to which the land was subject, and the price paid was reasonable, he may recover it in an action on the covenant.

3. Though no opportunity was given to a grantor in a deed with covenant against incumbrances to defend actions against the grantee for encroaching on a right of way to which the land was subject, the grantee may, in an action on the covenant, recover reasonable counsel fees for defending such actions.

4. In an action on a covenant against incumbrances, the incumbrance being a permanent right of way, the measure of damages is the amount which the premises are diminished in value at the date of the trial.

Report from superior court, Worcester county; John Hopkins, Judge.

¹ The statute provides that in actions on contract, against several defendants, plaintiff is entitled to judgment against such defendants as are found liable, though all the defendants are not jointly liable.

Action by Willard Richmond against Susan F. W. Ames for breach of covenant against incumbrances. The evidence and findings were reported to the supreme judicial court. Findings sustained in part, and new trial ordered.

W. S. B. Hopkins and Frank B. Smith, for plaintiff. Rockwood Hoar and Charles M. Thayer, for defendant.

FIELD, C. J. The report of this case is in some respects too meager to present the questions of law involved in it in a satisfactory manner. We do not know from the report whether the \$2,587.86 which the plaintiff "had to pay in damage * * * in order to remove so much of the incumbrance as is affected by the cases of Starkie & Green against Richmond" (155 Mass. 188, 29 N. E. 770) was the sum of the damages assessed in those cases, if any damages were assessed, or whether it was a sum agreed upon by the parties to those suits. We do not know whether the court in the present case found that this was a reasonable sum to be paid, or whether the court held that, by reason of the notice of the pendency of those suits given to the husband of the present defendant, she became conclusively bound to pay to the present plaintiff the amount of the damages recovered in those suits, if any were recovered. We do not know why the court found that the plaintiff in the present suit was entitled to recover interest "from October, 1892." This may have been the date when the money was paid by the present plaintiff, but that does not appear in the report. The date of the writ in the present action is June 12, 1893. The report refers to the cases of Starkie v. Richmond and Green v. Richmond, found in 155 Mass. 188, 29 N. E. 770, and it may be considered that those cases, as they are there reported, are to be taken as a part of the report of the present case. The original papers in those cases, entered in this court, show that it was a part of the final decree in each case that the plaintiff's damages should be assessed by a jury; but it does not appear, and we have no means of knowing, that this was done, or that the damages were assessed in any manner, although, as it seems, the briefs of both parties in the present suit assume that the damages were assessed, and also assume that the damages found in the present case to have been paid by the plaintiff are the sum of the damages assessed in those suits. No specific questions of law are reported in the present case for the consideration of this court, but certain facts are reported, some of the evidence is reported verbatim, and there are certain findings of fact by the court, and this court is to enter such judgment "as shall be deemed proper." We see no reason to doubt that the superior court was warranted by the evidence in finding as it did in the first and second clauses of the findings of fact set out in the report.

The remaining questions of law relate to the measure of damages. The plaintiff's claim is that the land conveyed to him by the defendant's deed was, on its southerly boundary, subject to a right of way in favor of other persons. The suit is maintained on the covenant against incumbrances. The suits of Starkie and Green v. Richmond were suits in equity to compel the defendant therein, who is the plaintiff in the present suit, to tear down a building which he had erected, and which was found to extend over a small part of the way, and also to remove a fence which inclosed a triangular piece in the rear of the lot, which was subject to this right of way. The court, under the facts found in those cases, refused to order the removal of the building, and appointed commissioners to run the line of the way. We understand that the fence was at some time removed, leaving the triangular piece thereafter open for the use of the persons entitled to use the way. Although the building encroached upon the way, yet the court permitted the building to stand, and decreed that the plaintiffs in those suits should be compensated in damages to be assessed for the destruction in part of their right of way. We do not know on what principles the damages were assessed in those suits, if they were assessed, or what issues were submitted to a jury, if any were submitted.

If the fair interpretation of the third clause of the findings of facts set out in the report is that the plaintiff bought off the incumbrance of the right of way, so far as the building extended over the line of the way, and had to pay therefor \$2,587.86, and, if it be assumed that these are the damages assessed in the suits of Starkie and Green v. Richmond, one question is whether the present defendant had notice of those suits, and was called upon to take upon herself the defense of them. Upon this question all of the evidence is reported. The evidence tends to show that the husband of the present defendant had notice of the bringing of those suits, and was a witness at the trial of them, and that he managed his wife's real estate for her, by her permission; but there is no evidence that the wife, who is the present defendant, had any notice. There is no evidence that the husband had notice, in terms, that his wife would be held responsible for the result of the suits, or that she was called upon, or would be given an opportunity, to defend them. There is no evidence that the notice was given with any such intention, or was understood by the husband to be a notice to his wife to come in and defend the suits. We doubt whether the fact that the husband was the agent of the wife in the management of her real estate made him her agent to receive any such notice for her. It is not within the ordinary scope of the duty of such an agent to appear for his principal in suits between other persons, relating to real estate not be-

longing to his principal, and to take upon himself the defense of the suits. In giving such a notice, although the strict formalities of the ancient law are not now required, still, whatever its form, the notice should be such as to give the person notified information that he is called upon to come in and defend the suit if he chooses, and that he is to be held responsible for the result of the suit. *Chamberlain v. Preble*, 11 Allen, 370; *Elliott v. Hayden*, 104 Mass. 180; *Boston v. Worthington*, 10 Gray, 496; *Boyle v. Edwards*, 114 Mass. 373. The principal object of the suits of Starkie and Green was to compel the defendant therein to remove a building which he had erected; the assessment of damages was incidental only; and, if it be assumed that the present defendant could properly be vouched in to defend such suits, there is no antecedent probability or presumption that the defendant in suits of this nature would be willing to intrust the defense to another person. It may be that notice of the pendency of a suit, without more, given to the person who is responsible over, may, under some circumstances, imply that the person notified is called upon to defend the suit, and it may be so understood by that person, but this is not the ordinary effect of such a notice. There is no evidence in the present case that the notice was anything more than information, orally given to the husband, that the suits had been brought, and that he might be needed as a witness, without any intimation that his wife should be informed of it, and should take upon herself the defense of the suits. We are of opinion that, on the evidence reported, it could not properly be found that the notice was intended as a notice to the wife to come in and defend the suits, or was so understood by the husband.

Still, if this defendant is not bound by the assessment of damages in the suits of Starkie and Green, yet if it was reasonable for the present plaintiff to buy off the incumbrance, so far as the building was concerned, and if the sum paid was reasonable, the plaintiff can recover such reasonable sum in the present suit, with interest from the time of payment. If it was a question reasonably doubtful whether the plaintiffs in the suits of Starkie and Green were right in their contention as to the right of way, the present plaintiff, acting in good faith, had the right to defend those suits, or to ask the present defendant to defend them; and it may be that any expenses reasonably incurred in defending against the claim of a right of way, made in those suits, the present plaintiff can recover of the present defendant. *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. 47; *Farnum v. Peterson*, 111 Mass. 148. Whether such expenses should include reasonable fees paid for counsel, in addition to the taxable costs, is, on the authorities, a question of some difficulty. If it was the duty of the present defendant to defend

the suits, and she had an opportunity of defending them, and declined to do so, then, if the present plaintiff, in good faith, defended them, it would seem that reasonable counsel fees should be recovered. *Inhabitants of Westfield v. Mayo*, 122 Mass. 100. See *Leffingwell v. Elliott*, 10 Pick. 204. If no opportunity was given to the present defendant to defend the former suits, the law is more doubtful, although the tendency is to allow reasonable counsel fees, if the circumstances were such as to render the employment of counsel proper. *Lindsey v. Parker*, 142 Mass. 582, 8 N. E. 745; *Boston & A. R. Co. v. Inhabitants of Charlton*, 161 Mass. 32, 36 N. E. 688. We are unable to determine from the report precisely what the court found in these respects.

One contention is that the present plaintiff, after notice by Starkie's wife, in 1878, that he was proceeding to build on the passageway, persisted in going on with the erection of his building, and thus, by his own fault, increased the damages which he had to pay; and it is argued that the present defendant ought to be compelled to pay damages occasioned by the fault of the plaintiff. If damages were assessed in the suits of Starkie and Green, we have said that we do not know on what principles they were assessed. We infer that the damages should have been assessed in those suits on the principles of a compulsory purchase of the incumbrance, so far as the erection of the building was concerned, and that this should have been done on the theory of paying compensation, at a fair price, for the incumbrance, in view of all the circumstances. It is probable that the court, by refusing to compel the defendant in those suits, who is the present plaintiff, to take down his building, and by ordering an assessment of damages, did not mean to give to the plaintiffs in those suits an opportunity to obtain an unreasonable price for a release or discharge of the incumbrance. It is entirely consistent with the facts reported that the present plaintiff proceeded in good faith in erecting his building, even after the notice of Starkie's wife. The facts, so far as they are reported, are such that it might well require the judgment of a court, in order to determine the boundaries and width of the passageway which Starkie and Green were entitled to use. If the damages assessed in the suits brought by them are not to be taken as conclusive upon the defendant in the present suit, it was for the court to determine whether the present plaintiff acted reasonably in contesting those suits, and in buying off the incumbrance.

In regard to the triangular piece, we infer that the court, in the present case, estimated the diminished value of the plaintiff's estate by reason of the incumbrance not as of the date of the deed, or as of the time of the trial, but as of the date when the incumbrance of the right of way under the build-

ing was extinguished by purchase. In an action on the covenant against incumbrances, when the incumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the incumbrance. *Wetherbee v. Bennett*, 2 Allen, 428. The general rule is stated in *Harlow v. Thomas*, 15 Pick. 66, 69, as follows: "The general rule in cases of this kind is plain and undisputed. If the covenantee has fairly extinguished the incumbrances, he ought to recover the expenses necessarily incurred in doing it. If they remain, and consist of mortgages, attachments, and such liens on the estate conveyed as do not interfere with the enjoyment of it by the covenantee, he can recover only nominal damages. But if they are of a permanent nature, like the perpetual servitudes in this case, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance. *Prescott v. Trueman*, 4 Mass. 630." See *Batchelder v. Sturgis*, 3 Cush. 201. We think that these damages are usually assessed as of the date of the trial. If there have been special damages theretofore suffered by the plaintiff, by reason of the exercise of the right of way, these may be shown up to the date of the trial; and, if the easement is of a permanent nature, the question is how much, at the time of the trial, is the plaintiff's estate diminished in value by reason of the existence of the incumbrance?

As it seems to a majority of the court that it does not appear upon what principles or rules of law the damages in the present case have been assessed, they are of opinion that there should be a new trial, but only upon the amount of the damages. So ordered.

(164 Mass. 490)

CLARK et al. v. MURPHY.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1895.)

PAYMENT TO AGENT—PROOF OF AUTHORITY.

Payment by a purchaser of goods to the seller's agent, who solicited and received the order for them, does not discharge the debt, in the absence of proof by the purchaser that the agent had any other authority than to make sales.

Exceptions from superior court, Hampden county.

Action by William S. Clark and others against Dennis Murphy to recover for goods sold and delivered by plaintiffs to defendant. There was a verdict directed by the court in favor of plaintiffs, and defendant excepts. Exceptions overruled.

Luther White, for plaintiffs. Gillett & McClench, for defendant.

LATHROP, J. There being no dispute at the trial of this case that the goods, for the price of which this action is brought, were sold and delivered by the plaintiffs to the defendant, the remaining issue raised by the pleadings is payment. On this issue the burden of proof is upon the defendant. *Burnham v. Allen*, 1 Gray, 496; *Hilton v. Smith*, 5 Gray, 400. The exceptions on this point show the giving of a check upon a bank to one Marks, who purported to be an agent of the plaintiffs, for the amount of the bill of the goods sued for. The check was made payable to the order of the plaintiffs. Marks forged an indorsement of the plaintiffs' names, and obtained the money. The question, then, is as to the authority of Marks to receive payment. As the case was taken from the jury by the presiding judge, who directed a verdict for the plaintiffs, we must, in considering this question, lay aside the testimony put in by the plaintiffs, unless there is something in it favorable to the defendant. The exceptions show that Marks was a traveling salesman for the plaintiffs, "whose business it was to solicit orders for the plaintiffs for their goods"; that Marks called upon the defendant and received an order for the goods, the price of which is sued for; that this order was transmitted to the plaintiffs, accepted by them, and the goods were duly forwarded to the defendant, and received and accepted by him. There is no doubt, on these facts, that the plaintiffs are entitled to recover. An agent who merely solicits orders for goods, sending these orders to his principal to be filled, has no implied authority to receive payment for the goods, and a payment to him will not discharge the purchaser, except on proof of some authority to the agent other than that of making sales. There was no evidence here that the goods were intrusted to the agent, or that the plaintiffs had in any way held out Marks as a person authorized to receive payment. The case is the simple one of a payment made to a person who has authority to make sales, and who is not shown to have any other authority. In such a case, if the purchaser sees fit to make a payment to him, he does so at his own risk. *Clough v. Whitcomb*, 105 Mass. 482; *Selple v. Irwin*, 30 Pa. St. 513; *Law v. Stokes*, 32 N. J. Law, 249; *Kornermann v. Monaghan*, 24 Mich. 36; *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. 628; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485; *Butler v. Dorman*, 68 Mo. 298; *Chambers v. Short*, 79 Mo. 204; *Clark v. Smith*, 88 Ill. 298. We find nothing in the evidence which would have warranted the jury in finding that the plaintiffs, by their subsequent conduct, had ratified the act of the defendant in giving his check to Marks. Exceptions overruled.

(164 Mass. 492)

GRIFFIN v. UNITED ELECTRIC LIGHT CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1895.)INJURIES BY ELECTRIC WIRES — NEGLIGENCE AND
CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

1. In an action against an electric light company for injuries caused by an electric shock, there was evidence authorizing the jury to find that the injury was caused by a galvanized iron pipe, which plaintiff was, in the daytime, rightfully placing on a building, coming in contact with a place on the electric wire running along the wall of, and into, such building, where the insulating material was worn off, and also evidence that plaintiff was not an expert, and did not know that an electric light wire would do any harm, or that electric light wires ran on the sides of buildings. *Held*, that the question of plaintiff's due care was for the jury.

2. There was evidence that the condition of the wire was such that the jury might have found, from the description of it given by the witnesses, that the insulating material had been gone for such a length of time that defendant ought to have known of it. *Held*, that the question of defendant's negligence was for the jury. *Hector v. Electric Light Co.*, 37 N. E. 773, 161 Mass. 558, distinguished.

Exceptions from superior court, Hampden county.

Action by Dennis J. Griffin against the United Electric Light Company to recover for personal injuries caused by defendant's negligence. There was a verdict directed by the court in favor of defendant, and plaintiff excepts. Exceptions sustained.

J. B. Carroll and W. H. McClintock, for plaintiff. Wm. H. Brooks, for defendant.

LATHROP, J. This is an action of tort, for personal injuries sustained by the plaintiff by receiving an electrical shock from a wire of the defendant company. The plaintiff was a tinsmith, and was at work, with a fellow servant, placing a galvanized iron conductor on the rear of a building called the "American House." He was upon the ground, and his fellow servant was on a ladder near the roof of the building, which was about 22 feet from the ground. The wire from which the plaintiff received the shock ran along the wall of another building until it reached a point about 2 feet from a corner formed by this building with the American House, and then ran diagonally across the corner to the wall of the American House, at a point 8 or 10 feet from the same corner, where it entered a square iron block attached to the wall of the American House. This wire was about 12 feet from the ground. Six or 8 inches higher than this wire, and about 8 inches nearer to the building, another wire ran along, and went into the same box. The conductor was to be placed in the corner formed by the two buildings, for the purpose of carrying off water from a gutter under the eaves of the American House. We are of opinion that there was evidence for the jury

that the plaintiff was in the exercise of due care. The jury might well have found, on the evidence, that the injury was caused by the pipe's coming in contact with a place on the wire where the insulating material had become worn off. It cannot be said, as matter of law, that this condition was so apparent to the plaintiff that he must have seen it, or ought to have seen it, although the accident happened in the forenoon. While an expert may consider it dangerous to touch any wire, unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt, or that electric light wires ran on the sides of buildings. The question of his due care was for the jury. *Illingsworth v. Electric Light Co.*, 161 Mass. 583, 588, 37 N. E. 778.

We are of opinion, also, that there was evidence of the defendant's negligence, proper to be considered by the jury. There was certainly evidence that the insulation of the wire was gone, and its condition was such that the jury might have found, from the description given of it by the witnesses, that it had been in that condition for such a length of time that the defendant ought to have known of it. The plaintiff was not a trespasser, or a mere licensee, who must take the premises of another as he finds them. He was rightfully on the premises, for purposes of business. On these premises the defendant had rightly placed, as the case finds, two electric wires. These were a source of danger, unless properly insulated. This fact was recognized by the defendant, by insulating them. But it was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises. What its duty was, in this respect, as to other persons, we have no occasion to inquire. See *Illingsworth v. Electric Light Co.*, *ubi supra*.

The ruling of the justice of the superior court in favor of the defendant is stated in the report, upon which the case comes before us, to be based upon the case of *Hector v. Electric Light Co.*, 161 Mass. 558, 37 N. E. 773. But that case differs essentially from the one before us. There a lineman of a telegraph and telephone company was sent to attach a wire to a standard owned by the defendant on the roof of a building numbered 45 Temple Place, in Boston. Instead of entering this building, and going out upon the roof, he went up through the building numbered 29 Temple Place, and passed over the roofs of several intervening buildings until he came to the roof of No. 41, which was next to, but higher than, the roof of No. 45. A bunch of wires ran from the standard on No. 45 over a small portion of the roof of No. 41. The plaintiff stooped under these wires, to see how he could get onto the roof of No. 45,

and was injured by reason of the insulation being worn off from one of these wires. The case was decided in favor of the defendant upon the ground that the defendant owed no duty to the plaintiff to maintain an effectual insulation of its wires over other buildings than that on which its standard was placed, which was the only place to which the telegraph and telephone company sent the plaintiff, or where he had a right to be. In the case at bar the plaintiff was rightfully where he was when injured. The question of the defendant's negligence was for the jury.

By the terms of the report, the order must be: Case to stand for trial.

(164 Mass. 477)

COMMONWEALTH v. FOLLETT.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 19, 1895.)

UNLAWFUL TAKING OF FISH.

1. One who takes trout from an open stream with a net, though on his own land, where he had placed them, violates Pub. St. c. 91, § 51, prohibiting the taking of trout with a net at any season of the year.

2. Pub. St. c. 91, § 26, declares that fish artificially propagated or maintained shall be the property of the person propagating or maintaining them, and that a person legally engaged in their culture may take them in his own waters at pleasure. *Held*, that the fish so declared to be the property of the person maintaining them are fish in waters which have been inclosed by a riparian proprietor, within his own premises, on a stream not navigable, as provided by section 25.

Exceptions from superior court, Berkshire county; Elisha B. Maynard, Judge.

Richard E. Follett was found guilty of taking trout from a stream with a net, and brings exceptions. Exceptions overruled.

This is a complaint charging the defendant with taking trout in violation of section 51, c. 91, Pub. St. The stream from which the trout were taken by the defendant was a brook made up of two or three tributaries, having its source in the town of Sheffield, and known as "Lee Brook." This brook flowed some three or four miles to a stream known as "Hubbard Brook," through which its waters discharged into the Housatonic river, all in the town of Sheffield. None of these streams are navigable. The principal tributary to Lee brook flowed about one-half mile, and entered land owned or leased by the defendant, there uniting with another tributary having two sources on said land of the defendant,—one a spring upon which his hatchery was situated, and the other a spring, the water from which flowed about one-half mile, and united with the stream flowing from the hatchery spring, a short distance below. On the tributary thus formed, and before its union with said principal tributary, the defendant had erected a number of small dams forming arti-

cial ponds, in which he kept trout for culture. This brook thus made up flowed from the land so owned or leased by the defendant to and through land of another riparian proprietor (the distance on the last-named land being about one-half mile), and then entered again upon other land owned or leased by the defendant, through which it flowed about one mile, and entered the land of another riparian proprietor. There were no obstructions in either of said brooks, to interfere with the passage of fish up and down the stream, except the dams erected by the defendant, as stated, upon the tributary having its sources upon his land, and the vats and tanks erected upon the same tributary in connection with the defendant's said hatchery; and there were trout in said Lee brook other than those which the defendant claimed were owned by him, it having been on one or two occasions, within two or three years before the erection of the defendant's hatchery, stocked by other parties.

The defendant testified that he was engaged in the business of artificially propagating and maintaining trout in Sheffield; that he had a trout hatchery, so called, on a small tributary of Lee brook, in Sheffield, where he artificially hatched nearly 3,000,000 of "fry" (i. e. young trout) yearly; that he owned or leased land through which a portion of Lee brook flowed as above stated; that the sources of said small tributary brook which emptied into said Lee brook were in land so owned or leased by him, one of which was the spring within his hatchery building, and another the spring outside of said building, which the defendant had dug out, and made into a series of small, artificial ponds, wherein he kept trout artificially propagated or maintained by him in his said business; that the overflow from the hatchery and from said pond united, forming said small tributary of Lee brook which flowed through said land owned or leased by the defendant as aforesaid, and to and through land of other riparian proprietors, finally emptying into a larger brook, called the "Hubbard Brook." That early in 1893 he purchased in Rhode Island 1,500 artificially propagated trout, of the species called "Hoxie Trout," for the purpose of obtaining their spawn for use in his said business; that said trout, when purchased, were two years old, and weighed, on the average, about one-half pound each; that he brought said trout from Rhode Island, and placed them in one of said artificial ponds; that in the following June, 1893, he noticed that said fish were becoming diseased (a fungus growth appearing on their fins and sides); that to check this disease he let them out of the pond, into said Lee brook, on the land owned or leased by him as aforesaid; that all the land so owned or leased by him, through which said brook flowed, was posted (i. e.

had printed notices stuck up, forbidding persons from fishing in said brook on defendant's premises); that afterwards he fed said trout in said brook, on those sections thereof which flowed through land so owned or leased by him, by throwing chopped meat and other substances into the water, a portion of which floated down the stream with the current; that said trout were fed by him daily in the same manner as he fed those in the hatchway; that in the latter part of August, or early part of September, of the same year, to secure some of the spawn from said trout for use in said business of trout culture, he caught from said brook, on his own premises, both on the land where his hatchery was located below said hatchery, and on his lands below the half-mile strip of the intervening riparian proprietor, a number of trout, estimated at 60, with a net; that nearly all the trout so caught were Hoxie trout, these being a part of the number let into the brook by him the June before, as previously stated, which were very tame, easily netted, and readily identified as the Hoxie trout; that he placed these fish, when caught as aforesaid, in his said hatchery, kept them there until ripe (i. e. until they were ready to be delivered of their spawn, some three or four weeks), then stripped the spawn from them, and let them all back into the brook; that all the fish so taken, other than the Hoxie trout, were thrown from the net back into the brook. The defendant also called witnesses, who claimed to be experts in trout culture, who testified that Hoxie trout could easily be distinguished from the ordinary brook trout. There was also evidence from the witnesses on both sides that the native or ordinary brook trout were of a deeper and richer shade than the Hoxie, and other trout artificially propagated, but that after remaining in the brook for a period of time the latter came to look more like the native trout.

At the close of the evidence, in consultation with counsel, the court stated that, in regard to the Hoxie trout, he should instruct the jury "that if defendant took the fish in a net, in the manner and in that portion of the brook testified to by him, and took them away and kept them till ripe, and then stripped them, as testified to by him, he was guilty of a violation of the statutes upon which the complaint is founded, although he was able and did identify each fish so taken and taken away as a fish which he had brought from Rhode Island, and let loose in said brook, as testified to by him, and although he returned each of said fish to said brook as soon as stripped." To this ruling defendant excepted, and, in view thereof, consented that the court might direct a verdict of guilty.

C. L. Gardner, Dist. Atty., for the Commonwealth. Charles E. Hibbard and Herbert E. Joyner, for defendant.

FIELD, C. J. Pub. St. c. 91, § 51, prohibit the taking of trout with a net at any season of the year. Sections 25 and 26 of the same chapter are as follows:

"Sec. 25. A riparian proprietor may, within the limits of his own premises, enclose the waters of a stream not navigable, for the cultivation of useful fishes; provided, he furnishes a suitable passage for migratory fishes naturally frequenting such waters.

"Sec. 26. Fishes artificially propagated or maintained shall be the property of the person propagating or maintaining them; and a person legally engaged in their culture and maintenance may take them in his own waters at pleasure, and may have them in his possession for purposes properly connected with said culture and maintenance, and may at all times sell them for these purposes, but shall not sell them for food at seasons when their capture is prohibited by law."

The construction we give to these sections, when applied to fish in the waters of a stream not navigable, is that the fish which are declared to be the property of the person propagating or maintaining them, and which such person may take "in his own waters at pleasure," are fish in waters which have been inclosed as provided by section 25. In *Com. v. Parley*, 130 Mass. 469, 471, the court say, speaking of St. 1869, c. 384, sections 16, 18, and 20 of which were incorporated in sections 25 and 26 of chapter 91 of the Public Statutes: "The absolute ownership created by the statute necessarily exists only where and so long as he who propagates or cultivates the fish keeps them within a territory over which he has absolute control. As soon as he permits them to pass into territory where others have right of fishery, equal to or greater than his, his ownership is gone, because they may then be rightfully taken by others without his consent," etc.

The contention of the defendant that the Hoxie trout had become so tame as to become his absolute property, wherever they might be found in an open stream, cannot be supported. Such fish are not of the class of animals which, without confining them in private waters, can become the absolute property of anybody. These trout, in an open stream, are like other trout; and Pub. St. c. 91, § 51, were intended to prohibit an owner of land on a stream not navigable from taking trout with a net from the stream on his own land, as well as to prohibit other persons from doing so. Exceptions overruled.

(164 Mass. 453)

DANE v. COCHRANE CHEMICAL CO.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1895.)**MASTER AND SERVANT — WHEN RELATION EXISTS.**

A manufacturing company employed a carpenter under a continuing contract to make all repairs and alterations which it determined upon to its works, he to furnish tools, and the company the materials, at \$2.50 per day for his own services and 25 cents profit on each man employed by him. The carpenter hired, paid, superintended, and discharged the men employed by him, but the company directed how the work was to be done. *Held*, that a man hired by the carpenter was an employé of the carpenter, and not of the company, within St. 1887, c. 270, regulating the liability of masters to servants.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by Norman J. Dane against the Cochrane Chemical Works for personal injuries as an employé. From a verdict for defendant, plaintiff brings exceptions. Exceptions overruled.

Freedom Hutchinson, for plaintiff. R. M. Saltonstall and Robert F. Herrick, for defendant.

FIELD, C. J. At the argument no objection was made that the notice given was not sufficient, or might not have been found by the jury to be sufficient; and it was not contended by the plaintiff that the ladders used could be found by the jury to be a part of the ways, works, and machinery of the defendant, within the meaning of St. 1887, c. 270, § 1. The plaintiff relied upon the second count of the amended declaration, and the principal, although not the only, question argued is whether there was evidence for the jury that Frederick Johnson was a servant of the defendant, intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence over the performance of the carpentry work which the plaintiff, with others, was engaged in doing, or whether Johnson, in doing this work, was an independent contractor. Johnson was employed by the defendant under a continuing contract to do from time to time such carpentry work as was necessary to be done on the buildings occupied by the defendant for the purpose of manufacturing chemicals. The works of the defendant covered an area of about a dozen acres, and were divided into two departments, and over each department was a superintendent. Johnson received his orders for the carpentry work to be done usually from one of the superintendents. He hired the men to be employed in doing the work, superintended, paid, and discharged them. The defendant paid Johnson \$2.50 a day for his work and 25 cents a day for each man employed by Johnson, in addition to the amount of the wages which Johnson agreed to pay the man. So far as appears, John-

son furnished the tools and the defendant the materials required to do the work. Johnson drew money from time to time from the defendant on account of what was due to him, and at the end of each month the accounts between him and the defendant were usually settled. Johnson paid his workmen every Saturday, but their names never appeared on the pay roll of the defendant. They never were paid by the defendant, and the defendant kept no account with them. Apparently Johnson kept workmen in his employ whom he used in performing work for other persons as well as for the defendant. We think that it was competent for the jury to infer from all the testimony that the defendant determined what repairs and alterations requiring carpentry work from time to time should be made, and when and how they should be made, although, when it decided upon what repairs and alterations were to be made, it usually left the manner of making them to the discretion of Johnson. When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of work done by the carpenter and the men he employs, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work.

The principles which govern the liability of the employer towards strangers for injuries occasioned by the negligence of persons so employed were considered in *Linnehan v. Rollins*, 137 Mass. 123. But the fundamental question in the present case seems to us not precisely that considered in *Linnehan v. Rollins*, nor whether Johnson was independent of the defendant in the manner of doing the work, but whether the relation between the plaintiff and defendant, as shown by the evidence, was that of employer and employé. Could the plaintiff have recovered his wages of the defendant if they had not been paid by Johnson? Did Johnson hire the plaintiff on his own account or as agent for the defendant? At common law the defendant, on the evidence, would not be liable to the plaintiff, because, if Johnson was a servant of the defendant in hiring the plaintiff and the other workmen, then the plaintiff, MacGregor, and Johnson were all servants of the defendant, and a master is not liable at common law for the injury to one servant occasioned by the negligence of his fellow servants; and if Johnson was an independent contractor, and the plaintiff was his servant, then the defendant would not be liable for any injury occasioned by the negligence of Johnson or of one of his servants to another of his servants. *Harkins v. Sugar Refinery*, 122 Mass. 400; *Morgan v. Sears*, 159 Mass. 570, 35 N. E. 101. We are of opinion that the only reasonable inference to be drawn from the evidence in the ex-

ceptions is that the plaintiff was an employé of Johnson, and not of the defendant, within the meaning of St. 1887, c. 270, and the amendments of that statute. It does not appear that Johnson was authorized to hire workmen on account of the defendant, or that the workmen hired by Johnson ever understood that they were to be paid by the defendant, or that the defendant or Johnson so understood. The fact that the defendant retained the right to decide how work should be done on its premises does not of itself make the workmen employed by Johnson employés of the defendant. Apparently Johnson employed whom he pleased, and directed the men employed by him in the performance of their work, whether upon the premises of the defendant or upon other premises where he might be doing work. On the evidence, we do not think that the jury could properly find that the relation of employé and employer existed between the parties. See *Reagan v. Casey*, 160 Mass. 374, 38 N. E. 58. If the relation of employer and employé did not exist between the parties, then the action cannot be maintained under St. 1887, c. 270, and the remaining exceptions become immaterial. The facts of the case do not bring it within section 4 of the statute, although that section may have some significance in favor of the construction we have here given to the statute. Exceptions overruled.

(164 Mass. 452)

RILEY v. HAMPSHIRE COUNTY NAT. BANK.

(Supreme Judicial Court of Massachusetts. Hampshire. Oct. 19, 1895.)

REVIEW ON APPEAL — PLEADING AND PROOF — PAROL EVIDENCE.

1. Where a wife indorsed and frequently renewed her indorsement on two notes for her husband, and pledged a certificate of stock as security for the payment thereof, and the evidence was contradictory as to whether the stock was originally pledged for a general credit, a finding that the stock did not cover a third note, referring to the stock as security, and executed without the knowledge of the wife, will not be disturbed on appeal.

2. Where an answer raised the issue as to a husband's agency for his wife, it was competent for the wife to show that he was not her agent.

3. A certificate of stock indorsed in blank may be shown to have been delivered in pledge.

Report from superior court, Hampshire county; John Hopkins, Judge.

Bill by Helen L. Riley against the Hampshire County National Bank to redeem certain shares of stock. There was a decree for plaintiff, and the case was reported to the supreme court for an opinion. Affirmed.

Hammond & Field, for plaintiff. Wm. G. Bassett, for defendant.

LATHROP, J. This is a bill in equity, filed January 24, 1895, to redeem 17 shares of the capital stock of the Northampton Emery

Wheel Company. The bill alleges that these shares are held by the defendant as collateral security for two promissory notes signed by the plaintiff's husband and indorsed by her, — one dated April 12, 1894, for \$150, payable three months after date; and the other dated June 4, 1894, for \$2,000, also payable three months after date. The bill also alleges that the plaintiff, on January 23, 1895, tendered to the defendant the full amount due on these notes, and demanded delivery of the shares, which was refused. The answer admits the tender, and alleges that the defendant holds the shares as collateral security for a promissory note dated June 21, 1894, for \$165, payable three months after date, as well as for the two notes mentioned in the bill. The answer further alleges that the certificate of the shares of stock was signed in blank by the plaintiff; that a power of attorney authorizing a transfer of the shares was also signed by the plaintiff; and both instruments were delivered to the defendant for the purpose of arranging "a line of credit" to be given to the plaintiff's husband by the defendant; that the plaintiff made her husband her agent in the first transaction and in all the subsequent ones; and that the plaintiff has permitted and sanctioned such a course of dealing with regard to the credit the defendant was giving her husband on the strength of the collateral security that she is not in a position to defeat the right of the defendant to hold the shares for the three notes. The case was heard by a single justice of the superior court, who entered a decree for the plaintiff, with costs. The decree ordered the defendant to surrender and deliver to the plaintiff the certificate of 17 shares described in the bill, on a renewed tender of the amount previously tendered. The decree also stated that the stock was not held for the note of \$165. No appeal was taken from the decree, but the justice has reported the case. The reservation is in these words: "The questions of law presented by this report are reserved for the determination of the supreme judicial court, who will make such order or decree in the case as justice and equity may require. All the evidence is reported." This is followed by a report of the evidence. Apparently this was done in this form because the only exceptions taken rendered it necessary to consider the evidence for the purposes of the exceptions, but we are of opinion that we are not called upon to revise the facts which the judge must have found to have entered the decree which he did.

During the trial, the defendant asked the court to rule that the plaintiff was not, on the competent evidence, entitled to a decree permitting her to redeem said shares without paying the balance due on said note for \$165, as well as the sum tendered by her. This ruling the court declined to give, and the defendant excepted. Exception was also taken

by the defendant to the admission of certain testimony of the plaintiff and her husband with reference to the arrangement with the defendant bank, and their dealing with it, and as to what the defendant did, understood, permitted, and did not permit. There are certain facts in the case which are not in dispute, which are as follows: In 1887, John E. Riley, the husband of the plaintiff, began business in Northampton, and borrowed the sum of \$2,500, giving his promissory note therefor, indorsed by the plaintiff. At this time she pledged to the defendant the 17 shares in question, and delivered to the bank an assignment of the shares, signed by her in blank, and also signed and delivered a power of attorney authorizing the cashier of the defendant bank to sell, assign, and transfer the shares above mentioned. The plaintiff's husband continued to keep an account with the defendant until June 28, 1894, when he filed a petition in insolvency. The first note was renewed from time to time, and sometimes other notes were given. Thirty-seven notes were given in all, and all of the notes, with the exception of the last one for \$165, which is the one in controversy, had upon them the name of the plaintiff. At the time of the failure of the plaintiff's husband the bank held the two notes mentioned in the bill, for which the plaintiff admits her liability, and the note for \$165. The circumstances attending the giving of this note were these: On June 21, 1894, Mr. Warner, the president of the defendant, knowing that the plaintiff's husband was "close pressed," called upon him at his shop, told him that his account was overdrawn to the amount of \$165, and asked him to make a note to the bank for that amount, and to write upon it the words, "Collateral, 17 shares Northampton Emery Wheel Co." This was done. At this time the plaintiff was not present, she was not consulted, and knew nothing about it until after her husband's failure. The question of fact in dispute between the parties is whether the shares of stock were pledged at the time of the first transaction for a general credit to be given to her husband, and included all notes to be thereafter given as well as the note then given. The testimony of the husband tends to show that the pledge was made for a specific purpose, namely, to enable him to buy out a local merchant, for which the note for \$2,500 was discounted. The testimony in behalf of the defendant in support of its proposition that the pledge was also for future indebtedness came from its president and cashier, and is not very definite. Assuming that the evidence of the

defendant tended to show that the pledge was for future indebtedness, and there was, therefore, contradictory evidence on this point, we cannot revise the finding of the judge in favor of the plaintiff. There is no pretense of any subsequent agreement between the parties, except as it is shown by their actions. Undoubtedly, the fact that the plaintiff, by signing her name on other notes discounted at the same bank, without demanding the delivery to her of the certificate of stock, is strong evidence that, as each note was signed, she assented that the shares should be security for this note; but this does not show an agreement on her part that they should be security for the general indebtedness of her husband to the defendant.

The evidence objected to relates principally to the question whether the husband had express authority to bind his wife by putting on the note for \$165, the words, "Collateral, 17 shares Northampton Emery Wheel Co." The answer alleged that her husband was her agent in the matter of the note for \$165, as well as in the first transaction. It was competent for the plaintiff to show that he had no express authority, and that the transaction was without her knowledge. So, too, it was competent for her to show that she never knew that he had ever overdrawn his account, for the purpose of showing that she had not acquiesced in his so doing. The effect of the form of the transfer of the shares of stock and of the power of attorney remains to be considered. There is no doubt that oral evidence is admissible to show that such a transaction, however absolute in form, is merely a pledge; and the consideration and purpose of the transaction may be shown in the same way. *Newton v. Fay*, 10 Allen, 505; *Minchin v. Minchin*, 157 Mass. 265, 32 N. E. 164. As was said in *Boardman v. Holmes*, 124 Mass. 438, 442, "we must look to the whole transaction between the parties." We find nothing in the conduct of the plaintiff which works an estoppel against her, or furnishes ground upon which a court of equity should not afford her relief. In each of her prior transactions with the bank she indorsed the note made by her husband. The note in controversy was not indorsed by her, and she knew nothing about it until after it was delivered. While it appears that her husband was frequently allowed to overdraw his account, it also appears that until the last transaction he borrowed money from third persons, and paid his overdrafts, and that his wife was ignorant of these transactions. It follows that the decree of the superior court must be affirmed.

(164 Mass. 486)

COLE v. TUCKER et al.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 19, 1895.)

CONSTITUTIONAL LAW — OFFICIAL BALLOTS AT
ELECTIONS.

1. St. 1893, c. 417, requiring the use of official ballots at elections, does not conflict with the constitution (Declaration of Rights, art. 9), declaring that "all elections ought to be free; and all inhabitants * * * have an equal right to elect officers," etc.

2. Nor is the statute of 1893 obnoxious to said constitutional provision in that it makes the use of the official ballot compulsory in the election of city officers, and optional in the election of town officers.

Exceptions from superior court, Hampshire county; John Hopkins, Judge.

Action by James W. Cole against George Tucker and others. A verdict was directed for defendants, and plaintiff excepts. Exceptions overruled.

Charles G. Delano, for plaintiff. Albert M. Addis, for defendants.

FIELD, C. J. It is necessary in this case to determine the constitutionality of St. 1893, c. 417. This question was discussed in *Miner v. Olin*, 159 Mass. 487, 84 N. E. 721, but the court there expressed no opinion upon it. The defendants in the present case were election officers at an annual election for city officers in the city of Northampton, and refused to allow the ballot offered by the plaintiff to be deposited in the ballot box; and the ballot was not deposited, and was not counted in the election. It was a printed ballot, designated in print at the head of it as the "Regular Prohibition Ticket." The official ballot provided for use at the election had on it the names of the candidates of the Republican and the Democratic parties for office, but no other names, and the plaintiff wished to vote for the candidates of the Prohibition party. The plaintiff was a duly-qualified voter, whose name was upon the check list.

The qualifications of voters for town and city officers are not prescribed by the constitution, but by statute; but we do not think it necessary to consider whether, so far as the question in this case is concerned, a distinction can be made between the powers of the general court to prescribe the manner of casting ballots at elections for city and town officers, and at elections for state officers or for state representatives or senators. Article 9 of the declaration of rights of the constitution is as follows: "All elections ought to be free; and all the inhabitants of this commonwealth having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This, in terms, relates to inhabitants having such qualifications as are established by the frame of government, but we assume that the same principles

apply to electors whose qualifications are established by statute. In regard to the right of voting for state officers, where the qualifications are prescribed by the constitution, the court, in *Capen v. Foster*, 12 Pick. 485, say: "And this court is of opinion that in all cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which the right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right which are designed to secure and facilitate that right in a prompt, orderly, and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself." See *Kinneen v. Wells*, 144 Mass. 497, 11 N. E. 916.

The principal question, then, is whether St. 1893, c. 417, is a reasonable regulation of the manner in which the right to vote shall be exercised, or whether it subverts or injuriously restrains the exercise of this right. The provisions of the statute requiring the use of an official ballot do not touch the qualifications of the voters, but they relate to the manner in which the election shall be held. In general, it may be said that the so-called "Australian Ballot Acts," in the various forms in which they have been enacted in many of the states of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he please, by leaving blank spaces on the official ballot, in which he may write, or insert in any other proper manner, the names of such persons, and by giving him the means, and a reasonable opportunity, to write in or insert such names. *State v. McMillan*, 108 Mo. 153, 18 S. W. 784; *Common Council v. Rush*, 82 Mich. 532, 46 N. W. 951; *Attorney General v. May*, 99 Mich. 538, 58 N. W. 483; *De Walt v. Bartley*, 146 Pa. St. 529, 24 Atl. 185; *State v. Black* (N. J. Sup.) 24 Atl. 489; *State v. Dillon* (Fla.) 14 South. 383; *Slaymaker v. Phillips* (Wyo.) 40 Pac. 971; *People v. President, etc., of Village of Wappinger's Falls*, 144 N. Y. 616, 39 N. E. 641; *Sego v. Stoddard* (Ind. Sup.) 36 N. E. 204; *Taylor v. Bleakley* (Kan. Sup.) 39 Pac. 1045; *Curran v. Clayton* (Me.) 29 Atl. 930; *Whittam v. Zaborik* (Iowa) 59 N. W. 57; *Bowers v. Smith* (Mo. Sup.) 20 S. W. 101. Without reciting in detail the provisions of St. 1893, c. 417, the material portions of which, relevant to the present case, are referred to in the opinion in *Miner v. Olin*, ubi supra, we are of opinion that, for the reasons given in the cases cited above, the provisions of the statute requiring the use of an official ballot cannot be declared unconstitutional. The provisions are such as may properly be deemed necessary by the legislature, in order to secure to the voters a full and fair election, and an accurate and honest

count of the ballots; and they do not impair the rights of the voters to such an extent as to warrant a court in holding them to be void on the ground that they are beyond the constitutional power of the general court.

The remaining contention of the plaintiff is that the use of the official ballot is made compulsory in the election of city officers, and optional in the election of town officers, and that, therefore, the statute is void, as partial and unequal in its operation upon the rights of voters. See St. 1893, c. 417, §§ 129, 143, 173. There is nothing in the constitution which requires that the laws regulating elections for city and town officers shall be uniform throughout the commonwealth, and in some respects the laws regulating elections in cities for city officers have always been different from those regulating elections in towns for town officers. See Pub. St. c. 7. As the provisions of the statute we are considering do not affect the qualifications of the voters, but merely regulate the form of voting by ballot, it may well be that in small towns it is not always desirable or necessary that all the precautions be taken against mistake, force, fraud, or intimidation in elections which ought to be taken in cities and large towns, where there are many voters. There are many provisions of the statutes concerning elections which require cities to do certain things which towns are not required to do; and some provisions concerning cities and towns are made to take effect only upon a vote of the city council, or of the inhabitants, adopting the provisions. One or two illustrations are sufficient: By article 2 of the amendments of the constitution, the general court is empowered to constitute city governments, and "to prescribe the manner of calling and holding public meetings of the inhabitants in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such meetings." Rev. St. c. 4, § 12, contains the general provisions in force at the time these statutes took effect, concerning the manner of conducting elections, but section 12 of the chapter is as follows: "In the city of Boston the several elections provided for in this chapter shall be conducted according to the provisions of the act establishing the city of Boston, and of the several acts in addition thereto." Rev. St. c. 15, § 34, is as follows: "The election of town clerks, selectmen, assessors, school committees and town treasurer and also of the moderator of the meetings held for the choice of town officers shall be by written ballots, and the election of all other town officers shall be in such mode as the meeting shall determine." See Pub. St. c. 27, § 80. In matters which concern the form of holding elections, in the absence of anything in the constitution prescribing the manner in which the elections shall be held, we are of opinion that the provisions need not be the same for all the cities and towns of the commonwealth. Judgment for the defendants.

(104 Mass. 501)

HERVEY v. RAWSON.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1895.)

ABATEMENT — PENDENCY OF ANOTHER ACTION —
RES JUDICATA.

Where the guardian of an insane person loaned money of his ward to one of the sureties on his bond on his note, the fact that the probate court, in passing on the account of the guardian on his removal, declared the loan unauthorized, and charged the amount of the loan to him in his account, and the pendency of a suit against the sureties for the amount, do not bar an action by a subsequently appointed guardian against the maker of the note personally.

Exceptions from superior court, Worcester county; J. B. Richardson, Judge.

Action by William F. Hervey, by his guardian, against Louie A. Rawson, on her promissory note. From a finding for plaintiff, defendant brings exceptions. Exceptions overruled.

Thomas G. Kent and George T. Dewey, for plaintiff. W. A. Gile and C. T. Tatman, for defendant.

FIELD, C. J. The money lent to the defendant was the money of the plaintiff. The note taken was payable to the plaintiff. It does not appear that the note was on time, or was negotiable; and, if it was negotiable, the plaintiff, while insane, and under guardianship, could not negotiate it; and it does not appear that his former guardian had indorsed it, and he could not indorse it after he was removed from the office of guardian. There is nothing in the exceptions which shows that the note is now outstanding as a valid note in the hands of some other person than the plaintiff or his former guardian. It is not contended that the plaintiff is not the proper party to bring the suit. There is no objection to the form of the pleadings, and the plaintiff, through his present guardian, could repudiate the note. The objection of the defendant is that the action cannot be maintained, because the probate court, in passing upon the account of the former guardian, has adjudged that this loan was one which the guardian was not authorized to make, and has charged him with the amount of it in his account, and a suit has been brought in this court against the guardian and his sureties upon the bond of the guardian for the purpose of obtaining execution against them for the same amount, and this suit is still pending. The fact that the present defendant is one of the sureties on the bond seems to us immaterial. The contention is that by the judgment or decree of the probate court charging the former guardian the right of action against this defendant is merged in that judgment or decree, and that the only remedy of the plaintiff is by an action on the bond. The plaintiff cannot, of course, have more than one satisfaction, but

the general rule in cases of trust is that, when the trust property has been misappropriated or misapplied by investing it in an unauthorized manner, the beneficiary may pursue and recover the trust property so far as it can be traced, unless the purchaser or holder of it has obtained a good title against the beneficiary, and can also recover of the trustee any damages which the beneficiary has sustained by reason of the misappropriation or misapplication. We think that this rule applies to guardians of insane wards. This defendant should be compelled to pay her indebtedness, if she can, to somebody, and it is a simpler proceeding to compel her to pay so much of it as she can to the plaintiff and leave the rest to be recovered of the obligors on the bond, than to collect the whole of them, and leave them to collect what they can of her, although the plaintiff, through his present guardian, is at liberty to proceed in either way, as he chooses. *State v. Murray*, 24 Md. 810; *Hill v. McIntire*, 39 N. H. 410; *Beam v. Froneberger*, 75 N. C. 540; *Branch v. Du Bose*, 55 Ga. 21; *Edmonds v. Morrison*, 5 Dana, 223. There is no merger of the claim against the defendant in the decree in the probate court charging the former guardian. That decree cannot be enforced directly against her. It is only by reason of her contract in signing the bond as surety that she is affected by the decree, and her liability upon the bond is not in every event which might have happened necessarily the same as the amount of her indebtedness to the plaintiff. That indebtedness arose after the bond was given, and the bond was not given for the indebtedness. The statute of limitations seems to us no defense to the action. Pub. St. c. 197, § 9. Exceptions overruled.

(164 Mass. 457)

MEYER v. ESTES et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1895.)

CONTRACT BY SEPARATE FIRMS—CONSTRUCTION—JOINT LIABILITY—RESTRICTIONS IN CONTRACT—RESTRAINT OF TRADE — DAMAGES FOR BREACH OF CONTRACT—WHAT LAW GOVERNS—PENALTY OR LIQUIDATED DAMAGES.

1. Where a contract for the use of electrotype plates was made by defendants with plaintiff individually, and plaintiff afterwards formed a partnership with his sons, without the knowledge of defendants, plates furnished thereafter will, as between the parties, be considered as furnished by plaintiff individually through the medium of the partnership.

2. Two separate firms contracted with plaintiff for the use of electrotype plates for a certain publication, the contract providing that either firm could use the plates separately or both firms jointly. Correspondence prior to the contract showed that it was understood that both firms had an equal interest in the publication, which was to be made in six volumes, and as an entire work. By separate agreement between such firms, unknown to plaintiff, each firm was to own three volumes. *Held*, that the contract with plaintiff was a joint agreement by such firms.

3. A joint contract by two firms for the use of electrotype plates provided that the plates should be used only to illustrate works to be published by such firms, "their heirs or successors." One of such firms thereafter sold all its interest in the plates and publication in which they were to be used to the other firm, which subsequently dissolved, after transferring all its interest to one of the members individually. Such member thereafter sold the whole publication, including the rights in the plates, to a firm which had no connection with the above firms, but which used the plates only in the publication of the work originally planned by such firms. *Held*, that the purchasing firm was not a "successor" in business, within the meaning of the contract.

4. Where electrotype plates are sold so that the absolute title passes to the buyers, a clause in the contract of sale, providing that the buyers will not sell the plates to other parties, or multiply them for the purpose of sale, is a contract in restraint of trade, but is reasonable in view of the nature of the property, and will be enforced between the parties.

5. Where a contract for the use in Massachusetts of electrotype plates owned by plaintiff in Leipsic, Saxony, is drawn up and signed in Massachusetts by defendants, and sent to plaintiff, who cabled acceptance to defendants in Massachusetts, the measure of damages for its breach is governed by the laws of Massachusetts.

6. Where a contract by defendants for the use of electrotype plates provided that they shall be liable for any damages caused by a wrongful use thereof, and shall pay in addition a fine equal to ten times the price of the electrotypes wrongfully used, the fine is a penalty, and not liquidated damages.

Report from supreme judicial court, Suffolk county; Daniel W. Bond, Judge.

Action by Hermann Julius Meyer against Dana Estes and another on contract. There was a verdict for defendants, and the facts and evidence were reported to the supreme judicial court. Judgment for plaintiff.

W. Schofield, for plaintiff. Elder, Wait & Whitman, for defendant Estes. H. Wardwell, for defendant Cassino.

FIELD, C. J. The agreement sued on must be regarded as an agreement made by the partnership of Estes & Lauriat and S. E. Cassino & Co. with Hermann Julius Meyer, then doing business in Leipsic under the name of "The Bibliographical Institute Meyer." After this agreement had been entered into, and some of the electrotype plates had been ordered and furnished through the English and Foreign Electrotype Agency, Hermann Julius Meyer took his two sons into partnership, and proceeded to carry on the same business under the same name as before; and after this other plates were ordered by the defendants and furnished by the partnership. It appears by the report that "no notice was given by the plaintiff to the defendants, or either of them, or by the defendants, or either of them, to the plaintiff, of any change in the business relations." So far as appears, the defendants did not know that the plaintiff had taken his sons into partnership, or that any other person than the plaintiff had any interest in the

business carried on under the name of "The Bibliographical Institute Meyer." There is no evidence, therefore, that the defendants made any contract with the partnership composed of the plaintiff and his two sons, and the plates furnished after the formation of this partnership must, we think, as between the parties to this suit, be regarded as furnished by the plaintiff to the defendants, in pursuance of the contract. It is not a case where a stranger to a contract voluntarily undertakes to perform it. After the formation of the partnership, the plates were furnished, in legal contemplation, by the plaintiff, acting through the partnership of which he was a member. The form of the contract shows a joint agreement on the part of Estes & Lauriat and S. E. Cassino & Co. Bartlett v. Robbins, 5 Metc. (Mass.) 184; Donahoe v. Emery, 9 Metc. (Mass.) 63; Boutelle v. Smith, 116 Mass. 111; White v. Tyndall, 13 App. Cas. 263. There are no words in it that indicate a several liability of these two firms. The previous correspondence between the parties had informed the plaintiff that the two firms of Estes & Lauriat and Cassino & Co. were jointly interested in certain publications, and the letter of Estes & Lauriat to the plaintiff, inclosing a copy of the agreement, signed by the two firms, which the plaintiff was to accept or reject by telegraph, contained the following sentences, viz.: "You must understand that Messrs. S. E. Cassino & Co. have an equal interest in this publication with ourselves, and it is a physical impossibility for us to execute any agreement by which they shall not be equally bound; and since they join us in this agreement, you have all the protection which you would have in an agreement from us alone." "Should you decline to accept this agreement joining Messrs. Cassino & Co. to us in your form of agreement, please cable the following words, 'Estes, Boston: No. Meyer,' and by this we shall understand that the negotiation is entirely at an end, as it is impossible for us to make any agreement which does not connect Messrs. Cassino and Co. with us in ordering these cuts for this enterprise." The enterprise referred to was the publication of an illustrated work of natural history, in six volumes, of which each of the two firms was to publish at its own expense three volumes. Each firm was to engage in the sale of the entire work, and was to receive for its own use the wholesale price of that part of the work published by it. It was a part of the plan between the two firms that some of the plates used to illustrate the work should be obtained from the plaintiff; that a part of these plates should be used in each of the volumes; that each firm should pay for the plates used in the volumes published by it, and that the plates should be the separate property of the firm which paid for them; but it does not appear that this agreement between the two firms as to the separate property in the

plates used by each firm was known to the plaintiff. As the volumes to be published were published as an entire work, although, as between themselves, the two firms owned the separate volumes, the two firms may be said to be jointly interested in the publication. The agreement sued on is that the defendants will use all the electrotype plates to be ordered through the plaintiff "only for the purpose of illustrating works to be published by the said Estes & Lauriat and the said S. E. Cassino & Co., or their heirs or successors in business, in the English language, and in the United States of America," and they agree "not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them, and to be responsible for every and all wrong use of said electrotypes to the amount of any damages," etc. This language literally relates to a publication by the two firms jointly, or by their heirs or successors in business; but the agreement not to sell these electrotypes to any other parties must mean to any other parties than some of themselves, and, as the two firms were separate partnerships, and were known to be such, the agreement must be held to confer the right upon either of the firms and its successor in business to use the electrotype plates for the purpose of illustrating works to be published by either firm separately, as well as the right to use the plates for illustrating works to be published by the two firms jointly, although the intention of the parties existing at the time of the making of the contract was that the electrotype plates should be used in publishing the natural history in six volumes, in the manner hereinbefore set forth. Notwithstanding that it was, in effect, provided that the plates might be used by either firm separately or by both jointly, the language of the agreement purports to be a joint undertaking of the two firms with the plaintiff. After making this contract, it was found impracticable for the two firms to publish the natural history together, and on September 24, 1883, Estes & Lauriat sold to S. E. Cassino & Co. all their interest in the work, and delivered to Cassino & Co. all materials and other articles owned by them relating to the history, and after that time Estes & Lauriat had nothing to do with the publication. At the time of the execution of the agreement sued on, the firm of S. E. Cassino & Co. was composed of Samuel E. Cassino and Bradlee Whidden. On December 31, 1885, this firm was dissolved, and Cassino sold all his interest in the firm assets to Whidden. Whidden continued to carry on the business under the old firm name until about December 31, 1886, and after that continued still in business as a publisher under his own name. On July 5, 1887, Whidden sold and delivered to Houghton, Mifflin & Co., of Boston, the property known as the "Standard Natural History," which is the name adopted for the work, "said property consisting of all the

electrotype plates of six volumes as published; all duplicate cuts ever made, now owned by him; the dies for binding cloth books; all stock in sheets, flat or folded; all bound stock, whether in paper parts, cloth, sheep, or half or full morocco; and the copyright of the work;" and he guaranteed that the property conveyed "is free from any and all incumbrances or liens on account of copyright, or on account of any other claim or indebtedness whatsoever." At the time of this sale all of the history had been stereotyped, and the electrotype plates for the illustrations had been soldered into the stereotype plates, and sets of the history had been printed in six large octavo volumes. The report finds that the work was the most valuable part of the assets of S. E. Cassino & Co., and was the "principal live publication" of the firm. Houghton, Mifflin & Co., after the purchase, continued the publication of the work, using, also, with their own imprint, the printed sheets purchased of Whidden. They made some revision of the text, and continued to publish and sell the work as revised down to the time of the trial, and were then publishing it. After the revision the work was called "The Riverside Natural History." But few alterations had been made by the revision, and it was substantially the same work as that prepared and printed by Cassino & Co. Houghton, Mifflin & Co. have never made any use of the electrotype plates except in the publication of this natural history. They had no connection with the firm of Estes & Lauriat, or with Cassino & Co., and they had no other rights in the plates derived from any one, except the rights derived from Whidden by the purchase. They sold, at their place of business in Massachusetts, 100 copies of the history to Mr. Trench, of the firm of Kegan, Paul, Trench & Co., of London, England, which were bound by Houghton, Mifflin & Co., with the imprint of the London firm as the publishers, and these were sent to London. Subsequently the London firm found that there was some trouble about the sale of the work in Great Britain, and 38 of the 100 copies were returned to Houghton, Mifflin & Co. It is found in the report that Houghton, Mifflin & Co. had no knowledge of any restriction as to the sale of said plates, and that there was no competent evidence at the trial of any damage to the plaintiff by reason of said sale of 100 copies.

Some evidence was introduced at the trial by the defendants "that by the custom of the publishing trade in Boston, a firm which purchases all the plates, sheets, and rights of publication of a work is considered the successor in business of the firm making the sale, so far as that work is concerned." There has been no finding of fact on this point. It is evident, we think, that Houghton, Mifflin & Co. were not in any general sense the successor in business either of the firm of Estes & Lauriat, or of Cassino & Co.,

or of Whidden. The original agreement contemplated that Estes & Lauriat or Cassino & Co. might use the plates in any of their publications, whether made by them jointly or separately, and that the successor in business of either firm should have the same right; but this probably means that the successor to the business generally of either firm should have the same right as the firm had, not that every purchaser of the right to continue any single publication of the firm should have the right to use the plates while the firm continued in business, and might use the plates in other publications. The sale to Houghton, Mifflin & Co. did not restrict them to the use of the plates in illustrating the Standard Natural History, and therefore this evidence became immaterial. When the natural history had been printed by means of the stereotype plates into which the electrotype plates had been soldered, and had been published by Cassino & Co. or by Whidden, who may be regarded as the successor in business of Cassino & Co., and when the publication had been sold, with the plates, to Houghton, Mifflin & Co., it may be that the continuance of this publication by Houghton, Mifflin & Co., even if it were a technical breach of the agreement, could not work anything more than nominal damages to the plaintiff. The agreement, however, is that Estes & Lauriat and Cassino & Co. will not sell these electrotype plates to any other parties; and they have been sold to Houghton, Mifflin & Co., who, so far as appears, must be regarded as another party than the defendants, "their heirs or successors in business," and the sale must be considered as a breach of the agreement. If the damages directly resulting from the publication of the history by Houghton, Mifflin & Co. cannot be regarded as substantial, yet if, by the sale, Houghton, Mifflin & Co. acquired the absolute property in the plates, so that they can use them in any of their publications, and can multiply them, and sell them to others to be used, the sale may be of substantial damage to the plaintiff.

It sufficiently appears that the plaintiff, at the date of the agreement, was the general owner of the plates, and of the right to multiply, sell, and use them, and that in his dealings with the defendants he required an agreement on their part that they would use them only in their own publications, and would not sell them, or multiply them for the purpose of selling them, in order that he might have the opportunity of selling the plates to other persons who might wish to use them in their publications, or might be able to protect persons to whom he had already sold the right to use the plates. It does not appear that the plates or the prints from them were protected, or could have been protected, by a copyright in the United States, but the plaintiff meant to accomplish much the same result, in requiring this agreement from the defendants, as could be reach-

ed under a copyright law by a license. It is not entirely clear from the agreement whether the plates were sold absolutely to the defendants, or were let to them to be used in a particular way. The prints, after they had been published, unless protected by a copyright, could be copied by any one, and plates could be engraved and electrotype plates made; but this would be a costly process when compared with that of multiplying the plates. We think that the evidence shows that the plates were sold to the defendants so that the title passed to them. The agreement on their part not to sell them to other parties, nor to multiply them for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of opinion that such an agreement is reasonable, and one which ought to be enforced between the parties to it. See *Publishing Co. v. Smythe*, 27 Fed. 914; *Clemens v. Estes*, 22 Fed. 899; *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784. The price to be paid for the plates, if they were to become the absolute property of the purchaser, without any restriction upon the use to be made of them, might reasonably be more than if they were purchased under such an agreement as is the foundation of this suit. It must be considered that the title of Houghton, Mifflin & Co., and their right to use the plates, are unaffected by this agreement; and therefore it is impossible to say, on the facts and evidence reported, that the defendants are liable only in nominal damages.

In determining the measure of damages, the first question is whether the contract is to be governed by the law of Massachusetts or by the law of the kingdom of Saxony. We think that it is to be governed by the law of Massachusetts. The contract was signed in Massachusetts, and sent to the plaintiff at Leipzig, Saxony. It did not become a contract until the plaintiff accepted it, and notified the defendants of such acceptance, which he did by telegram sent to them at Boston. *Lewis v. Browning*, 130 Mass. 173; *Pine v. Smith*, 11 Gray, 38; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30. The contract relates to what is to be done by the defendants in the United States of America. The defendants are described as "of Boston, Mass., U. S. A.," and the date of the contract is Boston. We think that it must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which is also the law of the forum, must determine the damages to be recovered in the action.

The provisions of the contract are that the defendants are "to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to the Bibliographical Institute Meyer, and to pay furthermore a fine to the Bibliographical Institute Meyer

equal to the tenfold price of the wrongly used electrotypes." The principal question in this part of the case is whether this fine is to be considered as a penalty. Some evidence has been introduced that by the law of the kingdom of Saxony the plaintiff, in the case of a wrong use of the electrotype plates, could recover both the damages and the fine, although there is the testimony of one juriconsult that under that law the plaintiff is not entitled to recover both, but can recover either one or the other, as he may elect. As by the terms of the contract the fine is in addition to the amount of any damages which may have been caused by the wrong use of the electrotype plates, it is impossible to hold that by our law the fine can be considered as liquidated damages. The amount of the fine is plainly intended as a penalty to be paid in addition to the amount of any actual damages suffered. *Higginson v. Weld*, 14 Gray. 165. The agreement does not provide that the damages suffered shall be considered to be tenfold the price of the wrongly used electrotype plates, but it leaves the damages to be assessed in the usual way, and provides that the fine shall be paid in addition to the damages, whatever they may be. As under our law the fine must be considered as in the nature of a penalty, it cannot be recovered, and the plaintiff is entitled to recover only the amount of the damages which have been caused by the breach of the contract. There may be some question whether this fine was intended to cover a breach of the contract which consisted in selling the electrotype plates to other parties than the defendants, their heirs or successors in business, when the plates have not actually been used for any other purpose than that for which the defendants were authorized to use them. It appears that Houghton, Mifflin & Co. have not used the plates for any other purpose than that of illustrating the publication of the natural history which was first published by Cassino & Co. Whether the fine was intended to cover all breaches of the contract or not is, however, immaterial, because, as a fine, it cannot be enforced. Damages are recoverable in the present suit for a breach of the agreement caused by the sale of the plates to Houghton, Mifflin & Co., and as, by the purchase, Houghton, Mifflin & Co. have acquired the right to use the plates for any of their publications, as well as the right to multiply them and sell them to others to be used, the damages to the plaintiff cannot be said to be nominal. It appears in the copy of the papers from the superior court that a jury has already assessed the damages, but this is not mentioned in the report of the presiding judge, and if it is a fact we can take no notice of it. By the terms of that report the amount of the damages are to be determined by a jury, unless the parties agree to have them determined by an assessor. So ordered.

(184 Mass. 495)

FITZGERALD v. LEWIS et al. SMITH v. SAME. PETERSON v. SAME.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1895.)

**STATUTES—AMENDMENTS—TRESPASS—NOTICE—
FALSE IMPRISONMENT.**

1. Where an act purporting to amend a previous act "so as to read as follows" contains a provision different from that of the original act, but on the same subject, other statutory provisions, relating to the old act, and not inconsistent with the new, will apply to the latter.

2. Overseers of the poor, in control of a poor farm, have authority to exclude trespassers thereon.

3. It is not necessary, under a statute providing that persons may be forbidden from entering on certain land by "notice posted thereon," that such notice should be signed.

4. Under St. 1890, c. 410, forbidding an entry without right on the improved or inclosed land of another, a belief on the part of a person entering on premises not in his control that the land is his is no justification.

5. Where notices forbidding trespassing are posted by one in lawful control of the premises, it need not be shown, in order to hold one entering liable, that he actually saw such notices, if they were reasonably distinct, and were posted in reasonably suitable places, so that by the exercise of due care they would be seen.

6. In an action for false imprisonment, evidence that plaintiffs were acquitted at the trial of the offense for which they were arrested is not admissible.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Three actions, one by Edmund Fitzgerald against James H. Lewis and others, one by Quartus J. Smith against same, and one by Andrew J. Peterson against same, for assault and false imprisonment. There was a verdict for defendants, and plaintiffs bring exceptions. Exceptions overruled.

These are actions of tort for assault and false imprisonment. Defendants were police officers of the city of Springfield, and claimed to justify the arrest by virtue of sections 99, 100, c. 203, Pub. St., and chapter 410, Acts 1890. Plaintiffs were arrested without warrant, and confined in lockup several hours, until released on bail; and complaint and warrant were issued against them the next day within 24 hours, upon which all were subsequently tried by the police court of Springfield. The evidence disclosed: That the plaintiff Fitzgerald is the part owner of premises adjoining real estate of the city of Springfield, owned by said city, said city land being a part of the poor farm on which the almshouse is situated. That for some time there had been a dispute between the city and Fitzgerald concerning the boundary line between his said premises and those of the city. The plaintiff Smith is a civil engineer, and plaintiff Peterson was in the employ of Fitzgerald as a laborer. That upon the day of the arrest all three plaintiffs were on the premises of both plaintiffs Fitzgerald and the city of Springfield; said Smith for the purpose of making a survey to determine the disputed line, and the other plaintiffs as-

sisting him. Smith was employed by Fitzgerald to do the work. The jury found that at the time of the arrest all three plaintiffs were upon the land of the city. The defendant Lewis was the legally appointed agent of the board of overseers of the poor of said city, and by direction of said board, prior to the arrests, caused to be posted in two places upon the land of the city, where they could have been seen, the following notice: "Trespassing on these grounds forbidden under penalty of the law." Lyman H. Sexton, employed by the overseers of the poor, master of the almshouse of said city, and the party who managed the farm, and by direction of defendant Lewis, prior to the day of the arrests, had verbally notified the plaintiff Fitzgerald not to come upon the land of said city. Said Fitzgerald, on the day of and prior to the arrests, had seen one of said notices upon the land. The other two plaintiffs had had no oral notice, such as was given Fitzgerald, and testified that they had not seen the posted notices; but there was evidence tending to show that the notices were fastened to stakes driven in the ground, and were about four feet in height. There was evidence tending to show that the overseers of the poor had been, and were in fact, in control of said farm. The complaint upon which the plaintiffs were tried, and which was introduced in evidence by the defendants (the material part thereof), is as follows: "Did there and then without right enter upon and remain on the improved land of the city of Springfield there situate [there follows description of land], after having been forbidden so to do by said city of Springfield, the owner of said land, and having the control of said land, by notice posted on said land; contrary to the form of the statute in such case made and provided." There was evidence tending to show that one Slocum, the present and past city engineer of Springfield, had several times, while such engineer, several years before this occasion, made attempts to determine the disputed line, but there was no evidence of authority for him so to do. The plaintiff Fitzgerald offered to show that immediately prior to the day of the arrest he had a conversation with Slocum about the line, in which Slocum suggested to the plaintiff that he get an engineer to find the line; and that it was in consequence of this suggestion that all the plaintiffs were present on said occasion; but there was no evidence of authority of said Slocum to make such suggestion or authorize entry on the city land. The plaintiffs offered to show by the record the acquittal by said police court of the plaintiffs Smith and Peterson on the complaint aforesaid, issued for said alleged trespass, but the court excluded the evidence. The plaintiffs asked the court for the several rulings following: "(1) The arrest having been made without warrant, the plaintiffs are entitled to recover. (2) There is no evidence that the overseers of the poor

had authority to post the notices. (3) The overseers of the poor, under said ordinance, had no authority to post said notice or to authorize the agent of the board to do it. (4) If the jury find that the only purpose of the plaintiffs, in going upon the land of the city, was to determine a disputed line, they were not guilty of trespass under this statute. (5) The plaintiffs must be proved to have had actual notice of the notices, or to have been on the land under such circumstances and conditions that the jury must find that they ought to have seen them. (6) The posted notices being unsigned, or unauthenticated by a name or signature of any party having the legal right to post them, were not such notices as the statute requires or contemplates, and were not sufficient to render the plaintiffs guilty of trespass, even if they were seen by them." There was evidence tending to prove the facts alluded to in the instructions, but the court refused said requests.

E. H. Lathrop, for plaintiffs. George D. Robinson, City Sol., for defendants.

FIELD, C. J. The first contention of the plaintiffs is that St. 1890, c. 410, is, in effect, a repeal of Pub. St. c. 203, § 99, and a substitution thereof of a new statute, and that Pub. St. c. 203, § 100, does not apply to the new statute. St. 1890, c. 410, begins as follows: "Section ninety-nine of chapter two hundred and three of the Public Statutes is hereby amended so as to read as follows," and then follows a somewhat different provision from that contained in Pub. St. c. 203, § 99, but upon the same subject-matter. This form of amendment is often one adopted by the legislature, and the effect of it is to put the language of the new statute in place of that of the old, and other provisions of statute relating to the old statute, and not inconsistent with the new, are held to apply to the new after that statute takes effect.

The next contention of the plaintiffs is that on the evidence "the overseers of the poor had no right to post the land." The argument is that, as the city of Springfield owned the land, the city council of the city alone had authority to order notices to be posted. We think that the evidence was sufficient to warrant the jury in finding that the overseers of the poor had authority to order the notices to be posted, and that, if the evidence was believed by the jury, it was their duty to so find. By Pub. St. c. 33, § 3, when no directors are chosen, the overseers of the poor have the inspection and government of the almshouse. Not only was there no evidence that any directors had been chosen, but the ordinances of the city put in evidence show that the overseers of the poor had the charge and direction of the almshouse or city farm. The exceptions also recite that "there was evidence tending to show that the overseers of the poor had been, and were in fact, in control of the farm." The overseers of the poor, if in control of the farm,

were in control either as public officers or as agents of the city (*Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111), and were, we think, persons having lawful control, under the laws and ordinances of the city, for the purpose of excluding trespassers.

The next contention of the plaintiffs is that the notices posted were unauthenticated by any signatures, and did not express the authority by which they had been posted. But there is nothing in the statute requiring the notices posted to be signed. It is common knowledge that similar notices posted on land, such as guideposts, notices of private ways, and notices at railroad crossings, are not signed. It would be almost impossible to have them signed in the handwriting of the persons who ordered them posted, and a printed facsimile would afford no assurance of the genuineness of the signatures. The legislature, in enacting that persons may be forbidden from entering upon certain land by "notice posted thereon," without prescribing the form of the notice, must be held to have intended that the notices might be posted in a reasonable manner, according to the usual way in which similar notices are posted. The instruction upon this part of the case seems to us correct.

It is suggested in the brief of the plaintiffs that an innocent entry by a person upon land under a claim of right cannot be an entry without right within the meaning of the statute, even although the land be found to belong to another person. The plaintiffs proved no right to enter upon the land of the city. Pub. St. c. 203, § 99, forbade a willful entry. St. 1890, c. 410, changed this, and forbids an entry without right. There is nothing in the last-named statute which indicates that a belief on the part of the person entering upon land not in his control that the land is his is to be regarded as a justification. He must be forbidden to enter by the person having lawful control of the premises, in the manner prescribed by the statute, and, this having been done, if he enters without right upon the improved or inclosed land of another person, the offense is committed. It is not necessary that the person entering should actually see the notices posted, if they were reasonably distinct, and were posted in reasonably suitable places, so that by the exercise of due care they would be seen by persons who come upon the land. *Smith v. City of Lowell*, 139 Mass. 336, 1 N. E. 412.

The last point urged by the plaintiff is the exception to the exclusion of evidence that *Smith* and *Peterson* were acquitted at the trial of the complaint issued for the alleged trespass. This evidence was rightly excluded. *Fowle v. Child* (Suffolk; Sept. 5, 1895) 41 N. E. 291; *Com. v. Cheney*, 141 Mass. 102, 6 N. E. 724; *Com. v. Waters*, 11 Gray, 81.

These are all the questions argued by the plaintiffs, and we see no error in the exceptions. Exceptions overruled.

(53 Ohio St. 430)

STATE ex. rel. CASTALIA SPORTING CLUB v. JUDGES OF CIRCUIT COURT OF ERIE COUNTY.

(Supreme Court of Ohio. Oct. 29, 1895.)

BILL OF EXCEPTIONS—TIME FOR SIGNING—RECORD CONCLUSIVE AS TO JUDGMENT.

For the purpose of fixing the time for the allowance and signing of a bill of exceptions, the record is conclusive as to the date of the judgment.

(Syllabus by the Court.)

Application, in the name of the state, at the relation of the Castalia Sporting Club, for mandamus to the judges of the circuit court of Erie county.

Samuel E. Williamson, E. D. Potter, L. W. Hull, and J. E. Ingersoll, for relator. Brown & Geddes, for respondent.

PER CURIAM. The petition shows that at the May term, 1894, of the circuit court of Erie county, a cause was tried therein upon its merits, a decision partly adverse to the relator being announced on the last day of the term, July 28th. A special finding of facts was requested by the relator, which its counsel were directed to prepare. By the 1st day of September said counsel had prepared such finding, which was submitted to counsel for the adverse party. The entry was finally settled by two of the judges in vacation on the 1st of December, 1893. Their approval was thereon indorsed, and, at request of such judges, counsel for the relator sent the entry to the clerk, with direction of the judges to enter as of the day of the decision, July 28th. Relator's counsel thereafter prepared a bill of exceptions, which on the 26th day of December, 1894, said judges refused to sign. The relator asks for a writ of mandamus to compel said judges to sign such bill.

Held, that a bill of exceptions signed on the day upon which the relator's bill was tendered would have been unavailing under sections 5298 and 5302 of the Revised Statutes. The record of the circuit court is conclusive of the fact that the judgment was rendered July 28th, more than 60 days before the bill of exceptions was tendered to the judges for their signatures. Demurrer to petition sustained, and writ refused.

(53 Ohio St. 433)

KOCH v. STATE.

(Supreme Court of Ohio. Oct. 29, 1895.)

CRIMINAL PROSECUTION—FORMER CONVICTION.

A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of a statute.

(Syllabus by the Court.)

Error to circuit court, Summit county.

Christ. Koch, having been convicted of a misdemeanor, brings error. Affirmed.

v.41N.E.no.20—44

Welsh & Sawyer, for plaintiff in error.
Samuel G. Rogers, for the State.

PER CURIAM. In the probate court an information was filed against the plaintiff in error, charging him with a misdemeanor, it being an offense against a statute. To this he pleaded in bar a former conviction before the mayor of Akron for the same act, it being also a violation of an ordinance of said city. A demurrer to the plea was sustained. The ruling is in accord with the general course of decisions. *Town of Bloomfield v. Trimble*, 54 Iowa, 399, 6 N. W. 586; *Kemper v. Com.*, 85 Ky. 219, 3 S. W. 159; *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *Robbins v. People*, 95 Ill. 175; *Cooley, Const. Lim.* 239. Judgment affirmed.

(53 Ohio St. 431)

MORTON v. WESTERN UNION TEL. CO.

(Supreme Court of Ohio, Oct. 29, 1895.)

NEGLIGENCE—DAMAGES—INJURY TO FEELINGS NOT CAUSE FOR RECOVERY.

The negligent failure of a telegraph company to deliver a message does not authorize an action by him to whom it is addressed to recover for resulting injury to his feelings and affections when no other injury results.

(Syllabus by the Court.)

Error to circuit court, Madison county.

Action by William F. Morton against the Western Union Telegraph Company. Defendant had judgment on demurrer, and plaintiff brings error. Affirmed.

George B. Cannon, for plaintiff in error.
John F. Locke, for defendant in error.

PER CURIAM. The plaintiff in error brought suit to recover damages for the negligent failure of the defendant to deliver to him at London, Ohio, a telegram as follows: "Henly, O., Oct. 12, 1890. To Will Morton, London, Ohio: Mother dying. Come immediately. Frank Morton." He alleges that the sender of the telegram, who was his brother, paid to the company the usual rates; that it negligently failed to deliver the message to him, whereby he was "left in total ignorance of his mother's illness, and was deprived of the solace and comfort of attending her in her last sickness, and of the privilege of attending her funeral, which he could and would have done but for the default of the defendant, its agents, and employes, and that he was injured in his feelings and affections thereby in the sum of five thousand dollars." A demurrer to the petition was sustained in the court of common pleas, and that judgment was affirmed by the circuit court.

The judgment rests upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation. *Cooley, Torts* (2d Ed.) p. 716; *Greenl. Ev.* § 267. Numerous reported cases show that this doctrine has been followed in

cases of this character by the federal courts and the courts of last resort in nearly all of the states. The wisdom of the doctrine is well illustrated by the experience of the courts that have departed from it. Judgment affirmed.

(53 Ohio St. 388)

PITTSBURGH, FT. W. & C. RY. CO. v.
MARTIN, County Treasurer.

(Supreme Court of Ohio. Oct. 29, 1895.)

CONSTITUTIONAL LAW — SPECIAL ACTS — ACTION
AGAINST PUBLIC OFFICER—WRIT OF ERROR.

1. The act of May 4, 1891 (88 Ohio Laws, 593), entitled "An act relating to certain cities of the fourth grade of the second class," is in conflict with section 1 of article 13 of the constitution of this state, and is therefore void.

2. An action against a county treasurer, for the purpose of enjoining the collection of taxes, is in its nature against the office, rather than against the person filling such office. In case of a change of incumbent, the action may proceed as commenced, or the new treasurer may be substituted.

3. In an action to enjoin the collection of taxes levied under an unconstitutional act, the payment of such taxes after the dissolution of the injunction on final hearing does not prevent the plaintiff from prosecuting error to test the validity of the act, when by its provisions other taxes are to be levied for one or more years.

(Syllabus by the Court.)

Error to circuit court, Columbiana county.

Action by the Pittsburgh, Fort Wayne, & Chicago Railway Company against John R. Martin, county treasurer. Defendant had judgment, and plaintiff brings error. Reversed.

The body of the petition in the court below is as follows:

"Plaintiff says that it is a corporation, duly organized and existing, and that, under the laws of the state of Ohio, it is authorized to own and operate a railroad through or within said state; that it is the owner of a continuous line of railway and right of way, extending from Pittsburgh, in the state of Pennsylvania, through the state of Ohio, to Chicago, in the state of Illinois; that said railway passes through and lies partly within the corporate limits of the city of Salem, Columbiana county, Ohio; that the defendant, John R. Martin, is treasurer of said Columbiana county. Plaintiff further says that heretofore, and during the years 1892 and 1893, the council of the city of Salem made two separate annual levies, of a tax of four mills on the dollar each, upon all taxable property of said city, for the sole purpose of paying the interest upon, and providing a sinking fund for the final redemption of, certain bonds issued in the name of said city of Salem, by a so-called board of trustees, known as the "Trustees of the Salem Railroad," for a fund or amount of money borrowed by said board of trustees for the construction of a line of railway from said city of Salem to the village of Washingtonville, in said county; that the tax so levied has been by said council certified to the auditor of said county, and by him placed

on the tax list for said county, and on the duplicate delivered to the treasurer thereof, and that the same now stands assessed and charged against this plaintiff; that said tax so levied upon the property of the plaintiff amounts to the sum of \$——. Plaintiff says that, on the 13th day of December, 1892, and on the 24th day of July, 1893, and on the 19th day of December, 1893, respectively, during business hours, and at defendant's office as such treasurer, it made to defendant due tender in legal tender money of the United States, of all taxes and assessments of any kind then due to or collectible by him as such treasurer, from this plaintiff, except the aforesaid tax, levied and sought to be collected for the payment of said bonds and interest; that defendant accepted all the taxes and assessments so tendered, except those levied by or in behalf of said city of Salem, or by the council thereof, which were by him refused; that plaintiff then and there made like tender of the amount of taxes and assessments so refused,—to wit, all taxes and assessments levied by or in behalf of said city, except said tax for the payment of said bonds and interest,—which last-named tender was by defendant then and there also refused, solely on the ground and for the reason, and without other cause than, that plaintiff did not tender therewith, and refused to pay, the tax, levied as above set forth, for the redemption of said bonds and payment of interest thereon. Plaintiff also says that, on said 24th day of July, 1893, and at the same time and place, it also made like tender to defendant of the full amount of the penalty of 5 per cent. then accrued on the installment of said taxes due and payable on or before June 20th of said year, and which had been levied by said council, or by or in behalf of said city. Plaintiff says that said money was borrowed, and said bonds were issued and sold, without warrant or authority of law; that they are not the bonds of said city of Salem; that said so-called board of trustees had no authority so to do, and never had a legal existence as such board; that said bonds are void; that the said city of Salem is under no legal obligation to redeem the same, or in any way to pay the money so borrowed. Plaintiff says that said city of Salem had, at the federal census of 1890, a population of not less than 5,750, nor more than 5,800, but further says that no other city or within the state of Ohio, of the fourth grade of the second class, had at such census such population. Plaintiff further says that defendant is about to, and unless restrained by the order of this court will proceed to, distrain and sell the goods and chattels of said plaintiff company, and collect by process of law said taxes so levied by said council of the city of Salem, for the redemption of said bonds and payment of interest on the same.

"(2) For a second cause of action, plaintiff adopts, and makes part hereof, all the averments of its first cause of action, as fully as though the same were here copied, and fur-

ther says that said money was borrowed, and said bonds issued, and said tax levied, solely under and in accordance with the terms of a certain act of the legislature of the state of Ohio, entitled 'An act relating to certain cities of the fourth grade of the second class,' and passed May 4, 1891, and found in volume 88, p. 593, of the Laws of Ohio. Plaintiff says that said act is a special act, conferring corporate powers; that it is not general in its character, but is special legislation, and is unconstitutional and void; and that it conferred no authority on said board of trustees to borrow said money or issue said bonds, or on said city of Salem, or the council thereof, to levy the said tax for the payment of said money and redemption of said bonds.

"Wherefore plaintiff prays that defendant, as such treasurer, be now temporarily restrained, and upon final hearing, he and his successors be perpetually enjoined—First, from collecting said tax so levied, and any that may hereafter be levied, for the payment of the interest on said bonds, and to provide a sinking fund for the final redemption of the same; and, second, from imposing upon or collecting from plaintiff any penalty on account or by reason of the nonpayment of the taxes tendered and refused as above set forth."

A temporary injunction was allowed, and the treasurer filed a general demurrer to the petition, and also filed a motion to dissolve the injunction. The demurrer and motion were both sustained, and the plaintiff not desiring to amend its petition, final judgment was rendered in favor of the treasurer, and the injunction dissolved, on the ground that the petition does not state facts sufficient to constitute a cause of action,—to all of which the plaintiff excepted. The circuit court affirmed the judgment, and a petition in error was thereupon filed in this court, seeking to reverse both judgments below.

Harrison, Olds & Henderson and J. R. Carey, for plaintiff in error. B. S. Ambler, Warren W. Hole, and C. S. Speaker, for defendant in error.

BURKET, J. (after stating the facts). The cause of action stated in the petition and urged in argument is that the act of May 4, 1891 (88 Ohio Laws, 593), "is a special act conferring corporate powers; that it is not general in its character, but is special legislation, and is unconstitutional and void." The first section of the act is as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that whenever in any city of the fourth grade of the second class, which at the federal census of 1890 had a population of not less than 5,750 and not more than 5,900, or which at any subsequent federal census may have such population, individuals and corporations owning more than one-half of the real and personal property assessed for taxation in such city, as shown by the tax duplicate of

the county in which such city is situated, then in force, shall by their petition in writing request the council of such city to provide for the construction of a line of railway between termini designated in such petition (one of which shall be such city) by such city and at its expense; the city council of such city may, by a resolution passed by a majority of all the members elected thereto, declare it to be essential to the interests of such city that the line of railway so prayed for in said petition be constructed by and at the expense of such city, and it shall thereupon be lawful for a board of trustees to be appointed, as hereinafter provided, to borrow, and they are hereby authorized to borrow, as a fund for the construction of such railway, an amount not exceeding the sum of five per cent. of the value of the property, real and personal, within such city, as the same are assessed on the tax duplicate of the county in which said city is situated; and to issue bonds therefor in the name of such city and under the corporate seal thereof, bearing interest at a rate not to exceed six per cent. per annum, payable semi-annually, such bonds to be redeemable at the option of such city at any time after five years from the date thereof, and to be payable in twenty years from said date, at such place as shall be deemed best by said board; said bonds shall be signed by the president of said board, and attested by the clerk of such city, who shall keep a register of the same, and they shall be secured by a mortgage upon said railway and by the pledge of the faith of such city, and a tax which it shall be the duty of the council thereof annually to levy, which tax shall not exceed five (5) mills on the dollar in any one year, to pay the interest and provide a sinking fund for the final redemption of said bonds; provided, that such city shall not in any one year levy taxes to a greater amount than fourteen (14) mills on the dollar, including the levy for said bonds; and provided, that no money shall be borrowed on bonds issued until after the question of providing the line of railway specified in said resolution shall have been submitted to a vote of the qualified electors of such city, at a special election to be ordered by the city council thereof, of which not less than twenty days' notice shall be given in the papers published in such city; and further provided, that two-thirds of said electors voting at such election shall decide in favor of said line of railway. The returns of said election shall be made to the clerk of said city, and be by him laid before the city council, who shall declare the result by resolution. The bonds issued under the authority of this section shall not be sold or disposed of for less than their par value."

That section 1 of article 13 of the constitution, which provides that "the general assembly shall pass no special act conferring corporate powers," applies as well to municipal

as to private corporations, is established by the following cases: *State v. Cincinnati*, 23 Ohio St. 45, 26 Ohio St. 18; *State v. Mitchell*, 31 Ohio St. 592. The act in question clearly confers corporate power. In *Walker v. Cincinnati*, 21 Ohio St. 14, the court held (on page 56) that the city was by that act authorized to build a railroad, but that the city acted through its trustees. The court says: "But it is clear that the trustees are a mere agency through which the city is authorized to operate for its own sole benefit. Neither as individuals nor as a board have they any beneficial interest in the fund which they are to manage, or in the road which they are to build. They are in fact, as well as in name, but trustees, and the sole beneficiary of the trust is in the city of Cincinnati." The corporate power to build a railroad, acting through trustees, is therefore given by the statute in question. The corporate power to levy taxes to pay interest and create a sinking fund for the payment of the bonds is given by this act. *State v. Cincinnati*, 26 Ohio St. 18; *State v. Pugh*, 43 Ohio St. 98, 115, 1 N. E. 439. The corporate power to call and direct an election is also given by this act. *State v. Mitchell*, 31 Ohio St. 592, 606; *State v. Constantine*, 42 Ohio St. 437-444. The above-enumerated corporate powers are granted by the act in question, and if the act is special, it is in violation of section 1 of article 13 of the constitution. The defendant in error relies upon the case of *Walker v. Cincinnati*, 21 Ohio St. 14; but in that case the question as to whether the act then under consideration was a special act conferring corporate power was not made by counsel, and was not considered by the court. The act was regarded as general. The *Walker* case is therefore not an authority upon the question.

Cities are by statute divided into classes and grades, and while some of the classes are so fixed as to include at this time only one city, yet other cities may, under present statutes, come into such established classes, either by increase or decrease of population, followed by proper proceedings authorized by statute. Whatever may be said as to the validity of a statute conferring corporate power upon an established class containing only one city, it is clear that, when an act is manifestly intended to, and does, in fact, at the time of its passage, apply to only one of a given class, consisting of many, it is special. The city to which the act, by some slight characteristic, is made to so apply, does not thereby become a class by itself, but is thereby excepted out of the class to which it belongs; and the usual provision in such statutes, that any city having such characteristic, or any other city which may thereafter have the same, shall have the corporate power therein conferred, does not have the effect to raise such other city into any class, but has the effect to place it into such exception.

Usually, to make an act conferring corporate power general and not special, the power should be conferred upon existing classes; but this is not always necessary, as there are cases in which the aim and object of the proposed statute cannot well be accomplished without making other and new classes. But in such cases there must be some substantial condition or characteristic requiring such classification. *Bronson v. Oberlin*, 41 Ohio St. 476, is a sample of such cases, and it goes to the extreme verge of constitutionality, and should not be extended. But, when the attempted distinguishing mark or characteristic is only a small difference in population, as in the act here in question, such difference is not substantial, and shows on its face that it is not an effort at classification, but an evasion of a classification already existing. Such laws are special, and when they confer corporate power they are unconstitutional and void. In the case of *Field v. Commissioners*, 36 Ohio St. 476, the population provided in the act was not less than 29,130, and not more than 29,135, and this court, while holding the act unconstitutional on other grounds, used the following language as to the point here in question: "There is no doubt that the county of Highland is the only county in the state to which the provisions of this act can ever apply, and the legislature might just as well have conferred on the commissioners of that county, in express terms and by direct language, the power actually conferred, as to name the county through the aid of the previous federal census. If the object in employing the language used to designate the county was to give to the act a general character, and thereby to obviate any constitutional objection, while intending to limit its operation to one county, the means adopted very clearly fails to accomplish the object intended. This court has repeatedly said that the constitutionality of an act, in respect to being local or general, is to be determined by its operation, without reference to its form. *State v. Judges of Court of Common Pleas*, 21 Ohio St. 11; *State v. Mitchell*, 31 Ohio St. 592; *McGill v. State*, 34 Ohio St. 223. If local in its operation, no phraseology can make it general. The act in question is not only local in its operation, but it was so intended to be by the legislature; and if a law of a general nature, within the meaning of the constitution, it is clearly unconstitutional because of such restricted operation."

To the same effect is the holding of this court in *City of Kenton v. State*, 52 Ohio St. —, 38 N. E. 883, and in *State v. Bargas*, 52 Ohio St. —, 41 N. E. 245. It is therefore clear that the act in question is unconstitutional and void.

The rights of the railway company as to the recovery of any taxes it may have paid, and the liability, if any, of the signers of the original petition for an election, and of others who may have so aided and assisted

the scheme as to be estopped, are not before us, and are not here decided.

The fact that, after the dissolution of the injunction, the plaintiff in error paid the taxes then due, does not have the effect to prevent plaintiff from prosecuting its proceedings in error to test the validity of said act.

The action was commenced against John R. Martin, then county treasurer, and before the case came into the circuit court, or this court, his term of office had expired, and his successor had been elected and qualified, and had been introduced into office. The question is now made that the proceedings in error in the circuit court, and in this court, should have been against the successor, and not against John R. Martin, who was no longer treasurer. The point is not well taken. The action in such cases is regarded as against the treasurer, whoever he may be, and it may proceed through all its stages in all courts in the same manner in which it was commenced, or, if desired, the new treasurer may, on motion, be substituted in the place of the retiring one, and this is certainly the better practice. The treasurer in office should, as one of his official duties, take charge of and look after all actions against or in behalf of his office; but a failure to substitute the new treasurer does not have the effect to abate the action, nor cause its dismissal on motion.

The judgments of the circuit court and court of common pleas are both reversed, and this cause is remanded to the court of common pleas with instructions to overrule the demurrer to the petition, and for further proceedings in the case. Judgment accordingly.

(147 N. Y. 323)

JAMIESON et al. v. KINGS COUNTY EL. RY. CO.

(Court of Appeals of New York. Oct. 29, 1895.)

ELEVATED ROAD—INJUNCTION—EVIDENCE OF DAMAGE.

1. Injunction will lie to restrain the operation of defendant road in front of plaintiffs' premises where it was found that the rental value substantially depreciated in consequence thereof, though the fee value remained stationary.

2. Damage to the rental value of premises, caused by the operation of a railroad, cannot be proved by calling owners of property in that vicinity to testify as to the rental value of their respective premises before and after the road was built.

26 N. Y. Supp. 127, reversed.

Appeal from supreme court, general term, Second department.

Action by Ella G. Jamieson and another against the Kings County Elevated Railway Company to recover damages, with fee and rental value of plaintiffs' property, caused by the construction and operation of defendant's elevated railroad, and for an injunction. A

judgment for plaintiffs was affirmed by the general term (26 N. Y. Supp. 127), and defendant appeals. Reversed.

W. A. Poste, for appellant. J. Newton Fiero and Theo. B. Gates, for respondents.

FINCH, J. I do not think the fact, which is explicitly found, that the construction and operation of the defendant's elevated road has injured the fee value of plaintiffs' property only to the extent of one dollar, necessarily defeats the equitable right to an injunction, and so defeats the action. It is further found that the rental value has depreciated to a substantial extent, and for which damages were awarded. While it is true that usually the fee value rises or falls in proportion to the changes of rental value, that is not always or necessarily true, and cases are possible in which one remains stationary while the other changes. That is found to be the fact in the present case, and I think that proof of a substantial and continuing injury to the rental value will sustain the equitable action. The wrong done is in the nature of a continuing trespass, involving a multiplicity of actions. The appellant's suggestion is that the finding of an unchanged fee value raises a presumption that there will be no loss of rental value in the future, and so no occasion for further suits. To indulge in such a presumption would require us to shut our eyes to the lesson of the past taught by the proofs in respect to this property. I think the action was maintainable and the remedy by injunction a proper one.

But I think, also, that there was error in the admission of evidence which we cannot disregard. The plaintiffs sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity, and proving, in each case, what the particular premises owned by the witness rented for before the road was built, and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue (*Gouge v. Roberts*, 53 N. Y. 619), and left the court to try a dozen issues over as many separate parcels of property. We have held such a mode of proof to be inadmissible. (*Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389.) The elevated railroad cases in this court, to which the plaintiffs refer us, give no warrant for such a mode of proof, but indicate that the general course and current of values must be shown by persons competent to speak, leaving to a cross-examination any inquiry into specific instances, if such be deemed essential. Almost all the evidence of depreciation was of an erroneous character, and we cannot say that it may not have worked harm to the defendant. The judgment should be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.

(147 N. Y. 326)

SANFORD v. COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA.

(Court of Appeals of New York. Oct. 29, 1895.)

CONTRACTS—VALIDITY—AGREEMENT TO REFER ACTION.

A stipulation in a certificate of insurance, that any action thereon shall be tried before a referee, is void as against public policy, being an attempt to limit the jurisdiction of courts and prevent jury trial. 83 N. Y. Supp. 512, affirmed.

Appeal from supreme court, general term, Fourth department.

Action by Adele N. Sanford against the Commercial Travelers' Mutual Accident Association of America. From an order of the general term (83 N. Y. Supp. 512) reversing an order of the special term directing reference of the issues, defendant appeals. Affirmed.

M. W. Van Auken, for appellant. F. H. Kellogg, for respondent.

GRAY, J. The certificate of insurance, to recover upon which this action was brought, contained this clause: "It is hereby stipulated and agreed, by and between this association and the member named herein and his beneficiary, that the issues in any action brought against it under this certificate shall, on the demand of this association or its attorney, be referred for trial to a referee to be appointed by the court in which such action is brought." An order of reference of the issues in the action has been reversed at the general term below, and the motion for a reference denied; and the question is whether such an agreement is valid and binding upon the parties. Little, if anything, can be added to the opinion of the general term. Such a provision, if beneficial at all to the company, can only be so through superseding the law established for the trial of actions and compelling the beneficiary practically to submit an issue. That is vicious, for tending to limit the court having cognizance of the action in its jurisdiction, and for militating against the constitutional provision which secures to a party the right of trial by jury. The cases cited in the opinion below abundantly show that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity. In the case of *President, etc., Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, where that proposition was so stated, Judge Allen, in his opinion, was inclined to question the rule *if res nova*; but he regarded it as too well established to be now questioned. The rule, in its application to such a case as this, seems to me, however, to be well supported by reason. The defendant is a corporation which owes its existence to the laws of this state, and to which has been granted the right to do the business of insuring the lives of individuals. The dictates of a sound public policy would seem to require that its contracts of insurance, while providing ev-

ery wise and reasonable restriction, should not compel the individual who seeks to insure his life to submit, as a condition of obtaining that insurance, to conditions which are in violation of constitutional rights. Such a provision in the policy has no reasonable relation to the contract of insurance. Its insertion is unnecessary to the protection of the insurance company, and may be regarded, therefore, as an unimportant provision. I think we may safely base the reason for the application of this rule upon the proposition that public policy is opposed to the enforcement of an agreement, which supersedes the law and deprives the individual of the protection which it was designed and framed to afford. The order appealed from should be affirmed, with costs. All concur. Order affirmed.

(147 N. Y. 346)

HENRY v. ALLEN et al.

(Court of Appeals of New York. Oct. 29, 1895.)

MOTION FOR NEW TRIAL PENDING APPEAL.

1. The fact that an appeal has been taken and is pending does not prevent a motion in the trial court for a new trial on the ground of newly-discovered evidence.

2. The return on appeal need not be produced on a motion in the trial court, pending appeal, for a new trial on the ground of newly-discovered evidence.

Appeal from supreme court, general term. First department.

Action by Hiram F. Henry against Norman M. Allen and another. A judgment dismissing the complaint was affirmed at general term (28 N. Y. Supp. 242), and plaintiff appealed. Heard on motion for a remand, that plaintiff may move for a new trial because of newly-discovered evidence. Denied.

John G. Milburn, for the motion. W. H. Henderson, opposed.

BARTLETT, J. The appellant moves for an order directing that the return herein be transmitted to the supreme court, and that this case be remanded there, without prejudice to the appeal to this court heretofore taken, for the purpose of enabling him to move for a new trial on the ground of newly-discovered evidence. We deny this motion for the reason that the pendency of the appeal is no bar to a motion in the court below for a new trial. We have heretofore pointed out that upon an appeal to this court the record itself is not transmitted to us, but a transcript thereof, and the case, for all general purposes, still remains in the court of original jurisdiction. *People v. Board of Education of City of New York*, 141 N. Y. 86, 35 N. E. 1087. In the above case we said: "In all matters pertaining to the appeal itself, and to the proper hearing thereon, this court has jurisdiction, and also in regard to all applications which by statute may be made to this court after the taking of the appeal;

but as to all other applications the case is regarded as still pending in the court of original jurisdiction, and such applications should be made to that court." The production in the court below of the return to this court on the motion for a new trial is manifestly unnecessary, as that motion is made on facts dehors the record. If the supreme court, in the exercise of its discretion, grants the motion for a new trial, the legal effect will be the vacating of the judgment from which the appeal has been taken to this court, and a motion to dismiss the appeal would then be proper. The motion should be denied, without costs. All concur. Motion denied.

(147 N. Y. 355)

PEOPLE ex rel. PURDY v. FITCH,
Comptroller.

(Court of Appeals of New York. Oct. 29,
1895.)

CONSTITUTIONAL LAW—TITLE OF ACT—CHANGE OF
STREET GRADE — APPOINTMENT
OF COMMISSIONERS.

1. Laws 1893, c. 537, by its title, provides for damages to property "caused by changes of grade of streets or avenues made pursuant to chapter 721 of the Laws of 1887, providing for a depression of railroad tracks in the Twenty-Third and Twenty-Fourth wards in the city of New York or otherwise." *Held*, that by the expression "or otherwise" damages are allowed for changes made pursuant to authority other than the Laws of 1887, so that the act does not violate Const. art. 3, § 16, requiring the subject of a local bill to be expressed in its title.

2. Laws 1893, c. 537, authorizes the appointment of commissioners to award damages for changes in grade of streets or avenues, under authority of Laws 1887, c. 721, or other proper authority. Laws 1894, c. 567, amends the preceding law by allowing prospective damages by reason of such changes. The certificate issued to commissioners duly appointed under the former act on their reappointment under the latter recited that they were appointed pursuant to the provisions of the latter act, and authorized them to award damages made pursuant to the Laws of 1887. The act of 1894 enumerated all the acts under authority of which damages could be allowed. *Held*, that the appointment of the commissioners was not irregular, in that it referred only to damages for changes made pursuant to the act of 1887. 34 N. Y. Supp. 388, reversed.

3. Where an act authorizing the appointment of commissioners for awarding damages for changes in grade is amended by a subsequent act, merely increasing the amount of damages which may be allowed, commissioners duly appointed under the former need not be reappointed under the latter.

4. On mandamus to compel a city comptroller to pay damages awarded by a commission for changes in grade, objections that the commissioners have included improper items in making their award cannot be considered.

5. Pending certiorari to review the proceedings of commissioners awarding damages for changes of grade, a mandamus issued to compel a city comptroller to pay the amounts awarded should be stayed until a final determination under the writ.

Appeal from supreme court, general term, first department.

Application, on the relation of Rachael Purdy, against Ashbel P. Fitch, comptroller of the

city of New York, to compel defendant to pay the amount of an award for damages caused by changes in grade. From a reversal by the general term (34 N. Y. Supp. 388) of an order of the special term allowing the writ, the relator appeals. Reversed.

Ernest Hall, for appellant. David J. Dean, for respondent.

HAIGHT, J. On the 14th day of November, 1894, the commissioners appointed under chapter 537 of the Laws of 1893, as amended by chapter 567 of the Laws of 1894, made an award to the relator, under and pursuant to the provisions of those acts, for damages sustained by her in consequence of a change of the grade of streets in front of premises owned by her. The comptroller having refused to pay the award, a peremptory writ of mandamus, directing him to pay the same, was, on the motion of the relator, issued by the special term. On appeal, however, the general term reversed the order, and directed that the motion of the relator be denied. It is now contended that chapter 537 of the Laws of 1893 is in contravention of article 3, of section 16 of the constitution, then in force, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The title of the act is: "An act providing for ascertaining and paying the amount of damages to lands and buildings suffered by reason of changes of grade of streets or avenues, made pursuant to chapter 721 of the Laws of 1887, providing for the depression of railroad tracks in the Twenty-Third and Twenty-Fourth wards in the city of New York or otherwise."

The act in question is, undoubtedly, local; and, if it contains more than one subject, it is within the condemnation of the constitution. Its character is remedial, and should be liberally construed. *People v. Zoll*, 97 N. Y. 203. The whole question necessarily depends upon the meaning that is to be given to the words "or otherwise." If they relate to the depression of the railroad tracks authorized by chapter 721 of the Laws of 1887, and the depression of such tracks is the subject expressed in the title under consideration, then there is a reference to something not fully expressed in the title, and consequently there is a failure to comply with the provision of the constitution referred to. But such is not our understanding of the language used. Changes of the grades of streets and avenues had been authorized and made in the Twenty-Third and Twenty-Fourth wards of the city, under the provisions of the Laws of 1887 and other acts, but no provision had been made for compensating the owners of lands abutting upon such streets for the damages they had sustained under any of such acts. It was to afford relief in this regard that the act in question was passed, and the subject expressed is unquestionably the payment of the damages sustained. There is a limitation to the territory to which the act

applies to the Twenty-Third and Twenty-Fourth wards of the city. It also limits the damages to those sustained by reason of the changes of grades of streets and avenues. It particularly specifies the changes of grades authorized by the law of 1887, but does not limit the awarding of damages to the changes authorized by that act, but includes changes "otherwise" made pursuant to authority. This, it appears to us, is the fair reading and the reasonable interpretation of the language used; and, if we are correct in this view, it follows that but one subject is mentioned, and that is expressed in the title.

The general term appears to have reached the conclusion that there was an irregularity in the appointment of the commissioners which affected the award made by them, and the reversal of the order of the special term appears to have been made for this reason. No criticism is made as to the appointment of the commissioners, made pursuant to the act of 1893. After the passage of the amendatory act of 1894, the mayor reappointed the same commissioners. The amendatory act enumerated a number of other acts, together with that of 1887, under which changes of grades of streets had been and were to be made, all of which were to be considered by the commissioners in estimating the damages that should be awarded to claimants. The appointment of commissioners made in 1893 was made pursuant to chapter 537 of the Laws of that year, and required them to ascertain the damages that had been sustained by reason of the changes of grades of streets made pursuant to the act of 1887, "or otherwise as provided by said act," meaning the act of 1893. It will thus be seen that the damages that were to be awarded were not limited to the changes of grades made pursuant to the law of 1887 alone, but they were also authorized to award damages for the changes of grades that had been "otherwise" authorized. In reappointing the commissioners under the amendatory act of 1894, the concluding phrase is omitted. The certificate is as follows: "City of New York. Office of the Mayor. Know all men by these presents, that, under the provisions of chapter 567 of the Laws of 1894, amending chapter 537 of the Laws of 1893, I do hereby appoint Daniel Lord, James M. Varnum, and Daniel P. Hays as commissioners to ascertain and pay the amount of damages to lands and buildings suffered by recent changes of grade of streets and avenues, made pursuant to chapter 721 of the Laws of 1887." The defect referred to by the general term is in referring to the Laws of 1887 alone, and not including other acts under which changes of the grades of streets had been made. But these acts are enumerated in the act of 1894, and the commissioners by that act were authorized to award the damages by reason of the changes made under the acts so enumerated. They were appointed pursuant to the provisions of the latter act. They qualified under that act, and it appears to us that the certificate is broad enough to empower

them to make the awards contemplated by its provisions. But the reappointment of the commissioners was unnecessary. Their appointment in 1893 was regular and valid. The certificate of appointment gave them full power to award the damages sustained. The appointment was made pursuant to the second section of the act. That section was amended by the act of 1894 by the addition of but three words, and those words have reference only to the awarding of damages to be sustained in the future. The provisions authorizing the appointment of commissioners, their qualifications, etc., remained unchanged. Their duties were enlarged, and this was all that was contemplated.

It is contended that the commissioners have improperly included in their awards items of damage which were unauthorized; that they have included prospective damages under chapter 339 of the Laws of 1892; and that such was unauthorized. But we do not feel called upon to consider these questions upon proceedings for a mandamus. If the commissioners have included improper items, or have adopted a wrong basis in estimating damages, they may be corrected upon review in proceedings for that purpose.

A writ of certiorari was issued to review the proceedings had before the commissioners. The order issuing such writ has been affirmed in this court. The order of the general term should therefore be reversed, and that of the special term awarding a mandamus affirmed, with costs; but the issuance of the mandamus should be stayed until the final determination of the proceedings under the writ of certiorari. All concur. Ordered accordingly.

(147 N. Y. 323)

HAIGHT et al. v. LITTLEFIELD et al.

(Court of Appeals of New York. Oct. 29, 1895.)

DEDICATION—HIGHWAY—EASEMENT APPURTENANT—OBSTRUCTION.

Where defendants, owning lands on all sides of a strip of land dedicated in the deeds to them, and in maps referred to in the deeds, as a street, though not accepted as such by the public, conveyed a lot abutting on the strip with reference to the strip as a boundary, referring to it as P. street, the grantee secured an easement in the strip, the obstruction of which by his grantors he was entitled to have enjoined, though at the time of the conveyance defendants were using the strip in a manner inconsistent with the existence of the right of way, with the grantee's knowledge.

Appeal from supreme court, general term, Third department.

Action by Samuel J. Haight and others against Dennis G. Littlefield and others to enjoin the obstruction of a right of way. From a judgment of the general term (24 N. Y. Supp. 1007) affirming a judgment for plaintiffs, defendants appeal. Affirmed.

Worthington Frothingham, for appellants. Isaac Lawson, for respondents.

O'BRIEN, J. The purpose of this action was to protect, through the judgment and decree of a court of equity, a right of way which the plaintiffs claim as appurtenant to their land, and to prevent its unlawful obstruction by the defendants. The facts which lie at the basis of the controversy have been alleged in the complaint, and found by the referee in great detail and with minute regard to every conveyance in the chain of title of both parties. The questions involved in this appeal can be sufficiently presented by a brief reference to some of the main or general facts alleged and found. On the 23d of November, 1868, the defendant Dennis G. Littlefield became the owner, by grant from the executors of Stephen Van Rensselaer, of a parcel of land in the city of Albany, which was bounded on the south by the north line of a street to be at least 50 feet wide. In the body of the conveyance was a map of the parcel, showing the boundary lines and the street on the south side. On August 1, 1870, the same grantors conveyed to the same grantee two other parcels of land, both of which were bounded on a street 50 feet wide. One of the parcels was bounded on the south by the north line of this street, and the other on the north by the south line of the street. This conveyance also contained a map which was referred to in the descriptions, and which showed the boundary lines of the parcels granted, and between the two parcels a street 50 feet wide was plainly delineated. The defendant Littlefield, under these grants, became the owner of all the lands on both sides of the street referred to, as it was a cul de sac about 350 feet in length, extending from North Pearl street to the railroad which closed it at one end. This way had never been accepted by the public authorities as a public street, and was not used as such, but simply as a means of ingress and egress to and from the lands along its boundaries. In the deed last referred to, however, there was a clause inserted to the effect that both parties to the grant dedicated this strip of land forever to the public as a public street, contemplating its extension in the future beyond the railroad where it then terminated. All the defendants have some title or interest in the lands described in the deeds referred to, which right has been derived solely through mesne conveyances from Littlefield, in which the lands were bounded and described substantially in the same language as in the conveyances to him. In all of them the existence of the street was recognized, and in none of them was it expressly restricted or any language used indicating an intent to extinguish it in whole or in part. On June 15, 1885, Littlefield also conveyed to the plaintiffs a parcel of this land on the south side of the street, which is now used by them for manufacturing purposes. It was bounded on the south line of this street, which in the conveyance is called "Pleasant Street," and further described as a portion of

the premises conveyed to Littlefield by the deed of August 1, 1870, by the executors of Van Rensselaer. This conveyance and the others referred to, with the maps, bounding the premises upon a street, secured to the plaintiffs an easement or right of way in the strip of land so delineated, described, and recognized. Whether it was then a public street or not, this easement or right of way was attached as an appurtenance to the land conveyed, and part of the thing granted; and thereupon the plaintiffs acquired the right to insist at all times that the way be kept open and unobstructed for the benefit of their premises, and as a means of access to and from the same. It is a property right, the destruction or invasion of which constitutes a ground of relief in equity. Irrespective of the rights of the public in a public street, the owners of lots bounded upon a street have, under the circumstances disclosed, a right of way as between themselves and their grantor. *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333; *Hennessey v. Murdock*, 137 N. Y. 317, 33 N. E. 330; *Lord v. Atkins*, 138 N. Y. 184, 33 N. E. 1035; *Cunningham v. Fitzgerald*, 138 N. Y. 165, 33 N. E. 840. The referee has found that, subsequent to the grant to the plaintiffs, the defendants obstructed the street or way by the digging of a ditch across it, and by inclosing some portion of it with fences for their own exclusive use. This was an invasion of the plaintiffs' rights, which equity could properly interpose to prevent or to remedy. Some of the findings of the referee, made at the request of the defendants' counsel, indicate that some of the fences by means of which the defendants had inclosed some portion of the street, and appropriated it to their own use, were in existence and upon the premises at the time of the plaintiffs' grant, and to their knowledge.

The mere fact that the defendants had obstructed the street to some extent before conveying to the plaintiffs, and that the plaintiffs, at the time of this grant, knew of the existence of such obstructions, or could have known, we do not regard as material. The plaintiffs' rights depend upon the construction of their deed, and, if that instrument secured to them an unobstructed right of way, they are not estopped from insisting upon such right by reason of the fact that the defendants were, at the time of the conveyance, using some part of the premises in a manner even inconsistent with the existence of the right of way now claimed. It must be remembered that the defendants then owned the land on both sides of the street, and could have extinguished the easement entirely, unless there had been a dedication of it to the public,—a question not now important to solve. In this condition of things, the defendants conveyed to the plaintiffs, recognizing the street as the boundary and without any restrictions or qualifications in the grant upon the manner or extent of its use by the grantees. It is not claimed

by way of defense that the deed does not in every respect express the intention of the parties, or that there was any intention on the part of grantors or grantees to limit its effect by reason of physical appearances which the defendants had created before the conveyance in the use of the premises. If the case presented such an issue, the presence of the fences on the ground at the time of the conveyance to the plaintiffs might possibly be material, as the question would then be whether the deed did not convey more than was intended. *Taylor v. Hopper*, 62 N. Y. 649. But in view of the fact that the defendants had, prior to the grant to the plaintiffs, used, possessed, and owned the whole of the premises, including the street, there was nothing in the appearance of things upon the premises at all inconsistent with the terms of the deed granting a right of way over the street, as described in the several conveyances. The plaintiffs have therefore, under these circumstances, the right to insist that their rights in the street shall be governed by the deed, and not by the actual physical appearances when it was made. It is the defendants' grant, and no equitable ground is presented for limiting its scope or construction by reason of the fact that the defendants had at the time put some part of the obstruction complained of in the street, so long as they have not acquired the right to continue it by user or adverse possession. One who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has to the land. He may insist upon its use whenever occasion requires, and it is ordinarily no answer to his claim to urge that his rights under the deed are more extensive than he had any reason to expect from the situation existing at the time it was made. The right conveyed can be defeated only by showing that it has been waived or lost in some of the ways recognized by law. *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896. That has not been done in this case. There is evidence to sustain all the findings of the referee, and these findings warrant the judgment given. We think there was no error in the disposition of the case in the courts below, and that the judgment should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 362)

WRIGHT v. MILLER et al.

(Court of Appeals of New York. Oct. 29, 1895.)

RES JUDICATA.

Where the judgment roll in a former action between the same parties did not show that a counterclaim for advances was not litigated therein, but, on the contrary, a proposed finding covering said counterclaim was submitted, but the referee refused to find as requested, said action is a bar to a subsequent action on said claim, though a witness for plaintiff in the latter action testified that he understood that the referee in the former action did not act on it, because he did not consider it

within his jurisdiction, but plaintiff, as a witness, did not show that the claim was not then disposed of on its merits. 22 N. Y. Supp. 24, affirmed.

Appeal from supreme court, general term, Second department.

Action by Benjamin Wright against David Miller and others. From an order and judgment of the general term (22 N. Y. Supp. 24) affirming a judgment dismissing the complaint upon the merits, plaintiff appeals. Affirmed.

I. H. Maynard, for appellant. Samuel Keeler, for respondents.

BARTLETT, J. This is a suit in equity to recover moneys alleged to have been loaned and advanced by plaintiff to one Charles E. Miller, since deceased; also moneys advanced for his funeral expenses, and to have certain instruments referred to in the complaint adjudged to be assignments by the heirs and next of kin of Miller to plaintiff of all their several rights and interests in the proceeds of sale in a certain partition suit to the extent of plaintiff's claim. Hannah E. Miller, the grandmother of the plaintiff, Benjamin Wright, was the beneficiary under a trust created in her favor in 1806. In 1861 the plaintiff became trustee thereunder, and so continued until the death of his grandmother, in 1871. The persons entitled to the trust property after the death of Hannah E. Miller were her three children, viz. Elizabeth Ann Wright, the mother of the plaintiff, Ezra Miller, and Charles E. Miller. The plaintiff claims that he loaned and advanced to Charles E. Miller, between October 17, 1872, and September 9, 1884, the date of Charles E. Miller's death, the sum of \$1,405 in small amounts of from \$20 to \$30, and took his notes therefor. He also alleges that he advanced to one David Miller, after the death of Charles, \$50, to pay funeral and other post mortem expenses of the latter. In 1876, Charles conveyed his interest in the trust property to David Miller, his son, in trust, and the latter began an action for the partition of the property and for an accounting by the plaintiff in this action as trustee of the estate of Hannah E. Miller. This action was pending at the time of Charles E. Miller's death in 1884. The partition suit was revived and continued against the heirs of Charles, and against the plaintiff in this action as trustee of the estate of Hannah E. Miller and individually, and resulted in judgment and sale of the property, and the proceeds have been brought into court, and one-third thereof belongs to the defendants in this action as the heirs at law of Charles E. Miller, deceased. The defendants in this action deny most of the allegations of the complaint, and aver that the amounts so paid to Charles by plaintiff are in no way secured as an express charge upon the real estate of Charles, or the proceeds of sale, and ask to have the moneys distributed. They also plead, among other things, that in the partition action of Miller v. Wright the plaintiff, as defendant therein, and as trustee of Han-

nah E. Miller's estate, set up the claim now sued upon by way of counterclaim in his answer, and sought to charge the alleged advances on the share of Charles E. Miller, and that the counterclaim was disallowed on trial before a referee. On the trial of this case the judgment roll in *Miller v. Wright* was read in evidence, and the plaintiff endeavored to show by the testimony of one of the attorneys in the action that there was no adjudication upon the merits against him on his counterclaim, but that the referee held he had no jurisdiction. This evidence was introduced for the very obvious reason that the judgment roll upon its face contains nothing to indicate that the claim of Benjamin Wright was not disposed of on the merits. On the contrary, it appears that Benjamin Wright submitted to the court a proposed finding of fact and conclusion of law covering his claim, and the referee refused to find as requested. On its face the judgment roll is clearly a bar to this action, and we must so hold, unless the evidence of the attorney overcomes the force of this documentary proof. This witness, on his direct examination, merely stated, as to the ground the referee took in reference to Benjamin Wright's claim, that he understood it to be that the referee did not consider it within his jurisdiction to pass upon it, but added, "I am not stating what the referee said, but only my inference from it." On his cross-examination the witness was asked this question: "Q. Mr. Taylor, before the referee, proof of Benjamin Wright's claim was presented? A. Yes, sir; and I understood the referee to hold that it could not be made a lien against the estate." This last answer might very well be claimed as tending to show an adjudication on the merits, but, without so treating it, we are of opinion that there is nothing in this evidence that would justify a finding that the referee held he had no jurisdiction to try and determine the issues raised by the counterclaim. The plaintiff was sworn as a witness on his own behalf, and, with full knowledge that the judgment in *Miller v. Wright* was pleaded as a bar to his claim, made no explanation as to the manner in which his counterclaim was disposed of in that case. If the plaintiff suffers injustice by the disposition we are compelled to make of this case, it is due to the fact that on the trial of this action there was an utter failure to establish the contention now made in his behalf that he has never had his day in court. While it is true that the counterclaim set up in *Miller v. Wright* was for advances made by Benjamin Wright as trustee, and the claim now sought to be established is that of Benjamin Wright individually, yet it is undisputed that both of these causes of action embrace the same transaction, to wit, the alleged advance of a certain sum of money. We do not pass upon the legal status of Benjamin Wright as an individual defendant in the suit of *Miller v. Wright*, but rest our decision solely upon the ground that the proceedings and judgment therein are a bar to this action. In

Miller v. Wright the plaintiff herein elected to assume the position that the advances in question were made by him as trustee, and, as this record is made up, it appears he was defeated on the merits. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(147 N. Y. 334)

In re FITCH, Comptroller.

(Court of Appeals of New York. Oct. 29, 1895.)

CERTIORARI—WHEN LIES.

Laws 1893, c. 537, as amended by Laws 1894, c. 567, authorizes the mayor of New York City to appoint commissioners, who "shall have exclusive jurisdiction to estimate the loss and damage which each owner of land" shall sustain by reason of the depression of certain railroad tracks, which damage the city is directed to pay. Held, that under Code Civ. Proc. § 2120, subd. 2, providing that certiorari may issue to review the determination of a body or officer where the writ may be issued at common law by a court of general jurisdiction, and the right to a writ or the power of the court to issue it is not expressly taken away by statute, certiorari lies to review the proceedings of the commissioners in making an award.

Appeal from supreme court, general term, First department.

Certiorari by Ashbel P. Fitch, comptroller, against Daniel Lord and others, commissioners, and Rachel Purdy, claimant. From an order of the general term (32 N. Y. Supp. 1142) affirming an order denying claimant's motion to quash the writ, claimant appeals. Affirmed.

Ernest Hall, for appellant. David J. Dean, for respondents.

HAIGHT, J. Under chapter 721 of the Laws of 1887 the department of public works in the city of New York was authorized to enter into an agreement with the New York & Harlem Railroad Company for the depression of the tracks and for the changing of the grades of the railroad in the Twenty-Third and Twenty-Fourth wards of the city, and for the carrying of the streets crossing such railroad over and under the same, etc. Pursuant to the provisions of this act an agreement was entered into and the tracks of the company were depressed and the grades changed in accordance therewith. Under chapter 537 of the Laws of 1893, as amended by chapter 567 of the Laws of 1894, the mayor of the city of New York was authorized and directed to appoint three discreet, disinterested persons as commissioners, who "shall have exclusive jurisdiction to estimate the loss and damage which each owner of land or land and building fronting on any such street or avenue has sustained or will sustain by reason of such change," etc., which damage the city was directed to pay to such owner. Pursuant to this provision the appellant presented a claim, upon which the commissioners appointed by the mayor have made an award in her favor, for

the sum of \$2,575. It was to review the proceedings of the commissioners upon which this award was made that the writ in question was issued. The motion to quash was made upon the ground that the court had no power to review such award, for the reason that by the terms of the act the commissioners were given "exclusive jurisdiction to estimate the loss and damage." The question presented must be determined from the provisions of the act. What is the fair and reasonable construction that should be given to them? Undoubtedly the commissioners are given exclusive jurisdiction to estimate the loss, but they are required to make their estimates upon legal and authorized evidence, to include only such element of damage as is authorized, and to adopt a proper rule or basis in estimating the damage. Their determination is not, by the language of the act, made final and conclusive. They are only given the exclusive power to estimate. It appears to us, therefore, that their proceedings are subject to review in the particulars indicated.

The case of *People v. Betts*, 55 N. Y. 600, we do not regard as in conflict with the views above expressed. That case was a proceeding to assess the damages of the owner for lands taken for railroad purposes under the right of eminent domain. The statute in that case authorized one review of the determination of the commissioners, and then provided that "the second report shall be final and conclusive on all the parties interested." In that case it was held that the writ of certiorari would not lie to review the second appraisal. But it will be observed that the language of that statute is very different from that which we now have under consideration. Exclusive jurisdiction to estimate does not necessarily mean sole power to determine the rule or elements of damage, or the competency of evidence by which such damage shall be ascertained. Neither do those words necessarily mean that the estimate shall be final and conclusive upon the parties without an opportunity to review; and, in the absence of any provision indicating an intent that they were intended to be so understood, we think they ought not to be construed as shutting off forever any right of review. Section 2120 of the Code of Civil Procedure provides that: "The writ of certiorari regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only: 1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized by a statute. 2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by statute." The commissioners appointed by the mayor are officers, and they act as a body. At common law the writ would issue to re-

view their action. There is nothing in the statute under consideration expressly taking away the writ. It was, therefore, properly issued under the second subdivision of this section of the Code. It is urged on behalf of the appellant that the clause of the statute referred to, giving the commissioners exclusive jurisdiction to estimate, is an expression of the statute taking away the writ; but for the reasons stated we do not so construe it. The order appealed from should be affirmed, with costs, and the proceedings remitted to the special term to proceed thereon. All concur. Ordered accordingly.

(147 N. Y. 290)

PEOPLE ex rel. BARNES et al. v. COURT OF SESSIONS OF ALBANY COUNTY.

(Court of Appeals of New York, Oct. 29, 1895.)

CRIMINAL CONTEMPT — SUFFICIENCY OF MANDATE — APPEARANCE.

1. Code Civ. Proc. § 11, provides that when a person is committed for a criminal contempt the particular circumstances of his offense must be set forth in the mandate of commitment. *Held*, that a mandate convicting relators of criminal contempt, and imposing punishment, was insufficient, as it did not apprise relators wherein they were guilty of contempt.

2. Where parties, in response to an order to show cause why they should not be punished for contempt, appeared and answered, they thereby waived any defects in the affidavit upon which the order was issued. 31 N. Y. Supp. 373, affirmed.

Appeal from supreme court, general term, Third department.

Certiorari by William Barnes and others to review the determination of the court of sessions of Albany county in holding the relators guilty of criminal contempt. From an order of the general term (31 N. Y. Supp. 373) affirming a judgment of the court of sessions dismissing the writ, relators appeal. Reversed.

Matthew Hale, for appellants. James W. Eaton, for respondent.

HAIGHT, J. It is charged that on the morning of April 12, 1894, the relators, as the editors and publishers of the Albany Morning Express, published in that paper two articles, one in the editorial column, entitled "The Disgrace of Clute," and the other in the news column, entitled "His Action Needs Explanation." That these articles reflected seriously upon the motives and action of the judge presiding at the court of sessions; and that they amounted to a criminal contempt. The editorial proceeds as follows: "County Judge Jacob H. Clute added to his unsavory notoriety yesterday by assigning Arthur L. Andrews and Henry A. Peckham to defend men who were arrested on election day charged with attempting to vote illegally. Messrs. Andrews and Peckham have been prominent among the lawyers whose services have been given freely, and without charge, to prosecuting violators of the election laws. Of this

fact Jacob H. Clute, of course, was fully aware, not only because their activity in the interest of honest elections has been a matter of current news, but also because they have appeared before Judge Clute's own tribunal in the performance of their duty. In the light of these facts, the low-down character of the judicial trick to which Jacob H. Clute descended may be realized. He availed himself of his power as county judge to place these two worthy lawyers, who have fought to prevent suffrage stealing in Albany, in the dilemma of defending election criminals, or else subjecting themselves to a fine of \$500, and imprisonment for thirty days, for contempt of court." Then follows a denunciation of the judge in unmeasured terms, with allusion to his judicial action in other cases. The proceedings were instituted upon the affidavit of James W. Eaton, the then district attorney, upon which the order was issued for the relators to show cause why they should not be punished for contempt. On the return day the relators appeared personally, and their counsel moved to vacate the order to show cause, which was denied. They thereupon filed their answer, which is as follows: "The above-mentioned defendants, and each of them, hereby deny, each for himself, that he has been guilty of the publication of any false or grossly inaccurate reports of any of the proceedings of the said court." Interrogatories were thereupon filed, requiring the relators to answer as to whether they were the editors and publishers of the articles in question. Answers having been filed, the court entered the following mandate or judgment: "On the 12th day of May, 1894, the matter again came before us, on all the papers in the proceeding, the parties appearing in person and by counsel; and after hearing Matthew Hale, Esq., of counsel for the defendants, and James W. Eaton, Esq., district attorney of the county of Albany, we did determine and adjudge the said William Barnes, Jr., George N. Southwick, and Arthur Lucas to be guilty of criminal contempt of court, and did sentence said William Barnes, Jr., George N. Southwick, and Arthur Lucas, as a punishment for said offense, to each pay a fine of one hundred dollars, or, in lieu thereof, to each stand committed to the Albany county jail for the period of thirty days."

The comments in the articles published, reflecting upon the character and conduct of the presiding judge, were of a most extraordinary nature. It is to be regretted that the editors and publishers of a prominent and influential journal should so far violate their privilege, and misconceive their duty to the public. The publication of the articles was exceedingly harmful. They tended to bring into disrepute the administration of the law, and to destroy the confidence of the public in, and its respect for the proceedings of, our courts. If the judge is guilty of the acts charged, complaint should be made to the proper officers, and proceedings instituted for

his removal. If he is not guilty, the dignity of the court should be preserved by the prompt punishment of the offenders. The punishment, however, must be inflicted under due forms of law, and such must be the point of our inquiry with reference to the proceedings under review.

"Criminal contempt of court" is defined as: "(1) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. (2) Breach of the peace, noise, and other disturbance, directly tending to interrupt its proceedings. (3) Willful disobedience to its lawful mandate. (4) Resistance willfully offered to its lawful mandate. (5) Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory. (6) Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein." Code Civ. Proc. § 8. Such contempt may be divided into two classes: (1) That which is committed in the immediate view and presence of the court; and (2) that which is committed out of court. When the contempt is committed in the view and presence of the court, it may be punished summarily. When not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense. Code Civ. Proc. § 10. The publication of a false and grossly inaccurate report of a proceeding in court belongs to the latter class, and, as we have seen, the party charged must be notified of the accusation.

It is urged on the part of the appellants that the court obtained no jurisdiction to punish them for contempt, for the reason that the order to show cause was based upon an affidavit of the district attorney, which was made wholly upon information and belief, and that it failed to specify the part or portions of the articles published which it was claimed amounted to a contempt, and also that there was no sufficient evidence showing that the articles were published by the appellants, and were grossly false and inaccurate. The conclusion reached by us renders it unnecessary to consider these questions in detail. The court undoubtedly obtained jurisdiction of the appellants when they appeared before it and were charged with the contempt. The only office of the order to show cause was to bring them before the court; and, if it was issued on an insufficient affidavit, they must now be deemed to have waived the defect by their personal appearance and answer. If they deny their guilt, they doubtless have the right to have it established by evidence, in so far as it is not within the personal knowledge of the court. The court had personal knowledge of its own proceedings. It could not, however, have

had personal knowledge as to whether the appellants were the editors and publishers of the articles, or as to whether the attorneys mentioned in the articles were the counsel of the so-called committee of 50. But, for the purposes of this case, we shall assume that the proceedings were regular, and that the evidence was sufficient to warrant the conviction. Our difficulty is with the formal mandate or judgment. As will be seen, it convicts the appellants of a criminal contempt, and imposes punishment by fine and imprisonment. It does not specify the particular circumstances of the offense. In case of criminal contempt, this is specifically required: "When a person is committed for such a contempt the particular circumstances of his offense must be set forth in the mandate of commitment." Code Civ. Proc. § 11. This is but a re-enactment of the Revised Statutes, which provided that, "whenever any person shall be committed for any contempt specified in this article, the particular circumstances of his offense shall be set forth in the order or warrant of commitment." 2 Rev. St. 278. Under the Revised Statutes, it is called the "order or warrant." Under the Code, it is called the "mandate of commitment." They doubtless mean the same, and relate to the final order entered in the proceeding. This is no new doctrine. Rapalje on Contempt, at page 178, says: "The final order must designate the particular misconduct of which the defendant is convicted." In *De Witt v. Dennis*, 30 How. Prac. 131, Morgan, J., says: "The order of conviction is not sufficiently definite and specific, and does not properly describe the particular misconduct for which he is convicted." And for this reason the order convicting the person of contempt was set aside. The same rule prevails in England. Oswald on Contempt, at page 158, says: "An order of committal is bad, if it does not specify in what particulars the person committed has been guilty of contempt." In the *Pollard Case*, L. R. 2 O. P. 120, it was said that "no person should be punished for contempt of court [which was a criminal offense] unless the specific offense charged against him was distinctly stated." See, also, *In re Rea*, 14 Cox, Cr. Cas. 139; *Reg. v. County Court Judge of Lambeth*, 36 Wkly. Rep. 475; *People v. Nevins*, 1 Hill, 154. The reason for the statute is perfectly apparent. In the criminal contempts committed in the immediate view of the court, it may punish summarily. The only record preserved is in the final order or mandate of the court entered in the minutes of the clerk. If the particular circumstances of the offense were not required to be set forth, there would be nothing that the accused could have reviewed, or that he could interpose as a defense to a subsequent conviction for the same act. If the court saw fit to call his act, no matter what it might be, a criminal contempt, that determination would, of necessity, be final, even though the act of the accused consisted in the putting on of his

hat as he was going out of the court-room door, and failed to come within any of the provisions of the Code constituting a contempt of the court. The rule applies with equal force to contempts which are not committed in the presence of the court, and its importance is made apparent in the present case. The articles published, as we have seen, contained numerous accusations and denunciations of the judge. These accusations and denunciations may be libelous, but they were not, within the statute, contempts of court. It was only in so far as the articles complained of purported to give the proceedings of the court of sessions that there could be any contempt. The publication of these proceedings could not be a contempt, if it were true and fair. The appellants, therefore, had the right to know whether they were adjudged guilty because of the publication of such proceedings of the court, or whether they were adjudged guilty by reason of other matters that appeared in the articles. The order appealed from should be reversed, and the proceedings dismissed, but, under the circumstances, without costs to either party. All concur, except PECKHAM, J., not sitting. Ordered accordingly.

(147 N. Y. 348)

In re BAER.

NATHAN et al. v. HENDRICKS et al.

(Court of Appeals of New York. Oct. 29, 1895.)

WILLS—CONSTRUCTION—CONTINGENT REMAINDER
—PARTITION SALE—RESCISSION—
REVIEW ON APPEAL.

1. A testatrix devised a life estate in her property in trust for a daughter, remainder on her death leaving issue to such issue or their heirs; but on her death without such issue or their heirs a life estate therein to another daughter, and on her death remainder to be conveyed to the children and lawful heirs of the deceased brother of the testatrix per stirpes. The first daughter died without issue. *Held*, that the remainder to the children and lawful heirs of the brother vested on the death of the second daughter. 34 N. Y. Supp. 1016, affirmed.

2. Where, on a suit for the construction of a will and partition, one purchases the property in litigation at a sale made under order of court, the question of whether the title is so involved as to justify a rescission of the sale on motion of the vendee being one of discretion with the court will not on appeal be disturbed.

Appeal from supreme court, general term, First department.

Action by Frances Nathan and others against Edmund Hendricks and others for the construction of a will, distribution and partition. On motion of Morris B. Baer, purchaser at a sale made under order of court, to be relieved from his purchase for defect of title. From an affirmance (34 N. Y. Supp. 1016) by the general term of an order of the special term denying his motion, he appeals. Affirmed.

Thomas W. Butts, for appellant. Benjamin N. Cardozo, for respondents.

O'BRIEN, J. On the 6th of March, 1895, pursuant to the judgment in an action of partition, the referee offered for sale the premises in question, No. 27 Mercer street, in the city of New York, and the appellant in this proceeding, as the highest bidder, became the purchaser. Subsequently he petitioned the court to relieve him from his bid upon the sole ground that the title under the judgment resulting in the sale was not a marketable one. The courts below have denied his application, thus holding that the title offered is good; and that is the only question presented by this appeal.

It is admitted that Charlotte Gomez, who died December 1, 1849, leaving a will, which was admitted to probate in that year, was, at the time of her death, seised and possessed of this property in fee. The defect which the purchaser claims to exist in the title under the referee's sale arises under this will and the judgment in partition. The property in question was disposed of by the residuary clause of the will, wherein the testatrix devised and bequeathed the same to her executors, as trustees, in trust for the use of her daughter Emeline, with directions to pay over to her the rents, income, or profits thereof, and, in case of her death, leaving issue, to convey the remainder to such child or children or his or her heirs. This provision of the will was modified by a subsequent clause, in which it was directed that, in case of the death of Emeline without children or their issue, her descendants, but leaving her sister Matilda surviving, then, and in that case, the trustees were to apply the rents, income, and profits of the property in question so held by them in trust to the use, benefit, and support of Matilda during her natural life, and upon her death to convey the remainder "to the children and lawful heirs of my brother Harmon Hendricks, deceased, to share and share alike per stirpes." The daughter Emeline died intestate, and without issue, March 20, 1885. The daughter Matilda survived her sister for several years, and died December 6, 1893, and so the trust then expired, and the estate in remainder passed to such descendants of Harmon Hendricks as were contemplated by the will. Harmon was the brother of the testatrix, but died some time before the will was made, leaving 10 children surviving, and who were alive at the death of their aunt, the testatrix; but all of them died before Emeline, to whom the first life estate was devised. These children, or some of them, left wills, under which any interest in the real estate in question which vested in them upon the death of the testatrix would pass. In the partition action none of the devisees of these children were made parties; but all persons who answered to the description of the living heirs of Harmon Hendricks at the date of the death of Matilda, on December 6, 1893, were brought in and are bound by the judgment.

The question, therefore, is whether the remainder vested upon the death of Charlotte

Gomez, the testatrix, in such of the children or descendants of her brother, Harmon Hendricks, as were then living, or only in such descendants living at the termination of the life estates to the two daughters of the deceased. If the remainder vested upon the death of the testatrix, then the contention of the petitioner as to defects in the title can be sustained, but not if it was contingent and to vest only in the future in the surviving children or heirs of the brother, since all such persons were made parties to the partition suit. The trust created by the provisions of the will referred to embraced personal as well as real property, and the contention of the purchaser is that the testatrix contemplated a division and distribution of the remainder at some remote period in the future, not only among the descendants of her brother then living, but also among the devisees and legatees of such as had died in the meantime, or their heirs or representatives; thus bringing into the class persons who are not of her blood, and who were wholly unknown to her in her lifetime. The duty which she imposed upon her trustees was clear and simple, and that was to distribute the remainder, when the trust terminated by the death of the life tenants, among the children and lawful heirs of her deceased brother. The language of the will, read in the light of settled rules of construction, indicates quite clearly that she did not intend that the remainder should vest upon her death in the then living children and heirs of her brother, but should be postponed until the time for division and distribution arrived, and then to vest in such persons as answered to the description who survived. The children of her brother were to take no interest whatever, except upon the contingency of her daughter's death without issue. In case of her death leaving issue, such issue would take the remainder absolutely. Where final division and distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made. *Bisson v. Railroad Co.*, 143 N. Y. 125, 38 N. E. 104; *Goebel v. Wolf*, 113 N. Y. 405-411, 21 N. E. 388; *Teed v. Morton*, 60 N. Y. 506; *In re Smith*, 181 N. Y. 239, 247, 30 N. E. 130. In such cases the gift is contingent upon survivorship, and, if it vests at all before the date of distribution, it is subject to be divested by the death before that time of a person presumptively entitled to share in the distribution. While this rule is sometimes made to yield to indications of a contrary intent in the will, yet it may be said to be a general rule, and there is nothing to be found in the will in question to prevent its full application.

Moreover, there are not in this devise any words of direct and immediate gift to the children or heirs of the brother, but a direction that the trustees should convey to them at a future time on a certain contingency. They were to take through the medium of a power in trust, and the time of the vesting of the in-

terest was thus deferred, in form, at least, until the time of distribution. It is a case, then, where, as the cases express it, "futurity is annexed to the substance of the gift," and warrants the application of the principle that, where a future interest is devised, not directly to a given person, but indirectly through the exercise of a power conferred upon trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift. This rule has been applied in numerous cases that do not differ essentially in the material facts from the one at bar. *Smith v. Edwards*, 88 N. Y. 92; *Delaney v. McCormack*, Id. 174; *Warner v. Durant*, 76 N. Y. 136; *Vincent v. Newhouse*, 83 N. Y. 511; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *Hobson v. Hale*, 95 N. Y. 588. The rule that in case of a devise to one person in fee, but, in case of his death, to another, the death referred to will be construed to be a death in the testator's lifetime, has no application to this case. The rule is never permitted to operate in a case where, as here, a point of time for distribution is mentioned other than the death of the testator, or where a life estate intervenes, or where the context of the will contains language indicating a contrary intent. In *re Denton*, 137 N. Y. 428, 33 N. E. 482; *Washbon v. Cope*, 144 N. Y. 297, 39 N. E. 388; *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. 11; *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. 515; *Vanderzee v. Slingerland*, 103 N. Y. 47, 8 N. E. 247; *Mul-larky v. Sullivan*, 136 N. Y. 227, 62 N. E. 762; *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471. The intention of the testatrix was that upon the death of the daughters, for whose benefit the trust was created, without issue, the remainder should be distributed among such of the children of her brother as might then be living, and the lawful heirs of such as might be dead; and, all the persons who answered to that description at the time of distribution having been made parties to the action of partition, and become bound by the judgment, the title tendered was good and marketable. Nor do we think that the title was involved in so much doubt, within the meaning of the rule, as to justify the purchaser in refusing to perform; and, moreover, the courts below have exercised their discretion in that respect, with which we ought not to interfere. *Kelso v. Lorillard*, 85 N. Y. 177; *Fry*, Spec. Perf. §§ 805, 871; *Radford v. Willis*, 7 Ch. App. 7. For these reasons we think the order appealed from should be affirmed, with costs. All concur. Order affirmed.

(147 N. Y. 329)

ISOLA et al. v. WEBER et al.

(Court of Appeals of New York. Oct. 29, 1895.)

DEATH BY WRONGFUL ACT — AMOUNT OF RECOVERY — RETROSPECTIVE FORCE OF CONSTITUTION.

Const. 1895, art. 1, § 18, providing that the right of action now existing to recover dam-

ages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, is not retrospective in its operation. 34 N. Y. Supp. 77, reversed.

Appeal from common pleas of New York city and county, general term.

Action by Maria Isola and another, administrators of Agostino Isola, deceased, against John Weber and another, for death of plaintiffs' intestate. From an order of the general term (34 N. Y. Supp. 77) reversing an order of the special term which denied plaintiffs' motion to amend the complaint, defendants appeal. Reversed.

Geo. E. Mott, John J. Fitzgerald, and Thomas F. Grady, for appellants. Geo. H. Hart, for respondents.

PER CURIAM. The motion to amend the complaint by changing the claim for damages occasioned by the negligence of the defendants and resulting in the death of plaintiffs' intestate, from \$5,000 to \$25,000, involves the question whether section 18 of article 1 of the new constitution operates retrospectively, and affects causes of action accrued before it went into effect. The language of that provision is, "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." At special term, Judge Pryor denied the motion to amend, upon the ground that the constitutional provision was prospective only, and did not operate upon causes of action antedating its own existence. The general term reversed, and granted the amendment, and the defendants appeal from that order. The same question, at nearly the same time, came before the general term of the First department, which held that the provision did not operate retrospectively. We think that conclusion was correct (*O'Reilly v. Stage Co.*, 34 N. Y. Supp. 358), and adopt the reasoning of the opinion by Follett, J., in that case, as a sufficient expression of our own views. The order of the general term should be reversed, and that of the special term affirmed, with costs. All concur. Ordered accordingly.

(147 N. Y. 344)

BROOKLYN EL. R. CO. v. FLYNN.

(Court of Appeals of New York. Oct. 29, 1895.)

COURT OF APPEALS — JURISDICTION — APPEALABLE ORDER.

Where there are three buildings on a tract of land taken by condemnation proceedings under the rapid transit act (Laws 1875, c. 606), the question whether the depreciation of the part on which one building stood should be set off against the benefits to the others is one of law; and no appeal lies from an order of the general term affirming an order of the special term confirming the report of the commissioners.

Appeal from supreme court, general term, Second department.

Petition by the Brooklyn Elevated Railroad Company against John Flynn for condemnation of land under the rapid transit act. From an affirmance by the general term (33 N. Y. Supp. 974) of an order of the special term confirming the appraisal of commissioners, petitioner appeals. Dismissed.

Frederick P. Delafield, for appellant. Stephen M. Hoye, for respondent.

ANDREWS, C. J. No appeal lies to this court from the order of the general term affirming the order of the special term confirming the report of the commissioners of appraisal. The condemnation proceedings were instituted under the provisions of the rapid transit act (chapter 606, Laws 1875). The first report of the commissioners was sent back for correction on the application of the petitioner, and was corrected in certain particulars, and returned to the court at special term, and was confirmed. The petitioner appealed from the order of confirmation to the general term, where the order was affirmed. The petitioner seeks in this court to reverse the order of affirmance, on the ground that the commissioners treated the property of the respondent not as a whole, but as consisting of three distinct parcels. The case shows that there was one tract on which there were three separate buildings, and the claim is that the depreciation of one place should have been set off against the advantage to the others. The question does not go to the jurisdiction of the commissioners, and upon the claim made presents an error of law simply. We held in the case of *In re Metropolitan El. Ry. Co.*, 128 N. Y. 600, 27 N. E. 1076, that condemnation proceedings under the rapid transit act were governed by the rule applicable to proceedings under the general railroad act of 1850, and that the determination of the supreme court at special term confirming the report of commissioners is final, and that no appeal therefrom to this court can be taken either for error of law or fact. A similar determination was made in *Re State Reservation*, 102 N. Y. 734, 7 N. E. 916, under a statute nearly identical, so far as respects this question, with the rapid transit act. If the case presented a question of jurisdiction, the rule might be different. In *re Southern Boulevard R. Co.*, 143 N. Y. 253, 38 N. E. 276. The appeal should be dismissed. All concur. Appeal dismissed.

(147 N. Y. 298)

BOOKMAN v. NEW YORK EL. R. CO. et al.
(Court of Appeals of New York. Oct. 29, 1895.)

EMINENT DOMAIN—RIGHT TO DAMAGES.

Where property was substantially vacant, and soon after the construction of an elevated road it was compactly built up, and the fee and rental values increased in consequence thereof, damages to the property abutting on the street upon which the railroad is constructed cannot be awarded, notwithstanding experts'

estimates of damages, and though property on side streets has had a proportionately greater increase in value. *Bohm v. Railway Co.*, 29 N. E. 802, 129 N. Y. 576, followed. *Becker v. Railway Co.*, 30 N. E. 499, 131 N. Y. 509, distinguished. 29 N. Y. Supp. 1140, reversed. Gray, O'Brien, and Bartlett, JJ., dissenting.

Appeal from superior court of New York City, general term.

Action by Jacob Bookman against the New York Elevated Railroad Company and others. A judgment for plaintiff was affirmed by the general term (29 N. Y. Supp. 1140), and defendants appeal. Reversed.

Arthur O. Townsend, for appellants. E. W. Tyler, for respondent.

FINCH, J. It is impossible to decide this appeal correctly without a full and definite appreciation of the difference between the case of *Bohm v. Railway Co.*, 129 N. Y. 576, 29 N. E. 802, and that of *Becker v. Railway Co.*, 131 N. Y. 509, 30 N. E. 499. Both belonged to the class of actions in which the abutting property was shown to have seriously increased in value since the construction of the elevated road, so that, presumably and apparently, benefit instead of damage had resulted; and in each it was, therefore, necessary to show as ground of recovery two things: First, that when the road was built the locality was increasing in value from the tendency towards it of incoming population and normal city growth; and, second, that in the continuance of that progressive increase of value the plaintiff's property would have shared if the railroad had not been built, but was prevented from so sharing to its due extent by the presence of the road operating more or less as a barrier to a normal advance. In the earlier case we held that there was no evidence of either essential fact, and reversed an award of damages; in the later case we decided that there was some evidence of the necessary facts, and so a reversal was not possible, however just such a reversal might have been. Since the evidence in the two cases was very much alike, the real difference in its effect was necessarily due to the wide difference of situation and surroundings existing when the new structure was built, and some consideration of that difference and of its results may prudently precede a reference to the facts now before us.

Where an elevated street railroad enters a vacant and uninhabited locality, which normal growth has not effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of growing value except such as lies in hope and expectation, and thereupon and thereby population and growth, tending elsewhere, are diverted to the new line of rapid transit, and build up the vacant locality, creating a demand for lots, and a steady and persistent increase of values both directly on the line and in the side streets near by, the only reasonable and sensible inference is

that the increased values are the sole and substantial product of the newly-opened line which has brought prosperity to a neglected locality. So far as normal growth or incoming population has had anything to do with the increase of value, they are themselves as operating causes due to the new mode of access, and in no respect separate from or independent of it. In and of themselves they would have done the locality no good; would have spent their force elsewhere; would have built up homes even in other states, whence steam would give rapid and easy passage, and left the locality to its normal solitude. Of course, in such a case, it is little short of an absurdity to say that the coming of the road prevented the abutter from having his share of the normal city growth, since it is the coming of the road that enables him to participate in that growth at all; that brings it to his vacant and unmarketable lots; that sets it in operation as a cause of increasing values. It is the obvious truth of such a situation that the removal of the road to some other locality would at once diminish the value of the abutting property by taking away the adequate cause of its advancement, and diverting the growth which had begun to the new line adopted. It is further true of such a case that no ingenuity and no proof can separate what is called the normal city growth as a cause of increasing value from the chief and principal cause, which is the rapid transit system. The two are not only interwoven and inextricably mingled, but the former has no existence in the supposed locality separate from and independent of the latter. It follows that in the supposed situation neither proposition essential to a recovery is or can be proved, for it is not true that the local values were seriously increasing when the road was built, nor that the increase, when it came, was due to any cause independent of the stimulating effect of the road. Such was the Bohm Case, and we were justified in refusing an award of damages, in disregarding the guess of experts, and in denying any force to a greater increase in the side streets.

But the situation changes materially when the elevated road enters an area already substantially built up and improved. In such a locality normal growth has come, and built the blocks up solidly, or nearly so, and caused an increment of value due to itself alone, and with which the rapid transit line had nothing whatever to do. Such normal growth, it is evident, had its own independent existence and operation, because it had already worked, and was continuing to work, its result of an increase of values when the railroad did not exist. The average rate of that observed increase in such locality can be approximately ascertained, and, if the rate continued after the construction of the elevated road in the side streets, but a less rate of increase is found on the avenue occupied by the cars, and facts are shown explaining such loss by evil effects of

the new line, it is possible to infer that the avenue property has not shared as it should in the normal and independent increase of value to the extent to which it was entitled. That I understand to be the substantial basis of the Becker Case. The distinction I have sketched was plainly drawn in the opinion. It was there said that: "Although certain of the side streets were not all built upon when the road was erected and put in operation, yet it does appear that the locality where this property is situated was fairly built up before the road was operated, although to some extent the adjacent side streets have been more compactly built upon since that time. There has been no such change from absolute vacancy within large and extensive portions of the city limits as has occurred in the vicinity of Harlem, where it has appeared in evidence the side streets and the avenues have been practically brought into existence and peopled since the building and operation of the elevated roads. It was in regard to such a locality that we said in the Bohm Case there was no proof whatever of damages." I have thus repeated the language of Judge Peckham's opinion, pointing out the difference between the Becker Case and that of Bohm, to show that I have strictly followed it, and merely further explained and discussed it, and that no new doctrine is in any manner asserted. The distinction is not narrow or argumentative, but radical and real. It will enable the courts below to put an end to any such injustice as awarding damages where benefits have instead accrued, and upon speculative theories destitute of actual foundation. If the proof shows that before the coming of the elevated road in the particular locality that locality was substantially or mainly vacant, and not built up, and that after the road came the building and improvement swiftly followed, accompanied by steady and serious increases of value, it will be the duty of judge or jury to award no damages, and dismiss the complaint, even though experts may guess, or side streets appreciate more rapidly. But if the proof shows that the elevated road has occupied a locality already substantially built up, in which normal city growth is operating and seriously increasing values, but, as a consequence of the road, the natural advance has halted, or palpably lessened, while in the adjacent side streets it continues, there is possible an inference of fact that the abutter has been injured. But even in those cases a trial court may well hesitate, and require decided and clear proof, and refuse to be misled by deceptive comparisons. It is very rare that in any case or any locality, where the value of the property has largely increased from the date of the coming of the road, and is more or less coincident with it, any damages ought to be awarded by the process of entangling one's common sense in a web of theory. There may be here and there some exceptional case. We thought the Storck Case (30 N. E. 497) was one, and affirmed it as such, though with much of doubt

and hesitation. The property involved was in the same locality with that owned by Bohm, and a similar decision denying damages would have been inevitable but for the proof of some exceptional facts and circumstances. There was evidence of a diminution of rentals because of the erection of the road, and that the influx of population which usually and naturally tends to increase values was of such a character as to prejudice, rather than benefit, the values in question. We thought there was something to raise a question of fact, and, without approving the judgment, felt bound to affirm it. That case was not intended to overrule the Bohm Case, and must be deemed exceptional and to stand on its own facts.

The present case comes clearly within the scope of the Bohm decision. It is specifically and explicitly found, and upon the evidence no other finding was possible, as to all the property except No. 261 Third avenue, that the locality was substantially vacant and unimproved, or, at the most, only partially built up, while soon after the construction of the elevated road it was compactly built up. It is found that the rental value of No. 261 was increased after such construction, and that the fee value rose from \$22,500, in 1869, to \$40,000, in 1890, and that the premises were worth more in 1890 than at any time prior to the coming of the new line. It is further found that the presence of the railroad, with its stations near by, has brought multitudes to the locality, increased business, and benefited the fee and rental values,—a benefit in which property on the adjacent side streets has also shared. As to No. 1028 it is found that its rental increased from \$2,400, in 1875, to \$5,500, in 1892, and the fee value from \$36,000, in 1881, to \$75,000, at the date of the trial. And the same facts as to the beneficial effect of the railroad upon values are again found. As to Nos. 1240 to 1248 and 1255 a similar state of facts appeared. The rents of the former in 1877 were \$9,136, and in 1892 had grown to \$11,835, and in that year the rents were greater than ever before the construction of the road. The great change was in the rental of the stores. While the rental of the flats overhead diminished, evidently because of the new supply of better apartments, the business rentals increased from \$3,440, in 1876, to \$8,200, in 1893, showing a gain of 138 per cent. It must have been difficult to persuade the owner who took that gain that nevertheless he had been damaged. The value of the lots as distinguished from the buildings was, in 1872, about \$66,000, and at the time of the trial about \$120,000. The value of No. 1255 was \$15,000 in 1873, and at the time of the trial about \$20,000. It is further found that in 1873 the streets and avenues in the vicinity were practically vacant, and have all been built up since 1877; that the increased accessibility has induced the settlement and building; that the same improvement would not have occurred in the absence of rapid transit, and that the defend-

ant's road has been one of the great and efficient factors in building up the locality.

We have thus before us a state of facts corresponding to that disclosed in the Case of Bohm. The result must be the same. That there may have been a greater increase in the side streets, due in part, at least, to the influence of the defendant's road, does not prove, or even indicate, damage in a situation like the present. For in every case where a vacant area is built up, and gains an increase of value coincident with the coming of the railroad, and obviously stimulated by it, the appreciation of property in the adjacent side streets is largely due to the same cause, and the case is one in which benefits only have accrued, and they do not become injury on the avenue because they help more largely the residence lots near by. In such a case there is no normal city growth operating independently, or capable, by itself, of severance or measurement. It is, relatively to the unimproved locality, a secondary cause, set in operation by a primary one; and the primary one, originating the general benefits flowing from the secondary one, does not become hurtful to one lot because it helps to a greater degree some other. The railroad in the vacant locality cannot be said to hinder what it in fact produces. It follows that the judgment rendered is erroneous. The finding that plaintiff's property was injured by the railroad over and above all benefits conferred is wholly unsupported by proof and contradicted by the specific findings. The judgment should be reversed, and a new trial granted; costs to abide the event.

GRAY, J. (dissenting). I feel constrained to dissent from the opinion in this case, not because I am unwilling to agree to the particular rule therein adverted to, but because I think there was some evidence upon which the decision of the trial court could rest. It may be considered unsatisfactory and it may be vague, but that consideration is no ground for reversing the judgment, as we held in the Becker Case, 131 N. Y. 509, 30 N. E. 499. I do not object to the rule which prohibits an award of damages where there has been no proof of damage, or where it must rest upon theoretical inferences. That rule was laid down in the Bohm Case, 129 N. Y. 576, 29 N. E. 802, and must be regarded as established by that decision; but I do object to the application of the rule to the facts as developed in the present case, which disclose a different condition of things from what was found to exist in the Bohm Case. It cannot be said, with respect to the entry of the elevated railroad into the neighborhood of the properties described in the complaint, that that part of the city was brought into existence and peopled through the agency of the defendants, unaided by a normal city growth which was operating to increase city values. It seems to me that consistency with our prior decisions, which have affirmed recoveries

based upon comparisons of property values in the neighborhood in connection with other facts relating to the railroad, as the only practicable proof within the reach of the complainant, requires us to affirm the recovery here. The Becker Case, *supra*, is an authority which we cannot well overlook in the consideration of the disposition of the present case.

ANDREWS, C. J., and PECKHAM and HAIGHT, JJ., concur with FINCH, J., for reversal. O'BRIEN and BARTLETT, J., concur with GRAY, J., for affirmance.

Judgment reversed.

(142 Ind. 301)

STOFFEL v. SELLERS et al.

(Supreme Court of Indiana. Oct. 17, 1895.)

APPOINTMENT OF RECEIVER—AMENDMENT OF PETITION.

Where an order appointing a receiver to take charge of the rents and profits was reversed on appeal because of the insufficient allegations of the complaint, and the receiver paid into court the moneys then in his hands, it was error to refuse to permit plaintiff to file an amended complaint on an affidavit alleging such facts as would have originally entitled him to the appointment of a receiver, and to have the moneys theretofore collected applied on his debt.

Appeal from circuit court, Huntington county; J. S. Cox, Judge.

Application by John P. Stoffel against Aaron Sellers and others for the appointment of a receiver to collect the rents and profits and pay off the mortgages on certain real estate. The supreme court reversed an order appointing a receiver, and from a judgment of the lower court ordering the balance in the hands of the receiver to be paid to the defendants, and denying plaintiff's application for filing an amended complaint, plaintiff appeals. Reversed.

B. F. Ibach, for appellant. James M. Hatfield, for appellees.

MONKS, J. On application of appellant, a receiver was appointed by the court below, February 23, 1893, to collect the rents and profits of certain real estate upon which mortgages had been foreclosed, and apply the same to the payment of said mortgages. An appeal was taken from this order of the court, and the same was reversed in this court. *Sellers v. Stoffel* (Ind. Sup.) 39 N. E. 52. On February 2, 1895, after the case had been returned to the court below, the receiver appointed in said cause made a report in writing of his receipts and expenditures as said receiver, showing a balance in his hands, and that appellant and appellees both claimed the same. Afterwards, on February 18, 1895, appellant asked permission of the court to file an amended complaint, and at the same time presented the amended com-

plaint and an affidavit in support of said application. The court overruled the application, and refused to permit appellant to file the amended complaint, to which action of the court appellant at the time excepted. The court thereupon ordered the balance in the hands of the receiver to be paid to appellee, to which appellant objected and excepted.

The affidavit in support of said application, so far as necessary to the determination of this cause, is substantially as follows: A mortgage was foreclosed on certain real estate, and a judgment for \$1,135 rendered against appellees, and in favor of a building and loan association, on the 2d day of November, 1892. On the same day a judgment and decree of foreclosure was rendered in favor of appellant against appellees for \$204.50, which was a second lien on the real estate. Said real estate was sold by the sheriff, on the decree of foreclosure first named, to the building and loan association, the plaintiff therein, for \$1,204.08, on January 14, 1893, leaving the judgment and decree of foreclosure in favor of the appellant wholly unsatisfied. Afterwards, to protect his interests in said real estate, appellant purchased and took an assignment of said certificate of purchase. At the time of said sheriff's sale, the real estate was occupied by a tenant of appellees. After said sale, the application and order was made for the appointment of a receiver, which was reversed by this court. When the said sale was made and the receiver appointed, there was a lien on said real estate of \$81.30 for state, county, and city taxes. Said real estate was not worth more than \$1,300, and the liens thereon amounted to the sum of \$1,600; and appellees were wholly insolvent, and had no real or personal property whatever out of which said judgment or taxes could be made, and were utterly unable to pay any part of said judgment or taxes. On the 14th day of January, 1894, the time of redemption expired, and the said real estate was not redeemed. Wherefore appellant asks that he may amend his complaint in which he asks for the appointment of a receiver so as to show these facts, which amended complaint (marked "Exhibit A") he files herewith and makes a part hereof, and which amended complaint he says is true, and asks that the money now in the hands of the court be paid first on said taxes, and the remainder on said unsatisfied judgment.

These facts are not the same as those presented on the former appeal, and, had they been before us then, a different conclusion might have been reached. We think the court below erred in not permitting appellant to file his amended complaint. Appellant, on a proper complaint, has a right to show, if he can, that he was entitled to have a receiver appointed in February, 1893; and, if he establishes such fact, then his right to the money in the hands of the receiver would

be the same, and would be determined in the same way as if a receiver had been properly appointed at that time; the only difference being that the complaint filed now should state, not only the facts showing that he was then entitled to have a receiver appointed, but also facts showing that he is now entitled to the money in the hands of the receiver. If the facts, when properly pleaded and proven, give appellant the money on hand, the delay or the fact that the year for redemption has expired cannot deprive him of such right. We express no opinion as to the sufficiency of the amended complaint, which is copied into the record, as that question is not before us. Judgment reversed, with instructions to the court to allow appellant to file an amended complaint, and for further proceedings not in conflict with this opinion.

(143 Ind. 49)

EVANSVILLE & T. H. R. CO. v. TOHILL.¹
(Supreme Court of Indiana. Oct. 16, 1895.)

DEATH OF EMPLOYE — NEGLIGENCE — PROXIMATE CAUSE — INCOMPETENCY OF FELLOW SERVANT — VERDICT.

1. A finding in a special verdict that a servant was incompetent, and that defendant had knowledge thereof, is indispensable to defendant's liability on the ground of its having employed an incompetent servant.

2. Where a train dispatcher was permitted to run a "regular" train ahead of schedule time as an "extra," a finding that he had run 40 trains ahead of time in a year did not establish his incompetency.

3. Every fact essential to plaintiff's recovery must appear to have been found and stated in a special verdict, or defendant is entitled to judgment.

4. Where plaintiff's husband, who was employed by defendant as an engineer, was killed in a collision between his train, which was run as a "regular," and another train which was being run as an "extra," or inferior train, a special finding that the company maintained rules under which regular trains might be converted into extra trains, that trains of inferior class should clear the right of way for trains of superior class, and a finding that said extra train did not take the side track, so that the regular could have passed it, was insufficient to support a judgment for plaintiff, as the proximate cause of the collision was not in ordering said train to run as an "extra," and failing to notify plaintiff's husband of the fact, but was the failure of his fellow servants in charge of the extra to comply with the company's rules by keeping out of the way of the regular.

Appeal from circuit court, Sullivan county; W. M. Franklin, Special Judge.

Action by Margaret C. Tohill, administratrix de bonis non of the estate of Edward D. Tohill, deceased, against the Evansville & Terre Haute Railroad Company to recover damages for the alleged negligent killing of her intestate. Plaintiff had judgment, and defendant appeals. Reversed.

Iglehart & Taylor, for appellant. Cullop & Kessinger, John Wilhelm, Mrs. A. D. Leach, Wm. F. Townsend, and John S. Bays, for appellee.

HACKNEY, J. This was an action, in three paragraphs of complaint, by the appellee, to recover damages from the appellant for the alleged negligent killing of Edward D. Tohill, an engineer of appellant, in a collision of two freight trains upon appellant's railway. Each paragraph of complaint alleged that the decedent was the engineer of train No. 20, north-bound from Evansville to Terre Haute, and running on the regularly established schedule time for said train; that train No. 19, running south on said railway, was, by direction of the appellant, running 1 hour and 20 minutes ahead of the schedule time for said train, and that while said two trains were so running, each at the speed of 25 miles per hour, and at a point where the track was so obscured by natural objects that a view could not be had in either direction for any considerable distance, said trains collided, and without any fault of said engineer, Tohill, he was killed. The first paragraph charged the appellant to have been negligent in running No. 19 ahead of schedule time, and passing a station where, by the schedule, said two trains should have met, and also in failing to notify Engineer Tohill of the running of No. 19 out of schedule time. The second paragraph pleads certain rules of the appellant as to the movements and the operating of trains, in leaving and arriving at stations, as to the preference between trains in taking the right of way, and the duties of trains to go upon sidings and clear the main track, in time for the arrival of schedule trains having such preference, at the meeting point established by the schedule. It is alleged that the train dispatcher had control of the movement of all trains and of all employes on such trains; that he directed the movements of the two trains in question, and that, in violation of said rules, he negligently ordered train No. 19 to run in advance of schedule time to Princeton, beyond Vincennes, the schedule meeting place for said two trains; that when he gave said order he knew, or could by diligence have known, that the obedience of such order would cause said train No. 19 to meet said train No. 20 between Vincennes and Princeton; that Tohill had no notice or knowledge of said order. It is also averred that appellant was negligent in "employing and keeping in its employ, in the office of train dispatcher, said Southern, whom the defendant well knew, or could have known, was incompetent and unfit, on account of his negligence and careless manner of running its trains ahead of their schedule time, in violation of defendant's rules, to fill said position; that it was known by the defendant that said train dispatcher had been for three months last past, before said date, violating the said rules * * * in carelessly and negligently running its trains ahead of its schedule time." It was also alleged that the appellant was negligent in running train No. 19 ahead of time without notice to Tohill, as in the first paragraph. The third paragraph

¹ Rehearing denied, 42 N. E. 352.

is identical with the second, except that it alleges the effect of the appellant's rules, which were set out at full length in the second. Demurrers to the several paragraphs of complaint were overruled, the appellant answered in general denial, the cause was submitted to a jury, and the trial resulted in a special verdict, upon which the circuit court gave judgment for the appellee over the motion of the appellant for judgment in its favor.

In addition to facts concerning the appellant's corporate existence, the line of its railway, the employment of Tohill, the collision, and its results, substantially as alleged in the complaint, the special verdict found that, by time-table, the company classified its trains as "regular" and "extra," gave all schedule trains numbers, specified all of the stations, the stopping and meeting points of such trains, and the times of their arrival at and departure from stations, and that no train should arrive at or leave a station in advance of its schedule time, if shown; that by rule it was made the duty of all train operatives to run all regular trains according to such schedule time, and it was provided that no person, except by order of the company, should change or modify such rule; that the company had in its employ, as train dispatcher, one Southern, who had full control of the movement of all trains, and of the employees operating such trains, with power to direct when and how all trains should run, to change the running of regular trains to that of extra trains, and to fully represent the company in that department; that No. 20 was running north on regular time, and as a regular train; that No. 19, running south, ran to Sullivan as a regular train, and when at said station it was ordered by said train dispatcher to run in advance of time to Princeton; that, pursuant to said order, it left Sullivan ahead of regular schedule time, and thereby became, under said classification of trains, an extra, between Sullivan and Princeton. It is found that No. 19 arrived at Vincennes, the place at which, if running as a regular train, it should have met No. 20 1 hour and 15 minutes later; that it left Vincennes 1 hour and 20 minutes ahead of schedule time, and continued its trip to a point eight miles south of that station. It is stated, in the tenth finding, that the appellant knew, when the order in question was given, that Nos. 19 and 20 must meet between Vincennes and Princeton; that it failed to direct, by said order, where said trains should meet, and wholly failed to give notice to No. 20 that No. 19 was running ahead of time; that said order, without such notice, or a direction as to where said trains should meet, was dangerous to operatives. It is, by other findings, stated that the company had a rule that trains of inferior class should take the siding, and clear the main track for trains of superior class, five minutes, and that no train should leave the station, except to meet or pass at the next station, the train having the right of track, unless it had the

full time allowed between stations to make the meeting at the passing point, and clear the track for such other trains. By finding No. 12 the jury returned that the operatives of No. 19 acted upon said special order to run ahead of time, and disregarded, and wholly failed and neglected to observe and act in accordance with, said rules as to the operation of said train between Vincennes and Princeton; that between Vincennes and Hazleton, on appellant's road, was a station called Pursell, where there was a side track of sufficient capacity to admit No. 19, and permit No. 20 to pass in safety, but that said operatives wholly failed to accept said opportunity, and continued to a point beyond Pursell, where the collision occurred. It is also found that the train dispatcher could have ascertained that such meeting place was available, but neglected to do so. By the fifteenth finding the jury stated that Southern had been the appellant's train dispatcher for one year, having full charge of the running of all trains; that during that time he issued 40 orders for schedule trains to run to and depart from stations ahead of their schedule time, "which said trains, under the rules of the company, were not permitted to arrive or leave stations ahead of their schedule time, except when ordered to do so by the" said train dispatcher, and that the office of the train dispatcher and that of the president of the company were in one and the same building. The evidence disclosed, without conflict, as existing rules of the company, the following, not returned by particular finding by the jury: "All extra trains are of inferior class to all regular trains of whatever class." "A train receiving order to run extra * * * must keep clear of all regular trains, as required by rule." "A train, or any section of a train, must be governed strictly by the terms of orders addressed to it, and must not assume rights not conferred by such orders. In all other respects it must be governed by the train rules and time-table." These rules are urged, in connection with those specially found, in support of the motion for a new trial, and as showing that the verdict was contrary to the evidence. The questions presented by assignments of error and the argument of counsel involve the sufficiency of the several paragraphs of complaint, the sufficiency of the facts found in the special verdict to sustain the judgment against the appellant, and whether the special verdict was not contrary to the evidence.

If the rules proven and not specially stated in the verdict had been found by the verdict, we would not find it difficult to determine that the negligence resulting in the death of Engineer Tohill was that of those in charge of train No. 19, and not that of the train dispatcher. It would then very clearly appear that the appellant had, by its general rules, directed No. 20 to run upon a given schedule of time; that it reserved the right to make of No. 19 an extra train,

as was done; that extra trains were required to clear the track for schedule or regular trains; that the order of No. 19 should have been construed, by the conductor of that train and by the jury, in connection with the general rules; that such construction would have required that No. 19 obey the general rules in all respects, excepting in the one that it should run ahead of time. To have so construed and acted upon the special order, train No. 19, knowing the schedule time of No. 20 at the several stations, and being required to leave no station unless it could safely reach the next station in time to clear the main track five minutes before the arrival of No. 20 at such station, there would have been no collision. The general rules were notice to No. 19 to keep out of the way of No. 20, and No. 20 was given the preference of the right of way. It was not only not negligence to give no notice to No. 20 that No. 19 was running extra, but such notice, and the fixing of a meeting place with No. 20 in the order, were impracticable, since No. 19 necessarily must run without a schedule, and with uncertainty as to the success of completing the work of the several stations, and the degree of speed attainable. Not only so, but the obedience by No. 19 of the order and the rules made the running of No. 20, by schedule, perfectly safe without notice. However, the issue of negligence, as presented by the allegations of any paragraph of complaint, did not include the omission to direct, by the special order, a meeting place for said two trains, and the conclusion that the circumstances excused the giving of notice is unnecessary to the decision of this case. There being no issue upon that question, the finding of the jury, in the tenth specification of the verdict, as to the failure to direct a meeting place for said trains, should be disregarded. *Railway Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Railway Co. v. Bush*, 101 Ind. 582; *Railroad Co. v. Spencer*, 98 Ind. 186.

While doubting the sufficiency of the allegations of the second and third paragraphs of complaint as to the incompetency of the train dispatcher, we feel certain that no doubt can exist upon the proposition that the special verdict does not find, as a fact, that he was incompetent, or that the appellant knew he was incompetent. Such findings are indispensable to a consideration of the question of the company's liability on the ground of its having employed an unskillful and incompetent servant. *Railroad Co. v. Duel*, 134 Ind. 156, 33 N. E. 355, and cases there cited. It is true that, by the fifteenth specification of the verdict, it is found that Southern, while acting as train dispatcher, had issued 40 orders for trains to run ahead of schedule time, and to depart from stations before the schedule time, and that the dispatcher and the president of the company occupied offices in the same build-

ing during that period. These statements are evidentiary, and are in no sense statements of the ultimate facts that Southern was incompetent, and that the company knew he was incompetent, and thereafter retained him. Such findings are not regarded. *Elliott*, App. Proc. § 753, and numerous cases cited in note 1. It is fairly inferable, however, from the same specification, that trains might leave stations, and run ahead of time, when ordered to do so by the train dispatcher. With this fact, it could not reasonably be held negligence simply to order and run a train as an extra train, or out of schedule time, and it would be far from showing that the train dispatcher was incompetent. It will be remembered in this connection that it was not found that, in the 40 cases, the train dispatcher was not permitted by rule to so run trains, nor that he did so without even the notice to opposing trains, for which the appellee's learned counsel earnestly contend in this case.

Not conceding that the complaint sufficiently alleges that the collision was due proximately to the negligence of the train dispatcher, and not deciding whether the train dispatcher and the deceased were fellow servants, we will proceed to examine the special verdict upon the appellee's contention that it finds that the collision was due to the negligence of the train dispatcher. It must be borne in mind that every fact essential to the appellee's recovery must appear to have been found and stated in the special verdict, or the appellant was entitled to judgment. *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, and 5 N. E. 746; *Kurtz v. Carr*, 105 Ind. 574, 5 N. E. 692; *Mitchell v. Colglazier*, 106 Ind. 464, 7 N. E. 199; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905; *Meeker v. Shanks*, 112 Ind. 207, 13 N. E. 712; *Kehr v. Hall*, 117 Ind. 405, 20 N. E. 279; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 735; *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 809. We think it may be conceded to be the law that a railroad company, operating a complicated system of trains, is required to provide for the reasonable safety of the operatives of such trains against collisions; that it would not be a compliance with such requirement to direct one train to run by schedule and another over the same track without schedule, in conflict with such schedule train, and without notice to the schedule trainmen, by rule or otherwise, or without some limitation upon the extra or nonscheduled train, under which it would so run as to guard against collision with the schedule train. Such is the effect of the case of *Railway Co. v. Lang*, 118 Ind. 579, 21 N. E. 317, and cases there cited. There are many authorities to the proposition that it is the duty of a railroad company to use ordinary care and prudence in making and promulgating reasonably necessary and sufficient rules for the safe running of its trains and for the government of its employes, so as to

furnish them a reasonable degree of safety, taking into consideration the nature of the service. *Railway Co. v. McLallen*, 84 Ill. 109; *Railway Co. v. Powers*, 74 Ill. 341; *Railway Co. v. Salmon*, 14 Kan. 512; *Besel v. Railway Co.*, 70 N. Y. 171; *Rose v. Railway Co.*, 58 N. Y. 217; *Wright v. Railroad Co.*, 25 N. Y. 562; *Railway Co. v. Woodward*, 41 Md. 268; *Cooper v. Railroad*, 44 Iowa, 134; *Slater v. Jewett*, 85 N. Y. 61. But this requirement does not deny the right of railway companies to vary from the timetables in any instance, nor does it mean that every variation involves negligence on the part of the company. From the very nature of the business of carrying on an extensive railway system, trains must be expected to run out of schedule time, some from unavoidable delays, and others as extra trains, carrying an accumulation of freight or passengers beyond the line of business ordinarily expected and regularly prepared for. As said in the case last cited: "It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect, in the course of his employment. Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general time table. All that can then be required from him by the public and passengers is that, when he makes a variation, he act under it with reasonable care and diligence." This, as there further said, and as we now say, was all that a servant could ask or expect. If, therefore, it is found that the appellant made and promulgated such rules as, by their faithful obedience, reasonable safety was secured to operatives of schedule trains against collision with extra trains, the appellant must be held to have performed its duty in this respect. The special verdict before us not only fails to find that the appellant had no rule by which the operatives of extra trains were to so run as to protect regular trains from collision, but it is, as we have seen, expressly found that the company maintained rules under which regular trains might be converted into extra trains; that trains of an inferior class should clear the right of way for trains of superior class, by taking a side track at least five minutes before the arrival of any schedule train at the last station to which it was safe for such inferior train to run; that No. 19 wholly failed to act in accordance with said rules, and did not take the side track at Pursell, where No. 20 could have passed in safety, but continued beyond said station to where the collision occurred. Thus, it appears that obedience to said rules by No. 19 would have made the passage of No. 20, running by the schedule, entirely safe. A rule easily followed by servants, and, when followed, securing safety to coservants, is a reasonable compliance with the duty owing by the master to his servants upon this question. As

held in *Rose v. Railway Co.*, *supra*, obedience to the regulations of a railway company in regard to the running of trains is a matter of executive detail, which neither the corporation nor any general agent can personally oversee, but as to which employes must be relied on. If those employes fail in their duty by breaking existing regulations, and in consequence other employes are injured, no action can be maintained for the injury, as it will be deemed to have been caused by the negligence of a fellow servant.

As we have seen, the negligence of those in charge of No. 19 was the proximate cause of the collision, and the order of the train dispatcher was not negligently issued. That the operatives of No. 19 were the fellow servants of the unfortunate engineer, Tohill, is not questioned by appellee's counsel, but is conceded. That injury resulting from the negligent act of a fellow servant creates no liability against the master is not only well settled, but is conceded also by appellee's counsel. It was error, therefore, to deny the appellant's motion for judgment upon the special verdict. In this view of the case, it is unnecessary to pass upon the sufficiency of the complaint, though we incline to doubt its sufficiency, and it is unimportant that we should pass upon the motion for a new trial. The judgment is reversed, with instructions to the circuit court to sustain the appellant's motion for judgment on the special verdict.

(14 Ind. App. 172)

EVANSVILLE & T. H. R. CO. v. CATES.¹
(Appellate Court of Indiana. Oct. 16, 1895.)

CARRIER — EJECTION OF PASSENGER.

Where a passenger calls and pays for a ticket to one place, but is by a mistake of a railroad company's agent given a ticket to another place, with which he, without fault, boards the train, believing that he has the proper ticket, he is entitled to ride thereon the distance for which he has paid, on making proper explanation to the conductor; and if the conductor refuses to heed his statements, and ejects him, the company must respond in damages. *Ross, J.*, dissenting.

Appeal from circuit court, Sullivan county; J. C. Briggs, Judge.

Action by James T. Cates against the Evansville & Terre Haute Railroad Company to recover damages for a wrongful ejection from defendant's train. From a judgment for plaintiff, defendant appeals. Affirmed.

Iglehart & Taylor and John T. Hays, for appellant. A. D. Leach and W. S. Maple, for appellee.

GAVIN, J. The appellee, desiring to travel from Evansville to Terre Haute over appellant's railroad, called upon its agent for a ticket to Terre Haute, and paid him the regular price for such a ticket. By mistake, the agent gave him a ticket to Vincennes on

¹ Rehearing denied.

ly. With this, believing it to be that for which he had asked, and without any fault or negligence upon his part, appellee boarded appellant's train, and surrendered his ticket. After passing Vincennes, the conductor demanded additional fare, as his ticket only called for Vincennes. He explained that he had bought and paid for a ticket to Terre Haute, and had given it to him, and had no money to pay additional fare. Producing neither ticket nor money, he was ejected from the train, and for this sued and recovered damages in the court below.

The case stated is such as we are required to consider established by the general verdict in appellee's favor, taken in connection with the answers to interrogatories. Construing all the averments of the complaint together, we think it was not intended to count upon the ejection of a passenger who had a ticket good upon its face, but that the gist of the complaint is, rather, the wrongful ejection of one actually entitled to be carried as a passenger upon the ticket presented. Such, we think, was evidently the construction placed upon it by both the court and parties, as indicated by the briefs and verdict and interrogatories. The case will not, therefore, fall upon the theory that there is a fatal variance, because it appears that the ticket was not good upon its face for the ride demanded.

The position of appellant's learned counsel is that the face of the ticket is conclusive as to the rights of the passenger, and that the conductor is neither required nor permitted to listen to and regard any explanations or statements by which the passenger may seek to establish a right variant therefrom. In this contention counsel are supported by the statements and decisions of courts and judges of high standing. *Frederick v. Railway Co.*, 37 Mich. 342; *Hufford v. Railway Co.*, 53 Mich. 118, 18 N. W. 580; *Vandusan v. Railway Co.*, 97 Mich. 439, 56 N. W. 848; *Mahoney v. Railway Co.*, 93 Mich. 612, 53 N. W. 793; *Railroad Co. v. Bennett*, 1 O. C. A. 544, 50 Fed. 496; *Poulin v. Railway Co.*, 3 C. C. A. 23, 52 Fed. 197; *McKay v. Railway Co.*, 34 W. Va. 65, 11 S. E. 737; *Shelton v. Railway Co.*, 29 Ohio St. 214; *Townsend v. Railroad Co.*, 56 N. Y. 295; *Hall v. Railroad Co.*, 15 Fed. 57; *Railway Co. v. Beaver*, 22 Can. Sup. Ct. 498; *Yorton v. Railway Co.*, 54 Wis. 234, 11 N. W. 482; *Railroad Co. v. Griffin*, 68 Ill. 490; *Railway Co. v. Willard*, 31 Ill. App. 435; *Baggett v. Railway Co.*, 22 Wash. Law Rep. 441; *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Peabody v. Railway Co.*, 21 Or. 121, 26 Pac. 1053. Other authorities, however, declare that in proper cases the conductor must heed the statement and explanation of the passenger as to his rights, and that one who has requested from the company and paid for a ticket to a certain place, and who boards the train, without fault, believing he has obtained that which he sought, is entitled to ride thereon, even though the agent has not given him

the proper evidence of his right to ride. *Railway Co. v. Olds*, 77 Ga. 673; *Railroad Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747; *Railroad Co. v. Riley*, 68 Miss. 768, 9 South. 443; *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, wherein the court seems to reverse the trial court for instructing the jury in accordance with the doctrine laid down by the supreme court in the same case in 53 Mich. and 18 N. W. *Railway Co. v. Dennis* (Tex. Civ. App.) 23 S. W. 400; *Railway Co. v. Mackle*, 71 Tex. 491, 9 S. W. 451; *Railway Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, and 21 S. W. 781; *Burnham v. Railway Co.*, 63 Me. 298; *Ellsworth v. Railway Co.* (Iowa) 63 N. W. 584; *Yorton v. Railway Co.*, 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401 (which it is difficult to reconcile with the same case in 54 Wis. and 11 N. W.); *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *Appleby v. Railway Co.* (Minn.) 55 N. W. 1117; *Murdock v. Railway Co.*, 137 Mass. 293; *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 358. These authorities do not all directly sustain the propositions to which they are cited, and in some, especially of those first set forth, the statements relied on are pure dicta; yet they may be thus lined up as favoring, more or less directly, the one or the other of two divergent rules. We deem it a hopeless task to undertake to reconcile all of them, and a needless one to take up each case, and examine and distinguish it from its fellows where distinguishable.

Thus far we have considered decisions outside of Indiana. In our own state, however, the current of adjudications has been, from an early day, against the position assumed by appellant. *Railroad Co. v. Hennigh*, 39 Ind. 509; *Railway Co. v. McDonough*, 53 Ind. 289; *Railway Co. v. Fix*, 88 Ind. 381; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Railroad Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170; *Railway Co. v. Beckett* (Ind. App.) 39 N. E. 429. These cases establish that where a passenger surrenders his ticket to the conductor, and fails to receive any check in return, the company is liable for his ejection by a subsequent conductor in charge, to whom he refuses to pay fare or present any ticket or check entitling him to ride; so, also, where the passenger, by direction of the conductor, transfers from one train to another, upon the assurance that he can ride on the first conductor's train check, which was in fact good only for his own train; also, where the holder of a return coupon ticket receives back from the conductor the wrong coupon, which, without discovering the mistake, he presents upon the return trip. In all these instances it was held that the conductor must heed the explanation of the passenger, who was without the proper evidence of his right to ride through the mistake of the company's agent, not by reason of his own fault. In the case last referred to (the Beckett Case), it is ad-

judged that one boarding a train without a ticket, by reason of the company's negligent failure to afford him an opportunity to buy one, cannot be required to pay an excess over the ticket fare, but is entitled to be carried at the regular lowest ticket rate; and the conductor must listen to his explanation of the circumstances, or the company must respond if he eject the passenger. It was there said: "The first wrong was by appellant in failing to furnish appellee a ticket upon his reasonable demand therefor, and it must answer for all the consequences naturally following from that wrong. The company cannot be permitted to justify its own wrongful conduct by the fact that its servants were acting according to its directions or rules." "Although the conductor may be acting strictly according to the rules of the company, and doing that and only that which, according to its rules, he is authorized to do, it by no means follows that his conduct is rightful towards the passenger. Between himself and the company, its rules will justify the conductor, but not so as between himself, as the company's representative, and the passenger." In *Railway Co. v. Conley*, 6 Ind. App. 16, 32 N. E. 96, 885, it was said by this court: "It is true that where the passenger has no ticket, or has a ticket so imperfect that it furnishes no sufficient evidence of being genuine, and the conductor has nothing to determine the passenger's rights from except his explanations, he is not bound to take the same as true, unless his failure to have a ticket or a perfect ticket was due to the company's fault." Again, in *Railroad Co. v. Ault*, 10 Ind. App. 661, 38 N. E. 492, the court said, through Reinhard, J.: "If the appellee really purchased and paid for a first-class passenger ticket, with a return coupon attached, at the time he testified he purchased it, and presented the same to the conductor, it would strongly tend to prove that his expulsion from the train was wrongful, no matter what the form or wording of the ticket may have been."

Carrying out the principles underlying these decisions, we do not see how it is possible to escape the conclusion that where a passenger calls for and pays for a ticket to one place, but is, by the mistake of the company's agent, given a ticket different from that desired, with which he, without fault, boards the train believing he has the proper ticket, he is entitled to ride thereon the distance for which he has paid upon making proper explanation; and, if the conductor refuses to heed his statements, the company must respond. He has paid for his ride, and presented in good faith the only evidence given him by the company of his right to make the journey. If the company has not furnished him the proper token to convey the fact to the mind of its conductor, the blame and the consequences thereof must both rest upon the company, which is in fault, rather than upon the passenger, who is not. In thus holding,

We are in harmony with the views of our supreme court, as expressed in *Godfrey v. Railway Co.*, 116 Ind. 30, 18 N. E. 61, wherein it was decided that where a passenger received from the station agent the wrong ticket, being the reverse of that for which he asked, he could not ride thereon four months after his discovery of the mistake, but Judge Mitchell says: "It is quite probable, if the plaintiff, without having had ample opportunity to correct the mistake after discovering it, had offered the ticket on the first trip, and had been refused passage, he would have been entitled to recover for any injury in case he had been ejected after having done all he reasonably could to rectify the mistake. The case would then have fallen within the principles declared in *Railway Co. v. Fix*, 88 Ind. 381, and cases of that class."

It is sometimes said that it is impracticable for the conductor to investigate, because, while he is doing so, the passenger may reach his destination and be gone, and the company cannot pursue him without disproportionate inconvenience and expense. To this it may be answered that this is not much more impracticable than for a passenger to pay a second time who has no more money; nor is it perhaps much more inconvenient for the company to pursue the passenger for his fare than for the passenger to go to the expense and trouble of convincing the company that its official has made a mistake, and compelling the return of the money improperly exacted. As a rule, the amount involved and the expense and trouble required would be widely disproportionate. If it be said that the conductor cannot inform himself and learn the real truth, we may answer that the opportunity is fully as good as in any of the other cases where it is held that he must listen to and heed the passenger's explanation. As it seems to us, every objection that may be offered to our holding, whether it be inconvenience to the company or conductor, impracticability of ascertaining the truth, or violation of the company's rules by the conductor, all are equally tenable and appropriate in these other cases. It is true these other cases are distinguishable from the one in hand, in that the facts are somewhat different, as in truth they differ from one another; yet the cardinal principle governing them is the same, and that we take to be this: The company has a right to enforce against the passenger its reasonable rules and regulations, provided his failure or inability to so do is not brought about solely by its own fault. The rule for which appellant contends is largely founded upon its supposed necessity as a requisite to the proper management of its trains; yet we have heard no general complaint of the impossibility of running trains in those states where the opposite rule has been adopted. We may say, also, that, in most of those courts which adhere to the rule asserted by appellant, those cases in our own state upon which we rely would have

been decided differently from the determination of our courts. We have referred to several federal court decisions sustaining appellant's views, some of which state quite strongly the rule for which its counsel contend. To show the opinion of the highest federal court upon some of the propositions therein advanced, we refer especially to the case of *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356. In this case the passenger purchased a ticket upon which the agent told him he could stop over by speaking to the conductor. This he did. The conductor punched his ticket, and returned it with the statement that this would be sufficient, and he could use the ticket on another train after stopping over. This he undertook to do, and was ejected because he had no proper ticket and would not pay fare. The following instruction was declared to correctly state the law: "That if the plaintiff's testimony was true in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on defendant's train, and if the plaintiff, when he bought his ticket in Boston, informed the ticket agent of his wish to stop off at the Olean station, and was then told by the agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean, and the conductor, instead of giving the plaintiff a stop-over ticket, punched the plaintiff's ticket, and told him that was sufficient to give him the right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the company were, the plaintiff was rightfully a passenger upon the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the conductor." The court says, further referring to its holding that the action of the last conductor was unwarranted: "The reason of such rule is to be found in the principle that where a party does all that he is required to do under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract." A recovery of \$10,000 was therein affirmed.

Our conclusion is also in accord with that set forth in the text of the latest (1894) edition of *Wood on Railroads* (volume 3, § 349): "Where the passenger asks and pays for a certain ticket, and the station agent, by mistake, gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has a right to rely on the agent to give him the right ticket. There are authorities which hold the other way, but it

seems that their views are indefensible." In *Hutchinson on Carriers* (section 580) the passenger's right to indemnity for all the resultant injury in cases like this is recognized and apparently approved, but is placed upon a somewhat different basis. The doctrine which we assert meets the approval of the editor of 25 *Am. & Eng. Enc. Law*, p. 1075. Judgment affirmed.

ROSS, J. (dissenting). I cannot concur in the holding of the majority that the answers to the interrogatories do not overcome the general verdict. The ticket received by the appellee from appellant's ticket agent entitled him to a passage from Evansville to Vincennes, and to that extent he was rightfully on the appellant's train, and the conductor was bound to accept his ticket and carry him to that point. Beyond Vincennes he had no right to be upon the train, unless he either produced another ticket issued to him by the railroad company, evidencing his right to ride further, or paid his fare. His right to be upon the train and to passage depended upon his either paying to the conductor the regular fare from the point of embarking to his destination, or the production of a ticket issued to him by an authorized agent of the company, which on its face called for a passage from the former point to the latter. And I may add that all the courts recognized it as a rule of "passenger traffic" that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right of transportation is presented to the conductor.

In order that we may properly apply the law to the facts in this case, it is necessary to determine first the theory upon which the complaint proceeds. It is in two paragraphs, and reads as follows: First paragraph: "The plaintiff complains of the defendant, and alleges: That the said defendant is a railroad corporation, organized and existing under the laws of the state of Indiana, and that as such corporation, on the 19th day of January, 1894, the said carrier of passengers for hire was then and there, as such, operating a line of railroad between Evansville, Ind., and Terre Haute, Ind. That on said day the said plaintiff purchased from said defendant a ticket for the sum of three dollars and thirty cents (\$3.30), which said sum of money the said plaintiff paid the said defendant then and there for said ticket, entitling him to passage on said road from Evansville, Ind., to Terre Haute, Ind., a station on said road, which said Terre Haute station was then and there a regular stopping place for its trains; and then and there at Evansville, Ind., on the 19th day of January, 1894, the said plaintiff, with his said ticket in his possession, took passage on the said defendant's cars and train for said station at Terre Haute, Ind.; and the train on which plaintiff so took passage, as aforesaid, was accustomed to and did go to Terre Haute, Ind. That, in consideration of

plaintiff's buying said ticket as aforesaid, the said defendant then and there, at the time of said purchase, promised and agreed to carry the plaintiff as a passenger from Evansville, Ind., to Terre Haute, Ind. That, soon after said train of the defendant on which plaintiff took passage as aforesaid left Evansville, Ind., the said defendant, by its conductor of said train, took up from the plaintiff his said ticket. That immediately after said train passed the station of Vincennes, Ind., the said conductor of the defendant on said train came to the plaintiff, and told him (the plaintiff) that he should have got off and left the train at Vincennes, Ind., and ordered him, the plaintiff, to get off at the next station. That plaintiff then informed the said conductor fully that he had purchased and paid for a ticket to Terre Haute, Ind., as aforesaid; but the conductor denied this, and insisted on plaintiff's getting off at the next station. That other persons on the train who were present at the time plaintiff purchased said ticket as aforesaid also then and there informed said conductor of the fact of said purchase of said ticket by said plaintiff as aforesaid, but said conductor still denied it, and refused to believe the plaintiff and said other persons, and insisted on plaintiff's getting off at the station, which the said plaintiff declined and refused to do. That thereupon, upon the arrival of said train at the next station, to wit, the station of Oaktown, on defendant's said road, in the nighttime, the said defendant, by its said conductor and its brakeman on said train, by force and arms, and with violence, wrongfully, willfully, unlawfully, and maliciously, picked up the plaintiff, and forcibly dragged him out of and from said train, and put him upon the platform at said station of Oaktown, Ind., and left him then and there in the nighttime, and refused to carry him to Terre Haute, Ind.; and that, after so putting this plaintiff off as aforesaid, the said defendant's train pulled out, and went to Terre Haute, Ind. That said plaintiff is and was at the time aforesaid a cripple, and had taken his shoes off on the train upon entering and taking his seat, and was put off said train without his shoes, as said defendant, by its said agents and servants, the said conductor and brakeman, well knew. That said plaintiff was thereby compelled to remain at said Oaktown all night, and did not and could not get to Terre Haute until the next day. That, by the violence and force used as aforesaid in putting him off said train at Oaktown, he was greatly injured and bruised and disabled and made sick, and was greatly humiliated and put to shame in the presence of his fellow passengers, and wounded in his feelings, to the great damage of the plaintiff, and said plaintiff was compelled to pay a large sum, to wit, \$1, as additional fare to Terre Haute, and also \$1 expense in paying the hotel fare at Oaktown that night, in the sum of twenty-five hundred dollars (\$2,500), for which amount plaintiff asks judgment against the said defendant." Second paragraph: "The

plaintiff complains of the defendant, and alleges: That the said defendant is a railroad corporation organized and existing under the laws of the state of Indiana; and said defendant, on the 19th day of January, 1894, was a common carrier of passengers for hire, and was then and there, as such, operating a line of railroad between Evansville, Ind., and Terre Haute, Ind. That on said day the said plaintiff purchased from said defendant a ticket for the sum of three dollars and thirty cents (\$3.30), which said sum of money said plaintiff paid said defendant then and there for said ticket, entitling him to passage on said road from Evansville, Ind., to Terre Haute, Ind., a station on said road, which said Terre Haute was then and there a regular stopping place for its said trains; and then and there at Evansville, Ind., on the said 19th day of January, 1894, the said plaintiff, with his said ticket in his possession, took passage on said defendant's cars and train for said station of Terre Haute, Ind., and the train on which plaintiff took passage was accustomed to and did go to Terre Haute, Ind. That, in consideration of plaintiff's buying said ticket as aforesaid, the said defendant then and there, at the time of said purchase, promised and agreed to carry plaintiff as a passenger from Evansville, Ind., to Terre Haute, Ind. That soon after said train of the defendant on which plaintiff took passage as aforesaid left Evansville, Ind., the said defendant, by its conductor of said train, took up from plaintiff his said ticket. That immediately after said train passed the station of Vincennes, Ind., the said conductor told him (the plaintiff) that he should have got off and left the train at Vincennes, Ind., and ordered the plaintiff to get off at the next station. The plaintiff then informed the said conductor fully that he had purchased and paid for a ticket to Terre Haute, Ind., as aforesaid, but the conductor denied this, and insisted on the plaintiff's getting off at the next station. That said plaintiff declined and refused to so get off. That said plaintiff informed said conductor that he had no other money than what he had used for the purchase of the ticket, and that he had an important engagement to meet at Terre Haute, Ind.; that he would be enabled to consummate such engagement if he arrived at Terre Haute that night, and would lose the same if he did not; that he had a chance and would be engaged to work for a man if he got to Terre Haute that night, and would lose said engagement if he was put off; that he had no money to further pay for such ride to Terre Haute, Ind., or to pay for his entertainment if put off. Nevertheless, at the station of Oaktown, Knox county, Indiana, the defendant, by its conductor and trainmen, forcibly and unlawfully removed plaintiff from its said cars and train, and said train and cars so left plaintiff at said station, whereby plaintiff lost said engagement. That, by said engagement, plaintiff would have been employed to take care of a farm at \$20 per month for

the term of ——. That plaintiff had no other opportunity to become so engaged. That plaintiff is a day laborer, and dependent upon his engagements to work for his living. That plaintiff has been damaged thereby \$1,000. Wherefore plaintiff asks judgment for one thousand dollars and all proper relief."

Both paragraphs are drafted upon the same theory, and differ but slightly in their allegations. From the facts alleged, it is evident they proceed upon the theory that the appellee purchased and received a ticket entitling him to ride upon the appellant's train from Evansville to Terre Haute, and that upon demand he delivered that ticket to the conductor of the train, who afterwards, and before he reached Terre Haute (his destination, as designated in his ticket), unlawfully expelled him from the train. It is not alleged that, although the appellee purchased and paid for a ticket from Evansville to Terre Haute, the ticket agent of the appellant, by mistake or otherwise, gave him a ticket entitling him to a shorter ride than he paid for, but the allegation is that he purchased a ticket "entitling him to passage" "from Evansville, Ind., to Terre Haute, Ind.," and "with his said ticket in his possession, took passage on said defendant's cars and train for said station of Terre Haute." It is clear to the mind of the writer that the complaint, judged, as it must be, by its general scope, proceeds upon the theory that the plaintiff is entitled to recover because he was wrongfully ejected from the train, and not for a breach of the contract of carriage.

The sufficiency of the facts alleged in the complaint to constitute a cause of action is not presented by any specification of error assigned in this court; hence we decide nothing with reference to their sufficiency.

By their general verdict, the jury necessarily found that the appellee purchased of and received from appellant's agent at Evansville a ticket entitling him to passage over its road from Evansville to Terre Haute; that, "with his said ticket in his possession, [he] took passage" on one of appellant's passenger trains, which run from Evansville to Terre Haute; that he gave his ticket to the conductor of the train, but that, before he reached Terre Haute, he was wrongfully ejected from the train. These facts, under the allegations of the complaint, the jury, by their general verdict, necessarily decided; and, unless the facts stated in the answers to the interrogatories are so clearly antagonistic to the facts thus impliedly found by the general verdict as that they cannot be reconcilable one with the other, the general verdict must stand. Under the issues presented by the pleadings, no question arises as to what rights, if any, appellee may have for being expelled from the train on account of any mistake of appellant's ticket agent in giving him the wrong ticket, and one entitling him to a shorter ride than he contracted and paid for; the only issue presented by the complaint being whether or not he presented to the conductor a ticket which on its face entitled

him to ride on appellant's train from Evansville to Terre Haute.

I believe I may assert without fear of contradiction that the great weight of authority in this country is that the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the railroad company, and that he is not bound to accept the statements of the passenger which in any manner vary or contradict the contract as evidenced by the ticket. In fact, counsel for appellee states the rule to be as follows: "As between the passenger and the conductor, the face of a ticket is conclusive evidence of his rights." The following authorities sustain this view of the rule: *Bradshaw v. Railroad Co.*, 135 Mass. 407; *McKay v. Railway Co.*, 34 W. Va. 65, 11 S. E. 737; *Townsend v. Railroad Co.*, 56 N. Y. 295; *Frederick v. Railway Co.*, 37 Mich. 342; *Shelton v. Railway Co.*, 29 Ohio St. 214; *Dietrich v. Railroad Co.*, 71 Pa. St. 432; *Petrie v. Railroad Co.*, 42 N. J. Law, 449; *Railroad Co. v. Griffin*, 68 Ill. 499; *Hall v. Railroad Co.*, 15 Fed. 57; *Weaver v. Railroad Co.*, 3 *Thomp. & C.* 270; *Pennington v. Railroad Co.*, 62 Md. 95; *Johnson v. Railroad Co.*, 63 Md. 106; *Peabody v. Navigation Co.*, 21 Or. 121, 26 Pac. 1053; *Vandusan v. Railway Co.* (Mich.) 56 N. W. 848; *Railroad Co. v. Bennett*, 1 C. O. A. 544, 50 Fed. 496; *Jerome v. Smith*, 48 Vt. 230; *Downs v. Railroad Co.*, 36 Conn. 287; *Mosher v. Railroad Co.*, 127 U. S. 890, 896, 8 Sup. Ct. 1324; *Boylan v. Railroad Co.*, 132 U. S. 146, 152, 10 Sup. Ct. 50.

The supreme court of Massachusetts, in the case of *Bradshaw v. Railroad Co.*, *supra*, says: "It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger without such evidence of his right to be carried might forcibly retain his seat in a car, upon his mere statement that he is entitled to passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It

is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be after his refusal to pay a fare, and that he might properly be ejected from the car."

In *Mosher v. Railroad Co.*, 23 Fed. 326, decided by the United States circuit court for the Eastern district of Missouri, where the facts were that Mosher had purchased a round-trip ticket entitling him to passage on the company's railroad from St. Louis to Hot Springs and return, the ticket providing on its face the return coupon thereof was good for passage only when properly stamped by the company's agent at Hot Springs on the day it was to be used for such return passage; that the passenger went to the ticket office of the company a reasonable time before the departure of the train upon which he took passage to return to St. Louis, but, on account of the absence of the company's agent, he could not get his ticket stamped; that he got upon the train, and tendered his ticket unstamped to the conductor, stating why he was unable to get his ticket stamped as provided on the face of the ticket; that the conductor refused to accept the ticket or to heed the statement, but demanded that he pay his fare, and, refusing, he was ejected from the train. Brewer, J., upon these facts, states the law thus: "The conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified, and the rules of the company, binding upon him as a conductor, required him to remove the party unless he paid his fare. Now, can it be that the railroad company is responsible because the conductor did that which, by the rules of the company,—reasonable rules, too,—in pursuance of his duty, he ought to have done? Grant that there was an implied contract that the station agent should have been at Hot Springs depot. If the plaintiff had sued for a breach of that contract, and had asked the amount which he was compelled to pay in order to purchase a return ticket, then a very different question would have arisen. But here he relies on the fact that the expulsion from the train was unlawful, because the conductor ought to have taken his statement, instead of that evidence which was provided by the contract, viz. identification and the stamp of the agent at Hot Springs. It certainly would introduce a very uncertain rule of procedure if a conductor could not rest upon the faith of the ticket which is presented to him,—if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the nonperfection of the ticket which is presented to him. The party took the ticket, upon the face of which was the express stipulation that, before it should be good for a return passage, the holder should be identified by the agent at Hot Springs, and he should stamp that ticket on the back. Now, the party says: 'Why, I wanted to prove to the railroad conductor that I was the man,—

the party who took that ticket in the first instance.' Can the courts cast upon the conductor the duty of entering upon a judicial investigation? Of course, the conductor could not at the instant secure counter testimony, and he would be bound to take the statement of the party as to the facts of the case, independent of the express language of the ticket. I do not think he has a right to rely upon the language of the contract as expressed in the ticket. If the party was injured by the negligence or wrong of somebody else, he should have paid his fare back, and then sued to recover the amount which he had been compelled to pay owing to the omission, negligence, or misconduct of the agent at Hot Springs."

In *Frederick v. Railway Co.*, supra, the supreme court of Michigan, by Cooley, J., says: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways,—one, the evidence offered by the ticket; the other, the statement of the passenger, contradicted by the ticket. Which should govern? There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence; and he must produce it, when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he had been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he should have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case."

In *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, the court says: "The conductor of a street car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statement of others to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the rights of a passenger, except in the usual simple and direct way. It is no great hardship for the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor the proper ticket or check, or, if he fails to do this, to leave him to his remedy against the company for a breach of contract; otherwise, the conductor must investigate and determine the question as best he can while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the pas-

senger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and often, if it should be ascertained by subsequent inquiry that he obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps for substantial damages. The practical result would be either that the railroad company would find itself pledged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus be subject to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of one line to another, which they now enjoy. It is a reasonable practice to require a passenger to pay his fare, and to show a ticket, check, or pass; and it would be unreasonable to hold that the passenger, without evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to a reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have the proper ticket. It follows that the plaintiff was where he had no right to be after his refusal to pay a fare, and that he might properly be ejected from the car."

In *Hall v. Railroad Co.*, supra, the court, after putting, by way of illustration, a case where a passenger had paid for a ticket: entitling him to ride from A. to C., but, by accident or the mistake of the ticket seller, he was furnished with a ticket from A. to B., (the latter an intermediate station between the stations A. and C.), says: "He has paid his money, and there is a valid contract to carry him to his destination, but it can hardly be that he can require the conductor to stop the train till he can rectify the mistake, or take the ticket on his assurance of the real contract, or to abandon the ticket system and disregard the regulations made for the general public and the carriers' mutual convenience. What is to be done? Clearly, it seems to me, the passenger should pay his fare, if able, and settle the difference with the company by returning the ticket and adjusting the balance. Men do this in ordinary business intercourse in other branches of trade or commerce, and there is no reason why they should not in this. The law recognizes that these carriers find it necessary in

their business to have their checks and balances in the intercommunication of their agents, and they require in its conduct elaborate systems of rules to prevent loss to them and to the public. Mistakes will occur with railroads as with others, and the same rules should be applied. It seems to me that a passenger, finding himself without a ticket or other evidence of his contract which will be recognized under these regulations, cannot plant himself on his contract right, and force the railroad, outside and against the regulations, to a specific performance then and there, by compelling the conductor to eject him, as a foundation for more damages than he would receive if he should comply with the regulations, and sue for a breach of the contract. There is no other just way to manage these mistakes. Those who would defraud the company might pretend to be the victims of mistakes or the beneficiaries of contracts outside the regulations. We took much time, examined many witnesses, and heard much argument on the issue whether the station agent did or did not make the alleged contract to carry the plaintiff on tickets expired on their face; and I doubt if, in the conflict of proof, the jury could have reached a satisfactory verdict on that issue. How, then, could the conductor have tried it successfully in the brief time allowed him in collecting tickets? It was impossible. He had either to take plaintiff's word for it, or enforce his regulations. The plaintiff's word was, and has been all along, disputed; and, giving him the benefit of all the credence his character and life entitle him to, the fact remains that the conductor had no means of knowing the weight to be attached to his word, and a common imposter could have told the story as well as the best of men."

And in *Poulin v. Railway Co.*, 3 C. O. A. 23, 52 Fed. 197, Taft, J., says: "The law settled by the great weight of authority, and but recently declared in a case in this court, (*Railroad Co. v. Bennett*, 1 C. O. A. 544, 50 Fed. 496), is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting the fares. The conductor cannot decide from the statements of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud and subsequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the

company for the negligent mistake of the ticket agent. There is some conflict among the authorities, but the great weight of them is in favor of the result here stated."

If, then, the ticket which appellee gave to appellant's conductor is conclusive as to appellee's right upon the train, and the jury, by their general verdict, having found that he gave the conductor a ticket which on its face entitled him to ride from Evansville to Terre Haute, we must look to the interrogatories to see what material fact is found in their answers, if any, which cannot be reconciled with the general verdict.

The interrogatories propounded, with the answers of the jury thereto, are as follows:

"(1) Q. Was the plaintiff a passenger on defendant's train that was scheduled to leave Evansville, Indiana, at 6:30 o'clock p. m. on January 19, 1894? A. Yes. (2) Q. Was not John Laugel conductor, and John Baldwin brakeman, on said train on which plaintiff was riding? A. Yes. (3) Q. Did plaintiff ride on said train from Evansville to Oaktown on said date? A. Yes. (4) Q. Did not said Laugel, as such conductor, collect the tickets and fares from the passengers, including the plaintiff, on said train on said date? A. Yes. (5) Q. Was the plaintiff requested by the conductor to leave said train at Oaktown, and did he refuse to get off? A. Yes. (6) Q. Did the conductor and brakeman put the plaintiff off said train at Oaktown? A. Yes. (7) Q. Was the plaintiff hurt or injured by the conductor or brakeman in putting him off? A. No. (8) Q. Was any more force used than necessary in putting the plaintiff off said train? A. No. (9) Q. Did the plaintiff have a ticket when he got on the train at Evansville? A. Yes. (10) Q. Did not the plaintiff pay the defendant's agent at Evansville \$3.30, and call for a ticket from Evansville to Terre Haute? A. Yes. (11) Q. Did not said agent give said plaintiff a ticket for passage on said train? A. Yes. (12) Q. Did the plaintiff give the conductor a ticket after leaving Evansville, and before reaching Vincennes? A. Yes. (13) Q. Is not the ticket introduced in evidence the same ticket so handed by the plaintiff to said conductor Laugel? A. Yes. (14) Q. Did not said conductor, after receiving said ticket, place the same in a pocket different from the one in which he put all the other tickets taken up on said train, except the ticket taken from Mr. Werley? A. Yes. (15) Q. Did not the conductor put plaintiff's ticket and Werley's ticket in the same pocket? A. Yes. (16) Q. Did the plaintiff ever read or examine his said ticket? A. No. (17) Q. Was not said ticket a ticket from Evansville to Vincennes, and numbered 9265? A. Yes. (18) Q. Did the plaintiff purchase said ticket at the defendant's office in Evansville? A. Yes. (19) Q. Did the plaintiff, at the time he purchased said ticket, ask for a ticket to Terre Haute? A. Yes. (20) Q. Did the plaintiff have his shoes on or was he

barefoot when put off the train? A. Yes. (21) Q. Did the plaintiff offer or give to the said conductor any other ticket than the one introduced in evidence? A. No. (22) Q. Did the plaintiff refuse to pay fare between Vincennes and Terre Haute, or any fare after leaving Vincennes? A. Yes. (23) Q. Was not the ticket which plaintiff gave to the conductor on said train in the words and figures following, to wit: 'Evansville and Terre Haute Railroad. No. 9265. Evansville (U. D.) to Vincennes. Good until one day after date of sale, and for continuous passage on trains stopping at points named, when stamped by selling agent. A. G. Palmer, Gen'l Pass'r Agent.' A. Yes." The jury, in answer to the twenty-first and twenty-third interrogatories, find that the only ticket which appellee gave to the conductor, on its face, entitled him to ride only from Evansville to Vincennes, and, in answer to interrogatory 22, that he refused to pay any fare from Vincennes to Terre Haute.

From these facts specially found by the jury in answer to the interrogatories, it is evident that appellee was wrongfully on appellant's train after it left Vincennes, the point to which his ticket entitled him to be carried, and his refusal to pay his fare from Vincennes to Terre Haute justified the conductor in putting him off the train. To hold otherwise under the issues of this case is to say that the ticket is not the evidence of the passenger's right to be carried, but that the right to be upon the train and to transportation depends upon the statement of the passenger, and that such statements are conclusive, and must be heeded by the conductor. In other words, if the passenger has an absolute right to be carried, the conductor cannot require the production of a ticket or the payment of fare.

In the majority opinion a number of decisions of this court and of the supreme court of this state are cited in support of said opinion, but I think they are each and all distinguishable from the case in hand. In *Railway Co. v. Hennigh*, supra, the question was whether or not the conductor had a right to expel the passenger, although he had purchased and given to the conductor a ticket which upon its face entitled him to ride from Chicago to New Castle; and the court held that his expulsion was wrongful. In *Railway Co. v. McDonough*, supra, the facts were that McDonough purchased a ticket entitling him to ride from Toledo, Ohio, to Ft. Wayne, Ind. He entered a passenger car attached to a freight train, and to the conductor of the train delivered up his ticket, and in return, from the conductor, received a conductor's check, which designated his destination. This train, before reaching Ft. Wayne, was overtaken by a passenger train, when the conductor advised McDonough to leave his train and get upon the other, in order that he might reach his destination sooner, assuring him that the conductor's check which he

had given him would be honored by the conductor of the passenger train. Acting on the advice and assurance of the conductor of the freight train, McDonough left the freight train, and got upon the passenger train, tendering for passage to the conductor of that train the conductor's check received by him from the conductor of the freight train. The conductor of that train refused to accept the check, and ejected him from the train; and a judgment rendered in his favor by the court below was affirmed. In the case of *Railway Co. v. Fix*, supra, the facts were substantially as follows: Fix purchased a coupon ticket from the railroad company's agent at Ambia entitling him to ride from Ambia to Boswell and return. On the train, going from Ambia to Boswell, the man acting as conductor took his ticket, returning to him the wrong coupon,—that which entitled him to ride from Ambia to Boswell, instead of the one from Boswell to Ambia. Fix did not notice the mistake of the conductor, but in the nighttime of the same day he got upon another of the company's trains going to Boswell, to return home, and handed the conductor of that train the coupon or part of the ticket which he had received back from the conductor of the other train. The ticket was refused, and, notwithstanding the explanations of Fix, he was ejected from the train, and the court held he was entitled to recover. The facts in the case of *Pennsylvania Co. v. Bray*, supra, are identical with those in *Railway Co. v. Fix*, supra; but the court, in deciding the case, was divided as to whether or not the rule announced in the *Fix* case was right. In the case of *Railway Co. v. Beckett*, supra, the facts were that Beckett went to the railroad company's passenger station, a reasonable length of time before the arrival of the train upon which he desired to take passage, and applied for and tendered the money for a ticket from Indianapolis to Jonesboro and return; but, on account of the disabilities of the company's agent, he was unable to get the ticket. He entered the car, and, upon the demand of the conductor for his ticket, offered to pay the round-trip rate the same that he would have been compelled to pay had he got a ticket, demanding that he be given by the conductor something as evidencing the fact that he had paid for a round trip. He was informed by the conductor that he (the conductor) was not empowered to accept payment in cash for round trips or to issue tickets entitling passengers to ride on other trains. On his refusal to pay the regular fare, he was expelled; and, having recovered judgment in the court below, the judgment was affirmed in this court by a divided court. Whether the decision in the last-named case is right or wrong need not be considered at this time, for it has no analogy to the case in hand; but it may be remarked that the decision in that case goes to the extreme limit, and should not be enlarged upon.

Of the other cases relied upon by the majority, it will be seen that they are readily distinguishable from the one under consideration, in this: that in each of those cases the passenger purchased, received, and tendered to the railroad company's conductor a ticket which on its face entitled the party to ride to his destination. True, in several of them the conductor had made a mistake in giving back part of the ticket, but a ticket entitling the passenger to passage in each case had been delivered up to the conductor by the passenger. In this case no ticket was ever received by the appellee or given to the conductor entitling him to ride from Vincennes to Terre Haute. Appellee was therefore wrongfully on the train. The general verdict rests upon a wrongful expulsion as alleged in the complaint; while the answers to the interrogatories show that the appellee was wrongfully on the train, hence rightfully ejected therefrom. For these reasons, I think the judgment should be reversed, with instructions to render judgment in favor of appellant on the answers to the interrogatories.

(164 Mass. 424)

HICKS v. NEW YORK, N. H. & H. R. CO. (two cases).

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1895.)

ACCIDENTS AT RAILROAD CROSSINGS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—TRIAL— INSTRUCTIONS.

1. Where, in an action against a railroad company for injuries at a crossing, there is evidence that plaintiff stopped about 150 feet from the crossing to look and listen for trains, but neither heard nor saw any, and that if he had continued to look he could have seen the train approaching before he reached the track; that the electric bells to signal the approach of trains with which the crossing was equipped, were not ringing,—the question of whether plaintiff was in the exercise of proper care is one for the jury.

2. In an action for injuries at a railroad crossing, evidence that, when 100 feet from the crossing, one could see only 500 feet of the track; that, at 150 feet from the crossing, one could only see 300 feet of the track; and that the train causing the injuries ran 300 feet past the crossing before it stopped,—justified a finding that 40 miles per hour was an unreasonable rate of speed at that crossing.

3. Where electric bells are placed at a railroad crossing to signal approaching trains, failure of the bells to ring is evidence of negligence in the company.

4. Refusal to grant requested instructions, correct in law, on detached portions of evidence, on a single issue, is not error, where full instructions applicable to the evidence have been given.

5. Where, in an action against a railroad company for injuries at a crossing, the evidence warrants the submission of the question whether plaintiff was in the exercise of due care, the question whether a boy who stopped when plaintiff stopped before crossing, and started ahead when he did, and followed him across, exercised due care, should also be submitted.

6. A complaint against a railroad company for personal injuries, under Pub. St. c. 112, § 212, making such a company liable for

such 'injuries when occasioned by the "gross negligence" of its servants, is fatally defective if it fails to allege that the negligence of defendant's servants that caused the injuries was gross.

7. In an action against a railroad company for wrongful death, the objection that the complaint failed to allege that decedent left next of kin, for whose benefit recovery is sought, cannot be urged for the first time on appeal.

8. In the absence of a statutory provision therefore, a recovery cannot be had for the wrongful death of a person, by a personal representative.

9. Where evidence is admitted with the belief that other evidence will be given, but is subsequently withdrawn by the court when such evidence is not given, and it appears that both parties considered it, in their arguments, as not in the case, its admission will not be considered reversible error.

Exceptions from superior court, Worcester county; Edgar J. Sherman, Judge.

Actions by Hugh Hicks against the New York, New Haven & Hartford Railroad Company for personal injuries, and by him, as administrator, against the same defendant, for death of his wife, heard together. From a verdict for plaintiff in each case, defendant brings exceptions. Exceptions in first action overruled, and in second action sustained.

W. S. B. Hopkins, Webster Thayer, and Hollis W. Cobb, for plaintiff. Frank P. Goulding and Chas. F. Choate, Jr., for defendant.

KNOWLTON, J. The presiding justice could not properly direct a verdict for the defendant in either of these cases. There was evidence in favor of the plaintiff upon the question whether he was in the exercise of due care. The evidence tended to show that the crossing on which he was injured was very dangerous. As the highway and the railroad approach each other going northward, towards the crossing, they run for a considerable distance almost in the same direction, and a part of the way a house and other objects make it impossible for a traveler on the highway to see a coming train. The civil engineer called by the defendant testified that at a point southerly on the highway 100 feet from the nearest rail, as you approach the crossing, you can see down the track, to the southward, 500 feet, and that at a point 50 feet further from the crossing, for a distance of 300 feet, the view of the track is obstructed by the house and a hill. The plaintiff testified that he stopped about 150 feet from the crossing, and looked to see if a train was approaching, and saw none, and listened, and heard none; that he then drove on, and was struck by the locomotive. It appeared that he knew that the crossing was equipped with electric bells, to warn travelers of the approach of trains, and he testified that the bells were not ringing. His testimony upon the question whether he looked after starting onward was indefinite, and somewhat contradictory. It appeared that, if he had con-

tinued looking, he could have seen the train before reaching the crossing. The locomotive engineer testified that the train was then running at the rate of a little more than 40 miles an hour. The plaintiff and his wife, sitting on chairs, were riding in a large, covered gypsy wagon, with a leather top, which extended forward to the front of the wagon, and which had in it large windows, of clear glass, in the sides, right opposite the chairs, and another window in the rear. He testified that he was driving at about four or five miles an hour. Under these circumstances, it cannot be said, as a matter of law, that the plaintiff was not in the exercise of due care. He was quite near the crossing when he stopped and looked and listened. His conduct after he started forward might properly be affected, to some degree, by the fact that the electric bells were not ringing. There was more or less difficulty in seeing, from his seat in the wagon, as he drove along, whether a train was coming on his left, from behind him, and the care of his horses necessarily occupied some of his attention. We think the case was properly left to the jury, to determine whether he exercised such care as ordinarily persons are accustomed to exercise under like circumstances.

The speed at which a train may be run, without negligence, depends upon the dangers attendant upon running it. Upon a good road, with proper equipments, over which there are no crossings where persons are liable to be in peril, it may safely be run very fast; but in a thickly-settled town, where there are frequent grade crossings of streets, at which the view of the track on each side is obstructed by houses, it would be negligent to run rapidly. In view of the nature of this crossing, and the amount of travel over the highway, of which the jury could judge somewhat from their view, we cannot say that the circumstances of the accident, the distance which the train went before it was stopped, and the testimony of the engineer, did not furnish evidence from which the jury might have found that the train was running faster than was reasonable at that place. For the same reasons, in view of the evidence indicating the rate of speed at which the defendant was accustomed to run trains there, we are unable to say that there was no evidence from which the jury might have found that it was the duty of the defendant to place a flag, gates, or other guards at the crossing. *Hubbard v. Railroad Co.*, 162 Mass. 132, 38 N. E. 366; *Eaton v. Railroad*, 129 Mass. 364. If trains are to be run at great speed, proper precautions must be taken for the protection of travelers at peculiarly dangerous crossings of highways. With such precautions, the rapidity of passing trains will not, alone, constitute negligence.

It cannot be said that the failure of the electric bells to ring at the approach of the train was not evidence of negligence of the corporation. The request to rule to that effect was

made in the case of the plaintiff suing personally, and in that action the defendant was liable for the negligence of its servants, to the same extent as for its own. The evidence tended to show that, if the apparatus had been kept in proper condition, the bells would have rung as the train approached. Their unexplained failure to ring was therefore some evidence of negligence on the part of the corporation or its servants. *White v. Railroad Co.*, 144 Mass. 404, 11 N. E. 552; *Mahoney v. Railroad Co.*, 160 Mass. 573, 36 N. E. 588; *Hennessy v. City of Boston*, 161 Mass. 502, 37 N. E. 688.

The evidence in regard to the care of the boy of 10 years of age, who was driving the pony team immediately behind the plaintiff's wagon, is very slight, but we are unable to say that there was nothing to submit to the jury on that point. It appears that he was close behind the plaintiff's wagon, and the circumstances warrant an inference that he was expected to be governed in his conduct, to some extent, by the management of the team just before him. If the pony had been hitched to the hind part of the plaintiff's wagon, it would not be contended that the boy was to be judged as if he had been driving with no other team in his company. There was evidence that the pony team stopped when the plaintiff stopped. If the jury found that the plaintiff was in the exercise of due care in his management of the team which he was driving, and that the boy 10 years old was a suitable person to be intrusted with the pony team just behind the other, as we think they might, we are of opinion that they might also find that the boy exercised such care in driving as ordinarily careful boys of his age are accustomed to exercise under like circumstances.

All the rest of the defendant's requests for instructions which were refused by the court, so far as they were correct in law, called for specific directions in regard to possible findings from particular parts of the testimony upon a single issue. It is largely a matter of discretion, for the presiding judge, as to how far he will discuss different phases of the testimony upon a particular subject, and give specific instructions, each founded upon only a part of the testimony bearing upon the subject. If he gives full and sufficient instructions, which enable the jury to understand the law applicable to all branches of the case, it is not a ground of objection that he declines to take each fragment of the testimony, and to state a conclusion of law applicable to a possible finding founded upon it. *McDonough v. Miller*, 114 Mass. 94; *Tatterson v. Manufacturing Co.*, 106 Mass. 56; *Gunnison v. Langley*, 8 Allen, 337; *Murray v. Knight*, 156 Mass. 518, 81 N. E. 646; *Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111. In this case the instructions upon these subjects were full and clear, and the defendant has no reason to complain of them.

In the action by Hicks as administrator, the

defendant requested the court to instruct the jury as follows: "There is no allegation in the first count on which the verdict can be rendered for the plaintiff. The count does not allege any carelessness or negligence of the corporation, nor any unfitness or gross carelessness of its servants or agents." The stenographer's report of the charge upon this part of the case leaves us in doubt as to what was said by the judge in regard to it. The exceptions were allowed by another justice after the death of the judge who presided at the trial, and, if the report of the charge was imperfect, there was apparently no correction of it. This instruction could not properly be given, for the count charges negligence of the corporation in failing to furnish proper signals or bells at the crossing, and in failing to protect the crossing by proper guards, or a flagman. In reference to the other negligence alleged in it, the count was defective in failing to charge that there was unfitness or gross carelessness of the servants or agents of the corporation. We have a report of the whole charge upon the question of liability, and, as we understand it, the judge submitted both actions to the jury under the same rules in regard to the liability of the defendant for the carelessness of its servants. They were permitted in this action, as well as in the other, to find for the plaintiff upon the first count, if there was negligence of the defendant's servants, without proof that the negligence was gross. This was error. Pub St. c. 112, § 212. The defendant excepted to this part of the charge, and its exception must be sustained.

It is contended that the declaration in this action is defective in not alleging that the plaintiff's wife left next of kin, for whose benefit there might be recovery under the statute. See *Com. v. Eastern R. Co.*, 5 Gray, 473. But this exception is not open to the defendant in this court, inasmuch as it was not taken in the court below.

It is also contended that this action must be treated as not brought under the statute, but at the common law, inasmuch as neither count of the declaration contains allegations which ought to be found in an action under the statute. But the common law recognizes no right of action in a case of this kind, and, although the counts are imperfect, we think the action must be deemed to have been brought under the statute.

We are of opinion that the withdrawal from the jury of the evidence of the action of the selectmen in regard to this crossing leaves the defendant without a legal ground of objection to the admission of it. It appears from the charge that at the time of its admission the court expected that it would be followed by other evidence, which was not subsequently offered; and both parties were informed that it was withdrawn from the jury, and they made their arguments with the understanding that it was not in the case. We do not see that it was so prejudicial to the

defendant, in its effect, as to require us to grant a new trial.

If there was error in the original instructions in regard to gross negligence, the error was corrected, and the jury were properly instructed, soon afterwards. In the first case the exceptions must be overruled, and in the second case they must be sustained. So ordered.

(157 Ill. 354)

ILLINOIS CENT. R. CO. v. GILBERT.¹
(Supreme Court of Illinois. June 15, 1895.)
MASTER AND SERVANT—NEGLIGENCE—RAILROAD COMPANIES—DEATH BY WRONGFUL ACT—TRIAL—INSTRUCTIONS—ORDINANCE.

1. Where an employé of a railroad company, who, in connection with more than a hundred other men, is employed in rolling car wheels over a large number of tracks, on which trains are almost continually passing, is killed one dark snowy morning by a train backing at the rate of eight miles an hour, and it appears that no one on the train knew of the accident till after it occurred, and the evidence as to ringing the engine bell is conflicting, the question of negligence of the company is for the jury.

2. Where it appears that the deceased was going towards the shop where he was ordered to go, that the train approached so noiselessly that the deceased's companions could not hear it, and that they could not see whether it was moving or not, the question whether deceased was guilty of contributory negligence in going on the track when the train was only 10 feet off is also for the jury.

3. In an action for wrongful death, if the defendant is guilty of the negligence charged, and the same resulted in the death of plaintiff's intestate, then the plaintiff is entitled to recover, for the benefit of the next of kin of said deceased, a fair compensation for whatever pecuniary damage the next of kin have sustained, not exceeding \$5,000. *Railway Co. v. Dimick*, 96 Ill. 42, and *Mill Co. v. Morrissey*, 111 Ill. 646, distinguished.

4. Under Rev. St. 1891, c. 24, art. 5, § 1, subd. 27, which authorizes city councils to "provide protection against the injury to persons and property in the use of railroads," the council may by ordinance require engines passing through the city to keep their bells ringing continuously.

5. It is no excuse for the violation of such ordinance that the person injured thereby was a servant of the railroad company.

6. Whether an ordinance offered in evidence has been repealed is a question of fact to be shown by the introduction in evidence of the repealing ordinance and not by objection to the introduction of the first ordinance supported by production of the repealing ordinance.

Appeal from appellate court, First district.

Action on the case by George A. Gilbert, administrator of the estate of Charles F. Gilbert, against the Illinois Central Railroad Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 51 Ill. App. 404. Defendant appeals. Affirmed.

This is an action by the administrator of Charles F. Gilbert, who was 17 years old at the time of his death, to recover damages be-

cause of alleged negligence of appellant causing the death of the intestate. The facts, as shown both by the witnesses for the plaintiff and defendant, and wholly uncontradicted, are these: At the Twenty-Seventh street shops of the Illinois Central Railroad there were six main tracks, numbered consecutively, 1, 2, 3, 4, 5, 6, from west to east. East of these six main tracks are many side or switching tracks. The repair shop stands east of and immediately next to track No. 6, and also stands directly opposite to the intersection of Twenty-Seventh street by the west boundary line of the right of way land of the Illinois Central Railroad Company. The machine shop is situated west of track No. 1, and several hundred feet north of Twenty-Seventh street. As alleged in the declaration, and shown by the evidence, the trains moving along the tracks at the place in question during a day averaged 20 per hour, and in the morning, and at the hour Gilbert was killed,—about 7:45 a. m.,—they passed more frequently than at other times during the day, except the hours of the late afternoon and evening. The tracks were straight, and a person passing over the tracks from the machine shop on the west to the repair shop on the east could see north nearly to Sixteenth street, and south a little beyond Thirty-First street. At the time of the accident there was no obstruction to prevent Gilbert seeing the approaching train, had he looked. No other trains were passing the place at the time, but two suburban trains, one north bound and the other south bound, had passed a few minutes before. At that point there are some 16 or more tracks running through the company's yards. The two tracks on the west side are used for the suburban trains running north and south between the city and the suburbs. The next two tracks are used by through passenger traffic. The next two tracks are used by freight trains. The rest are miscellaneous tracks, used for different purposes,—some for storing damaged cars, some for repairing, and so on. Gilbert was struck on track No. 6, which was the outgoing freight track; the ingoing freight track being number 5. On the morning in question all the men in the shops, including deceased, were called by the foreman to come out and push certain wheels across all the tracks over to the machine shop, where they were to be repaired. To push these wheels, which were the ordinary car wheels in pairs,—that is, an axle with a wheel at each end,—required two men to each pair of wheels, and they pushed them from a repair track on the east side of the tracks across all the tracks to the machine shop, which is on the west side of the tracks, and some distance to the north; that is, the men, in pushing the wheels across, and in going from the repair shop and repair track to the machine shop, proceeded in a northwesterly direction, at an angle across the tracks. The witnesses on both sides testified that the labor of push-

¹ Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

² Rehearing denied October 25, 1895.

ing the wheels across was pretty severe. After getting the wheels across the tracks, the men returned in a southeasterly direction to the repair shops, where their regular work was. The morning was a very bad morning. As one of the witnesses expressed it, "It was a very bad morning; snowy, and very thick, so you could not see very far from you;" or, as again expressed, "That was a very thick morning; snowy and very thick; foggy." There was no one in front of the engine by the foot-board. As another witness expressed it: "It was storming. It was one of those March blizzards. It came from the northwest." Defendant's fireman testified that the morning was so bad that the engineer did not have his window open, as was customary. The deceased was returning, as above stated, in a southeasterly direction, towards the repair shops. All the witnesses agree that the storm was so bad that he had his head turned a little sideways to avoid the storm. Deceased had barely stepped upon track No. 6 when the engine of the approaching train caught him. The whole train of engine (which was going backwards at the time) and six or seven cars passed over deceased, and went as far as Twenty-Seventh street before they were able to stop it. This is a place where large numbers of men cross back and forth. It was testified that at that hour of the morning a great many suburban trains passed that point north and south. As one expressed it: "The suburban trains run every ten or twelve minutes. More engines pass there in the morning. It is hard to tell how many trains pass there. The men usually go to work at seven o'clock. It was between seven and eight when Gilbert was killed; nearly eight." Defendant's foreman testified: "There was a host of trains passing that place during the day. Suburban trains come in every five or six or eight minutes." That, in order to get the wheels across, "he had to watch the time and wait for an open track, before he could get them up or down;" that he "watched the time to see when he could get the wheels across; that he watched the men as close as he could, and always told them to be careful." There was from 150 to 200 men called out of the shops to roll those wheels across. The train which struck the deceased was going about seven or eight miles an hour, and was about ten feet north of Gilbert when he stepped upon the sixth track. The foreman testifies that Gilbert "didn't pay any attention when he was going along; that is, when I saw him walking along holding up his hand. He was about five or six feet away before he stepped on the track, and I yelled at him, and he sort of pulled his hand up against the side of his head. He didn't hear anything, and I yelled then as loud as I could yell. He didn't stop. He stepped right along in front, and the first thing I knew the train went over him. When the train struck him he was on the east side of the bumper, between the bumper

and the east corner of the tender, on the east side of the track. He was going diagonally or cat-a-cornering across track No. 6; taking a kind of short cut. He was looking south." That he had warned Gilbert on the morning he was injured, and also that he had told the employes to come down from the machine shop along the west side of the tracks, and to cross at the place where he (Crawford) was.

The plaintiff charged: (1) That the railroad company was guilty of common-law negligence; that is to say, that under all the circumstances it recklessly and negligently, without warning of any kind, and at a high rate of speed, drove its train through a place where men were working, and over the deceased. (2) That it wholly failed to observe the duty imposed by ordinance, viz. in ringing its bell within the city limits. On the engine, which was backing up, there were the engineer and fireman. On the six or seven cars there were a conductor and two switchmen. No one of these five men saw deceased before he was struck, and no one of them knew that he had struck and killed a man until the train had passed over deceased and reached Twenty-Seventh street, 500 feet away.

On the trial of the cause the plaintiff introduced in evidence, against the objection of defendant, section 2462 of the Ordinances of the city of Chicago, set forth in his declaration, to wit: "The bell of each locomotive engine shall be rung continuously while running within said city, except locomotives running upon the railroad track situated east of Indiana avenue on the shore of Lake Michigan between 22nd street and Park Row in said city, when no bell shall be rung or whistle blown except as signals of danger." (As amended by ordinance passed January 3, 1883.) To the introduction of this ordinance, the defendant objected: "First, upon the ground that the city of Chicago had no power or authority to enact the ordinance; and second, that, if the city of Chicago had such power, the ordinance has no application to relations between employer and employé on the right of way of the company, and not at a public crossing; and, third, that the section 2462 was by implication repealed by a subsequent ordinance of the city of Chicago entitled 'An ordinance fixing the rate of speed at which railroad companies may operate trains within the corporate limits of the city,' passed March 26, 1890. And in support of the objection counsel for the defendant read to the court an ordinance of the city of Chicago.

The first and fifteenth instructions asked by the defendant were that plaintiff was not entitled to recover, which were refused. The thirteenth instruction was refused, which was as follows: "(13) The court instructs the jury that if, in the manner in which the defendant conducted its business in the operation of its trains, it caused the employment

in which the deceased was engaged as a servant of the company to be attended by extraordinary and unusual danger to deceased while performing his work and duty as such servant, yet, if deceased knew, or by the exercise of his ordinary senses might have known, that the defendant so operated its trains, and thereafter voluntarily continued to expose himself to such extraordinary hazard in performing his duty as a servant of the defendant, and in doing so was killed by a train of the defendant, then the plaintiff is not entitled to recover." To the refusal to give the first and thirteenth and fifteenth instructions the defendant excepted. The court gave for plaintiff the following instructions, to which the defendant excepted: "If you find from the evidence that the defendant is guilty of the negligence charged in the plaintiff's declaration, and that the same resulted in the death of Charles F. Gilbert, then the plaintiff is entitled to recover in this action, for the benefit of the next of kin of said deceased, such damages as the jury may deem, from the evidence and proofs, a fair and just compensation for whatever pecuniary damage, if any, the evidence shows said next of kin have sustained by reason of said death, not exceeding five thousand dollars." The verdict of the jury was for the sum of \$5,000, and upon motion for a new trial plaintiff entered a remittitur of \$2,500, and thereupon the court overruled the motion for a new trial, and entered judgment in favor of the plaintiff for the sum of \$2,500. The appellate court affirmed the judgment, and this appeal is prosecuted.

O. V. Gwin, for appellant. Walker & Eddy, for appellee.

PHILLIPS, J. (after stating the facts). The refusal of the first and fifteenth instructions asked by the defendant presents to this court the question as to whether, under the facts in this record, the plaintiff was entitled to recover because of any negligence on the part of the defendant, and whether the intestate exercised due care and caution for his own safety. The number of tracks running parallel with that on which the intestate was killed, and the number of trains passing each way at about the time of the injury, and the fact that a great many men were liable to be ordered from the shops to roll wheels from the repair shops to the machine shops, which necessitated crossing the tracks from 1 to 6, inclusive, and, after doing that work, to return across those six tracks from the machine shops to the repair shops, were facts known to the master. It was a fact also known to the master that engines were being run both forward and backward on various tracks. These known facts rendered the place a hazardous one. The work of rolling the wheels across the tracks was laborious, and the crossing of the tracks with those wheels and returning to the repair shops across those tracks was required

from and necessary on the part of the men called from the repair shops for that work, the place where the injury occurred being rendered hazardous by reason of the number of tracks, trains, and character of switching. There was conjoined the fact that work requiring a large number of men—from 150 to 200 in this instance—to cross the tracks to and fro was a frequent occurrence, alike known to the master. The manner of moving trains, and their number, and the number of men crossing back and forth at that place in the discharge of their duties to the company, was such that it became the common-law duty of the company to take extra precautions to look out for and warn the men so crossing. Of all the men employed on the train none saw or knew of the injury to the intestate until after his death. All the efforts of Crawford, the foreman at the shops, the hallooing of him and others, failed to attract their attention. None of the train crew saw or heard their efforts to give notice, and it is apparent there was no lookout from the engine for danger to persons crossing. There was difficulty in seeing a train approaching because of the morning being dark, snowing, and the wind blowing. Witnesses testified that they saw the engine two or three car lengths from where they were as they crossed, and could not see whether it was moving or not. Its approach was with but little noise, and there is conflict in the evidence as to whether the bell was ringing. With all these circumstances shown by the evidence, and this conflict as to whether the bell was ringing, it was a question for the jury to determine whether the company used proper precautions to look out for and warn the men whose duties required them to cross the tracks under such state of facts. It does not appear that a lookout was kept from any part of the engine or train or on the track. The intestate, on entering the service, impliedly undertook to observe all proper care for his own safety without any warning against the ordinary perils of his employment, and by his contract assumed the risk of injury from the ordinary dangers, which would include those known to him, or discoverable by the exercise of ordinary care on his part; and where, knowing the hazards of the employment in the manner in which the business was conducted, he voluntarily continued therein, he could not recover because there was a safer mode of conducting that business; yet, employed as he was, and subject to the orders of the foreman of the shops, who directed the wheels to be taken across the tracks, and the men to return to the shops, and who testified that he had to watch the time, and wait for an open track, before he could get them up or down; that he watched the time when he could get the wheels across, and watched the men as close as he could, and always told them to be careful,—would induce in the minds of the men thus sent across the tracks the belief that they might pass on safely, and it became the duty of the company, in running engines or trains

through the yard, where so many men were employed, to exercise extra care and caution under the circumstances, which rendered the usual method of doing the work more than ordinarily hazardous. Admitting that danger arising from the elements or changes of the weather are a part of the ordinary risks incident to an employment, and assumed by the employé on entering the service, and, if injury results from such assumed risks, without that risk being aided or incurred by the negligence of the company or its superintending agencies, still the rule is, where negligence is a question of fact,—as it most generally is,—it must depend on the circumstances surrounding at the time of the injury. The negligence charged being that the defendant was guilty of negligence, under the circumstances, in recklessly and negligently and at a high rate of speed running its train through a place where men were working, and over Gilbert, the surrounding circumstances required a commensurate degree of care on employer and employé alike; and whether that degree of care was used was a question for the jury.

It is urged that the deceased was not in the exercise of proper care and caution for his own safety at the time he went upon the track, or in attempting to cross it at the place and time when and where injured. Under the orders of the foreman, who watched the time for an open track, when he could get the wheels across, the deceased discharged his duties; and if the surroundings were such that others near him were unable to tell whether the train was moving at the time they saw it, and its approach so noiseless that it was not heard by them, and Gilbert going directly towards the shops, where he was required to be, then the question whether, under all the surrounding circumstances, the deceased, just prior to being killed, was in the exercise of reasonable care and caution for his own personal safety, was proper to be submitted to the jury. It was not error to refuse the first and fifteenth instructions asked by the defendant. What has been said herein sufficiently disposes of the error assigned in refusing the thirteenth instruction asked by the defendant. We are of opinion it was not error to refuse the fifteenth instruction. It entirely ignored the fact of circumstances surrounding at the time affecting the duty of employer and employé alike to exercise care and caution commensurate with attendant danger. The court instructed the jury, at the request of the defendant, fully, that plaintiff could not recover unless the deceased was in the exercise of ordinary care at the time of his death, etc., as well as other questions in the case.

The plaintiff asked, and the court gave, but one instruction for the plaintiff, which is copied in the statement herein, and it is urged this instruction has been held erroneous by this court in *Railway Co. v. Dimick*, 96 Ill. 42, and in *Mill Co. v. Morrissey*, 111 Ill. 646. In the *Dimick* Case the first and eighth instructions given for the plaintiff are copied

in the opinion, and held to be erroneous. The first was that the statute required a bell of at least 30 pounds weight, or steam whistle, to be placed on each locomotive, and to be rung or whistled at the distance of at least 80 rods from the place where the railroad crosses any public street or highway, and to be kept ringing or whistling until such street is reached, etc.; and the eighth instruction is similar to that given in this case. In the discussion of those two instructions they are discussed as one instruction. The opinion holds: "An instruction almost identical with the above was condemned in *Railroad Co. v. Harwood*, 80 Ill. 88. It may be said that the defendant's instructions gave the law on this subject accurately to the jury, but that is not enough. Where a case is close in its facts, the instructions should all state the law accurately. The jury, not being judges of law, are as likely to follow a bad instruction as a good one." After discussing the ninth instruction, it is then further said: "Without entering upon any discussion of the evidence, we are of opinion that the giving of these three instructions was error." On referring to the *Harwood* Case, cited in the *Dimick* Case, the instruction is found to embrace substantially in one instruction all that is included in the first and eighth instruction in the *Dimick* Case. The instruction in the *Harwood* Case was held to be error, because it asserted a right of recovery under the circumstances named in it, without containing the requirement of due care on the part of the deceased. It is apparent of a consideration of the *Dimick* Case that the writer of the opinion in that case used the first and eighth instructions together for determining a settled question as being the same when so taken as one instruction, as the instruction in the *Harwood* Case, and says of it, "an instruction almost identical with the above was condemned," etc. No discussion of the eighth instruction separately is had, and the subsequent reference to the three instructions as made in the *Dimick* Case was merely an inadvertent use of the word "three" instead of "two." In *Mill Co. v. Morrissey*, supra, the instruction purported to be complete in its statement of what would authorize a recovery, and omitted all requirement of due care and caution on the part of the deceased. It further allowed the jury to give such damages as they should deem a fair and just compensation, regardless of proof. An instruction almost identical with that given in this case was challenged by the appellant in *Railroad Co. v. Payne*, 59 Ill. 534, and it was held: "The point of this instruction is the measure of damages, and in this respect is entirely correct. But appellant's counsel insists that it is wrong because it withdraws from the jury all consideration of the conduct of the deceased. We do not think the instruction obnoxious to criticism as claimed. It is not an unusual, nor is it an objectionable, practice,

where the plaintiff's counsel desire an instruction as to the rule of damages, to say to the jury that, if they find from the evidence that the defendant is guilty as charged in the declaration, then the plaintiff is entitled to recover, and to define the measure of damages. Such a mode obviates the necessity of stating, and perhaps reiterating, hypothetically each element of the cause of action before coming to the real point of the instruction. The declaration here alleges that the death * * * was caused by the wrongful acts, neglect, and default of defendant's servants, while he was exercising due care." That case stated that the point in the instruction was as to the measure of damage, and was not referred to in the Dimick Case, nor intended to be qualified by it. So far as that instruction was alluded to in the Dimick Case, it was, as we have said, to make the first and eighth as one instruction passed on in the Harwood Case. Instructions like the one now under discussion were before this court in *Railway Co. v. Dowd*, 115 Ill. 659, 4 N. E. 368; *Pennsylvania Co. v. Marshall*, 119 Ill. 899, 10 N. E. 220; *Railway Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. 398,—in each of which it was held solely to relate to the measure of damage. On consideration of all these cases together, it cannot be said there is any conflict in the opinions of this court on the instruction given in this case for the plaintiff, and it relates solely to the measure of damage, and need not incorporate the requirement that plaintiff was in the exercise of due care and caution. It was not error to give it.

Plaintiff offered in evidence an ordinance of the city of Chicago which required a bell on the engine to be rung continuously while running within the limits of the city, certain places excepted, which was allowed in evidence over the objection of the defendant. It was objected to—First, because the city had no power to enact such ordinance; second, if it had the power, the ordinance had no application to the relation of employer and employé on the right of way of the company; and, third, it was repealed by a subsequent ordinance. By the twenty-seventh subdivision of section 1, art. 5, of the city and village act the city council is authorized "to require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against the injury to persons and property in the use of such railroad." The authority to provide protection to persons in the use of such railroad would authorize the enactment of ordinances which would reasonably tend to protect persons from injury by the use made of the road by the company. An ordinance requiring the ringing of a bell on an engine running within the limits of a city would not be an unreasonable requirement, and a compliance with that requirement would tend to give notice of the approach of an engine on the track. Notice of its approach would tend to the protection of persons on or crossing such track. The first ground of the ob-

jection was not well taken. The city having the right to adopt the ordinance, whoever would be benefited by a compliance therewith on the part of the company would be entitled to the protection that obedience to the law would furnish, whether an employé or not. The second ground of objection was not well taken. The third ground of objection was a question of fact, and presented no question on which the court could act without the introduction of an ordinance showing the repeal. The ordinance was admissible in evidence as a fact in the case when offered by the plaintiff. The attempt to introduce another ordinance to show the repeal when the first was offered in evidence was not a proper practice. After the plaintiff closed his case, if the ordinance had been repealed by a later ordinance, then such later ordinance could be introduced in evidence, and the question of the effect and construction of the two ordinances, and whether the former was repealed by the latter, could have been determined by the court in an instruction to the jury. We find no error in the record, and the judgment is affirmed. Affirmed.

(157 Ill. 206)

**CLEMMER et al. v. DROVERS' NAT
BANK et al.¹**

(Supreme Court of Illinois. June 5, 1895.)
BANKS — FACTORS AND BROKERS — EQUITY JURISDICTION — APPEAL.

1. Where a bank knows that money deposited with it to the general credit of a depositor is held in trust by such depositor, the bank has no right to apply such deposit to the payment of a note due to it from the depositor. 57 Ill. App. 107, reversed.

2. Where defendant, in its answer, does not challenge the jurisdiction of the court, and in fact asks and obtains equitable relief in the suit, it cannot on appeal challenge the jurisdiction on the ground that there was an adequate remedy at law.

Appeal from appellate court, First district.

Bill by G. G. Clemmer against the Drovers' National Bank, Hanna, Son & Co., John Jones, John Bower, and J. A. Felthous, J. C. Felthous, and A. A. Moore, copartners trading as Felthous Bros. & Co. There were also cross bills by John Jones, John Bower, J. A. Felthous, J. C. Felthous, and A. A. Moore. There was a decree in favor of the complainant and the cross complainants, which decree was reversed by the appellate court. 57 Ill. App. 107. Complainant and cross complainants appeal. Reversed.

Appellant Clemmer filed his bill in equity in the circuit court of Cook county against appellee and Hanna, Son & Co., making the other appellants defendants also, wherein he alleged: That June 8, 1890, he owned a car load of cattle and a car load of hogs, which on that day he shipped from Iowa to Hanna, Son & Co., commission merchants at the Union Stock

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

Yards, Chicago, to be sold for him on commission; the proceeds, after deducting commissions and expenses, to be placed to the credit of the Citizens' Bank of Hampton, Iowa, in the Merchants' National Bank of Chicago. That on June 9, 1890, the stock was received by said commission firm, and sold by them. The proceeds, after deducting expenses and commissions, amounted to \$1,311.87, and were the property of Clemmer, and were held in trust for him by said commission firm. That it was the duty of said commission firm to keep the money separate from all other moneys, and to remit the same to Clemmer, or place it in the Merchants' National Bank to the credit of the Citizens' Bank of Hampton, Iowa. That without appellant's knowledge, and without any authority from him, but not with fraudulent intent, said commission firm placed all of said moneys to its own account and credit in the Drovers' National Bank, which bank had been the bank through which the said commission firm transacted all its banking business; and that said commission firm placed said money, together with all other trust moneys which it had of the proceeds of sales of stock of other shippers, in said Drovers' National Bank at or about the close of business on the 9th day of June, 1890; and that immediately thereafter, on the 10th day of June, the said bank, wrongfully and without authority, knowledge, or consent of complainant, Clemmer, or Hanna, Son & Co., diverted all of said money and appropriated the same, claiming to have applied said money as a partial payment on a note which said bank claimed to hold against said Hanna, Son & Co. and other parties to Clemmer unknown. That said bank has ever since and now wrongfully retains said money, and claims to hold it as a payment on the said note. That at the time said bank received the money from said commission firm, and appropriated it, it had notice that said money was not the money of Hanna, Son & Co., but that the same was the proceeds of stock sold by them as commission merchants, and held by said commission firm in trust only for the owners and shippers of said stock, and knew that it had no right to apply the same on any indebtedness of the said commission firm, and had notice that the money was the property of Clemmer, and was held in trust only for him by said firm. That the said firm of Hanna, Son & Co., and each member, were at the time of the deposit, and for many months prior thereto, and are now, wholly insolvent, and nothing can be recovered from said firm by any legal proceeding. That such insolvency was unknown to complainant until after the said deposit and appropriation of such money. That the bank knew of such insolvency at the time it appropriated said money, and had known the same for many months prior thereto. That said bank advised and procured said commission firm to continue in the commission business, and to hold itself out to the public as solvent, and withheld from the public all knowledge of their indebtedness and

insolvency, and furnished said commission firm all of its banking facilities, paid its checks and sight drafts, and induced public belief that said firm was solvent, etc. That said bank and firm established ostensibly for convenience a custom in their dealings relative to proceeds of sale whereby said commission firm deposited in said bank all of the proceeds of commission sales by them made; and said bank first placed all of said proceeds, notwithstanding their being trust funds, to the account of said firm, and then afterwards distributed the same to the credit of the parties to whom they in fact belonged. That said course of dealing was followed for a long time next prior to said deposit. That said bank at all times induced said firm to think that it would not in any manner interfere with said trust funds, nor attempt to divert the same to the payment of its private debt; and that all of said acts of said bank were done by it fraudulently intending to come into possession of trust funds, and fraudulently intending to divert and appropriate the same to the payment of its debt, and in pursuance of such purpose and intent to fraudulently divert and appropriate complainant's money as aforesaid. That complainant had no knowledge of the course of dealing between said parties, their business relations, said indebtedness, nor of the intention or purpose of said bank; and that, if he had known of such insolvency, indebtedness, or course of dealing, he would not have consigned his stock to said commission firm, nor permitted said firm to come into possession of the proceeds thereof. That, immediately after said diversion and appropriation of said money by said bank, complainant notified said bank of his ownership of said money, and demanded the same of said bank. That said commission firm also notified said bank forthwith of said ownership of complainant of said money, and demanded that the same be delivered to complainant; but said bank refused and still refuses to deliver said money, or any part thereof, to complainant. That on or about the time of the deposit, as aforesaid, said firm also deposited in said bank, as complainant is informed, certain moneys of one John Bower in the sum of \$1,104.31, and of the moneys of John Jones \$1,094.11, and of the moneys of J. A. Felthous, J. C. Felthous, and A. A. Moore, copartners, etc., \$1,348.75, all of whom are made defendants to this bill. That all of said moneys were then and there wrongfully and without authority placed to the credit of said commission firm in their account, and were then and there, together with complainant's moneys, commingled without the knowledge or consent of any of the owners thereof. That, of the moneys of complainant, John Jones, John Bower, and Felthous Bros. & Co., there remained in the hands of said bank on the morning of June 10, 1890, the sum of \$3,475, and no part of said money belonged to said commission firm, nor any member thereof, but all belonged to said complainant, said Jones, Bower, and Felthous Bros. & Co., and to no other person or persons what-

ever; and said commission firm and said bank held all of said money in trust for complainant and said Jones, Bower, and Felthous Bros. & Co. That said bank wrongfully and without authority diverted and appropriated to its own use, and applied on the indebtedness of said commission firm, \$3,475, and has ever since claimed to own said money, and refused to pay any part thereof to the owners thereof. That, to avoid litigation, dispute, or question between themselves as to their respective rights to the trust fund and to the proportionate amount due them, this complainant, Bower, Jones, and Felthous Bros. & Co. have mutually agreed to abide by a pro rata distribution of said fund, and that upon such basis there is due complainant from said bank \$938.25, with interest. Prays that the defendant bank be decreed and adjudged to be a trustee holding said moneys in trust for the benefit of complainant, and be decreed to pay and deliver said moneys to complainant, with interest from June 10, 1890; and that complainants have judgment against said bank for the said sum of \$938.25, together with said interest; and that complainant have judgment against the said commission firm for the balance due him over and above the amount adjudged to be in the hands of the said bank, such balance being the sum of \$374; and that the distribution of said trust fund, as agreed upon between complainant and said defendants, Bower, Jones, and Felthous Bros. & Co., be adjudged and decreed and made binding on all parties,—together with a prayer for general relief.

The other appellants answered, admitting Clemmer's bill, and filed cross bills, claiming their pro rata share of the fund. Appellee demurred to the bill, on the ground that it was exhibited against appellee and other defendants for distinct matters and causes in which appellee had no interest, and for multifariousness. The demurrer was overruled, and appellee answered to the merits. After the issues were made, appellee, by leave of court, filed an amendment to its answer, which it asked to have treated and considered as a cross bill, asking for affirmative relief, in this: That Hess Bros. claimed to have a demand against appellee on account of said fund, and as the holders of a certain check drawn in their favor by Hanna, Son & Co., on appellee, for \$3,300; that Hess Bros. had since the filing of the bill brought a suit at law against appellee, which was then pending,—prayed that they be made parties, and required to litigate their said demand in this cause, and that they be perpetually enjoined from prosecuting said suit at law, or any suit against appellee for said demand. The hearing of the cause was postponed, and Hess Bros. were made parties as prayed, and, on being summoned, answered, and filed their cross bill, claiming payment of said checks out of said fund. Appellee demurred to said cross bill, which demurrer the court sustained. The cause was heard, and final decree rendered, finding that the material allegations in the bill

and cross bills of appellants were true, and that appellants were entitled to the fund as alleged; that Hess Bros. had no claim against appellee on account of said check; and they were perpetually enjoined from prosecuting said suit or any suit on said alleged claim against appellee. On appeal by the bank, the appellate court reversed the decree, and adjudged that the bill be dismissed; and appellants now prosecute this appeal to reverse the judgment of the appellate court.

L. G. Kirkland and W. D. Evans, for appellants. Geo. P. Merrick, for appellee.

CARTER, J. (after stating the facts). Hanna, Son & Co. were factors, engaged in selling live stock on commission at Chicago, and transacted their banking business with appellee. Appellants were shippers of stock, having no business relations with each other, but each shipping separately on his own account from Iowa. On June 9, 1890, Hanna, Son & Co. received and sold for the several appellants certain lots of live stock at the Union Stock Yards. For each lot sold, the factors received from the purchasers a ticket which stated the kind of stock, the weight, price, the total amount to be paid, and that it was for deposit in appellee's bank, but did not state who the consignor was. According to the custom of business between appellee and Hanna, Son & Co., the clerk of the former called for and obtained from the latter their tickets, collected the money, and deposited it to the credit of Hanna, Son & Co. When sales were made, the proceeds, except a certain amount allowed for commissions and expenses, belonged to the owners of the stocks; and it was the duty of Hanna, Son & Co. to pay over the same to them, or on their order, or, as to some of the appellants, to deposit in other designated banks, as directed. The aggregate amount appellants should have received was \$4,859. A few hundred dollars of this was for one lot sold on June 7th. Appellee knew this money was the proceeds of sales of stock consigned for sale on commission, but did not know who the consignors were. Hanna, Son & Co. had been transacting business in this way with appellee for several years, but appellants had no knowledge of their business relations. The total deposits of Hanna, Son & Co. made with appellee on June 9th amounted to \$12,379.21, but they checked out on the same day all but \$3,475; and, on the morning of June 10th, appellee applied this balance on an overdue note of Hanna, Son & Co.; and it is this balance which the circuit court decreed that appellee should pay to appellants pro rata according to their respective demands, over which this controversy arises. John S. and William P. Hanna constituted the firm, and as such firm, or as members of another firm, had been in the same business for many years. As members of another firm, they had become liable as

sureties of one Clark to appellee for upward of \$12,000, and later, with one Sinclair, gave their note to appellee for \$7,135.86 of this indebtedness, which note, by successive renewals, appellee carried several years, and until it applied the above-mentioned balance of \$3,474.31, standing to the credit of Hanna, Son & Co., towards its payment, on June 10, 1890. We think the evidence fairly shows that Hanna, Son & Co. had been for several years, and were at the time of the application of said balance by the bank, unable financially to pay this indebtedness, and that appellee well knew their financial condition. They failed in business June 10, 1890, and have since remained wholly insolvent. Upon receiving notice from the bank, on June 10th, that it had applied this balance on the note, Hanna, Son & Co. protested against any such application, and stated to appellee that the money did not belong to them, but belonged to their consignors. They also notified appellants, who soon thereafter severally came and demanded from the bank payment to them, as the real owners of the fund.

Appellee contends that the relation of trustee and cestui que trust did not exist between the consignees and the consignors, but the relation of debtor and creditor only, and that, when the moneys in question were deposited, the bank became simply a debtor therefor to the depositors, and had the right, in accordance with a previous agreement attached to the note in question, to apply such deposits towards the payment of the note. The theory of appellee on appeal, and the one on which the appellate court seems to have reversed the decree, was and is that, whether the proceeds of these sales were or were not a trust fund, still, when they were deposited in the bank with other moneys of Hanna, Son & Co., and mixed with a mass of other money in the bank, they lost their identity, and could not be followed as a trust fund; that "the right to follow a trust fund ceases when the means of ascertainment and identification fail, as where the subject-matter is turned into money, and mixed and compounded in a general mass of property of the same description." And the contention of appellee now is that, whatever remedy appellants may have, it is not by bill in equity to fasten a trust upon this balance in appellee's bank, and compel its distribution to appellants according to their respective interests; and it is insisted that this contention and the judgment of the appellate court are in strict conformity to the previous decisions of this court, as announced in the following cases: *School Trustees v. Kirwin*, 25 Ill. 73; *Bank v. Goetz*, 138 Ill. 127, 27 N. E. 907; *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904; *Association v. Jacobs*, 141 Ill. 261, 31 N. E. 414; *Svanoe v. Jurgens*, 144 Ill. 507, 33 N. E. 953; *Doyle v. Murphy*, 22 Ill. 502. On the other hand, it is insisted by appellants that the precise question here involved was not presented by the cases cited, nor

by any case heretofore decided by this court adversely to appellants' contentions. It is said that in *School Trustees v. Kirwin*, supra, much relied on by appellee, it did not appear that there was any balance or fund in the bank standing to the credit of French, the depositor, upon which a trust could have been impressed in favor of the trustees of schools; and that, in all the cases cited, the rights of creditors were involved, and, as presented, the question was not, as in the case at bar, whether there was a general liability of the bank or receiver of the fund or property to the complainant, but whether the complainant was entitled to a preference over other creditors. Appellants cite, among other cases, *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, where a bill based upon facts very similar to those here involved, was sustained by the supreme court of the United States.

We are, however, clearly of the opinion that the decree of the circuit court should be sustained upon other grounds, and that it does not become necessary to determine whether or not appellants have pursued precisely the proper remedy to recover the moneys justly belonging to them. It is well settled that a factor has no right to pledge, deposit, or apply the property of his principal to secure or pay his own debt. *Bank v. Schween*, 127 Ill. 573, 20 N. E. 681; 3 Am. & Eng. Enc. Law. 345. Appellee knew that the moneys collected and deposited by it on the tickets received from Hanna, Son & Co. were the proceeds of the sales of stock consigned to them for sale on commission, and was bound to know it had no right to apply these moneys in payment of its own demands against the commission merchants. As to the contention that it cannot be known that this balance applied by appellee on the note was the moneys of appellants, and that all of appellants' moneys may have been drawn out by Hanna, Son & Co., and embraced in the \$9,000 checked out on the 9th of June, it is sufficient to say that it must be presumed that they checked out their own moneys to others, rather than the moneys of appellants. *Knatchbull v. Hallett* (In re Hallett's Estate) 13 Ch. Div. 686. We think it clear from the evidence that this balance really belonged to appellants, and that they had the right to recover it in some appropriate action cannot well be doubted; and if it should be conceded that, in following previous decisions of this court, technically appellants' bills could not be maintained on such a state of facts, but that their remedy lay in some other form of action, yet appellee is in no position to take advantage of the error. When its demurrer to the bill was overruled, appellee not only answered to the merits, claiming the right to apply the fund in question towards the payment of its own demands against Hanna, Son & Co., and denying that appellants had any right to or interest in the fund, but the answer contained no allegation that there was an adequate remedy at law, nor any other allegation distinctly challenging the

equitable jurisdiction of the court. More than this, appellee itself invoked the equitable jurisdiction of the court, and upon its own motion, by an amendment filed to its answer, which it asked to be treated as a cross bill, compelled the complainant to amend his bill and make Hess Bros. parties thereto, and to continue the case, that these new parties might be summoned in. Hess Bros. had, since the filing of the bill, brought a suit at law against appellee, based upon a check drawn upon the bank by Hanna, Son & Co. for \$3,300, whereby they claimed that much of the fund in controversy. Upon this amended answer, treated as a cross bill, appellee obtained, in the decree on final hearing (whether erroneously or not it is not necessary in this case to consider), affirmative relief, by having it adjudged that Hess Bros. had no claim against it, and that they be perpetually enjoined from prosecuting said suit, or any other, against appellee on account of said matter. On such a record it would be highly inequitable to allow appellee to deny on appeal that equitable jurisdiction which it had itself invoked in its own behalf, and by which it had obtained relief. It has been said by courts of high authority that there is no adequate remedy at law in such a case (*National Bank v. Insurance Co.*, 104 U. S. 54; *Bank v. Gillespie*, 167 U. S. 411, 11 Sup. Ct. 118); but whether there is or not, if appellee desired to avail itself of such an objection on the hearing, in a case not wholly foreign to the jurisdiction of a court of equity, it should have set it up in its answer, and should not itself have invoked the same equitable jurisdiction in its own behalf which it now seeks to have denied to appellants. If any valid objection might have been raised, by demurrer or answer, to the granting of the equitable relief on the bills and cross bills of appellants, as prayed, it had been waived by appellee, and cannot be availed of on appeal. *Stout v. Cook*, 41 Ill. 447; *Magee v. Magee*, 51 Ill. 500; *Kimball v. Walker*, 30 Ill. 482; *Ohling v. Luitjens*, 32 Ill. 23; *Colton v. Hanchett*, 13 Ill. 616; *Oomstock v. Henneberry*, 66 Ill. 212; *Gridley v. Watson*, 53 Ill. 186; *Dodge v. Wright*, 48 Ill. 382; *Hickey v. Foristal*, 49 Ill. 255; *Knox Co. v. Davis*, 63 Ill. 406; *Gage v. Griffin*, 103 Ill. 41; *Richards v. Railway Co.*, 124 Ill. 516, 16 N. E. 909; *Ryan v. Duncan*, 88 Ill. 144; *Gordon v. Reynolds*, 114 Ill. 178, 28 N. E. 455; *Brill v. Stiles*, 35 Ill. 305; *Snowdon v. Tyler*, 21 Neb. 199, 31 N. W. 661; *Town of Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Niles v. Williams*, 24 Conn. 279; *Edgett v. Douglass* (Pa. Sup.) 22 Atl. 868; 1 Beach, Mod. Eq. Jur. § 13.

Substantial justice is done by the decree of the circuit court, and we see no sufficient reason, on the record as it stands, for reversing it, and remitting the parties to some other remedy, by which the same ends might possibly be reached, but no more just results attained. The judgment of the appellate court is reversed, and the decree of the circuit court is affirmed. Decree affirmed.

(157 Ill. 244)

HERR et al. v. PAYSON et al.¹(Supreme Court of Illinois. June 15, 1895.)²

ATTORNEY AND CLIENT—FORECLOSURE—LACHES.

Where an attorney who has acted for a mortgagor in defending a suit for separate maintenance, and who has also vainly attempted to obtain a renewal of the mortgage, buys the land at mortgagee's sale after notifying the mortgagor's agent that he intends to do so, such purchase is not voidable, especially where it is not attacked for more than 15 years.

Baker, J., dissenting.

Error to circuit court, Livingston county; Edward P. Vail, Judge.

Bill by Sallie E. Herr and Benjamin C. Herr against Lewis E. Payson and Andrew J. McGinniss. Defendants obtained a decree. Complainants bring error. Affirmed.

E. M. Prince and Williams & Capen, for plaintiffs in error. N. J. Pillsbury and C. C. Strawn, for defendants in error.

CRAIG, J. This was a bill in equity, brought by Sallie E. Herr and Benjamin C. Herr, widow and only child of Benjamin Herr, Jr., deceased, against Lewis E. Payson and Andrew J. McGinniss, to set aside a sale of the N. ½ of section 36, township 27 N., range 4 E. of third P. M., in Livingston county. The sale was made under a deed of trust executed December 7, 1872, by B. Herr, Jr., and wife, Sallie E. Herr, to secure a loan of \$6,000, obtained of Thomas J. Bunn, due in five years, with interest at 10 per cent., payable semi-annually. In default of payment the property was sold at public vendue, under a power of sale contained in the deed of trust, on March 29, 1878, to Lewis E. Payson, for \$6,308, the amount due in deed of trust. Upon making the purchase, Payson entered into the possession of the land, and continued in the possession, paying all taxes, until March 28, 1890, when he sold to Andrew J. McGinniss, who has occupied the land and paid all taxes since that time. B. Herr, Jr., died intestate July 22, 1893, and this bill was brought by complainants, his former wife and only son. It is, in substance, charged in the bill that Payson, who was an attorney at law, residing in Livingston county, was employed to take charge of the affairs of Benjamin Herr, Jr., in Illinois; that he agreed to procure a loan, and protect the land against the Bunn mortgage; that he made no effort to procure a loan to pay off the debt, but, with the intent to cheat and defraud the said Benjamin Herr, Jr., out of the land, induced Bunn to sell the lands in the mortgage in order that he might procure the title himself; that the lands were sold in the Bunn mortgage, and purchased by Payson for much less than their value, while he was acting as attorney for Herr, Jr.; that the sale was fraud-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 25, 1895.

ulent and void as against Herr and the complainants, who are his heirs at law.

It appears that Benjamin Herr, Jr., purchased the land in controversy, improved it, and occupied it as a residence. In 1872 he had a severe attack of sickness. After he had somewhat recovered, his wife took him to Hot Springs, Ark. While at Hot Springs, he gave his father-in-law, W. G. Miller, a power of attorney to transact his business. Miller continued to act as attorney for Herr until the fall of 1875, when Benjamin Herr, Sr., the father of Benjamin Herr, Jr., came out from Pennsylvania; and being dissatisfied with the manner in which Miller had transacted the business, and being interested on account of moneys he had advanced his son, and the son also being dissatisfied, Miller's power of attorney was revoked, and a power of attorney was given to Herr, Sr., to transact and manage the business of the son. The father returned to Pennsylvania, taking his son with him, where the son remained until his death, in 1893. In May, 1877, the wife of Benjamin Herr, Jr., brought an action in this state against him for support, and by letter of August 6, 1877, Payson was employed by Benjamin Herr, Jr., to defend the action. In the fall of that year Benjamin Herr, Sr., came to Illinois to look after business of his own as well as the business of his son. The Bunn loan became due that fall, and up to the time Herr, Sr., came to this state the parties had failed to make an arrangement extending the time of payment. Payson was then a loan agent at Pontiac, representing Baldwin & Co., of New York. Herr, Sr., applied to Payson for a loan to pay off the Bunn mortgage, and Bunn agreed to aid Herr in procuring the money. Payson made an effort to procure the money from Baldwin, but he required principal and interest paid in gold, and Herr would not consent to these terms, so that no money was procured of Baldwin. Culver, of Pontiac, a loan agent, was applied to. He succeeded in making an arrangement for the money in January, 1878, of one Robinson, of Peoria; but Miller, the former attorney of Herr, Jr., informed Culver and Robinson that Mrs. Herr refused to sign a mortgage, and, upon learning this fact, Robinson refused to make the loan. Payson made an effort with Bunn to get the loan renewed, but in this he failed. Finally, on the 6th day of March, 1878, Payson secured a power of attorney from Benjamin Herr, Jr., given to C. Rohrer, of Canton, Ill., authorizing him to act as the attorney. This was placed in Rohrer's hands, and he made a number of applications for money, but failed. He also saw Bunn, and made an effort to procure a renewal, but failed in that. In February, 1878, the Herrs were informed that the efforts to obtain a loan had failed, and Payson made the suggestion to Herr, Sr., that he might purchase the land. In reply to this communication Herr, Sr., wrote Payson: "I have not got the means to buy as you

propose in your last, so if you cannot make the loan from another party I will have to let it go." "How long will they advertise before selling?" In reply to this Payson wrote, March 4, 1878, as follows: "I regret exceedingly that the loan fell through, but I see no way of avoiding the difficulty. The advertisement runs thirty days. I sent you a paper this week. Mr. Robinson, of Peoria, the man from whom we were to get the loan, was here, and, learning that Mrs. Herr declined to execute new papers, & of the litigation, went home, & so that ended it with him." Three days before the sale Payson telegraphed to Rohrer: "I will bid the amount of mortgage for myself. If it goes above, you will get excess. Answer, if satisfactory. Letter by mail. L. E. Payson." Rohrer replied on March 28th as follows: "In reply to yours I would say that I suppose you have just as good a right to bid as any other person. I hope you will bid a liberal price for it. I don't think the mortgage is half price for the land. We are at the mercy of you moneyed men. I would like to save a little of his property if I could. If the land should bring a fair price, I could save the balance." In addition to the trustee, Bunn, Miller, Culver, Rohrer, Payson, and a few others attended the sale. Payson was the highest bidder, and the land was struck off to him, as heretofore stated. A man named Haynes intended to attend the sale, but missed a train, and failed to reach Pontiac. He, however, telegraphed a bid of \$8,000 for the land, but the telegram was not received until after the sale. Rohrer, having learned of the offer of Haynes, called on Payson, and offered him \$100 for his bid, but the offer was declined.

Under the facts as they appear in the record it is insisted by counsel for appellants that Payson occupied such relations to the property in question and its owners and those having the management of it as prohibited him from acquiring any rights or interest in it antagonistic to the interest of Benjamin Herr, Jr. Consequently any interest he did acquire in the property by the sale he held in trust for Benjamin Herr. As has been seen, Payson was employed by Benjamin Herr, Jr., to defend an action brought by his wife for separate maintenance, but this retainer created no such relation of trust and confidence as would preclude Payson from purchasing property owned by Herr at public sale, which might be exposed to sale under a judgment or decree or under a power of sale in a mortgage with which he had no connection as attorney for Herr. But it is said Payson was employed as an attorney by Herr to procure a loan to pay off the Bunn mortgage, and that this employment precluded him from becoming a purchaser at the sale under the Bunn mortgage. The law does not prohibit an attorney, an agent, or a trustee from dealing with his client, principal, cestui que trust, or buying his property. *Hess v. Voss*, 52 Ill. 472; *Morrison v. Smith*,

130 Ill. 304, 23 N. E. 241; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 418; *Bank v. Keeler*, 109 Ill. 385; *Uhlich v. Muhlke*, 61 Ill. 498. Such contracts, if open, fair, and honest, when deliberately made, are as valid as contracts made between other parties. In *Hess v. Voess*, supra, where an attorney who obtained a decree of sale in a proceeding for partition became the purchaser of the premises at the master's sale, it was held there is no rule of law which prohibits an attorney in a cause from becoming a purchaser at the master's sale under a decree of land belonging to his client, where the attorney has acted with fairness and honesty. *Uhlich v. Muhlke*, supra, is a case which involved the fiduciary relations of principal and agent, a large amount of property having been conveyed by a principal to a confidential agent. In speaking in regard to the validity of the deed the court, among other things, said: "We are called upon by complainant to say that the deed is null and void by reason of the relation then existing between the grantor and grantee, the latter being the confidential agent of the grantor. We have examined the rule of equity invoked by the complainant as applicable to such cases, and no commentator on the principles of equity, and no reported case, goes to the extent of saying that by force of such relation a deed is ipso facto void." "To render such transaction valid, it is only necessary to show that the other party had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise." *Kerr, Fraud & M. p. 104*, note 1. *Bank v. Keeler*, supra, is a case where the validity of a conveyance of property from a client to attorney arose, and in the discussion of the question it is said a sale of property from a client to an attorney will be sustained where the transaction is open, "honest, and fair, and no undue influence is used. Under the proposition submitted to the court to be held as law if the relation of attorney and client existed when the deed was made, no title passed, although the attorney concealed nothing, made no misrepresentations, and although the transaction may have been in every respect fair and honest. Such is not the law, and it would have been error if the court had given the proposition." In *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241, and in *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, the same principle is announced.

It nowhere appears that Payson concealed or attempted to conceal any fact in relation to what was done to procure a loan, or in regard to the acts or proceedings which transpired before the sale. Both Herr, Jr., and his father were fully advised of the steps taken by Payson, and also all that was done by Mr. Bunn in reference to a sale under his mort-

gage. The acts and doings of Payson were open and public. Moreover, Mr. Rohrer, who was especially empowered by Herr, Jr., some four or five weeks before the sale, to raise money, and pay off the Bunn mortgage, was expressly notified by Payson several days before the sale that he intended to bid on his own account on the lands at the sale; so that it was known by the most trusted agent and attorney of Mr. Herr, before the sale took place, as to the attitude of Payson in regard to the lands. Under the facts as they appear in the record, we are inclined to the opinion that the relations existing between Payson and Benjamin Herr, Jr., did not deprive Payson of the right to purchase the lands at the sale.

But, if we are not correct in this, and the facts may be regarded as sufficient to create a trust, it was only a constructive trust, or a trust which arose by operation of law. The statute of limitations or laches may be relied upon to defeat rights claimed under a constructive trust. *Quayle v. Guild*, 91 Ill. 384. Here, upon making the purchase, Payson went into the immediate possession of the lands as owner, and he and his grantee have remained in possession, making valuable improvements, ever since. Benjamin Herr, Jr., brought no action to set aside the sale during his life, although he lived for over 15 years after the sale, and was fully informed in regard to all the facts relating to the sale. Conceding that the sale was voidable, and might have been set aside had a bill been brought at once for that purpose, the long delay, the laches of Benjamin Herr, Jr., and his legal representatives, is a complete bar to the relief claimed in the bill. *Winchell v. Edwards*, 57 Ill. 41; *Noyes v. True*, 23 Ill. 503; *Prather v. Hill*, 36 Ill. 405; *Fergus v. Woodworth*, 44 Ill. 379; *McHany v. Schenk*, 88 Ill. 357; *Jackson v. Spink*, 59 Ill. 404; *Rigney v. Small*, 60 Ill. 416; *Castner v. Walrod*, 83 Ill. 176; *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611; *Munn v. Burges*, 70 Ill. 604.

But it is claimed that Benjamin Herr, Jr., was of unsound mind, and on that account he is not precluded by laches. Where sections 6 and 7 of chapter 83, Rev. St. 1893, entitled "Limitations," are relied upon to defeat an action of ejectment under section 8, the bar provided for cannot be invoked or made available where the owner of the adverse title is a minor or an insane person. The rule imposed by statute in an action of ejectment may with propriety be adopted where a bill has been filed to impeach a sale of lands, and laches is set up as a defense to the bill. If, therefore, Benjamin Herr, Jr., was insane at the time the sale was made, and remained insane until his death, his laches could not be relied upon to defeat the action. It appeared from the evidence that Benjamin Herr, Jr., was affected with syphilis; that the bones of his skull became softened, and his whole system became impaired, and in 1873 he went to Hot Springs for treatment. On

the advice of a physician; he placed his business in the hands of others, in order that his mind might be relieved from all care, and thus aid in the restoration of his health. From 1873 to 1876, Miller, his father-in-law, attended to his business under a power of attorney. In January of that year Herr became dissatisfied with the management of his business by Miller, and his father came out from Pennsylvania, and under a power of attorney he assumed the management of the business, and took the son back to Pennsylvania, where he remained until he died, in 1893. Benjamin Herr, Sr., acted until his death, in 1879, when Henry Rohrer and C. S. Herr, a brother, acted for a while. It thus appears that from the time Herr, Jr., became sick up to the time of his death what business he had was transacted by an attorney duly authorized by him. The complainants took the depositions of a large number of witnesses residing in the state and in the state of Pennsylvania, who testified, in their opinion, Herr was not competent to transact ordinary business. These witnesses had done no business with him, nor had they seen him attempt to transact business; and whether he was actually capable of attending to any business they, of course, could not determine. All the agents of Benjamin Herr, Jr., from 1873 to the time of his death acted under a regular power of attorney executed by him. His ability to execute a power of attorney was never called in question, nor was his capacity to act intelligently in a business matter disputed or challenged. In 1876, in a suit commenced by Mrs. Herr for support, a want of capacity was set up by her, but when the proof came in she failed. A decree was rendered on a personal answer and tried; no conservator or guardian having been appointed. At a later date, in a bill for divorce by the wife, the mental condition of Herr was regarded as having been established in the former suit, and on a personal answer and evidence taken a decree was rendered. In that bill the complainant, who is also one of the complainants in this case, in substance alleged that from depositions taken in the separate maintenance case by defendant she is informed that her husband has much improved in health in Pennsylvania, and become sound in mind and body, and is capable of taking care of his property; that from said evidence she had learned that her husband had willfully absented himself, and therefore she charges desertion. Later Sallie E. Herr filed a bill in the circuit court of Livingston county to set aside two mortgages made by Benjamin Herr, Jr., to Benjamin Herr, Sr., on the ground of mental incapacity of Benjamin Herr, Jr., to make them, and want of consideration. In this case full proofs were taken. Among the proofs is B. Herr, Jr.'s, deposition, taken in 1883,—a long depo-

sition, taken especially to show his condition then as well as in 1875, when the first mortgage of \$300 to Herr, Sr., was given, and in 1877, when the second one for \$1,394.75 was given by Herr, Jr. This deposition fails to show any trace of insanity in Herr, but, on the other hand, so far as can be judged from the deposition, Herr at the time it was taken seemed to be in full possession of his mental powers. The deposition of Henry B. Gish, a brother-in-law, was taken in the same case, and he testified that he made the settlement between Benjamin Herr, Sr., and Benjamin Herr, Jr., for which the note and mortgage were given; that they were both satisfied. The witness testified that Benjamin Herr, Jr., in 1877, before, and since, was competent to transact business and execute contracts. Cyrus S. Herr, a brother, also testified that Benjamin Herr, Jr., in 1875 and 1876, was then, and still is, competent to transact business. In addition to this evidence, it appears from the evidence that Benjamin Herr, Jr., was in the habit of keeping a copy of his letters, using Shipman's duplicating letter book, and a record of his correspondence. The defendants procured a copy of Herr's letters for each year from July 1877 to 1891, and these letters were read in evidence. A reference to these letters written to various parties in regard to Herr, Jr., and his family and affairs, not only show that he was not insane, but he seemed to have a clear conception of his situation and his business. Indeed, it is difficult to perceive how any person can read these various letters upon different subjects without being convinced that Benjamin Herr, Jr., fully realized the nature and condition of his business. He may have been regarded as an imbecile, and his mind may have been weakened by the disease which was gradually undermining his constitution, but he was not insane, or in that condition of mind where he could be excused or relieved from responsibility from his acts. Mere weakness of mind, impairing only the capacity to properly transact business, in the absence of fraud is not enough to avoid a deed or contract. *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249. Sickness, extreme distress, or debility of body will not affect the capacity to make contracts, or be bound by the acts, where sufficient intelligence remains to control the doing or the not doing of an act. *Pooler v. Cristman*, 145 Ill. 410, 34 N. E. 57. Some other questions have been referred to in the argument, which have been considered, but it will not be necessary to refer to them here. After a careful consideration of the whole record, we think the decree of the circuit court correct, and it will be affirmed.

BAKER, J. I do not concur, either in the opinion or in the conclusions reached.

(158 Ill. 224)

WARE et al. v. CITY OF JERSEYVILLE:
(Supreme Court of Illinois. Oct. 14, 1895.)

CONTINUANCE—MUNICIPAL CORPORATIONS—
SPECIAL TAX.

1. Under Rev. St. 1893, c. 110, § 47, which makes it sufficient ground for continuance that an attorney in the case is a member of the legislature, and is attending its sessions, it is reversible error to refuse to continue a petition for confirmation of a special tax when the objectors' attorney is absent for such cause.

2. An assessment of a special tax should not be confirmed where the report of the committee contains no estimate of "the cost of levying and collecting the special tax," as required by Rev. St. 1893, c. 24, art. 9, § 20.

3. Where the ordinance requires the special tax to be assessed according to the frontage, an assessment according to some other rule is fatally defective.

Appeal from Jersey county court; Allen M. Slaten, Judge.

Petition by the city of Jerseyville for confirmation of a special tax. George W. Ware and others filed objections. Judgment of confirmation was entered, and the objectors appeal. Reversed.

Thos. F. Ferns, for appellants.

BAKER, J. The city of Jerseyville, on June 20, 1894, passed an ordinance ordering the paving and grading of State and Pearl streets, in said city, the cost thereof to be paid for by special taxation of the real estate, lots, parts of lots, and tracts of land abutting upon the line of the said streets, respectively, within the limits to be improved, to be in proportion to the frontage thereof upon said streets respectively,—the cost and expense of making surveys, and the full amount of the cost of paving of street intersections and crossings, to be paid for by general taxation. The committee appointed under the ordinance to make an estimate, etc., made its report to the city council. The council approved the report. Thereafter, the city presented its petition to the county court of Jersey county, praying, etc. That court appointed commissioners to levy and assess the special taxes mentioned in the above ordinance, who, on December 24, 1894, filed their report and assessment roll. At the February term, 1895, of said court, the appellants herein, owners of certain of the lands sought to be taxed, made and filed their motion for a continuance of the cause, on the ground that their sole attorney was a member of and in actual attendance upon the general assembly, then in session at Springfield, which motion was supported by affidavit. The court denied the motion, and ordered all the defendants to file their objections to the confirmation of the assessment roll by the ensuing 11th day of February.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

On that day the appellants filed their objections, covering, among others, the points hereinafter noted, and renewed their motion for a continuance, supported by a new and similar affidavit. The motion was denied. The court thereupon entered an order overruling all of the said objections, except objection 10, and ordered a jury impaneled to try the issue raised by that objection. The jury rendered a verdict in favor of the city. The court, after overruling the appellants' motion for a new hearing, entered an order confirming the assessment roll. To all and singular of the said rulings of the court the appellants duly excepted. From that judgment of the county court an appeal to this court was perfected.

There are several reasons why the judgment of the court below should be reversed.

First. The continuance asked by appellants should have been allowed. The affidavit in support of the motion was sworn to by one of the appellants, and set forth that the attendance of their attorney in court was necessary to a fair and proper trial of the cause, and contained all the requirements of the statute. 8 Starr & C. St. p. 1811, c. 110, §§ 46, 47; Railway Co. v. Teters, 68 Ill. 144; Wicker v. Boynton, 83 Ill. 545; Stock Exchange v. McClaughry, 149 Ill. 372, 36 N. E. 88.

Second. The report of the committee appointed under the ordinance contained no estimate of "the cost of levying and collecting the special tax," which estimate the committee were required, by the ordinance and by the law, to make and report to the city council. 3 Starr & C. St. p. 493, c. 24, art. 9, § 20.

Third. The assessment roll returned by the commissioners shows that they did not apportion and assess the amount of special tax against each piece of land along the line of the improvement according to the proportion its frontage bears to the entire frontage thereon, as they were required by the ordinance to do, but followed some different rule. Measured according to the rule prescribed by the ordinance, we find that the taxes assessed against the different pieces of land are not in proportion to the frontage said pieces of land bear, respectively, to the entire frontage on the line of improvement, but that they are unequal,—some pieces of property being assessed at one rate, and others at other rates. The tax must be uniform, and where it is to be in proportion to frontage, the entire cost of the improvement for which the assessment is to be made should be ascertained, and each piece of land charged in the proportion its front bears to that of all the land abutting on the line of improvement. Davis v. City of Litchfield, 145 Ill. 313, 33 N. E. 888.

For the errors indicated herein, the judgment is reversed. Reversed.

(157 Ill. 235)

LEAVITT v. KENNICOTT.¹

(Supreme Court of Illinois. April 1, 1895.)
CONTRACT—EVIDENCE OF CUSTOM—MASTER AND SERVANT—THEATERS.

In an action on a written contract for employment as theater manager for an indefinite length of time, "at a weekly salary of \$40 per week," evidence that the word "weekly," according to theatrical custom, means the weeks of the theatrical season, and not of the entire year, is admissible, since it seems to explain, and not to vary, the terms of the contract.

Appeal from appellate court, First district. Assumpsit by Bruno Kennicott against Michael B. Leavitt. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 633. Defendant appeals. Reversed.

Case, Hogan & Case, for appellant. A. C. & F. W. Story, for appellee.

MAGRUDER, J. This is an action of assumpsit brought by Kennicott, the appellee, against Leavitt, the appellant, to recover damages for breach of a contract of employment. The trial below was before a jury, and resulted in verdict and judgment for plaintiff. This judgment has been affirmed by the appellate court (54 Ill. App. 633), and the present appeal is prosecuted from such judgment of affirmance.

The contract, which is set out in *hæc verba* in the third count of the declaration, is as follows:

"Dated May 25th, 1889. I hereby engage Bruno Kennicott as manager of the New Windsor Theater, of Chicago, providing I have such theater, at a weekly salary of forty dollars per week; and, in addition thereto, I agree to give him five per cent. of the net profits of said theater,—the same to be accounted and ascertained at the end of each and every season. It is, however, fully understood that the said Bruno Kennicott is in no way to be considered a partner with me in said theater, and that he is, in all things in and about said management, subject to my directions and approval; and he is to be fully competent to perform the duties of manager of said theater, and to render faithful services at all times for the artistic and financial success of said theater. M. B. Leavitt.

"I hereby agree to accept the above agreement, conditions, and arrangements. Bruno Kennicott."

While the plaintiff below was upon the stand as a witness, the court said, "This jury will be instructed to pay \$40 per week from the time the contract commenced until the close of the season of 1891." Subsequently the court instructed the jury that the plaintiff was entitled to recover "the amount of the salary from the date of the contract to the date of the discharge at \$40 per week,

less the payments," etc. It is claimed by appellant that the court erred in thus instructing the jury. The evidence of the plaintiff tended to show that the theater building had burned down in 1889, and that the defendant, Leavitt, holding a lease thereof, did not open the theater until September 2, 1889 (a little more than three months after May 25, 1889, the date of the contract); that this theater, and theaters generally, are closed in the summer about three months, between some time in June and some time in September, leaving about 40 weeks in each year for what is known as the "theatrical season"; that the plaintiff was discharged by the defendant on September 24, or 26, 1890, after the beginning of the second season; that the first season began on September 2, 1889, and ended in June, 1890; and that the plaintiff had received his salary regularly, at the rate of \$40 per week, from time to time, from September 2, 1889, up to June, 1890, but had been paid nothing for the time preceding September 2, 1889.

The contract recites that Kennicott is engaged "as manager of the New Windsor Theater, of Chicago, providing I have such theater," etc. This language, in connection with the fact that the lease had been executed theretofore, on May 15, 1889, might be capable of the construction that the employment would begin when the employer should have the theater, and that he did not then have it. We are inclined to think that the jury should not have been instructed as above indicated, but that it should have been left to them to determine, from all the evidence, whether or not the payment of the salary was to begin at once, at the date of the contract, or subsequently, when the theater was opened, on September 2, 1889. But, if we are wrong in this view, we think that it was error to refuse to allow the defendant to show, if he could, that the custom in the theatrical profession was not to pay for such services as those which are mentioned in the contract, except during the theatrical season. The plaintiff had been allowed to state, when upon the stand, that it was the custom to pay managers during the summer or vacation season. Defendant proved that there was a custom with reference to such payments, and made an offer to show that the custom was not to make payment during the summer, between the date of the closing of the season and its opening in the fall. Objection to this offer was sustained, and the jury were instructed upon the theory that the salary was to be allowed for the whole year. The admission of the offered evidence would not have operated as a permission to vary the meaning of a written contract by parol, but its effect would have been to explain the meaning of the words used in the contract. The contract says, "at a weekly salary of forty dollars per week," but fixes no time during which the weekly salary is to be paid. If it could be shown that the "weeks" here re-

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

² Rehearing denied October 16, 1895.

ferred to were, by the custom and usages of the theatrical profession, the weeks of the theatrical season, and not all the weeks of the whole year, we see no reason why testimony to that effect was not allowable. In *Grant v. Maddox*, 15 Mees. & W. 737, there was a contract between the plaintiff, an actress, and the defendant, a theatrical lessee and manager, which provided for an engagement for "three years at a salary of five, six, and seven pounds per week in those years, respectively." On the part of the defendant, evidence was tendered to show that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more years, actors were never paid during the time of vacation, when the theater was closed, but only during what was called the "theatrical season." The evidence was admitted, and the jury were instructed that the question for them to decide was whether the contract was to perform and be paid throughout the three years, or only during the theatrical season in three years. It was there held that the evidence was properly admitted, and the question properly left to the jury. Alderson, B., saying: "It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is, not to alter the contract, but to show what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shown by parol evidence. Here the contract is that the plaintiff is to be paid for three years a salary of five pounds, six pounds, and seven pounds per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the theater is open in those years." For the reasons thus stated, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(158 Ill. 190)

ADAMS v. GILL et al.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

EQUITY PRACTICE — AMENDMENT — BILL TO SET ASIDE DEED — VARIANCE.

1. Where a proposed amendment to a bill materially changes the issue by charging fraud where the original bill charged mistake, it is reversible error to proceed to a hearing, over the defendant's objection, without ruling the defendant to answer the bill.

2. Where the record shows that a cause was heard on the bill, the court has no power at a subsequent term to amend the record so as to show the hearing was on an amended bill.

3. Where a bill to set aside a deed alleges

that the deed was incorrectly drawn by mistake of the scrivener, and the evidence shows that the grantee, by deception, induced the grantor to sign it, the variance is fatal.

Appeal from circuit court, Christian county; Robert B. Shirley, Judge.

Bill by Emma F. Gill, Elizabeth Conner, and Joseph, Oscar, John, and Bruce Sloan, by next friend, against Harriet Adams. Complainants obtained a decree. Defendant appeals. Reversed.

A. McCaskill and McGuire & Salzenstein, for appellant. A. M. Crafton and J. C. McBride, for appellees.

WILKIN, C. J. This was a proceeding in chancery, in Christian county, by appellees against appellant, to reform a deed by Emma F. Gill and others to Harriet Adams. The court below found for the complainants, and the cause is brought to this court on appeal. Several points are assigned for error,—one that the court erred in not ruling on defendant's motion to dismiss for want of evidence to sustain the bill, and another that the court erred in making an order at a subsequent term amending the decree, after the cause had gone off the docket. The record shows that the bill was filed July 12, 1893, and the answer December 29th, following. Then an amended bill was filed, which, being demurred to, was withdrawn. The hearing was had on the bill, answer, replication, and proofs, March 30, 1894. During the hearing, the evidence of complainants being all in, the defendant moved to dismiss the bill on the ground that there was no evidence to sustain the allegations therein, but no ruling was made on the motion. Complainants then proposed to amend the bill, stating the substance of it as it would be when completed, and showing that material changes were to be made in the allegations. The hearing then proceeded to its close. The judge's minutes show: "March 30. Leave to comply. to amend bill. Demurrer to amended bill. Leave to comply. to withdraw amended bill. Cause called for trial, and heard on bill, answer, and replication, and taken under advisement." The proposed second amendment to the bill was not filed until after the hearing. When complainants proposed to file it, and stated its substance, during the hearing, the court could not properly proceed to hear the cause made by it (even if it treated the amendment as of record) without first ruling the defendant to answer it. It presented an entirely different issue from that tendered by the original bill, charging that by the design or mistake of Josiah H. Adams and Harriet Adams the deed was improperly drawn, whereas the charge in the original bill was that the mistake in the deed was occasioned wholly by the attorney who drew it, and was an act of mere oversight on his part. The original bill charged mistake, the amendment fraud, and, if the amendment was regarded as made, the issues

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

should have been regularly presented by requiring the defendant to answer. *Gage v. Brown*, 125 Ill. 523, 17 N. E. 734.

Appellees contend that because the hearing proceeded appellant cannot now be heard to say she ought to have been required to answer the amended bill, and cite the cases of *Miller v. Whittaker*, 33 Ill. 387, and *Long v. Fox*, 100 Ill. 43. The former was a cause where the party appealing to this court consented that it be set down for hearing notwithstanding the pleadings were unfinished (an answer to a supplemental bill not having been filed), and the change made in the supplemental bill was only of minor importance. In the latter case the matter contained in the supplemental bill did not materially change the scope and purpose of the original bill, and the issues were treated by both parties as having been properly made up; and, of course, on appeal to this court they could not be heard to complain. Neither of these cases can be said to be in point here, as in the case in hand appellant objected to proceeding further, and moved the court to dismiss the bill, and also because here there was a new and distinct issue presented by the amendment.

The decree was rendered at the August term, 1894, on September 8th. The judge then entered on his minutes: "Sept. 11. The court finds the issues for the plaintiffs, and finds they are entitled to the relief prayed in the bill." About two months after the decree was rendered, and at still another subsequent term of court, on motion of complainants' counsel, the cause was again placed on the docket, and an order made amending the decree, by reciting that the cause was heard on the second amended bill. From the record it appears that it was heard "on the bill," and that the decree was rendered "on bill." It also shows that none other than the original bill was on file during the hearing. It further appears that when the court amended the decree it refused to make an order showing that an amended bill was filed with leave, and it therefore never was, strictly speaking, a part of the record. Was it proper for the court, at a subsequent term, to amend the decree by making it appear that it was rendered on a second amended bill? The general rule is that courts, while a cause is pending, and parties before them, have control over the records and proceedings in a cause, and have jurisdiction over their judgments and final orders of a pending term, and may, while the cause is depending, and the parties in court, amend or set them aside for cause. But after the term, power of amending is confined to clerical errors and matters of mere form; and these may, at any time, upon notice to parties in interest, and saving all intervening rights, be corrected so as to make the record conform to the fact. *Dunham v. Commissioners*, 87 Ill. 188, and cases there cited. See, also, *Cook v. Wood*, 24 Ill. 295; *Railroad Co. v. Holbrook*, 72 Ill. 419; *Church v. English*, 81 Ill. 443; *Goucher v. Patterson*,

94 Ill. 526; *Lilly v. Shaw*, 59 Ill. 76; *Lill v. Stookey*, 72 Ill. 497. The correction sought to be made in this case cannot be said to have been a clerical error, such as is contemplated in the rule deduced from the decisions cited. It was an error of substance, and not subject to amendment after the term. Complainants waited too long before attempting to have the correction made, if, indeed, it could be made at all, owing to the peculiar state of the record.

The decree below must, therefore, stand or fall on the original bill alone. As before stated, when complainants had introduced all their evidence, and rested their cause, the defendant moved the court to dismiss the bill for want of evidence to sustain it. That was a proper motion, and should have been heard and sustained by the court. Its refusal to do so, and permitting the hearing to proceed, is assigned for error. The bill set forth that a deed had been made, by which it was intended to convey a life estate in certain lands to Harriet Adams, but by mistake of the scrivener who prepared the deed she was granted an estate in fee simple; "that the failure of the scrivener to insert the limitation was purely and wholly an act of oversight and omission on his part." This was denied by defendant in her answer, and an issue thus regularly formed. None of the testimony introduced by complainants tended to prove that a mistake had been made by the scrivener, but, instead, that Harriet Adams and Josiah H. Adams, two of the parties to the deed, by deception induced complainants to sign it. In other words, the complainants set forth one case in their bill and attempted to prove another on the hearing, placing their right to relief on entirely new ground. In *McKay v. Bissett*, 5 Gilman, 505, it was said: "A complainant must recover on the case made by his bill. He is not permitted to state one case in the bill and make out a different one in proof. The allegations and proof must correspond; the latter must support, and not be inconsistent with, the former. Although a good case may appear in the evidence, yet, if it be variant from the one stated in the bill, the bill will be dismissed. The defendant has the right to answer and contest the case on which the complainant claims relief,"—citing *Harrison v. Nixon*, 9 Pet. 483; *Boon v. Chiles*, 10 Pet. 177; 1 Smith, Ch. Prac. 346; *Doyle v. Teas*, 4 Scam. 202. The rule is elementary, and has been strictly enforced by this court whenever invoked. *Fish v. Cleland*, 33 Ill. 244; *Bush v. Connelly*, Id. 452; *Heath v. Hall*, 60 Ill. 344; *Lloyd v. Karnes*, 45 Ill. 70; *Carmichael v. Reed*, Id. 112; *Marvin v. Collins*, 98 Ill. 517; *Brockhausen v. Bochland*, 137 Ill. 552, 27 N. E. 458. If the evidence makes a case variant from the one made in the bill, no decree should pass other than to dismiss the bill. *Ohling v. Luitjens*, 32 Ill. 29. It is well said in *Kellogg v. Moore*, 97 Ill. 287: "The chief object of

written pleadings is to distinctly inform the adverse party of the facts relied on for a recovery or a defense, so that he may admit or deny them, or question their legal sufficiency by a demurrer, exceptions, or otherwise, as he may be advised by his counsel; and also to inform the court of the real points of difference between the parties to the suit, so as to enable it to intelligently pass upon and determine their respective rights. But if parties are not held bound by their pleadings, it is clear the very object of them would not only be defeated, but they would be used by unscrupulous litigants for the express purpose of misleading their adversary, and neither the court nor the parties could ever know to a certainty the points of difference till all the evidence is in, and hence no one could intelligently prepare for trial." The decree of the circuit court will be reversed, and the cause will be remanded. Reversed and remanded.

(157 Ill. 95)

BICKERDIKE v. ALLEN et al.¹

(Supreme Court of Illinois. April 1, 1895.)²

CONSTITUTIONAL LAW — REVIVAL OF JUDGMENT — EQUITY PLEADING — CONSTRUCTIVE SERVICE OF PROCESS — JUDGMENT — COLLATERAL ATTACK.

1. Rev. St. 1893, c. 110, par. 27, § 26, providing that in scire facias to revive a judgment, where it is shown by affidavit that defendant resides out of the state or is concealed within the state, so that process cannot be served on him, notice to defendant may be given by publication and mail, is constitutional as being "due process of law," so far as it applies to residents of the state whose residence is stated in the affidavit, since the presumption is that the notice mailed to them was personally delivered to them within the state.

2. Where a bill in chancery waives answer under oath, the fact that the answer is sworn to gives it no force as evidence.

3. Where the jurisdiction of the court is collaterally attacked on the ground that there was no affidavit on which to base constructive service, the fact that the jurat merely recites that the affidavit was subscribed to before the notary is not enough to invalidate the service, where the affidavit states that its allegations are made "on oath" and the judgment recites that there was presented to the court due proof of publication of notice, since the presumption is that the clerk did not make publication without a proper affidavit.

4. An affidavit which states in the disjunctive that defendant "is concealed within this state or has gone out of this state, so that process cannot be served on him," is sufficient basis for notice by publication, since the material fact is that he could not be served with process.

Appeal from superior court, Cook county; Phillip Stein, Judge.

Creditors' bill by Mary O. Allen and Edwin C. Allen, Jr., executors of Edwin C. Allen, deceased, against Joseph R. Bickerdike and others. Complainants obtained a decree. Defendant Bickerdike appeals. Affirmed.

Swift, Campbell, Jones & Martin, for appellant. Sleeper, Barbour & Emrich, for appellees.

MAGRUDER, J. This is a creditors' bill, filed on December 17, 1891, in the superior court of Cook county by the appellees, as executors of the estate of Edwin C. Allen, deceased, against appellant and others, based upon a judgment recovered by said testator, in his lifetime, on November 20, 1873, against appellant and one Pratt, and claimed to have been revived by judgment of revival entered on December 9, 1891, upon which execution was issued and returned unsatisfied after demand made. Amendments were filed to the original bill, and afterwards a supplemental bill was filed. Answers were filed by the appellant and other defendants alleged to have in their hands stock belonging to appellant. A receiver was appointed by agreement of parties, with directions to sell the stock and hold the proceeds to abide the final disposition of the case. The answer of the appellant here to the creditors' bill below set up, among other things, that in the scire facias proceeding to revive the judgment the revival judgment was void, because the court obtained no jurisdiction over the appellant by personal service or entry of appearance; and that section 26 of the practice act (chapter 110, par. 27, Rev. St. 1893; 2 Starr & C. St. p. 1789, par. 27) was unconstitutional as being in conflict with section 2 of article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and also as being in conflict with section 1 of the fourteenth amendment to the constitution of the United States. Appellant's answer to the bill admits that the judgment was recovered against himself and Pratt on November 20, 1873, as alleged in the bill, and that on October 1, 1891, appellees instituted proceedings by scire facias in said superior court to revive said judgment, and that execution was issued upon the judgment as revived, and returned nulla bona. The answer also sets out in full all the proceedings in the suit to revive, from the praecipe for a scire facias to the judgment of revival. Upon the hearing, appellees introduced in evidence the said proceedings as set out in the answer. The appellant introduced no evidence whatever, but at the close of the evidence introduced by appellees made a motion to dismiss the bill, upon the alleged grounds that the court had no power to enter a judgment of revival for want of jurisdiction over appellant, and that the said section 26 was unconstitutional, as aforesaid, and also because of certain alleged defects in the affidavit for publication notice in the scire facias proceeding. This motion was overruled, but no exception is shown by the bill of exceptions to have been taken to the order overruling it. The court

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

below rendered a decree finding that the original judgment remained due and unpaid; that it had been duly and regularly revived; that the proceedings of scire facias to revive it were valid and legal; and directed that there should be paid out of the proceeds of the sale of said stock the original judgment, and interest from the date of its rendition, and the costs accrued both in the original proceeding and in the scire facias proceeding. From this decree the present appeal is prosecuted.

First, as to the alleged unconstitutionality of section 26. That section is as follows: "It shall not be necessary to file a declaration in any scire facias to revive a judgment, or foreclose a mortgage, in any court of record in this state. And in such case of scire facias to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of the court out of which the writ issues, showing that the defendant in the scire facias, resides or has gone out of the state, or is concealed within the state, so that process can not be served on him, and stating the place of residence of such defendant, if known, or that on due inquiry his place of residence cannot be ascertained; then in such case notice to the defendant may be given by publication and mail in the same manner as is provided by statute for notice in like cases in chancery." 2 Starr & C. St. p. 1789, par. 27; Rev. St. 1893, c. 110, par. 27, § 26. The provision for notice in cases in chancery, so far as applicable, is as follows: "The clerk shall cause publication to be made in some newspaper printed in his county * * * containing notice of the proceeding of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk, that he has sent such notice in pursuance of this section, shall be evidence." Rev. St. c. 22, par. 12, § 12. Where the defendant is a nonresident of the state of Illinois, and the proceeding is not in rem, but in personam, the publication of notice and the mailing of a copy thereof to an address outside of the state, without personal service or appearance, would not give to a court in this state such jurisdiction over the person of the defendant as to make a judgment in personam against him valid and impervious to collateral attack, except in cases affecting the personal or civil status and capacities of the citizen of the state towards a nonresident (as, for instance, in reference to the dissolution of the marriage relation), and except in cases where another mode of service than that of personal service may be regarded as having been assented to in advance (as, for instance, the appointment of agents in the state to receive service), and requirements as to service upon

corporations created by the state. *Pennoyer v. Neff*, 95 U. S. 714. A proceeding in rem is not merely a direct proceeding against property, but any action between the parties where the direct object is to reach and dispose of property owned by them or of some interest therein. For example, suits by attachment against the property of debtors, suits for the partition of land, to foreclose mortgages, to enforce liens or contracts respecting property, may be regarded as proceedings in rem so far as they affect property in the state. *Pennoyer v. Neff*, supra. In such proceedings in rem, where the object is to reach and dispose of property within the state, or some interest therein, service by publication, or in some mode other than upon the person, may be sufficient. The theory of the law is that when a man's property is brought under the control of the court by seizure, such seizure informs and notifies him of the proceedings taken for its sale or condemnation. In such cases, constructive notice is permitted and becomes effectual solely by reason of the attachment or seizure of the property. The jurisdiction of the court to determine the obligations of the defendant constructively notified is incidental to its jurisdiction over the property. The judgment has no effect beyond the property reached or affected in that suit. "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court." *Boswell's Lessee v. Otis*, 9 How. 336. "But," says Mr. Justice Field, in *Pennoyer v. Neff*, supra, "where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely in personam,—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability." See, also, *Webster v. Reid*, 11 How. 437.

So far as section 26 applies to defendants residing out of the state, we do not see how it can be upheld as a valid law, in view of the principles hereinbefore announced. That is to say, where the proceeding by scire facias is instituted to revive a judgment rendered against a nonresident, the judgment of revival cannot be regarded as valid, if such nonresident has not been personally served or has not entered his appearance, but has only been served by publication and the mailing of a notice to him to his residence outside of the state. The scire facias proceeding to revive a judgment is not a proceeding in rem,—certainly not

where the original judgment sought to be revived is a judgment in personam. Although the nonresident may receive the notice mailed to his residence out of the state, he is not bound to appear, because "no state can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer v. Neff*, supra. We held in *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507, that service out of the state by copy of the bill and notice in a chancery case, so far as property in this state was sought to be affected, would give the court jurisdiction to decree concerning it, but not to render a personal decree against the defendant for the recovery of money or costs, and to award a general execution against him for the collection of the same. If the statute provided for bringing in a resident of the state by publication of the notice only, without the mailing of any notice to him, the same objection might lie as in case of a nonresident. A judgment in personam in the court of a state against one of the citizens who is not served with process, but is served by publication only, cannot be valid, except in cases coming within the exceptions already indicated. In *Webster v. Reid*, supra, it was said: "These suits were not proceedings in rem against the land, but were in personam against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached." So, in *Pennoyer v. Neff*, supra, it was said that such judgments were not binding in the state where rendered, any more than they were outside of such state, and that since the passage of the fourteenth amendment to the federal constitution their enforcement in the state could be resisted "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." But this statute does something more than require the publication of the notice. It requires a copy of the notice to be sent by mail, addressed to the defendant whose place of residence is stated in the affidavit. Suppose that a defendant resides in this state, and has a known residence here, but conceals himself so that process cannot be served upon him, and that the notice specified in the statute is sent to him by mail. If he receives the notice so sent, he has received personal notice just as much as though a summons was served upon him by the sheriff. The certificate of the clerk is made proof of the mailing of the notice. "Proof of the mailing of notices, properly addressed, is prima facie evidence of their having been received by the party addressed." *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372. Where, therefore, in any collateral proceeding, a judgment of revival based upon notice given through the mail, as well as by publication to a resident of the state, is relied up-

on, it is prima facie valid. In such case the judgment cannot be said to have been rendered without jurisdiction over the defendant. The proceeding by scire facias to revive a judgment is not a new suit, but merely the continuation of the old one. It does not determine the obligations of the defendant to the plaintiff, as involved in the original controversy and as settled by the former judgment, but merely seeks a revival of the former judgment in order to have execution of it. The defendant cannot show any matter which was pleaded or might have been pleaded in the former action. The only defense which can be set up in the scire facias proceeding is that no judgment was rendered, or, if one was rendered, that it has been satisfied or discharged. 21 Am. & Eng. Enc. Law, pp. 855, 864; *Smith v. Stevens*, 133 Ill. 188, 24 N. E. 511. Hence we are inclined to think that section 26, taken in connection with section 12 of the chancery act, is a constitutional enactment so far as it provides for service by publication of notice and mailing of copy thereof to residents of the state whose residence is stated in the affidavit. *Clark v. People*, 146 Ill. 348, 35 N. E. 60.

In the case at bar, the appellant admitted in his answer that the copy of the notice required by the statute was mailed to him. He sets forth therein in *hæc verba* the certificate of the clerk filed in the scire facias proceeding, in which that official certifies that on October 10, A. D. 1891, he sent by mail a notice (of which a copy is thereto attached) addressed to "Joseph R. Bickerdike, Elston Road, near Belmont Ave., Chicago, Ills." This certificate was prima facie evidence that the notice so sent by mail was received by appellant. If it be permissible to introduce evidence in the collateral proceeding to show that the copy of the notice sent by mail was not received, it is sufficient to say that, in this proceeding by creditors' bill, no evidence was introduced to overcome the prima facie case made by the clerk's certificate. It is true that, in his answer to the creditors' bill, appellant states that the notice was not received by him, but the bill waives the answer under oath; and therefore, under the statute, the answer has no greater force as evidence than the bill. Rev. St. c. 22, par. 20, § 20. Where the oath is thus waived, the fact that the answer is sworn to gives it no force as evidence, but it will be deemed as merely a pleading. *Wallwork v. Derby*, 40 Ill. 527; *Willenborg v. Murphy*, 36 Ill. 344; *Moore v. Hunter*, 1 Gilman, 817. As to the only defenses which appellant could have made in the scire facias proceeding (namely, the nonexistence of the judgment, or its satisfaction or discharge), it may be said that, in his answer in the case at bar, appellant admits the existence of the original judgment, and he neither pleads nor attempts to prove any satisfaction or discharge. If the judgment had been satisfied or discharged, such fact could have been shown as a defense against the enforcement of the revived

judgment by creditors' bill. It follows that, so far as the justice of the matter is concerned, appellant has been deprived by the filing of this creditors' bill of no defense which he was entitled to make in the scire facias proceeding.

Second, it is claimed that, even if section 28 is a valid enactment, the publication and mailing of the notice are not authorized without the filing of the affidavit mentioned in the section, and that the affidavit in this case was so defective as not to warrant the publication and mailing of the notice.

The affidavit, which was filed in the scire facias proceeding on October 6, 1891, is as follows:

"State of Illinois, County of Cook,—ss. In the Superior Court, October Term, 1891. Mary C. Allen and Edwin C. Allen, Jr., Executors of the Estate of Edwin C. Allen, Deceased, v. Joseph R. Bickerdike and Zacharias I. Pratt. 135,489. James J. Barbour, attorney for above-named plaintiffs, on oath states that Joseph R. Bickerdike, one of the above-named defendants, resides in the city of Chicago, in this state, and that he is concealed within this state or has gone out of this state, so that process cannot be served upon him. Affiant further states that he has made inquiries at the residence of said defendant as to his whereabouts, and the replies received from said defendant's wife were to the effect that he was away, and she could not tell when he would be home; and when asked where said defendant was, she refused to state, and to every question put by this affiant she would make an evasive answer. Affiant further states that his inquiries of the person in charge of said defendant's office in the city of Chicago, in this state, failed to bring any information, further than that Mr. Bickerdike was away and did not wish to have it known where he was. Affiant further states that said defendant's neighbors stated to this affiant that said defendant would conceal himself to avoid service should suit be brought against him, and affiant is utterly unable to find said Bickerdike. [Signed] James J. Barbour.

"Subscribed before me this 6th day of October, A. D. 1891. [Signed] John M. Meyer, Notary Public. [Seal.]"

It is said that the affidavit is void because the notary whose certificate is attached does not state that it was sworn to before him, but only states that it was subscribed before him. The case of *McDermald v. Russell*, 41 Ill. 489, is referred to in support of the objection. In that case, where the widow of the deceased husband, who had died intestate and childless, filed a bill to have her interest, as statutory heir, in her husband's estate set off to her, and sought to bring in by publication certain minor heirs at law of her husband, it is said: "The affidavit of nonresidence does not appear to have been sworn to before any officer. For that omission, it was no affidavit, and gave no authority to the court to enter an order of

publication." The affidavit is not set forth; and how the fact that it was not sworn to appeared, is not stated. That, however, was a case where the decree, which was against infants, was brought up for review in a direct proceeding. Here, the attack upon the judgment of revival is made in a collateral proceeding, and it appears that the affiant, whose name is signed to the affidavit, avers therein that what he states he states "on oath"; and the name of the notary public with his seal appears below the notarial certificate attached to the affidavit; and the judgment of revival entered on December 9, 1891, recites upon its face that there was presented in the court "due proof of publication of the notice of the defendants." The clerk is directed by the statute to cause publication of the notice to be made, and to mail a copy thereof, where the plaintiff or his attorney files an affidavit. The presumption is that the clerk did his duty, and that he would not have caused publication to be made and notice to be mailed unless such an affidavit as the statute requires was first filed in the clerk's office; and it will be presumed that the affidavit was sworn to, or that the statements alleged upon its face to have been made on oath were made on oath. Non constat that the clerk himself did not administer the oath before causing the publication to be made. The recital in the judgment that "due proof" was made is at least prime facie evidence of that fact, and it will be presumed that such proof was made to the satisfaction of the court. *Pierce v. Carleton*, 12 Ill. 358; *King v. Emden*, 9 East, 437; *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 Ill. 307. In *Kruse v. Wilson*, 79 Ill. 233, the action was ejectment, and the defendant relied upon a sheriff's deed made in pursuance of a sale under a judgment in an attachment proceeding. The record showed that the part attached to the affidavit for the attachment writ was not signed by any officer, and had no signature at all, and it was held that the affidavit was sufficient to authorize the issuance of the writ, and could not be assailed in the ejectment suit. In that case, the clerk recited in the attachment writ that the plaintiff had complained on oath to him; and the court said: "It is not to be presumed that the clerk has made a false statement in the writ, or that he would have issued the writ without the oath." It is true that here the clerk makes no such recital as that made in the attachment writ in that case. But the presumption that he did his duty is as strong, from the fact that he signed and published the notice and mailed a copy of it, as it would have been had he made a recital that an affidavit had been sworn to and filed in his office. *Cook v. Jenkins*, 30 Iowa, 452.

A further objection is made to the affidavit upon the ground that it is in the disjunctive, and cases are referred to where affidavits in attachment proceedings which state two or more statutory causes or grounds of attachment in the disjunctive are held to be defective. We do not think that those cases are ap-

plicable here. The material fact was that appellant, being a resident of the state, could not be found in it, so that process could be served on him; and it could not be certainly known, as the facts set up in the affidavit show, whether the impossibility of finding his whereabouts was due to his concealment within the state or to his departure from it. The fact that he could not be found might be due either to his having gone out of the state or to his concealment within it; but the result of either circumstance was the same, namely, ignorance of his whereabouts, making it impossible to serve him with process. The alternative causes are linked by a common and necessary consequence. We think that the notice conformed to the requirements of the statute, as above set forth. The judgment of the superior court of Cook county is affirmed. Affirmed.

(157 Ill. 70)

STERRICKER et al. v. McBRIDE et al.¹
(Supreme Court of Illinois. April 1, 1895.)
VENDOR AND VENDEE—SPECIFIC PERFORMANCE—TENDER.

1. A stone dealer bought for quarry purposes a block of platted land, and the land platted as a street directly north of said block, and secured an option on the block south of this land, and the land platted as a street between the two blocks, the option being conditional on his finding no seam of stone on the land conveyed. The vendor then conveyed the second block to a third party, and the vendee sued such third party for specific performance. *Held*, that he could not recover on the theory that the platted street was a public highway, and the respective deeds passed title to the middle thereof, because he had not proved that no seam existed on his half of such street; nor could he recover on the theory that the street was not a highway, since in that case the title thereto would remain in his vendor and his heirs, whom he had not made parties to the suit.

2. The option for the purchase of land being at the same price as another parcel purchased, and it appearing from the evidence that the price paid for such other part was five dollars per rod, including a street, a tender of five dollars for the land described in the option contract, except the part included in the street, is not a compliance with the contract.

Appeal from circuit court, Kane county; Charles Kellum, Judge.

Bill by Henry McBride and Herbert A. Gage against William Sterricker and others. Complainants obtained a decree. Defendants appeal. Reversed.

The bill of complaint herein was exhibited in the Kane circuit court by Henry McBride and Herbert A. Gage, appellees, against the South Elgin Stone Company, William Grote, William Sterricker, A. C. Joslyn, and J. W. Fletcher, the three latter being the commissioners of highways of Elgin township. The bill charges, in substance: That appellees have been for some years engaged in the business of selling and

furnishing masons' supplies and building stone to contractors and others at Elgin; and that the South Elgin Stone Company, of which William Grote is president, is in competition with them in such business, at that place. That on April 28, 1888, appellees purchased from one Joseph Tefft a strip of land at Clintonville, about two miles south of Elgin, that contained deposits of building stone, for the purpose of opening a stone quarry thereon, and at the same time secured from him and his wife an optional contract to purchase the land in controversy on or before the 28th day of January, 1889, at the same price as they paid for the land then deeded to them. This option was secured, so that, in case it should become necessary in opening the quarry to secure a seam at the south of it to successfully work it, they could have a deed of the land in question. That, immediately after purchasing the land, the complainants went into possession, and commenced to develop the stone quarry, and soon discovered that there was no seam in the quarry at the south end of said block, and that the quarry could not be successfully worked without securing one. That there are indications of such seam within the boundary of the lands mentioned in the contract, and thereon complainants decided to take advantage of the provisions of the contract and obtain a conveyance of the north half of the north half of block 15, and a quitclaim deed of the space marked as "Kane Street." That Joseph Tefft died August 26, 1888, and that partition of his lands was had among his heirs; and that the property mentioned in the contract was sold under decree in partition, subject to the rights of the complainants under their contract; and that at such sale William Grote purchased block 15 for and on behalf of the South Elgin Stone Company. That, before the death of Joseph Tefft, complainants informed him of their desire to take under the contract, and, with his consent, went into possession of the lands mentioned in the contract, fenced the same along the highway, and erected a work and tool house on the strip between blocks 15 and 16. That said officers and agents of said stone company purchased at said sale the said block 15 for the purpose of oppressing and annoying complainants, and to prevent competition with their trade. That in May, 1889, complainants applied to said Grote, who then represented his interests and those of the company, for a conveyance of the north half of the north half of block 15 and the strip of land lying north and east thereof, and tendered therefor \$241, being the full purchase price provided for in the contract, and demanded a deed for the same, which was refused. That a plat of the lands in question was made by the owners of the same in 1847, and called "Tefft & Raymond's Plat of West Clinton," (afterwards called "Clintonville" and now "South Elgin"), but

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

the village has never been incorporated under any law of this state. That North and Kane streets have never been used, recognized, or traveled as highways. That the land is low, wet, and swampy. That access to them from La Fox street, which is the principal street on which they join, is practicably impassable, and made so by a deep gully, which forms part of an abandoned stone quarry; and that such pretended streets were never accepted, worked, or recognized by the public authorities, but by said authorities were expressly excluded from the highways of said township. That the agents of said stone company, to annoy and harass complainants, pretended that North and Kane are public streets, and should be opened, and have prevailed on the highway commissioners to enter upon and attempt to improve the same; and that said commissioners, by force, have torn down the fence inclosing said premises, and are proceeding to fill up said gully, and threaten to demolish or remove the complainants' building out of said pretended streets. The bill states that the complainants are able, willing, and ready to perform said contract, and bring into court the money so tendered in payment for a conveyance. The said highway commissioners, William Grote, and said Elgin Stone Company are made parties defendant. The bill prays for an injunction to prevent said threatened injury, and prays for a decree requiring said South Elgin Stone Company or William Grote—which ever of them shall hold a fee-simple title to the premises mentioned in the contract—to convey the same according to the terms of the said contract.

William Grote and the South Elgin Stone Company jointly answer the bill, and deny that they have attempted to or are interfering with defendants' business; admit large deposits of stone at Clintonville, but deny that they have a monopoly of the stone trade; admit the possession of complainants to land upon which they are opening a stone quarry, and admit the prevalence of seams in said quarry, but deny that said seams are necessary for the successful working of a quarry at the present day; admit the purchase of block 16 by the complainants, which abuts upon the streets as shown on Tefft & Raymond's plat, which is a statutory plat, duly recorded; admit complainants had some contract with Joseph Tefft about a seam, and to convey to them a part of block 15, and the land lying between blocks 15 and 16, known as "Kane Street," but that such contract is not binding on the defendants; that said Tefft had no right to convey any interest in said Kane street; that complainants did find a seam on said premises, and therefore have no right to a conveyance of the premises mentioned in the contract; admit a partition sale of the premises and the purchase of block 15 by Grote for the South Elgin Stone Company; claim that complainants had no

right to fence in the strip of land between blocks 15 and 16, but admit that complainants erected a tool house thereon, but claim that they are trespassers against the rights of the public; deny that they purchased the block for the purpose of annoying complainants, but made the purchase for a legitimate purpose of its own; admit the demand for a conveyance of said premises, but deny a tender of \$241; admit the refusal to make any conveyance of said premises, because complainants were not entitled to receive one under said contract, because a seam had been found on their quarry on block 16; admit the making of the plat as charged in the bill of complaint, and admit that South Elgin or Clintonville has never been incorporated, and that the said plat forms no part of any incorporated city or town; deny that said Kane street is no part of the public highways of the township, but has been used and traveled as such, and, when complainants invaded it, it was being improved for street purposes; claim that, by their purchase of block 15, they secured a vested interest in said street, and that it could not be legally closed against them, nor complainants acquire any rights or interest in it. The answer of the highway commissioners denies that they interfered with complainants' possession on behalf of the South Elgin Stone Company; deny that the complainants are entitled to have the option to purchase performed under said contract, and deny that the streets in question have ever been vacated, but expect to prove, when required so to do, that such streets are public highways; deny that there is no seam in the quarry as opened, and deny that it is necessary to have a seam for the purposes of conducting a quarry.

The circuit court, by its decree, found the facts substantially as set up in the bill, and granted a perpetual injunction against the highway commissioners from interfering with the possession of the complainants, and decreed conveyances to the complainants by the South Elgin Stone Company upon payment to it of the sum of \$241, by good and sufficient deeds of the land described in the bill, in manner and form as prescribed in the contract.

The contract involved in the suit, omitting the attesting clause and the signatures and seals of the parties thereto, is as follows: "Memorandum of an agreement between Joseph Tefft and Lavina Tefft, his wife, of the city of Elgin, Kane county, Illinois, party of the first part, and Henry McBride and Herbert A. Gage, of the same place, parties of the second part, made this 28th day of April, 1888: Whereas, said parties of the first part have this day sold and conveyed to said parties of the second part, by warranty deed, block sixteen (16) of Tefft & Raymond's plat of West Clintonville, Kane county, Illinois, and by quitclaim deed a strip of land two rods wide originally platted for a street, and lying immediately north of said block sixteen

(16), and all that piece of land lying between said block and Fox river, for the sum of twelve hundred dollars (\$1,200); and whereas, said parties of the second part intend to open a stone quarry in said premises so conveyed to them, and, in case they are unable to find a seam in the quarry on said premises, they want to secure enough of the land lying immediately south of said block, owned by said Joseph Tefft, to get such a seam so they can work such quarry: Now, therefore, this indenture witnesseth: That, if the said second party does not find such a seam on the land so conveyed to them, then, in consideration of the premises and the sum of one dollar to them in hand paid by the said second party, the parties of the first part hereby agree to give the parties of the second part, their heirs and assigns, the privilege of purchasing on or before the 28th day of July, A. D. 1889, the following described real estate in the county of Kane and state of Illinois, to wit: So much of the north one-half ($\frac{1}{2}$) of block fifteen (15) of said plat as they may desire to purchase, provided as follows: That the south boundary of the land so purchased shall extend across said block, and be parallel with the north line thereof; and provided, further, that, if the second party desire to purchase more than the north one-half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of said block, they shall take the entire north half thereof. The first parties also agree to convey, by quitclaim deed with the above, the land between blocks sixteen (16) and fifteen (15), known as 'Kane Street,' and all that land between Kane street and that part of block fifteen (15) so purchased, on the one side, and Fox river, on the other, at the same price per square rod as has been paid for the said land this day conveyed to said parties, to be paid as follows: Cash in hand when possession is taken. The said north half of said block fifteen (15), or any part thereof, as the case may be, to be conveyed by warranty deed, and the other premises by quitclaim deed. This instrument shall not be recorded, but is deposited by mutual agreement with J. W. Ranstead; and, in case the privilege of purchase hereby given is not exercised and the conditions thereof fully performed by said parties of the second part, their heirs or assigns, on or before the 28th day of July, 1889, said privilege shall thereupon wholly cease, and the said J. W. Ranstead shall at once surrender this instrument to said parties of the first part for cancellation. During the existence of this said privilege of purchase, this instrument shall be binding upon the heirs, executors, and administrators, and assigns of both parties."

Irwin & Egan, for appellant Sterricker and others. Sherwood & Jones, for appellant South Elgin Stone Co. Botsford & Wayne, for appellees.

BAKER, J. (after stating the facts). We will assume, but for the purposes of this ap-

peal only, that the intent and scope of the executory contract of April 28, 1888, was that the "seam" mentioned in and contemplated by said contract was a seam located in the south part of the premises that day sold and conveyed to appellees. What premises were so sold and conveyed? The preamble to the contract says that they were block 16, and a strip of land two rods wide originally platted for a street, and lying immediately north of said block 16, and all that piece of land lying between said block and Fox river. The desire of appellees, as stated in the preamble, was simply to secure additional land to the south in the event they were "unable to find a seam in the quarry on said premises,"—i. e. on the lands then conveyed; and the option given by the contract of making an additional purchase was one that could be availed of only "if the said secured party does not find such a seam on the land so conveyed to them." The strip of ground 66 feet wide lying south of block 16 and north of block 15 was platted and designated as "Kane Street." The provision in the contract for the future and contingent conveyance to appellees of this land between said blocks known as "Kane Street" seems to indicate quite clearly that it was not the understanding of the parties that Tefft, by the deed which he made to appellees for block 16, conveyed or transferred to them any part of said strip; and other language in the contract points in the same direction. But it is claimed by appellees that the lands platted by Tefft & Raymond were never embraced within any municipal corporation; that the making of the plat was only an offer to dedicate, which was never accepted by the public authorities; and that the so-called "North Street" and "Kane Street" were never used or traveled as streets or highways by the public; and that the conveyance to them (appellees) of block 16, which was abutting property, transferred to them the title, by operation of law, to the center line of each of these once-platted streets. The contention is that the warranty deed of April 28, 1888, for block 16, conveyed to them the north half of the land designated as "Kane Street"; and the subsequent deed, after the death of Tefft, to the South Elgin Stone Company of lot 15, had the effect of conveying the south half of said strip to that company. Of course, if the one deed had the effect of working such conveyance to the one party, the other deed had the effect of working a like conveyance to the other party.

The case of appellees is in a dilemma. If the fee-simple title to the north 33 feet of Kane street passed to appellees by reason of their deed from Tefft, then under the option contract of April 28, 1888, they are not entitled to the right and privilege of purchasing all or any part of the north half of block 15, and of exacting a quitclaim deed that covers the south half of the land between blocks 15 and 16, that is known as "Kane Street," because by the terms of the contract such right

and privilege is only conditional, and is expressly limited thereby to accrue to them only in the event they are unable to find a seam in the quarry on the land and premises conveyed to them by the deeds of April 28, 1888; and the evidence is clear and conclusive that they have never removed the soil from the north half of the land designated as "Kane Street" and to the center line of said land, and demonstrated that no seam would or could be found on said north half. In fact, the evidence shows that the indications are that there is a seam either on said north half or immediately south of it; and, if there is a seam on said north 33 feet, then it is perfectly manifest that they have no legal or equitable right to maintain a bill for specific performance as to the decree awarding them conveyances for the north half of the north half of block 15, and the south half of Kane street.

We are unable to appreciate the force of the argument of appellees that they are the owners in fee of the north half of this strip of land, but subject to the easement of the owner of the adjoining land in block 15; that, while there is no public highway or right of passage that the public can assert to the strip of land called "Kane Street," yet, so long as Tefft or any third party held any part of the land in block 15 bordering on the line of the strip, he or such third party had the right to have the strip for its entire width kept open for access to that portion of the block; and that until appellees had decided to purchase the land mentioned in the contract, and had received, or had become entitled to receive, a conveyance therefor, they could not legally enter upon nor appropriate the north half of this strip to themselves. This argument proceeds upon the assumption that there is no street there. If there is no street, then not only Tefft, and those holding block 15 under or through him, but the public, had and have a right to insist it should be kept open, and a right to use it at will in passing and repassing. If it was and is a public street, then it was and is a public street for all legitimate purposes of such a street. If it is not a public street, then, when Tefft executed and delivered a deed which conveyed the north half of it to appellees, and made no reservation of an easement therein to himself, or for the benefit of his property in block 15, there was no easement or right to use it for the purpose of passing and repassing to and from block 15. Tefft was the owner of the whole of block 15 as an entirety, and the South Elgin Stone Company, through him, is the owner of the whole of said block as an entirety. There was and is free access to the block, by way of La Fox street on the west, and Stone street on the south, both of which are admittedly open and public highways, and by way of what is designated as "Water Street" on the east. On the other hand, there is practically no access to the block by means of Kane

street, because said street is low, wet, and swampy, and is impassable on account of a deep gully which forms part of an abandoned stone quarry. But, even if said street were or could be made otherwise, yet ample means are afforded of reaching the block on the north, by way of the south half of the strip; said south half being two rods wide. This 33 feet of ground being between block 15 and the land and premises that, according to the claim of appellees, were conveyed to them by the deeds from Tefft, it necessarily follows that the strip of ground that forms the north half of Kane street not only does not adjoin block 15, but is so located that there would and could be no occasion for passing over it in order to get to and from said block on its north side. The theory of appellees on this branch of the case seems to be that block 15 was and is the dominant, and the strip designated as "Kane Street" the servient, estate, and that the latter was and is burdened with an easement for the benefit of the former; and it is also a part of their same theory that Joseph Tefft, at and before the time of the sales to and contract with them (the appellees), was owner and in possession of blocks 15 and 16, and the land four rods wide that lies between them. If so, the rule that, when the dominant and servient estates are united in the same person, the easement is extinguished, is applicable to the case; and it is not deducible from the language used in the warranty deed for block 16 that it was the intention of Tefft to create a right in the nature of a servitude or easement in any of the property conveyed for the benefit of block 15.

The other horn of the dilemma is equally fatal to the validity of the decree. If the titles to the north half and to the south half of the land designated as "Kane Street" did not vest in appellees and the South Elgin Stone Company, respectively, by virtue of the deed to the former for block 16 and the deed to the latter for block 15, then it must either be that Tefft & Raymond, by their plat of Clintonville, dedicated the strip of land in question to the public for street purposes, and such dedication remained in abeyance and operated as a continuous offer to so dedicate until the township authorities accepted the dedication and the commissioners of highways commenced to improve the street, or that the title to the strip is vested in the heirs of Joseph Tefft. If Kane street is a public street and highway, then, of course, appellees cannot have specific performance of the contract of Tefft for the conveyance of said street to them, or a perpetual injunction enjoining the commissioners of highways from entering upon and improving such street; and, on the other hand, if the title to the land known as "Kane Street" is in the heirs of Joseph Tefft, deceased, then such heirs are necessary parties to the suit, in order to give the court jurisdiction to adjudicate the matters in controversy.

There is another ground upon which the

decree is clearly erroneous. Appellees tendered to the South Elgin Stone Company only the sum of \$241, and the court found that to be a sufficient tender, and decreed the execution of deeds to appellees upon the payment of said sum of \$241. As we understand the contract and the record, the tender made and the sum required to be paid are wholly 'insufficient in amount. The contract gives to appellees the privilege of purchasing "so much of the north one-half ($\frac{1}{2}$) of block fifteen (15) * * * as they may desire to purchase." It also contains this further provision: "The first parties also agree to convey, by quitclaim deed with the above, the land, between blocks sixteen (16) and fifteen (15), known as 'Kane Street,' and all that land between Kane street and that part of block fifteen (15) so purchased, on the one side, and Fox river, on the other, at the same price per square rod as has been paid for the said land this day conveyed to said parties, to be paid as follows: Cash in hand when possession is taken. The said north half of said block fifteen (15), or any part thereof, as the case may be, to be conveyed by warranty deed, and the other premises by quitclaim deed." As has been hereinbefore seen, "the said land this day conveyed" is stated in the preamble of the contract to be, not only block 16, but also the land immediately north thereof, two rods wide, originally platted for a street, and the land between said block and Fox river. It is conceded that the "price per square rod" paid for the land first bought was \$5; and the tender that was made by appellees to the stone company was \$5 per square rod for the number of square rods contained in the north half of the north half of block 15. It is also an admitted fact that \$1,200 was the price paid by appellees to Tefft for the land bought and conveyed on April 28, 1888. The plat in evidence shows that block 16 is 330 feet from east to west, by 167 feet from north to south, and that North street is 2 rods wide, and is 330 feet in length from La Fox street to the east end of block 16. We find nothing in the record to indicate the width of the land lying between said block and Fox river; but, judging from the plat, it was probably regarded as insignificant, and not taken into the account. North street contains 40 square rods of land, and that street and block 16, taken together, contain but a few feet more than 240 rods of land; and 240 square rods of land, at \$5 per square rod, amounts to \$1,200, the exact price that was paid for the land deeded to appellees at the time of the first purchase. As the quitclaimed land contained in North street was taken into account in computing the purchase money then paid, and as, by the executory contract, appellees were to pay for the land in which the option was given the same price per square rod as was paid for the lands then conveyed to them, it necessarily follows that the price of the square rods of land located in Kane street,

at \$5 a square rod, was also to be included in the purchase money to be paid in the event appellees desired to avail of the privilege of buying contained in said contract.

It is true that \$1,200 was inserted in the warranty deed for block 16 as the consideration money, and also that the nominal consideration of \$1 was stated in the quitclaim deed; but the rule is that the recitals in a deed in regard to the consideration may be inquired into in any way, provided it is not sought to impair the effect of the deed as a conveyance. *Insurance Co. v. Wolf*, 37 Ill. 354; *Morris v. Tillson*, 81 Ill. 607. It is also true that one of the appellees, in his testimony, after first testifying that the consideration for the two conveyances of April 28, 1888, was \$1,200, says, in answer to a question asked by his counsel: "One thousand two hundred dollars was the price of the block. Then he gives me a quitclaim deed of a piece of land on the north side of the block and on the east of it. \$1,200 was the consideration for the land described." But we regard this as ambiguous and unsatisfactory, and as of little weight as against the evidence afforded by the contract itself, and the plat of the land and the deeds.

There are other questions of interest that arise upon the record, but a consideration of them is not necessary for the purposes of this appeal; and, as it appears that other persons who are not parties to this suit are interested in the subject-matter at issue and involved in said questions, we refrain from any decision upon them. For the errors indicated herein, the decree is reversed, and the cause is remanded. Reversed and remanded.

(158 Ill. 137)

CITY OF ROODHOUSE v. CHRISTIAN.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

FORMER ADJUDICATION—MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—APPEAL.

1. Where a person injured by being burned by an electric wire, against which he stumbles on account of a defect in the sidewalk, sues the city therefor, without alleging any joint negligence of the city and the electric company owning the wire, the fact that he has obtained judgment against said company for the same injury presents no defense to the action. 55 Ill. App. 107, affirmed.

2. Instructions which lead the jury to understand that a city is absolutely bound to maintain its sidewalks in a safe condition do not constitute reversible error, where other instructions announce the correct rule, that the city is only bound to exercise reasonable care in maintaining its sidewalks.

3. It is the duty of an appellant, who assigns as error the giving of certain instructions, to set forth in his abstract all the instructions given.

Appeal from appellate court, Third District.

Action on the case by George W. Christian against the city of Roodhouse. Plain-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

tiff obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 107. Defendant appeals. Affirmed.

Mark Meyerstein and J. M. Riggs, for appellant. D. J. Sullivan and D. F. King, for appellee.

WILKIN, C. J. Appellee brought this action to recover damages for a personal injury alleged to have been sustained through the negligence of the defendant. He recovered a judgment in the circuit court of Greene county for \$2,500, and that judgment has been affirmed by the appellate court. The declaration is of five counts. In the first, fourth, and fifth the negligent act charged against the defendant is permitting a telephone wire, charged with electricity, to be and remain across and near one of its sidewalks, whereby the plaintiff was injured by falling against the same and being burned. In the second and third counts it is charged with negligently suffering a sidewalk to be and remain out of repair and in an unsafe condition, whereby the plaintiff was thrown against a telephone wire charged with electricity, and burned, etc. The defendant filed four pleas, the first being the general issue, and the second setting up that plaintiff had theretofore recovered a judgment for \$1,250 against the Roodhouse Electric & Power Company for the same injuries and damages, which had never been reversed or annulled, pleading the same in bar to this action. The third and fourth pleas are substantially like the second. To these three special pleas a demurrer was sustained by the circuit court, and proper exceptions taken. The only errors of law assigned upon the record are—First, sustaining the demurrer to the special pleas; and, second, in giving instructions on behalf of the plaintiff.

In support of the first of these assignments of error, counsel contend that the evidence wholly fails to prove that the injury to the plaintiff was caused by the joint negligence of appellant and the electric and power company, and therefore, the plaintiff having sued the latter and recovered a judgment against it for the same injuries here complained of, that action is a bar to this. If the premise of this proposition is admitted, the conclusion does not, in our opinion, follow. But the several counts in this declaration clearly charge that the injury was the result of the individual negligence of the city, and the evidence clearly tends to prove the truth of the charge. The appellate court having affirmed the judgment of the circuit court, the fact of negligence is conclusively settled against appellant. Counsel admit that the appellate court has found that there was a defect in the sidewalk at the point in question, and that thereby appellee was caused to trip and fall; but they say the fall was not the real cause of the

injury. "He did not thereby receive any fracture, sprain, bruise, or similar injury. The whole injury was caused by electric burning." But, if the defect had not been in the sidewalk, as charged in the second and third counts, thereby causing the plaintiff to trip and fall against the wire, he would not have been burned; and so the negligence of the city, under these counts, in permitting its sidewalk to be and remain in an unsafe condition, was the primary cause of the injury. These pleas do not aver satisfaction of the judgment obtained against the electric and power company, and under this declaration we are unable to see wherein the doctrine of the liability of joint tortfeasors has any application whatever. This declaration does not charge that plaintiff was injured through the joint negligence of the defendant and the electric and power company, nor do the pleas so aver, and hence his recovery in this case in no way depends upon the liability of the latter company. The pleas presented no defense to this action.

Numerous instructions were given at the instance of either party. Of the 24 given on behalf of the plaintiff, the 1st, 3d, 8th, 12th, 16th, 17th, 18th, and 20th are criticised. Notwithstanding the fact that appellant has failed to present in its abstract either of the instructions given at its request, we have examined the series given on behalf of the plaintiff; and while some of those objected to, if they stood alone, might contain reversible error, we are clearly of the opinion that, considered together, in view of the evidence in this case, they could not have misled the jury to the prejudice of the defendant. In determining whether or not an instruction is erroneous, it must be considered in connection with all the other instructions given in the case. And even though one or more instructions in a series may be erroneous, still, unless it can be seen that some injury thereby resulted to the party complaining, the error will be treated as a harmless one. It is therefore manifest that a case can only be properly considered, where the ruling of the trial court in giving instructions is assigned for error, when all the instructions given are presented by the abstract. All the instructions asked upon the trial should be set forth in the abstract. Parties have no right to set forth a single instruction, or the instructions given on one side of the case, and object to the same, leaving the court to go to the record for the purpose of determining whether others supply omissions or cure defects complained of. To illustrate, complaint is made, of the several instructions given in this case at the request of the plaintiff, that their language is calculated to lead the jury to understand that the defendant was absolutely bound to keep and maintain its sidewalk in a safe condition, whereas the law only required it to exercise reasonable care in the discharge

of that duty. Some of them are justly subject to that criticism, but many of those to which no objection whatever is urged lay down the correct rule with so much precision and directness that it is readily seen that no intelligent jury could have been misled by the objectionable ones.

After a careful consideration of the questions raised upon this record, we are satisfied that the appellate court decided properly in affirming the judgment of the circuit court, and its judgment will be affirmed. Judgment affirmed.

(157 Ill. 57)

KEELER v. HERR et al.¹

(Supreme Court of Illinois. April 1, 1895.) *

**ACTION ON BUILDING CONTRACT — DAMAGES —
APPEAL—HARMLESS ERROR.**

1. In an action to recover for work done under a building contract, where there has been only a substantial, and not a full, performance of the contract, the contractor can only recover the difference between the contract price and the reasonable cost of completing the building according to the contract.

2. Where the jury are correctly instructed, for the defendant, that the cost of completing the building should be deducted from the contract price, in an action to recover it, and the amount of the verdict is less than the contract price with interest, it sufficiently appears that instructions given for the plaintiff allowing a recovery of the full contract price did not mislead the jury.

Appeal from appellate court, First district.

Assumpsit by Hiero B. Herr and others against James H. Keeler. Plaintiffs obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 468. Defendant appeals. Affirmed.

Flower, Smith & Musgrave, for appellant. Gregory, Booth & Harlan, for appellees.

WILKIN, C. J. Appellees sued appellant to recover a balance which they claimed he owed them for constructing a certain dock. The declaration is in assumpsit, setting up a contract between the parties whereby plaintiff agreed to build 1,650 feet of dock on the Calumet river for defendant, according to plans and specifications named in the contract; the defendant to pay them therefor \$7.25 per lineal foot,—\$2,500 to be paid when 500 feet of the work was complete, \$3,000 on the completion of 1,500 feet, and the balance when the whole was finished. Performance of the contract on the part of plaintiffs, and a refusal by the defendant to pay, were properly averred. Issue being joined on pleas of nonassumpsit and non-performance of the contract, a trial by jury resulted in a verdict and judgment for the plaintiffs for \$10,835.20. On defendant's appeal, the appellate court affirmed that judgment, and he now brings the record to this court.

There was no controversy between the par-

ties on the trial, except as to whether the dock had been constructed in conformity with the contract. Plaintiffs offered evidence to the effect that they completed the work, according to the agreement, on the 21st of November, 1890, and that there was then due them, in payment for the same, a balance of \$9,362.50, the sum of \$2,000 having been paid during the progress of the work. The amount claimed to be due was denied by the defendant on the sole ground that the material used and manner of constructing the dock did not conform to the terms of the contract.

No error is assigned upon the admission or exclusion of testimony. A reversal is urged upon no other ground than that the jury was erroneously instructed, at the instance of the plaintiffs, to the prejudice of the defendant. These instructions, in effect, directed the jury that if the evidence showed that the plaintiffs constructed the dock "in substantial conformity to their contract," then they were entitled to recover the contract price, leaving it to determine whether there had been such a substantial performance. We think they are erroneous, both because they allow plaintiffs to recover the full contract price upon proof of a "substantial performance" of their contract, and because they submit to the jury the question of performance without any construction of the contract by the court. *Taylor v. Beck*, 13 Ill. 376; *Estep v. Fenton*, 66 Ill. 467.

That some of those instructions are justly subject to the last of these objections is not denied by counsel for appellees, but it is insisted that defendant's instructions are subject to the same objection, and that he cannot therefore take advantage of the error; citing *Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Packet Co. v. Binniger*, 70 Ill. 571. There is force in this position, but we think the judgment of the circuit court should be affirmed on the more substantial and meritorious ground that it clearly appears that the error complained of worked no injury to appellant. All the instructions given on behalf of the plaintiffs went upon the theory that they were entitled to recover the entire contract price. Those given for the defendant, except the fourth, are to the effect that they could only so recover upon proof that they had fully performed the contract. But the defendant's fourth instruction is in the following language: "The jury are instructed that, under the written contract in evidence, the defendant was entitled to have erected such a dock as was called for by the terms of the contract, and even though the jury may believe that there has been a substantial performance of the terms of the contract by the plaintiffs, yet, nevertheless, if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as from the evidence they may believe are reasonable and proper to enable the defendant to complete the dock in the manner stipulated for in the contract." This instruction correctly states the law applicable to the facts of the case, and we

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

* Rehearing denied October 15, 1895.

think it clearly appears that the jury followed it in making the verdict. In contracts like the one in suit, sometimes called "building contracts," a literal compliance with the specifications is not necessary to a recovery by the contractor. A substantial performance, in good faith, is sufficient. As was said in *Sinclair v. Tallmadge*, 35 Barb. 602: "If there has been no willful departure from the terms of the contract or omission in essential points, and the laborer has honestly and faithfully performed the contract in all its material and substantial particulars, he will not be held to have forfeited his right to remuneration by reason of mere technical, inadvertent, or unimportant omissions or defects. The law imposes no such liability, and enforces no such penalty." *Glacius v. Black*, 50 N. Y. 145, is to the same effect, and in *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, it is said: "Then slight defects, caused by inadvertence or unintentional omissions, are not necessarily in the way of recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted." See, also, *Linch v. Elevator Co.*, 80 Tex. 23, 15 S. W. 208; *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418; *Gallagher v. Sharpless*, 134 Pa. St. 134, 19 Atl. 401; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Aetna Iron & Steel Works v. Kossuth Co.*, 79 Iowa, 40, 44 N. W. 215.

But counsel for appellant insist that the jury did not obey that instruction, but followed those given on behalf of plaintiffs. As above stated, plaintiffs claimed there was due them, on the completion of the work, November 21, 1890, \$9,962.50, and it is not denied by defendant that, if the work and material had been as good as contracted for, they would, by the terms of the agreement, have been entitled to recover that amount as of that date. By the statute in force when the contract was entered into, and when payment should have been made, they were entitled to interest on the amount due at the rate of 6 per cent. per annum to the date of the recovery, and they made that claim on the trial. Herr testified: "The balance due, including interest at 6 per cent., was \$11,504.76." It was admitted defendant was entitled to a credit of \$150 for posts not put in, by agreement of parties; so that the actual amount claimed by plaintiffs at the trial was \$11,354.76. The verdict (\$10,835.20) was therefore \$519.56 less than the amount which plaintiffs insisted was due them, and this difference can, in our view of the evidence, be accounted for only upon the theory that the jury allowed interest on the claim of plaintiffs, and allowed the defendant damages for defective material and construction. It is true the jury were not specifically instructed on the subject of interest, but that the third given at the request of plaintiffs, to the effect that, if they had substantially performed the contract on their part; they were entitled to recover the contract price, less a reasonable

allowance for "shutting posts," amounted to a disclaimer to interest on the amount due, as contended by counsel for appellant, cannot be maintained. That instruction, as well as others given at plaintiffs' request, were, as already said, intended to direct the jury to allow them the full contract price, on proof of substantial performance. If they were entitled to that price under the contract, the statute gave them the right to interest from the time the money became due by the terms of the written agreement. The third instruction in no proper sense waived that right. It seems clear that the jury did allow interest, because in no other way, consistent with the evidence, could the amount of the verdict have been reached. This counsel for appellant concede, but they attempt to account for the reduction of plaintiffs' claim upon the supposition that but 5 per cent. interest was allowed, and that only from the commencement of the suit to the date of the verdict. The exact amount of the verdict cannot be reached even in that way, but no evidence was offered by either party upon which interest could have been so competent, neither did the law authorize it. On the whole case, we think the conclusion is irresistible that the verdict of the jury was reached by following the directions of the court as given in defendant's fourth instruction. That being so, an affirmance of the judgment below must follow, notwithstanding the errors in other instructions, because they were harmless.

We are also of the opinion that, from all the evidence in this record, substantial justice is done the defendant by the verdict of the jury and judgment of the circuit court, and that he could not reasonably expect a more favorable result if allowed another trial. The judgment of the appellate court will be affirmed. Affirmed.

(158 Ill. 186)

HUMPHREYS et al. v. ROTH et al.¹
(Supreme Court of Illinois. Oct. 14, 1895.)

APPEAL—HARMLESS ERROR.

Where a decree dismissing a bill, and granting relief on a cross bill, is appealed from only by the original complainant, who is not affected by the cross bill, the fact that the evidence does not sustain the allegations of the cross bill is not cause for reversal.

Error to circuit court, Champaign county; Francis M. Wright, Judge.

Bill by J. F. Humphreys & Co. against J. M. Roth, Ida B. Roth, J. B. Savage, and Sarah L. Savage. Defendants obtained a decree. Complainant brings error. Affirmed.

Plaintiff in error, having recovered a judgment in attachment in the county court of Champaign county, against J. M. Roth, for \$160 and costs of suit, levied upon and caused to be sold 6 feet off of the east side of lot 9, and 22 feet off the west side of lot 8, block 6, in the town of Fisher, in Champaign coun-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ty, itself becoming the purchaser. It subsequently filed this bill, alleging that one J. B. Savage claimed to be the owner of said property, and that the legal title is in him, but that he is not the owner thereof, but is claiming the same for the benefit of J. M. Roth, to defeat plaintiff. The bill also alleges that Ida B. Roth, wife of J. M. Roth, claims some interest in the property. The prayer is for a decree finding the property subject to plaintiff's attachment, etc. J. B. Savage and Sarah L., his wife, and J. M. Roth and Ida B. Roth, were made defendants. They filed a joint answer, denying all fraud, and admitting that the legal title to the premises described in the bill was in J. B. Savage, but denying that J. M. Roth had any interest therein except a verbal agreement by Savage to convey the same to him upon the payment of \$500. To this answer a general replication was filed, and afterwards, at the March term, 1894, Ida B. Roth filed her cross bill, alleging that she purchased said property of one A. D. Ricketts in January, 1892, and received from him a deed therefor, for which she paid the purchase price with her own separate funds; that in April, 1892, to aid her husband in the purchase of a stock of goods in Fisher, Ill., from said J. B. Savage, she conveyed the premises to Savage, but that, both the deed from Ricketts to her and from her to Savage being unrecorded, they were by agreement destroyed, and Ricketts deeded directly to Savage; that afterwards, on July 15, 1892, her husband resold the stock of goods to Savage, and that it was then agreed by Savage, herself, and J. M. Roth that said premises should be reconveyed by said Savage to her, which Savage has frequently since been requested to do, but has as often failed to convey the same back to her; that J. M. Roth paid nothing towards the purchase of the premises, and has not now and never had any interest in the same, except as her husband. Complainant in the original bill, Savage and wife, and J. M. Roth were made defendants to this cross bill, answers under oath except as to J. M. Roth being waived, and a decree prayed dismissing the original bill at the cost of the complainant therein, and ordering J. B. Savage and Sarah L. Savage to execute a good and sufficient deed of conveyance of the premises to oratrix. On the 5th of March, 1894, J. M. Roth and Ida B. Roth, having obtained leave to withdraw their former answer to the original bill, answered over, denying that J. B. Savage holds the legal title to the property described for J. M. Roth, or that the latter is the owner thereof or ever had any interest therein except as husband of Ida B. Roth, and denying all collusion and fraud on the part of J. M. Roth, and averring that the premises are the separate property of Ida B. Roth, purchased and paid for with her own individual money. On the same day, J. M. Roth filed a sworn answer to the cross bill, admitting that its allegations were true in substance and in fact. Answers by the other de-

fendants being filed, the cause was heard in open court, on written exhibits and oral proof. The original bill was dismissed for want of equity, and a decree entered granting the relief prayed in the cross bill, at the cost of the complainant therein.

Fifer & Barry and J. O. Cunningham, for plaintiff in error. Thomas J. Smith, for defendants in error.

WILKIN, C. J. (after stating the facts). Complainant in the original bill alone prosecutes this writ of error. The only ground for reversal urged by it is that the decree of the circuit court is unsupported by the proofs, and the first and controlling question is, was its bill properly dismissed? If it was, even though the decree on the cross bill is erroneous, no injury results therefrom to plaintiff in error, and it cannot complain. While there is much uncertainty and indefiniteness in the testimony, it is clear that, at the time the property was purchased by plaintiff in error on its attachment, the legal title was in J. B. Savage. It is so alleged in the bill. The fact that he got that title by the destruction of an unrecorded deed from Ricketts to either J. M. or Ida B. Roth is, as between these parties, of no consequence; nor do we think it makes any difference in the decision of this case to which of the Roths the destroyed deed from Ricketts was made. It is not denied that Savage got the property in part payment for a stock of goods purchased by J. M. Roth prior to the incurring of his indebtedness to plaintiff in error. It cannot therefore be said that the conveyance to Savage was for the purpose of defrauding it; nor is that the theory of its evidence. The testimony on its behalf on the hearing was to the effect that, by the contract of resale between Savage and J. M. Roth, the latter was to have this property conveyed to him, but that he afterwards concluded with Savage to allow the title to remain in him for his (Roth's) benefit, to defraud plaintiff in error. The chancellor who heard the cause evidently found against that contention. The witnesses were before him, and we cannot say his finding is so clearly contrary to the weight of the evidence as to justify us in setting it aside. While the testimony of both Mr. and Mrs. Roth as to the repurchase of the property by the latter from Savage is inconsistent with the allegations of her cross bill and his sworn answer as to the truth of those allegations, still, unless they have knowingly and willfully sworn falsely, J. M. Roth never owned the property or paid anything for it; and as to this fact they are wholly uncontradicted by any competent proof. If, in fact, Mrs. Roth purchased and paid for it as her own separate property, plaintiff in error could not lawfully seize it for her husband's debts, even if the legal title had once been in him, unless it could show that it had been misled thereby to its injury; and, as we have seen, there is no claim, either in the al-

legations of its bill or its proof, that it gave J. M. Roth credit on the faith of his being the owner of this property.

It would seem that either party could have made the proof in this case much more satisfactory than they have done; but we are not disposed to interfere with the conclusion of the court below to the effect that the original bill should be dismissed for want of equity. As already said, the allegations of the cross bill are not in harmony with the testimony of either the complainant therein or her husband. It is a familiar rule that, to entitle a complainant in equity to relief, the allegations and proofs must correspond. The decree here undeniably violates that rule. But it is also true that only parties injured by an error can have a reversal of a judgment or decree on that ground. No one affected by the decree on the cross bill is complaining here, and therefore no grounds for its reversal are shown. It will accordingly be affirmed. Affirmed.

(157 Ill. 225)

GARDEN CITY SAND CO. v. MILLER
et al.¹

(Supreme Court of Illinois. April 1, 1895.) *

EVIDENCE — FOREIGN JUDGMENT — REGISTER OF
DEEDS—DEED—SPECIFIC PERFORMANCE
— VENDOR AND VENDEE.

1. Rev. St. 1893, c. 51, § 13, which declares that "records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having custody thereof," applies to foreign judgments and abrogates the necessity of a certificate of the presiding judge that the attestation is in due form.

2. Under How. Ann. St. Mich. § 610, which declares that in case of the absence of a register of deeds his deputy shall perform the duties of register, a copy of the records certified to by such deputy in his own name as deputy register is admissible in evidence, the presumption being that the deputy only acted when he had legal authority to do so.

3. A deed which describes land by section, township, and range, without mentioning any meridian, county, or state, but which describes the grantor as being of a county and state wherein he owned land answering to the description in the deed, and under which the grantee has taken possession of said land, is sufficient to pass title thereto.

4. A contract for the sale of land in another state made in that state should be construed with reference to the laws of such state.

5. A contract made in Michigan for the sale of land in that state contained no provision as to the condition of the title or as to the nature of the deed to be given. There was a possibility that the vendor's title might be subject to the liens of creditors of the vendor's ancestor, who had died intestate and whose estate had not been settled, but there was no proof that there were any such creditors. Held that, since the Michigan law puts the burden of proving defects on the vendee in such a contract, the title was sufficient to justify a decree of specific performance.

Appeal from circuit court, Cook county; L. C. Collins, Judge.

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

Bill by Anna M. Miller, Eva M. McKinnon, and R. I. Wendell against the Garden City Sand Company. Complainants obtained a decree. Defendant appeals. Affirmed.

Appellees, as vendors, filed their bill for specific performance against appellant, as assignee of one Harpold, vendee of certain lands in Manitou county, state of Michigan. The evidence shows that Eva M. McKinnon and Romaine I. Wendell are minor heirs of Jacob A. T. Wendell, deceased, and that Anna M. Miller was his widow, he dying in Michigan, intestate. The evidence also shows that in August, 1889, the said Anna M. Miller (then Wendell), as guardian of the said Eva M. McKinnon and Romaine I. Wendell, made a contract in writing with one E. C. Harpold for the sale of the said real estate for the sum of \$1,000, of which \$100 was paid at the execution of the contract, the remainder to be paid in installments thereafter, the deed to be delivered at the last payment; that Harpold subsequently assigned the contract to the said Garden City Sand Company, the latter notifying the said Anna M. Miller of such assignment, and requesting that the deed be made to the company; and that said Anna M. Miller agreed to so make the deed. On the hearing there was offered in evidence a transcript of certain proceedings in chancery in the circuit court of Mackinac county, Mich. In such transcript it appears that Anna M. Miller, as guardian of the said minors, by a petition filed in said court October 8, 1889, asked leave to sell the premises above mentioned; that by an order of said court filed October 18, 1889, she was granted such authority, and was directed to report to the court any agreement which she might make for such sale, for approval and confirmation by the court; that on November 18, 1889, she filed a report stating that she had made a contract with said company for the sale of said premises; and an order of said court was entered November 18, 1889, approving the report, ratifying the contract, and directing the guardian to make and deliver a deed. Mrs. Miller made the contract with Harpold and ratified the assignment to appellant before applying to the court for authority so to do. Correspondence passed between the appellant and Anna M. Miller for some time, when, on November 2d, appellant notified her that it would forfeit the money paid and relinquish its claim. The land was conveyed from the United States to Joseph V. Brown, and by him to George Wendell and Jacob A. T. Wendell. This deed describes the section, township, and range, but gives no meridian, county, or state in which the lands are located. George Wendell by will devised all his real and personal property to Jacob A. T. Wendell. The date of the death of George Wendell is not shown, but his will was admitted to probate February 12, 1890, and Anna M. Wendell was appointed administratrix. The record does not show that estate settled. The transcript of the proceedings in chancery in the circuit court of Mackinac county, relating to

the matter of guardianship referred to above, is certified by only the clerk of that court, the judge not having added his certificate that the clerk's attestation is in due form. A decree was entered for complainants as prayed.

E. C. Crawford, for appellant. F. W. Becker, for appellees.

PER CURIAM. The transcript of the chancery court of Michigan which authorized the guardian to make sale and approve the contract is attested by the certificate of the clerk under the seal of the court. The attestation is not in accordance with the act of congress which requires the presiding judge to certify the attestation of the clerk as in due form. The admission of that transcript in evidence is assigned as error. Prior to 1872 there was no statute in this state providing for the manner of attestation of the judgment of the courts of another state to make the same evidence in the courts of this state. In the absence of such legislation, this court held in numerous cases that where a judgment of a foreign state was sought to be introduced in evidence in the courts of this state it was necessary that it should be attested by the clerk, under the seal of the court, together with a certificate of the presiding judge that the attestation was in due form. Among the cases declaring such rule we refer to *Brackett v. People*, 64 Ill. 170. By section 13, c. 51, Rev. St., enacted in 1872, it was declared by the legislature of this state that "the papers, entries, and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof and the seal of the court, or by the judge of the court if there be no clerk." Since that legislation the question of the admissibility in evidence of the transcripts of records of the courts of other states has been frequently before this court. In no case arising since the legislation of 1872 has the question been presented as to the sufficiency of the attestation under section 13 of the chapter entitled "Evidence and Depositions," but the question has arisen as to whether the attestation was in accordance with the act of congress. Of those cases we refer to *McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 772; *Horne v. Spelman*, 78 Ill. 206. Before the enactment of 1872 the records of judgments of courts of this state, when offered in evidence in other courts of this state, were attested as at common law. There was no statutory provision on the subject. At common law, the manner of authentication was by certificate of the officer having custody of the record, or by exemplification,—that is, affixing the great seal of state. It has been universally held a sufficient authentication of a record of a judgment of a court of a state, when offered in evidence in another court of the same state, that it be certified by the clerk under the seal of the court. This was evidence at common law, and was the rule in this state when the act of 1872 was adopted. So far as the admissibility of evidence was concerned, section 13 of chapter 51

made no new rule with reference to domestic judgments. That section changed no rule of law, by adding to or limiting the admissibility of evidence of domestic judgments within the courts of this state, from what the rule was at common law. The intention of the legislature could not have been to declare as a rule of evidence that which had immemorably existed. By the enactment of section 13 of chapter 51 there is no limitation as to the class of judgments to be so authenticated, and the language used includes both domestic and foreign judgments. The act of congress as to manner of authentication of judgments of sister states does not abrogate common-law proof, and is not exclusive. The states may pass laws as to what shall be evidence of foreign records within their courts, not inconsistent with the act of congress, yet waiving some of the requirements of that act. *Ordway v. Conroe*, 4 Wis. 45; *Goodwyn v. Goodwyn*, 25 Ga. 203; *Karr v. Jackson*, 28 Mo. 316; *Dean v. Chapin*, 22 Mich. 275; *Ex parte Povall*, 3 Leigh, 816; *Kingman v. Cowles*, 103 Mass. 283. The record of the chancery court of Michigan, though not certified in accordance with the act of congress, was authenticated in consonance with section 13 of chapter 51, Rev. St., and was admissible in evidence.

It appears from the evidence in this record that the lands the contract involved in this litigation had reference to were entered by the patentee, Joseph V. Brown, and in the patent the lands are described as fractional section 17, township 39 N., of range 11 W., in the district of lands subject to sale at Sault St. Marie, Mich., containing 80 acres and $\frac{80}{100}$ of an acre, and the patentee is described as of Chippewa county, Mich. The evidence then shows a deed from Joseph V. Brown, of Sault St. Marie, Chippewa county, Mich., to George Wendell and Theodore Wendell, of Mackinac county, in the state of Michigan, conveying, among other lands, fractional section No. 17, township 39 N., range 11 W., containing $80\frac{80}{100}$ acres. That deed was acknowledged before a justice of the peace of Chippewa county, Mich. The testimony of the guardian shows that the Theodore Wendell mentioned in that deed is Jacob A. T. Wendell, who was sometimes called Theodore, and the guardian further testifies that Jacob A. T. controlled the land described in her guardian's deed, in his lifetime, and that she had controlled them since his death. A copy from the records of that deed is introduced in evidence, certified to by a deputy register of deeds. That deed is objected to because it does not describe the meridian, or any county or state. The further objection is made that it is not certified to by the register of deeds, but by a deputy, who signs her own name as deputy.

The general rule is that the certificate of an officer, when made by a deputy, must be in the name of the officer. By section 609 of Howell's Annotated Statutes of Michigan, which was in evidence, a register of deeds is

authorized to appoint a deputy. Section 610 of the same statute is: "In case of a vacancy in the office of the register of deeds, or his absence or inability to perform the duties of his office said deputy shall perform the duties of register during the continuance of such vacancy or disability." Under that statute, in the case of vacancy or absence or inability of the register, the deputy may act. The deputy, though a deputy merely, is made the officer, and a certificate made by such deputy, and signed as deputy, will be presumed to have been made by reason of a vacancy, or because of absence or inability of the officer. The deputy certifies she is the keeper of the records. The authentication is sufficient.

While the deed does not mention a meridian or a county or state in which the land is located, yet it does appear that the patentee and grantor in that deed was a resident of Chippewa county, Mich., and the deed was acknowledged in that county. The evidence in the record shows that the ancestor of these minors was in control of the lands prior to his death, and the guardian had been in control since. These facts, all considered, are sufficient to apply the deed of Brown to the Wendells (and under which possession was taken) to the land described in the patent and in the guardian's deed tendered appellant. Any fact or circumstance by which the mind is convinced as to what tract was intended to be conveyed will be resorted to, instead of treating the description as a patent ambiguity. *Pursley v. Hayes*, 22 Iowa, 11; *Mecklem v. Blake*, 19 Wis. 397; *Russell v. Sweezey*, 22 Mich. 235; *Billings v. Coal Co.*, 67 Ill. 499; *Atwater v. Schenck*, 9 Wis. 160; *Clark v. Powers*, 45 Ill. 283. It was not error to admit in evidence the deed from Brown to George W. Wendell and Theodore Wendell as *prima facie* conveying the lands in controversy.

A court of equity will not always confirm the specific performance of a contract, and if there is anything that makes it unconscionable for equity to lend its aid, specific performance will not be decreed. *Dintleman v. Gilbert*, 140 Ill. 597, 30 N. E. 766. Specific performance is not a matter of right, but of sound legal discretion. *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589. Where there is any doubt about the validity of the title, or its being free from liens or incumbrances, the court will not decree a specific performance. The title must not be doubtful, its validity resting upon some fact not before the court. *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. 868. Neither will a decree be entered to compel performance by the vendee when the title is subject to the exercise of a power in another that may defeat the title sought to be thrust upon the purchaser. The evidence shows that George Wendell, the brother of Jacob A. T. Wendell, died testate; and by his will in evidence all his real and personal property was devised to Jacob A. T. Wendell. The date of the death of George is not shown

by the evidence, further than that he died before Jacob A. T. Wendell, and letters of administration of the estate of George were issued to Annie Marie Wendell on February 12, 1880, and in the letters of administration it is recited that Annie Marie Wendell is the administratrix of Jacob A. T. Wendell. The death of Jacob A. T. Wendell is proven, but the date not proven further than by the recital above. There is no evidence in the record showing that either the estate of George Wendell or the estate of Jacob A. T. Wendell is settled. In *Burns v. Berry*, 42 Mich. 176, 3 N. W. 924, it is held: "The real estate of the deceased descends to his heirs subject to the payment of his debts; and conveyances made by them before the estate is administered upon, and the claims paid or barred by the statute of limitations, are in like manner subject to the debts of the deceased; and, as against the debts proved against the estate, our registry laws afford no protection. Subsequent purchasers take subject to the right of the administrator to have the same sold for the payment of the debts and the expenses of administration."

It is insisted that the vendee cannot be compelled to specifically perform the contract and take the land, until it is made to appear affirmatively that either there are no debts against the estate or that there is sufficient personal property to pay whatever debts may exist. There is nothing in the record to show that either estate was indebted, but the evidence rather tends to raise the presumption that there were no debts for the payment of which the land was liable to be charged. Mrs. Wendell was permitted to testify, without objection, that she had managed the land since the death of her husband, and that there were no liens or incumbrances upon it. It also appeared that the circuit court of Mackinac county, on her petition as guardian of the minor heirs, authorized her as such guardian to make the sale of the undivided interests of such minors in the land. While a purchaser cannot be compelled to take a doubtful title, he will not be permitted to object to a title on account of a bare possibility that it will prove defective. 1 Sugd. Vend. 391; 22 Am. & Eng. Enc. Law, 957; *Society v. Brown*, 147 Mass. 296, 17 N. E. 549; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Spring v. Sanford*, 7 Paige, 553; *Schermerhorn v. Niblo*, 2 Bosw. 161; *Hayes v. Cemetery*, 108 Mass. 400; *Moser v. Cochrane*, 107 N. Y. 41, 13 N. E. 442. But the contract in question is silent as to the condition of the title and as to the nature of the deed of conveyance by which it was to be transferred to the vendor. It was made in Michigan, and related to Michigan land, and should be construed with reference to the law of that state, which has been held to be that in such a case the vendee will be presumed to have satisfied himself concerning the title. It was said by Judge Cooley in *Baxter v. Aubrey*, 41 Mich. 13, 1 N. W. 897, that "if the vendee accepts a contract in which the

ownership of the vendor is assumed, and agrees to pay for the land, without requiring the vendor to produce evidence of his title, the burden will be upon him to show defects. The presumption will be, in the absence of any showing, that he satisfied himself respecting the title when he made the bargain." See, also, *Allen v. Atkinson*, 21 Mich. 352; *Dally v. Litchfield*, 10 Mich. 29; *Dwight v. Cutler*, 3 Mich. 506; *Brown v. Bellows*, 4 Pick. 178. We find no sufficient evidence in the record to justify the vendee in his refusal to perform the contract. The judgment of the circuit court will therefore be affirmed. Judgment affirmed.

(157 Ill. 33)

GOELZ et al. v. GOELZ.¹

(Supreme Court of Illinois. April 1, 1895.)²

WITNESS—HUSBAND AND WIFE—RESULTING TRUST—EQUITY—APPEAL.

1. Rev. St. 1893, c. 51, § 2, which forbids a litigant to testify in his own behalf when the adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person, does not apply to a case where the adverse party, although claiming title to the land in controversy through his deceased ancestor, derives his title through a deed from such ancestor.

2. In chancery, objections to the legal competency of evidence admitted at the hearing may be made for the first time on appeal, since it is assumed that only competent evidence was considered by the chancellor.

3. Under Rev. St. 1893, c. 51, § 5, which states when husband and wife may testify for or against each other, but provides that "nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other except in suits between such husband and wife," a man cannot, in a suit against third persons, testify as to admissions made to him during marriage by his deceased wife.

4. Land bought by a son was paid for with money furnished partly by his mother and partly by his father, title being taken in her name. The father knew that the title was vested in her, and made no objection for several years, and until he learned that she was about to dispose of the property. *Held*, that there was no resulting trust in his favor, the presumption being that he intended the transaction to be a settlement on her.

Appeal from superior court, Cook county; Phillip Stein, Judge.

Bill by William Goelz against William Goelz, Jr., and Josephine Goelz. Complainant obtained a decree. Defendants appeal. Reversed.

Thompson & McCaslin, for appellants. Johnson, Herring & Brooke, for appellee.

BAKER, J. In 1880, William Goelz, the appellee, was residing with his wife, Josephine Goelz, at Bowmanville, in Cook county, Ill. He was a German by birth, and a physician by profession, and had accumu-

lated some property. He was at that time 61 years of age, and his wife was several years older. They had three living children,—William Goelz, Jr., about 33 years old; Carl August Goelz, a few years younger; and a daughter, Dorothea F. Goelz, since intermarried with one August Grossman. William Goelz, Jr., and Carl August Goelz were married men, Louisa Goelz being the wife of the former and Anna Goelz the wife of the latter. William Goelz, Jr., had no property or money, and was working for a very small compensation and on commissions in the real-estate office of B. F. & M. Weber, in Chicago. The premises in controversy in this suit are 10 acres of land in the town of Lake View, in Cook county. On the 12th day of February, 1880, said 10 acres were sold at public venue, at the south main-entrance door of the criminal court building in Chicago, by one Edward Knauer, trustee, under a trust deed executed by John Krummenacher and wife to secure the payment of a note for \$2,000 and interest. William Goelz, Jr., had learned of the proposed sale some days prior to the date it was advertised to take place, and that the property could probably be bought for the amount of the debt, interest, and expenses of sale, and informed both his father and his mother in regard thereto. He attended the sale, taking with him a certified check for \$300, dated said 12th day of February, 1880, signed by Bernard F. Weber, and payable to "Edward Knauer (trustee) or order." He bid in the property for \$2,400 in the name of his mother, Josephine Goelz, and delivered to Knauer, the trustee, the check for \$300, in part payment of the purchase money. The trustee thereupon made to Josephine Goelz a trustee's deed for the land. The deed bears date February 12, 1880; was acknowledged April 28, 1880; and was filed for record on July 19, 1880. The residue of the purchase money was paid to the trustee by William Goelz, Jr., in March and April, 1880; he having obtained most of the money necessary for so doing by getting Bernard F. Weber to cash certain notes secured by mortgages, and known as the "Deinzer note," for \$1,090; the "Zender note," for \$600; and the "Bell note," for \$200. It seems that William Goelz, the father, was the owner of each and all of said last-mentioned notes. It also satisfactorily appears that, prior to the trustee's sale, William Goelz, Jr., had arranged with Weber to cash the notes in the event he bought the property. About the time of the above transaction, or shortly thereafter, Josephine Goelz met with an accident by which a leg was broken. She afterwards suffered greatly from rheumatism, and her lower limbs were paralyzed, and the latter five years of her life she was a confirmed invalid. She and her husband gradually became estranged from each other, until, finally, they were not even on speaking terms. In 1884 ap-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

pellee was told that his wife had executed a will in which she had devised the land in question. Thereupon, on the 12th day of September, 1884, he exhibited the original bill filed herein, making his wife and his son, William Goelz, Jr., parties defendant thereto. Josephine Goelz had not in fact made a will, but on the 26th day of July, 1884, she had executed and acknowledged a deed by which she conveyed the south half of the land to William Goelz, Jr., and had also executed and acknowledged a certain other deed, by which she conveyed the north half of the premises to Carl August Goelz. Both of said deeds were delivered and filed for record on said 26th day of July, 1884; and each deed states on its face that it was made for the consideration of one dollar, and for other good and valuable considerations. The substance of the original bill was that complainant gave to William Goelz, Jr., \$2,400, and directed him to purchase the land in the name of the complainant; that said agent fraudulently took the deed in the name of Josephine Goelz; and that complainant, as soon as he heard that the deed was in the name of Josephine, requested her to convey to him, which she refused to do. The prayer was that a trust be declared for the use of the complainant, and that Josephine be decreed to convey to him. Josephine Goelz and William Goelz, Jr., each filed answers, and denied the allegations of the bill. On October 23, 1885, William Goelz, Jr., made a quitclaim deed for the south half of the land to John Jacobs, a brother-in-law; and on December 28, 1885, John Jacobs and his wife made a quitclaim deed for the same property to Louisa Goelz, wife of William Goelz, Jr. Each of said deeds stated a nominal consideration of one dollar. Josephine Goelz died, intestate, on or about the 18th day of April, 1886. On June 20, 1887, the complainant filed a supplemental bill. Said bill made reference to the prior bill and answers, and replications to the latter; stated the executions of the two deeds of July 26, 1884, and of the deeds of October 23 and December 28, 1886; and alleged the death of Josephine Goelz. It charged that all of said conveyances were made without consideration, and in fraud of the complainant's rights. It made William Goelz, Jr., Carl August Goelz, Dorothea F. Grossman, August Grossman, and John Jacobs, and his wife, defendants, and prayed for relief against them. Jacob and his wife filed disclaimers. Dorothea F. Grossman and her husband made default. Carl August Goelz, William Goelz, Jr., and Louisa Goelz filed answers in denial of the averments and charges contained in the original and supplemental bills. Various amendments were afterwards made to both the supplemental bill and the answers, but it is not deemed necessary to here specify what they cover. The cause was referred to the master in chancery, who took the dep-

ositions and proofs, and reported them to the court, with his conclusions. The decree of the superior court of Cook county, entered December 26, 1893, granted the relief prayed for by appellee in his bill of complaint, and decreed that the title to the ten acres of land was held in trust by Carl August Goelz and Louisa Goelz, and required them to convey to appellee, as being the equitable owner of the land.

Appellants claim that all of the testimony given by appellee himself as a witness is incompetent, and should be disregarded. They base their claim on section 2 of the chapter on "Evidence and Depositions," which provides that no party to any civil action, suit, or proceeding shall be allowed to testify therein in his own behalf when any adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person. This contention is met by appellee by the counterclaim that objections to the competency of a witness or to testimony cannot be made for the first time in this court; and that no objections were interposed before the master as to the competency of Dr. William Goelz as a witness, nor as to the competency of his testimony; and that no objections or exceptions to his testimony were filed in the court below. Neither the claim of appellee nor that of appellants is well grounded. It is to be borne in mind that the question here does not go to mere matter of informality or irregularity, which might be cured in the trial court. The question before us concerns the legal competency of certain evidence; and the question arises, not in an action at law, but in a suit in equity. In *Swift v. Castle*, 23 Ill. 209, this court said: "The question presented upon the trial before the chancellor, as well as in the appellate court, is, upon all the legitimate evidence in the cause, what decree should be rendered? The chancellor being the judge of both the law and evidence, the presumption is that, in rendering his decree, he will only regard that which is legal and pertinent. * * * It is the correct practice for the chancellor, after the evidence is heard, to regard no portion of it which is immaterial or illegal, and to decide the case alone on the legal evidence adduced. Such is believed to have been the uniform practice, which has been adopted from considerations of convenience, and is in no way calculated to hinder or delay the administration of justice, and no reason has been suggested nor is any perceived why it should be changed." In *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189, it was said: "In chancery cases the whole record, including all the evidence offered, is before us, and we are required to assume that all the incompetent evidence was rejected, and all the competent evidence was admitted and considered on the final hearing. If there is competent evidence in the record sufficient to sustain the decree, it must be affirmed. If not, it must be reversed, and this without regard to whether the chancellor may have been right or wrong in his views as to

the competency of the evidence at the hearing." And to the same effect are *Stone v. Wood*, 85 Ill. 603; *Tunison v. Chamblin*, 88 Ill. 378; *Moore v. Tierney*, 100 Ill. 207; *Ritter v. Schenk*, 101 Ill. 387; *Smith v. Long*, 106 Ill. 485; *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; and numerous other cases.

It is plain, however, that appellants ask too much when they insist upon excluding from consideration the whole of the testimony given by appellee in his own behalf. Appellants are not defending as heirs, legatees, or devisees of Josephine Goelz, deceased, but as immediate and remote grantees of said deceased. Consequently the case does not fall within section 2 of chapter 51 of the Revised Statutes. Appellee is a competent witness in the case; but, at the same time, much of his testimony is incompetent, and must be disregarded.

On grounds of public policy, and wholly independent of any question of interest or identity, neither husband nor wife could at common law testify to communications or conversations occurring between them during coverture; and this inability to testify continued, as to such communications and conversations, even after the marital relation was severed, either by divorce or by death. 1 Greenl. Ev. §§ 254, 334, and following sections. By section 5 of the act of 1867 (Laws 1867, p. 184), which was re-enacted in 1872 as section 5 of the act in regard to evidence and depositions (Laws 1871-72, p. 405), this rule was relaxed, but only in respect to certain specified cases. In 1874 said section 5 was amended by the addition thereto of a proviso to the effect "that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her, or by her to him, or by either to third persons, except in suits or causes between such husband and wife." Laws 1873-74, p. 98; 1 Starr & C. Ann. St. p. 1077. This was a recognition and re-enactment of the above-mentioned rule of common law, based on public policy, but confining its operation to cases other than suits or causes between the husband and wife. *Mueller v. Rebhan*, 94 Ill. 142-149; *Munford v. Miller*, 7 Ill. App. 62. In respect to this matter, the cases of *Deniston v. Hoagland*, 67 Ill. 265, and *Galbraith v. McLain*, 84 Ill. 379, are not of controlling effect. *Deniston v. Hoagland* was decided in 1873, and the decision was expressly placed upon the statute as it stood prior to the addition of the proviso; and *Galbraith v. McLain* was decided upon the authority of the *Deniston* Case, and without any reference to the amendatory act of 1874.

In the suit at bar, Josephine Goelz, the wife, died in 1886, and her death was suggested in the supplemental bill filed in 1887, and her grantees made parties defendant. The evidence was taken and the cause heard several years after she had ceased to be a party to the litigation. Her administrator, if there be one, is not a party. Her conveyances to her two sons were mere quitclaim deeds, and even

her estate has no interest in the result. It seems to us that, necessarily, the conclusion must be that the testimony given by appellee in regard to conversations with and admissions by his wife is not competent and lawful testimony, and must be wholly excluded from consideration. But, even if such evidence was not excluded on the ground that it is in contravention of the statute and of public policy, it would be entitled to but little weight. It is hardly credible that Josephine Goelz should have had the supposed conversations, and should have made the claimed admissions, and yet there be no testimony other than that of appellee tending to prove them. The daughter Dorothea, whose interests are adverse to those of her brothers, was living with her parents at the time of the transactions involved, and she nursed and took care of her invalid mother during the many years of her sickness; and yet neither she nor any other witness testifies to any of the conversations or admissions, or to any like admissions or statements. The record is quite voluminous, and is largely taken up with the examinations and cross-examinations of Dr. Goelz and William Goelz, Jr. Upon most of the important and material points involved in the issue, there is an absolute contradiction between these two witnesses. The substance of the claim of appellee is that he furnished the moneys, notes, and securities used in buying and paying for the land; that his son, as his agent, promised to buy in the land in his name, but fraudulently bid it off in the name of Josephine Goelz, and had the deed made to her; and that he (appellee) was not advised of these facts until a year later. The substance of the claim of William Goelz, Jr., is that he purchased the land for himself, and that it was so understood by both his father and mother; that he borrowed from Bernard F. Weber the \$300 to make the cash payment at the time of the bid, and borrowed from his mother the Denizer note for \$1,300, the Zender note for \$600, and the Weber note for \$500, upon which to raise money to pay the whole \$2,400 purchase money; and that he had the deed made to his mother in order to secure the repayment of the \$2,400 borrowed from her. In our opinion, neither of these claims is the true theory of the actual transaction.

The evidence shows that at the trustee's sale, on the 12th day of February, 1880, the land was struck off to Josephine Goelz for \$2,400, and that a deed of conveyance was made to her for the premises. This, *prima facie*, vested in her both the legal and the equitable title. Whose money or property was used in paying for the land? William Goelz, Jr., testifies that he made the cash payment of \$300 on the day of sale with money borrowed from Bernard F. Weber. Weber testifies that the \$300 was a payment on a note of \$500 that he owed for borrowed money; that he does not remember whether the note was payable to Mrs. Goelz or Mr. Goelz, Sr.; that he thinks he got the bor-

rowed money at the house of Mrs. Goelz, but is not positive, and may have got it from Mr. Goelz, Sr. Dr. Goelz testifies, positively, that he never had a note from Bernard F. Weber or Michael Weber for \$500, or any other sum, and that he never loaned either of them any money; and he does not claim that the notes which he says he turned over to his son a few days after the sale included a note against Weber. Mrs. Goelz very probably had saved the \$500 from the rents of the Bowmanville property and the North Wells street property, both of which she had owned since 1875. We think it quite certain from the evidence that the \$500 Weber note belonged to Mrs. Goelz, and that not only the \$300, but also the remaining \$200, secured by that note, were paid as a part of the purchase money of the land in controversy. We also think that the balance of the purchase money was paid with moneys procured by selling to Weber the Denizer note, the Zender note, and the Bell note, there being also some back taxes, etc., to pay; and that all of these last-mentioned notes were owned by and were the property of Dr. Goelz, the appellee. The doctor also testifies that he handed the notes to his son a few days after the trustee's sale, and at the same time gave him \$700 in money to pay on the land. The son positively denies that any such money was turned over to him. The doctor was 69 years of age when his deposition was taken, and we think from his testimony that this transaction has become mixed up in his mind with a former transaction, where he had to advance \$700 to pay off a prior mortgage on land on which he held a second mortgage. At all events, the \$700 cannot be traced into the purchase money paid for the land. The purchase money was substantially all paid by four certified checks drawn by Weber,—two payable to Knauer, the trustee, or order, and the other two payable to David Donegan, the holder of the notes secured by the trust deed; and the evidence of Weber shows that these checks were all given for the notes delivered to him by William Goelz, Jr. The checks above mentioned bear date, respectively, February 12, 1880, March 5, 1880, April 8, 1880, and April 22, 1880. The trustee's deed to Josephine Goelz bears date February 12, 1880; but the certificate of acknowledgment shows that it was not acknowledged until April 28, 1880, and it was not filed for record until July 19, 1880. The land was sold under the trust deed for cash. The presumption must be that the deed was not delivered until payment was made of all of the purchase money bid at the sale. Therefore, the doctrine of *Alexander v. Tams*, 13 Ill. 221; *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095, and other like cases that a resulting trust must arise, if at all, at the time of the execution and delivery of the conveyance, and that it is not possible to raise such a trust by the subsequent application of the money of a third person in satisfaction of unpaid purchase money, does

not control this case. The transfer of the notes was here a part of the original transaction. The general rule is that where the purchase money of land is paid by one person, and the title is taken in the name of a third party, then such third party holds the title in trust for him who pays the purchase money. But the purchase of land by a parent in the name of a child, or by a husband in the name of his wife, will, *prima facie*, be presumed to be an advancement or settlement, and not a trust. This latter presumption may be either supported or rebutted by proof of antecedent or contemporaneous acts or facts, or by proof of any acts or facts so soon after the purchase as to be fairly considered a part of the transaction. *Maxwell v. Maxwell*, 109 Ill. 588; *Cartwright v. Wise*, 14 Ill. 417; *Taylor v. Taylor*, 4 Gilman, 303; 10 Am. & Eng. Enc. Law, pp. 18, 19, and authorities cited in notes.

There are very many facts in this record that tend to prove that appellee intentionally had the title placed in the name of his wife, and that tend to sustain and uphold the *prima facie* case in favor of the wife. Some of them we will briefly mention. The legal title was vested in the wife for more than four years by a duly-recorded deed, before the husband raised any objection or made any claim; and then not until his affections had become alienated from her and his sons, and his feelings were hostile to them all, and he had learned that his wife had made some disposition of the estate for the benefit of such sons. According to his own testimony, he knew for more than three years of this time that the deed to the land had been made to his wife; and, according to the testimony of his son and the documentary proofs, he was advised of that fact from the very first. On July 24, 1880, five days after the deed to his wife was filed for record, he effected an insurance for the term of five years upon the dwelling house and barn located on said land in the name of his wife, and signed the installment note given for unpaid premiums immediately under his signature. The fact that a considerable amount of his wife's money, as well as his own, went in to make up the purchase money paid for the lands, tends to prove that it was the intention that she should have a beneficial interest therein. In 1875 he owned a lot at Bowmanville, and also a lot on North Wells street, in Chicago; and he conveyed both lots to his wife, in consideration of love and affection and one dollar, and ever after recognized and acknowledged both lots to be her property. This renders it at least likely that when, five years later, he furnished part of the purchase money for buying another piece of real estate, he would be desirous of having both the legal and the equitable title vested in her. Since the purchase of the land in 1880, the taxes thereon have sometimes been paid in the name of William Goelz, sometimes in the name of Josephine Goelz,

and sometimes in the name of William Goelz, Jr. At the time of the purchase, the premises were in possession of one Frank as a tenant. Said Frank took a written lease for them for a term expiring January 1, 1881. The lease was signed by William Goelz, Jr., but the rent was payable in a single sum, at a stipulated time, at the office of Dr. Goelz, and was paid to him. Ever since the expiration of the lease the land has been occupied by William Goelz, Jr., and Carl August Goelz.

The rule is well settled that where the evidence is doubtful, and not entirely clear and satisfactory, or is capable of reasonable explanation upon theories other than that of the existence of an implied or a resulting trust, such trust will not be held to be sufficiently established to entitle the beneficiary to a decree declaring and enforcing the trust. *McGinnis v. Jacobs*, 147 Ill. 24, 35 N. E. 213; *Strong v. Messinger*, 148 Ill. 431, 36 N. E. 617. The evidence in this record falls far short of establishing such a case as is demanded by this rule. The parties who are the real owners of the land, each of a moiety, are the appellants Carl August Goelz and Louisa Goelz. In his answer, Carl August Goelz denies all the allegations of the original and supplemental bills; denies that the complainant has any interest whatever, legal or equitable, in the land; and avers that his mother, Josephine Goelz, was the lawful owner of the premises, and that she conveyed to him. In her answer, Louisa Goelz denies that the complainant has any interest whatever in the land; and claims that her husband, William Goelz, Jr., conveyed to her one-half of the land, in consideration of natural love and affection, and that her said husband was the owner thereof, "by virtue of a deed to him from his mother, Josephine Goelz." The evidence sustains these defenses. It matters not that the trust set up in the answer of William Goelz, Jr., one of the codefendants, and of which he claimed to be the beneficiary, is not made out. The decree of the superior court of Cook county was erroneous. It is reversed. The cause is remanded, with directions to dismiss the original bill and the supplemental bill, for want of equity, at the cost of the complainant therein. Reversed and remanded.

(157 Ill. 108)

RYAN v. CUDAHY et al.¹

(Supreme Court of Illinois. April 1, 1895.)²

BY-LAWS OF BOARD OF TRADE — EQUITY JURISDICTION.

1. A rule of the Chicago Board of Trade provides that, in case of failure of members to adjust their respective claims to money deposited as margins upon an executory sale, the matter in dispute shall be submitted to a com-

mittee of the board, which shall "hear such evidence under oath as either may wish to submit concerning their claims to the deposit," and shall decide the controversy. *Held*, that where such a committee decides such a controversy by taking the difference between the contract price and the board price, without permitting the introduction of offered evidence showing that the board price is not the real market value, but is a fictitious price, produced by pretended sales made to corner the market, the decision of such committee is not binding. 50 Ill. App. 568, reversed.

2. A court of equity has jurisdiction to review the decision of a tribunal appointed by the Board of Trade for the purpose of deciding disputes between its members, when such decision is not fairly made, and involves property rights.

Appeal from appellate court, First district.

Bill by Thomas J. Ryan against John Cudahy, A. W. Wright, W. R. Roloson, Walter L. Roloson, George F. Stone, secretary, and Charles D. Hamill, president, of the Board of Trade of the City of Chicago, J. H. Norton, and E. S. Worthington, and the Merchants' Loan & Trust Company. Defendants obtained a decree, which was affirmed by the appellate court. 50 Ill. App. 568. Complainant appeals. Reversed.

This was a bill brought by Thomas J. Ryan against John Cudahy and others. The bill alleges that the complainant and all the defendants except the Merchants' Loan & Trust Company are members of the Chicago Board of Trade; that from April to November, 1892, complainant and Cudahy and Wright were large buyers on said board of short ribs; that the market advanced normally until about the middle of August, at which time complainant held 5,000,000 pounds of said commodity, which he had paid for and then held in store in Chicago; that Cudahy induced complainant to exchange his 5,000,000 pounds of cash ribs with Cudahy for a September option for the same quantity; that thereupon it became known that Cudahy was acting for Wright in such transactions, and that they were jointly interested therein; that, on October 31st, complainant was under contract with various members of the board to deliver to them on that day short-rib middles amounting to 1,450,000 pounds, but was unable to fulfill such contracts, because the market was cornered and engrossed by an unlawful and wrongful combination and conspiracy of certain members of the board, who controlled substantially all the short ribs in the Chicago market, and would not furnish them at the natural and legitimate market price, which on October 31st did not exceed 7½ cents per pound, and would only sell at a forced, fictitious, and arbitrary price of 12 cents per pound; that Cudahy and Wright were members of such conspiracy; that they shipped about 15,000,000 pounds of ribs to various southern points, first sitting and mutilating them so as to render them undeliverable, under the rules of the board, in fulfillment of contracts; and that Cudahy, by various deceitful representations, and in breach of confidence, induced complainant to

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 15, 1895.

make large sales of October ribs in the belief that they could be obtained at a fair price to fill such sales. It is averred that the defendants J. H. Norton and E. S. Worthington, composing the firm of Norton & Worthington, and the defendants R. W. Roloson and Walter L. Roloson, composing the firm of Roloson & Co., made large purchases of such ribs from complainant for October delivery, and that they were, without complainant's knowledge, acting as brokers of Cudahy and Wright in making such purchases; that Norton & Worthington purchased 200,000 pounds at \$7.45 per 100, and 200,000 pounds at \$7.47½ per 100, for the nondelivery of which by complainant, on October 31st, Norton & Worthington demand of complainant \$18,150, being the difference between the selling price and the fictitious and illegitimate price of \$12 per 100 created by the corner; that Roloson & Co. purchased of the complainant 600,000 pounds at \$7.60 per 100, and for complainant's failure to deliver the same, by reason of the corner, Roloson & Co. claim \$28,400 as their damages, being the difference between the selling price of \$7.60 per 100 and the corner price of \$12 per 100, and that, if such claims are collected, Wright and Cudahy will receive the amount for their benefit. It is averred that, under a rule of the board, complainant, from time to time, made margin deposits with the defendant the Merchants' Loan & Trust Company on account of such sales, such deposits on account of the sale to Roloson & Co. amounting to \$28,500, evidenced by 11 certificates of deposit issued by the bank in duplicate, the originals being delivered to complainant, and the duplicates to the secretary of the board; and that complainant likewise deposited, to secure the sales to Norton & Worthington, \$18,000, evidenced by 10 similar certificates of deposit. Disputes having arisen between complainant and Norton & Worthington and Roloson & Co. touching their respective claims to the margin certificates, at the request of Roloson & Co. the defendant Charles D. Hamill, president of the Board of Trade, appointed a committee of three, under section 6 of rule 20, to decide such differences between complainant and Roloson & Co.; that complainant appeared before the committee, and offered to prove, and could have proved, the legitimate market value of short ribs deliverable October 31st, as well as their value in other markets, and their value for consumptive purposes in Chicago, but all such offers of proof were by the committee wrongfully, unjustly, illegally, and in violation of rule 20, rejected, and not considered by the committee, to which ruling complainant excepted; that the committee decided that the margin deposits of \$28,400 were payable to Roloson & Co., which decision was not based upon the natural and legitimate market price of short ribs in Chicago on October 31st, which did not exceed \$7.80 per 100 pounds, but upon the fictitious, unnatural, and manipulated

corner price of \$12 per 100 pounds. It is averred that, unless enjoined, the defendant Hamill, as president of the board, will indorse on the duplicate certificates in the custody of the defendant Stone, as secretary of the board, an order for their payment by the bank to Roloson & Co., in accordance with the decision of the committee. Upon this bill a temporary injunction was granted ex parte restraining the indorsement, payment, and collection of the certificates. The defendants interposed a demurrer to the bill, which the court sustained, and dismissed the bill. The complainant appealed to the appellate court, where the decree of the circuit court was affirmed.

Barnum, Humphrey & Barnum, for appellant. W. J. Hynes, F. A. Riddle, J. L. High, and A. W. Green, for appellees.

CRAIG, J. (after stating the facts). By an act of the legislature approved February 18, 1859, the persons composing the Board of Trade of the City of Chicago were created a body politic and corporate, under the name and style of the Board of Trade of the City of Chicago, and by that name they were authorized to sue and be sued, receive and hold property, real and personal, adopt a common seal, and "make such rules, regulations and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land." Section 4 provides as follows: "The said corporation is hereby authorized to establish such rules, regulations and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper." Priv. Laws 1859, p. 13. Section 7 provides that said corporation may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules and regulations or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members or other persons. The acting chairmen of committees, when sitting as arbitrators, may administer oaths to parties and witnesses, issue subpoenas and attachments, compel the attendance of witness the same as justices of the peace, and in like manner directed to any constable to execute. In pursuance of the act under which the Board of Trade became an incorporated body, the board adopted rules and by-laws which were in force when complainant became a member, and still remain in force. Section 1 of rule 10 provides that each person, before becoming a member of said board, shall sign "an agreement to abide by the rules, regulations, and by-laws of the association, and all amendments that may be made thereto." Section 1 of rule 20, among other things, provides that, "on time contracts, purchasers shall have the right to re-

quire of sellers, as security, a deposit of ten (10) per cent., based upon the contract price of the property bought, and further security from time to time, to the extent of any advance in the market value above said price. Sellers shall have the right to require as security from buyers a deposit of ten (10) per cent. on the contract price of the property sold, and, in addition, any difference that may exist or occur between the estimated legitimate value of any such property and the price of sale. All securities shall be deposited with the treasurer of the association, or with some bank duly authorized by the board of directors to receive such deposits. By section 6 of rule 20 of the board, it is provided that, in case of failure between the contracting parties to adjust their respective claims upon margin deposits within three business days after the maturity of all contracts upon which the deposits are applicable, "the matter in dispute shall, upon the application of either party to such contracts, be submitted to a select committee of three disinterested persons, members of the association, to be appointed by the president, which committee shall, without unnecessary delay, summon the parties before them, and hear such evidence under oath as either may wish to submit touching their claims to the deposit, and shall by a majority vote decide, and report to the president of the board, in writing, in what manner and to whom the deposit is payable, either wholly or in part; whereupon the president shall indorse on either the original or duplicate certificate an order for the payment of such deposits in accordance with the decision of said committee, and such order shall be a sufficient warrant to the party holding the deposit to pay the same in accordance with such order." Rule 23 provides as follows (section 1): "In case any property contracted for future delivery is not delivered at maturity of contract, the purchaser may, if he shall so elect, consider the contract forfeited; or he may purchase the property on the market for account of the seller, by 1:15 o'clock of the next business day, notifying him at once of such purchase; or he may require a settlement with the seller at the average market price on the day of maturity of contract, and any damage or loss due to the purchaser, by reason of such purchase or declared settlement, shall be due and payable by the seller immediately."

It appears from the allegations of the bill that the complainant, Ryan, sold Roloson & Co. 600,000 pounds of short ribs, for delivery in October, 1892, at \$7.60 per 100 pounds. After Ryan had sold the ribs for delivery in October, during the months of September and October, 1892, in compliance with the demands or calls for margins to secure the performance of his contracts for the sale and delivery of the quantities of short ribs sold by him, he deposited certain amounts of money with the Merchants' Loan & Trust Company of Chicago. The sums deposited for the purpose of

securing the performance of his contracts for the sale and delivery of the short ribs sold to R. W. Roloson & Co. amounted to \$26,500. It is charged in the bill that Roloson & Co. and others entered into a combination to corner the market of short ribs for October delivery, and that they did corner the market, and established or pretended to establish the price of short ribs on October 31st at 12 cents per pound, which price was not real, but fictitious. It is alleged in the bill that a fair, legitimate, and natural market price and value of short ribs in Chicago on October 31, 1892, irrespective of the fictitious price aforesaid, did not exceed $7\frac{1}{2}$ cents per pound. "On the next day, November 1, 1892, the same ribs sold at \$7.75 per 100 pounds which were sold or pretendedly sold on said board the day before in pursuance of said conspiracy and combination at 12 cents a pound, in order to establish that as a market price, and to swell the damages as against your orator and other sellers from whom deliveries were due on October 31, 1892. The fair, legitimate, and natural price of said ribs in Chicago throughout the entire months of September and October, 1892, did not exceed \$7.85 per 100 pounds. That, all during and through said months, cash sales of such ribs were made in the Chicago market at from \$7.50 to \$7.85 per 100 pounds. And that, while the advance of prices on such sales during said two months did not exceed 20 cents on 100 pounds, the advance on option sales during the same period ending October 31, 1892, was \$4.50 per 100 pounds, under the manipulations of said prices by the parties engaged and interested in said corner. Such sales of short ribs on said board as purported to be made by parties thereto on October 31, 1892, at 12 cents per pound, were insignificant in number and quantity, and were purely colorable, and were made for the purpose of establishing a fictitious price to govern the measure of damages on contracts unfulfilled by 'short' sellers, and were in some instances sales for that purpose by one broker to another broker of the same principal engaged and interested in, or taking advantage of, and thereby becoming a party to, said corner." It is also alleged: "That disputes, differences, and disagreements have arisen and exist between your orator and Roloson & Roloson touching and relating to the respective claims of your orator and Roloson & Roloson to the margins deposited as aforesaid and the margin certificates of such deposits, and to whom said deposits are payable, either wholly or in part, and relating also to the true market price and value on October 31, 1892, of the respective amounts of short ribs covered by the respective contracts between your orator and R. W. Roloson & Co., the performance of which contracts by your orators was recited in said certificates of deposit to be thereby secured. That a committee was appointed by the president of the board to adjudge the differences. That the following notice was served on complainant: 'Board of Trade of the City of Chicago. Secretary's Office. Chicago,

Nov. 9th, 1892. Messrs. T. J. Ryan & Co.—Gentlemen: You are hereby notified to meet a committee of this board, appointed under the provisions of section 6 of rule XX. of the rules of the board, in the directors' room on Monday next, the 14th instant, at eleven o'clock in the forenoon. Respectfully, George F. Stone, Secy.' A postponement was had from the 14th to November 16th, when the parties met before the committee for a hearing. It is also alleged in the bill that, on the hearing before the committee, he offered to prove, and could have proved, by the sworn testimony of said witnesses, in answer to said questions, all and singular the matters and allegations of fact hereinbefore in this bill contained and set forth, and particularly offered to prove, and could have proved, by said witnesses, the fair, natural, and legitimate market value of the quantities of short ribs deliverable on October 31, 1892, by your orator upon his contracts of sale of six hundred thousand pounds to R. W. Roloson & Co., and further offered to and could have proved by said witnesses the value of short ribs on October 31, 1892, in other markets, and their value for consumptive purposes in the Chicago market, and other facts that might and should and do justly enter into a determination of the real market value of such short ribs in Chicago, irrespective of any fictitious price such ribs might have sold for in the Chicago market on the 31st day of October, 1892; but each and all of said offered evidence the committee rejected, and refused to allow the complainant to introduce any of said evidence."

Under the act of incorporation, the legislature, in clear terms, conferred the authority on the board to establish such regulations and adopt such rules or by-laws as it might deem proper for the transaction of the business of its members, and, under the authority conferred, section 6 of rule 20 provides for the appointment of a committee clothed with authority to determine in what manner and to whom a margin deposit is payable. The language of the rule as respects the duty of the committee to hear the evidence of the respective parties is plain and unambiguous. It decides: "Which committee shall without unnecessary delay summon the parties before them, and hear such evidence under oath as either may wish to submit touching their claims to the deposit." The complainant, when he became a member of the board, agreed in writing to abide by the rules, regulations, and by-laws of the association. He voluntarily submitted to a trial of the matter referred to the committee, without in any manner calling in question the jurisdiction of the committee of the person or subject-matter. Under such circumstances, having selected his tribunal, he is estopped from denying the jurisdiction of the committee of the person and subject-matter. But the committee appointed under section 6 of rule 20 to determine to whom the margin deposit belonged or should be paid may be regarded

as a tribunal of limited jurisdiction, and they were bound to proceed in conformity to the rules under which they were selected; and if they failed to conduct the investigation in accordance with the charter and by-laws of the Board of Trade, under which they were appointed, the complainant ought not to be bound by their judgment. It seems plain that where property rights are involved, as is the case here, the courts have the power to so far supervise the action of a tribunal like the one in question as to determine whether they have proceeded according to the rules and regulations provided for their action, and, if they have failed in a substantial manner to correct abuses which may result from their unwarranted procedure. *Com. v. Pike Ben. Soc.*, 8 Watts & S. 250; *Com. v. German Soc.*, 15 Pa. St. 254; *Society v. Com.*, 52 Pa. St. 183; *Com. v. Pennsylvania Ben. Inst.*, 2 Serg. & R. 141; *Wood v. Wood*, L. R. 9 Exch. 196. The rule, as its language declared, required the committee to hear such evidence under oath as either party may wish to submit touching their claims to the deposit. It may be conceded that the committee was not required to hear evidence that had no bearing whatever on the question involved, but any evidence bearing on the claim of either party to the deposit was proper for their consideration. There may be various grounds upon which the claims of the respective parties may be predicated or opposed. The seller might prove that he had delivered the short ribs sold according to the contract; that he had paid the damages of the purchaser; that the contract had been rescinded by agreement of the parties; that the claim had been arbitrated, and thus adjudged; that there was no difference between the contract price and the real market price on the day of delivery; that the market price deemed by the buyer was not the correct market price of short ribs, but was a false and fictitious price,—one established by fraud and corruption. So, too, the purchaser might controvert by his evidence each one of the claims made by the seller. Other grounds might be relied upon, and evidence introduced in their support. The committee, engaged, as it was, to determine a question between the two parties involving, as it did, over \$26,000, had no right to confine their investigation to the mere difference between the contract price of the short ribs and the price at which sales were made in the Board of Trade on the day of delivery, closing their eyes to the fact that these sales may have been false, fraudulent, and fictitious,—sales brought about by a fraudulent combination and a violation of a statute of the state. If the committee is to be confined to a mere calculation of the difference between the contract price and a figure established by a combination on the Board of Trade on the day of delivery, regardless of the fact whether such figure is real, fictitious, or manipulated by a corner,

then a tribunal of that character is but a device for legalizing acts prohibited by the common law of the state. It will be observed that the complainant offered to prove the fair, natural, and legitimate market value of short ribs deliverable on October 31, 1892, and offered to prove the market value on other markets, and its value for consumptive purposes in Chicago; but the committee refused to hear this or other evidence offered by the complainant. This is not a case that has any analogy to one where, during the progress of the trial, a party may offer to prove some particular fact, and the court excludes the offered evidence, and may err in that one particular; but the complainant was allowed no evidence touching his claim to the deposit; he was, in effect, turned away without a hearing. A proceeding of that character cannot be sustained. It may be conceded to the fullest extent that Ryan, when he became a member of the board, agreed to abide by all its lawful rules and regulations, and he is bound by the agreement. But the Rolosons, who are contending for this deposit margin, did the same, and the three members of the board comprising the committee are in the same position. No reason is perceived why he should be concluded by the rules, and they should not. If the committee and the Rolosons conform to the rules, then it may be insisted that complainant shall also abide thereby; but, when they violate the rules, it cannot in justice be claimed that he shall be bound by a decision resulting from a violation of the rules on their part.

But it is said Ryan should have made a defense under section 7 of rule 20 when he was called upon to put up margins. That section is as follows:

"Sec. 7. In determining the value of property under this rule, its value in other markets, or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter into the determination of its value, shall be considered, irrespective of any fictitious price it may at the time be selling for in this market. Such value, for the purposes of this rule, in case of disagreement, shall be determined by the board of directors, and communicated to the parties in interest through the president or secretary."

It is true that this rule provides that the value of property may be determined by the board of directors, and it may be, when Ryan was called upon for margins, he might have resisted the call by presenting the question to the board whether there was actually a rise in the market value of the article sold; but, conceding that to be true, it does not follow that this was his only remedy. The fact that Ryan may have been able to defeat the call for margins does not deprive him of the right, when the title to the margins is put in issue, to prove, if he could, that the market value of the article sold was no higher on the day of delivery than it was when sold. But, while

we do not think this section of rule 20 lends any aid to the defendants, it has an important bearing in favor of the complainant. The committee appointed to settle the dispute in question was appointed under section 6 of rule 20; this is section 7 of the same rule. And, in giving a construction to rule 20, it is proper to consider all of the sections; no intelligent construction can be arrived at in any other manner. Where a dispute as to a margin deposit is to be settled by a committee under section 6 of rule 20, and the market value of the article sold becomes a material question, section 6 is silent as to the nature or character of the evidence which may be introduced before the committee. But section 7 says, in determining the value of property under the rule,—that is, under rule 20, which was the identical rule under which the value of the property arose in this proceeding,—its value in other markets or for manufacturing or consumptive purposes in this market shall be considered, irrespective of any fictitious price it may at the time be selling for in this market. The evidence offered by the complainant was not only within the spirit, but within the letter, of this section of the rule.

But it is insisted that a court of equity has no jurisdiction to interfere with the action of the Board of Trade, or the action of committees appointed to settle controversies submitted to them under the rules and regulations of the board; and, in support of this position, reliance is placed on the following cases: *People v. Board of Trade*, 45 Ill. 112; *Fisher v. Board of Trade*, 80 Ill. 85; *People v. Board of Trade*, 30 Ill. 134; *Baxter v. Board of Trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 88 Ill. 441; *Pitcher v. Board of Trade*, 121 Ill. 412, 18 N. E. 187. Language may have been used in some of the cases cited which might, without a close examination of the question involved in the cases, lead to the conclusion reached by counsel; but, upon a careful consideration of the questions involved and decided in each case, it will be found that the question presented by this record did not arise in those cases and was not decided. In the first case cited (*People v. Board of Trade*), it appears from an examination of the case that Page had been suspended from the board for a failure to pay a certain note given by him to another member of the board, and he filed a petition for mandamus to compel the board to restore him to membership. The court in the case presented held that the charter gave the board the power of expulsion, and, under the power conferred, the corporation adopted a by-law providing that, if a member fails to comply with a business contract made with another member, he shall be expelled. In *Fisher v. Board of Trade*, 80 Ill. 85, it appears that Fisher, a former member of the board, had been expelled. After the expulsion, he filed a bill for an injunction, which in effect prayed that complainant should be restored

(157 Ill. 284)

to his position as a member of the board. The court held that if a member was improperly expelled, contrary to the constitution and by-laws, a court of equity cannot restore him. *People v. Board of Trade*, 80 Ill. 134, is also a case where a member had been expelled, and sought to be restored to membership by petition for mandamus, and the relief claimed was denied. Expressions may be found in the opinion of the court which may bear the construction that a court would not interfere in any case with the action of an organization like the Board of Trade, but these expressions were not necessary to a decision of the case, and cannot be regarded as authority. There the petitioner had been expelled after he had been offered a full opportunity to make defense on the board, but refused; and the court properly held that he could not be restored by mandamus. *Baxter v. Board of Trade*, 83 Ill. 146, was also a case where a member had been expelled; and, following the *Fisher Case*, it was held that a court of equity would not interfere by injunction. *Sturges v. Board of Trade*, 86 Ill. 441, merely followed the rule laid down in the *Baxter Case*,—that a court of equity would not entertain a bill; that the remedy, if any, is in a court of law. *Pitcher v. Board of Trade*, 121 Ill. 417, 13 N. E. 187, was also a case where a member had been expelled, and he filed a bill to enjoin the board from preventing him from transacting business on the board. The relief prayed for was denied, but it appeared that the expulsion had been made in accordance with the rules of the board. *Pitcher v. Board of Trade*, 121 Ill. 417, 13 N. E. 187, was also a case where a member had been expelled, and a bill was filed to enjoin the board from preventing the complainant from transacting business on the board. The relief sought was denied in the circuit court, and the judgment was affirmed in this court; but, upon looking into that case, it will be found that the judgment was predicated, in part at least, on the fact that the proceedings resulting in the expulsion had been regular and confined to the rules of the board. It is there said: "The proceedings against him appear to have been regular and in accordance with the rules and the provisions of the charter. The expulsion is therefore conclusive. * * * The merits of appellant's expulsion cannot be re-examined by us in this proceeding. The minor irregularities of which he complains were waived by his appearance before the board of directors, and the submission of his case for trial by them without objection either to the manner in which that body was established or to the mode of its proceedings." If the allegations of complainant's bill are true,—and they are admitted to be true by the demurrer,—we are inclined to the opinion that he made a case by his bill which entitled him to relief. The judgment of the appellate court and the decree of the circuit court will be reversed, and the cause remanded.

BISHOP v. AMERICAN PRESERVERS CO. 1

(Supreme Court of Illinois. April 1, 1895).²

EVIDENCE—TRUST COMBINATIONS—CORPORATIONS—REPLEVIN—AGENCY.

1. Where it is shown that a written instrument is beyond the jurisdiction of the court, and is under the control of the plaintiff, who has been notified to produce it, and has declined to do so, the defendant may introduce secondary evidence of its contents.

2. An agreement to form a trust in the business of manufacturing and selling preserves, by having trustees hold the stock in certain existing corporations, and in others to be formed, and having such corporations wholly controlled by such trustees, is void as contrary to public policy, in creating a monopoly, and in providing for a partnership between corporations.

3. Where, in pursuance of such agreement, property is conveyed to a corporation, a member of the trust, but possession thereof is immediately restored to the vendor, the illegality of the trust constitutes a good defense to an action by such corporation to recover the property, since, where an attempt is made to enforce a cause of action resting upon an executed illegal agreement, the position of the defendant is preferable.

4. Such defense is not affected by the fact that the defendant is the agent of the plaintiff, since the law will not enforce the performance of an agency which tends directly to promote the doing of an illegal act.

Appeal from appellate court, First district.

Replevin by the American Preservers Company against Andrew D. Bishop. Plaintiff obtained judgment, which was affirmed by the appellate court. 51 Ill. App. 417. Defendant appeals. Reversed.

This was an action of replevin begun on May 11, 1891, by appellee against appellant, to recover the possession of certain goods and chattels, consisting of the stock in trade and machinery and equipments belonging to and connected with the business of manufacturing fruit butters, jellies, preserves, and like products, and selling and dealing in the same. The declaration consisted of three counts, the first being for goods wrongfully taken; the second, for goods wrongfully detained; and the third being a count in trover. An order was subsequently entered discontinuing the cause as to the last count. The pleas were non cepit, non detinet, property in defendant, and a fourth plea setting up: That on, to wit, the 1st day of March, 1888, the defendant was doing business in Chicago under the name of the Michigan Fruit-Butter Company, and was sometimes styled A. D. Bishop & Co., and was engaged in the manufacture of fruit butters, jellies, preserves, and like products, and that the greater proportion of the goods mentioned in the declaration were then and there the property of the defendant, and used by him in carrying on his said business, and that the residue of said articles was subsequently bought by the defendant in carrying

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

² Rehearing denied October 25, 1895.

on said business under his said name of the Michigan Fruit-Butter Company. That in March, 1888, Benjamin Fenton and B. E. Ryan approached the defendant, and laid before him a scheme to form a trust, to be called the American Preservers Trust, to be organized for the purpose of bringing into one combination all manufacturers, throughout the United States, of fruit butters, jellies, preserves, and like products, which the defendant avers are staple articles of food, and are in general use and demand by the inhabitants of the state of Illinois and of the United States, and for the further purpose of raising the price of said products, to prevent competition, and to secure a virtual monopoly thereof, and to crush out any manufacturer who would not join said trust; and the defendant then and there refused to enter into such combination. Then and there said Fenton told the defendant that, unless the defendant joined the trust, the same would ruin his business. That upon, to wit, the 20th day of May, 1888, said B. E. Ryan, the now secretary of the plaintiff, and a confederate of said Fenton, came to the defendant, and stated to him that all the leading manufacturers of said products in the United States had signed, or agreed to sign, a trust agreement, and that, if any manufacturer did not sign said agreement, he would be forced out of business, and his business ruined; and the defendant, fearing that said threats would be carried into execution, on, to wit, the 20th day of May, 1888, signed a trust agreement. The plea then states the substance of the agreement, which is hereinafter set out in full, and then proceeds as follows: "That at the time when the defendant signed the said trust agreement, to wit, in May, 1888, said B. E. Ryan, one of the trustees mentioned in the trust agreement, caused an inventory to be made of the defendant's merchandise and equipment, and appraised the same at the sum of \$9,063.03, and informed the defendant that he would have to assign and transfer the same, by bill of sale, to the American Preservers Trust, and that at the time and place last aforesaid the said B. E. Ryan directed the defendant to open a new set of books, in the name of the American Preservers Trust. That pursuant to said scheme, to wit, upon the 20th day of June, 1888, the said trustees caused, or attempted to cause, a pretended corporation to be organized, under and by virtue of the laws of West Virginia, under the name and style of the American Preservers Company, with a capital of \$600, which corporation is the plaintiff in this suit. That the incorporators were the said A. R. Bremer, B. E. Ryan, Henry Williams, B. Fenton, C. A. Max Wiehl, and F. R. Jennings, all of whom were trustees of the said American Preservers Trust. That subsequently, to wit, in July, 1888, said Ryan came to the said defendant's said place of business, in said city of Chicago, and stated to the defendant that, in order to carry out the scheme of said trust, it was necessary for the defendant to execute a bill of sale of his

business, inventoried as aforesaid, to the American Preservers Company,—said pretended corporation organized under the laws of West Virginia by said trustees for the purpose of forming a channel through which said trust could purchase and control the business of the defendant, and purchase and control the entire manufacture and sale of fruit butters, jellies, preserves, and like products,—and then and there, at the time above mentioned, said Ryan handed to the defendant a certain bill of sale, already drafted, running to the said pretended American Preservers Company, as vendee of the articles inventoried as aforesaid, and then and there directed the defendant to execute the same, as part and parcel of said scheme for the organization of said trust, which the said defendant then and there, under the compulsion and threats of said Ryan, executed, and also, then and there, said Ryan handed to the defendant 331 shares of stock in said American Preservers Company, of the pretended par value of \$33,100, and directed the defendant to assign said shares to the trustees of said trust, which the defendant, under said direction, and by compulsion and threats, then and there did. That, at the time of the execution of said bill of sale, said Ryan took said certificates of stock so assigned under the direction and compulsion of the said Ryan, and handed the defendant, to wit, 662 certificates of trust in said American Preservers Trust, at the pretended par value of \$66,200, which certificates were known as 'American Preservers Trust Certificates.' And the defendant avers that said bill of sale to said American Preservers Company was procured to be made by the said company to aid said American Preservers Trust, as one of the agents and instruments employed and controlled by the trustees of said American Preservers Trust, in controlling the entire manufacture and sale of said products, and that the pretended title acquired by the plaintiff under said bill of sale is the only title the said plaintiff acquired or had to the goods and chattels in said declaration described, and to the articles named in said bill of sale, or to the property and good will of the defendant's business, and that the procuring of the execution of said bill of sale was part of said scheme for the organization of said trust, and the prevention of competition in the manufacture and sale of said products, for the raising of the market price of the same, and for securing a virtual monopoly therein, under the control of the American Preservers Trust. That the trustees of the American Preservers Trust and the plaintiff, by their agents, after procuring the defendant to sign said trust agreement, and execute said bill of sale to plaintiff, permitted and required the defendant to carry on the said business under his own firm name and style, to wit, the Michigan Fruit-Butter Company, or A. D. Bishop & Co., and to account to, and make returns thereof to, the plaintiff, or to said trustees of said American Preservers Trust. That it was not intended

by the incorporators that said American Preservers Company should have an independent existence as a corporation, but that the said plaintiff company submitted itself to be used, and was used, as a mere channel through which the trust acquired title to the interests of individuals, partnerships, and corporations engaged in the manufacture of said staple articles of food; and to this end the majority or controlling interest in shares of stock in said American Preservers Company were issued by the plaintiff to the said trustees of the American Preservers Trust. That in December, 1888, the defendant tendered his trust certificates to the general manager of the trust, and demanded that said trust return to him the articles inventoried in said bill of sale, which said general manager, B. E. Ryan, then and there refused to do. Whereupon the defendant refused to make any reports to the trust until March, 1889, when the defendant again presented his trust certificates to said trustees for cancellation, and demanded the return of the property and business so taken from him; and thereupon the president of said trust called upon the defendant, and, by threats, induced the defendant to continue making reports of business until the 1st of March, 1891, and that in April, 1891, a representative of said trust came to the defendant, and asked the defendant to return said trust certificates, and to take in lieu thereof 221 shares of stock in said American Preservers Company, stating that all the members of the said trust were going into said American Preservers Company, which the defendant refused to do, because the defendant avers that the said American Preservers Company was a mere agent of said trustees in and about the organization of said trust, and that he states the fact to be that the said trustees sought to avoid the appearance that said trust was a partnership of corporations by canceling said trust certificates, and abandoning the charters of the various corporations organized by the said trust, except the charter of the American Preservers Company, and intending to give to the stockholders in the corporations whose charters were to be abandoned shares of stock in said American Preservers Company, to be held in trust by the said trustees of the American Preservers Trust, as trustees for the stockholders of the American Preservers Company, in the place of said American Preservers Trust. And the defendant avers that said trust, whether under the name of the American Preservers Trust, or of said American Preservers Company, is a combination organized for the purpose of raising the price of staple articles of food, and preventing competition therein, and securing a virtual monopoly thereof, and is contrary to public policy, and void in law, for which reason the defendant then and there refused to return the said certificates of trust. That upon, to wit, March 1, 1891, the defendant was advised that said trust agreement was illegal, and since said time has refused to render any reports to said

trust. All of which acts and doings of the plaintiff, the defendant avers, are contrary to public policy, and void in law; and so the defendant in fact saith that the goods in the first and second counts mentioned, at the time when," etc., "were the property of him, the defendant, and not of the plaintiff. Wherefore," etc. Here follows usual conclusion to pleas in bar in replevin.

The fourth plea was demurred to, but the demurrer was overruled, and plaintiff replied to said fourth plea. The second replication sets up that "long prior to the commencement of the action the plaintiff was the sole and absolute owner of the property in question; that in July, 1888, the defendant, in consideration of 331 shares of the capital stock of the plaintiff, transferred his entire business property to the plaintiff, and that the defendant continued to manage the business as the agent of the plaintiff until, to wit, April 1, 1891, at which time he claimed ownership of the property in question, without this," etc. The third replication says that "after the time of the alleged trust agreement mentioned in the plea as having been made, the defendant, in consideration of 331 shares of the capital stock of the plaintiff, then and there delivered by the plaintiff to the defendant, sold therefor his goods and chattels and machinery," etc., "and that the defendant acted as the agent of the plaintiff, and received and bought goods and chattels mentioned in the declaration, as the agent of the plaintiff, until, to wit, April 1, 1891, at which time the defendant attempted to repudiate his agency, and asserted title to the property, and refused to account to the plaintiff, and that the property then in the hands of the defendant was the property originally sold, together with the additions and improvements made by the defendant as plaintiff's agent; without this, that the plaintiff purchased or held said goods as agent of said trust, or acted as tool or agent of said trust." The fourth replication says that "on, to wit, June 20, 1888, the plaintiff was legally incorporated by virtue of the laws of West Virginia, and became thereby, and had continued, a legal corporation, and since its incorporation has increased its stock to \$2,500,000, and that subsequent to the incorporation of the plaintiff, to wit, in July 1888, in consideration of 331 shares of the capital stock of the plaintiff, the defendant sold his machinery, stock of goods, and business for manufacturing mince-meats, etc., and after that the plaintiff entered into an agreement with the defendant, whereby the defendant was to carry on the business as the agent of the plaintiff; that he did so up to April, 1891, and the additions and improvements made in said time were made by the defendant as the agent of the plaintiff, and that in April, 1891, the defendant, disregarding his duties, refused to recognize the title of the plaintiff; that the plaintiff was organized and continued to exist as an independent corporation, having no connection with the American Preservers Trust, without this," etc.

Upon the trial of the cause the defendant offered in evidence a copy of the agreement mentioned in the fourth plea, after introducing evidence tending to account for the nonproduction of the original agreement, and to establish a foundation for the introduction of secondary proof. The copy, as offered, is as follows:

"Whereas, it is designed to form a trust, to be known as the American Preservers Trust, for the purpose of securing intelligent co-operation in the business of manufacturing preserves, jellies, fruit butters, mince-meat, and all articles of commerce connected therewith or relating thereto, and of selling and dealing in the same in home and foreign markets, and of doing all business relating and incidental thereto: Therefore, it is mutually agreed by all who may sign this agreement, or become at any time the holders of the certificates of trust herein provided for, as follows:

"First. Until otherwise provided, the trust herein created shall be vested in nine trustees.

"Second. C. A. Max Wiehl, Max Ams, A. R. Bremer, B. E. Ryan, B. Fenton, and F. R. Jennings are hereby appointed trustees, to hold their office until the first day of April, A. D. 1890, or until their successors are elected and qualified; and the six trustees aforesaid are hereby directed, authorized, and empowered to select and appoint the other three trustees, to hold their office until the said first day of April, A. D. 1890, or until their successors are elected and qualified.

"Third. The trustees shall prepare certificates, which shall show the interest of each beneficiary in said trust, and deliver them to the persons entitled thereto. The certificates shall be divided into shares of the par value of one hundred dollars each, and shall be known as the 'American Preservers Trust Certificates.' The trustees shall have full power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be executed, attested, and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement, and by the by-laws herein provided for.

"Fourth. No certificate shall be issued, except for property, bonds, stock, money, or businesses, as hereinafter provided; and the certificates issued shall represent, as nearly as possible, the value or earning capacity of the property, bonds, stocks, money, or businesses held by the trustees in trust. The certificates shall be the best evidence of the amount of interest of the beneficiaries in the trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificates, and cancellation of the same, or upon satisfactory proof of the loss thereof, and the giving of a satisfactory bond of indemnity.

"Fifth. Each subscriber hereto agrees to assign and transfer, absolutely, to said trustees, as many as he shall own of the shares of the capital stock of the particular corporation or corporations indicated in article sixth of this agreement, whether said corporation now ex-

ists, or is hereafter to be organized, in consideration of which said trustees do hereby agree to execute and deliver to each subscriber trust certificates as above specified, equal to the appraised amount of the earning capacity of said stock. The appraised amount shall be determined by the parties in interest and said trustees. The value of the capital stock of any corporation whose stock it is contemplated will be assigned to said trust shall be first agreed upon between said trustees and the stockholders willing to transfer the same, and, after it is agreed upon, there shall be no discrimination in the purchase price thereof, as between stockholders of the same corporation transferring their shares at the same time.

"Sixth. This agreement shall take effect within sixty days from the time those holding a majority of the stock in the following corporations, formed or to be formed, to wit: J. O. Schimmel Preserving Company, Buffalo Conserve Company, Max Ams Preserving Company, A. R. Bremer Preserving Company, Ryan Bros. Preserving Company, Charm Preserve Company, Indianapolis Preserving Company,—have transferred the same to said trustees. Thereafter, the said trustees and their successors shall have power to purchase other stocks and bonds of the same companies, or of companies organized for or engaged in conducting the same business, or any of the businesses hereinbefore specified, and to purchase the property or business of any company, association, partnership, or individual engaged in any of said businesses, and may issue therefor certificates of trust equal, at par value, to the appraised amount of the earning capacity and value to the trust of said stocks, bonds, property, and businesses so purchased, or shall have power to lease the premises of such companies, partnerships, associations, or individuals, paying therefor such rental as they may deem proper, whenever, in their judgment, it is for the best interests of the trust to lease, rather than purchase.

"Seventh. All stocks and bonds sold and transferred to said trustees shall be held by them and their successors for the benefit of all the owners of said trust certificates. No stocks so held by said trustees shall be sold or surrendered by said trustees, during the continuance of this trust, without the consent of a majority in number and value of the holders of trust certificates: provided, however, that said trustees may, from time to time, assign such shares of stock as may be necessary to qualify any person or persons chosen, or desired to be chosen, as directors of any companies, the stock of which are held by said trustees. Bonds and other property held by said trustees may be sold by them.

"Eighth. That said trustees shall have power to cause corporations to be formed for the purposes, and with all or any of the powers specified in the purposes, of this agreement: provided, that the stock of such corporation shall be issued for cash, or for property at its

cash value, and shall be issued to, or be purchased by, said trustees, in the manner provided in section sixth of this agreement.

"Ninth. Said trustees shall receive and safely keep all moneys received from dividends, or interest upon stocks, bonds, or moneys held in trust, and shall distribute the same, as well as all moneys received from sales of trust property, by declaring and paying dividends upon said trust certificates as funds accumulate which are not needed for the uses and expenses of the trust. The trustees shall, however, keep separate accounts of receipts from dividends and interest, and of receipts from sale of trust property, and, in declaring any dividends in which moneys derived from sales of trust property are included, shall render the holders of trust certificates a statement showing what amount of the fund distributed was derived from such sales or transfers.

"Tenth. The trustees shall render to the holders of trust certificates, at each annual meeting, a statement of the receipts and disbursements, and of the affairs of the trust, for the year. They shall also, whenever demanded by a majority in value of the holders of trust certificates, furnish a true and complete inventory and appraisal of all property held in trust, and a statement, as full as possible, of the financial affairs of the various companies whose stocks are held in trust.

"Eleventh. Said trustees shall exercise supervision, so far as their ownership of stock shall enable them to do, over the several corporations or associations whose stock is held by said trustees. As stockholders of said corporation, they shall elect, or endeavor to elect, honest and competent men as directors and officers thereof, who may be paid a reasonable compensation for their services. They may elect themselves as such directors and officers, and shall endeavor to procure such judicious and efficient management of such corporations as shall be most conducive to the interest of the holders of trust certificates.

"Twelfth. All of the powers of the trustees can be exercised by a majority vote of their full number, either in person or by proxy, except in the election of officers, as provided in the by-laws: provided, that no proxy to represent a trustee can be given to or be voted by any person other than a trustee. The said trustees may appoint from their own number an executive committee, and may appoint other committees, composed wholly or in part of persons not of the board of trustees, and delegate to such committees such of their powers as they may deem advisable. A majority of each committee may exercise all the powers conferred upon such committee. Whenever the trustees, by resolution, shall determine to increase the number of trustees, a copy of said resolution, together with the call for a meeting of certificate holders to vote thereon, shall be sent to every certificate holder whose address is known to the secretary. At least thirty days' notice of

said meeting shall be given. If a majority in value of certificate holders at said meeting vote to increase the number of trustees, the board of trustees shall appoint the additional trustees thus created, as in case of a vacancy; and whenever the trustees shall, by resolution, determine to diminish the number of trustees, a copy of said resolution, thirty days prior to the annual meeting, shall be mailed to each certificate holder; and they shall vote on such proposition at said annual meeting, and, if agreed to, the trustees, or the number by which it shall be determined to reduce, shall not be elected at said meeting, provided the board of trustees shall never be reduced to less than five, and not reduced at any annual election by more than three to be at said meeting elected.

"Thirteenth. The trustees may employ and pay all such agents and attorneys as they may find it necessary to employ in the management of said trust.

"Fourteenth. Until after April 1, 1889, no trustee shall receive a salary for his services as trustee. After that date each trustee shall receive a salary not to exceed the sum of six thousand dollars per annum, the amount of which salary shall be fixed from time to time by the certificate holders at their annual meetings. This provision is not intended to prohibit any of the trustees, prior to or after April 1, 1889, from receiving salaries, the amount whereof shall be fixed by the board of trustees, for services as president, secretary, treasurer, manager, or in other capacities than a trustee only. The whole or any part of the foregoing provision, to wit, provision fourteenth, may be modified by any by-law now or hereafter adopted by the certificate holders.

"Fifteenth. The board of trustees shall have its principal office in the city of Pittsburgh, subject to change by a vote of the trustees, at which office, or in a place of safe deposit adjacent thereto, the stocks held in trust shall be kept.

"Sixteenth. All powers and duties vested in the trustees herein named shall vest in, and be exercised by, the successors of said trustees, appointed as herein prescribed.

"Seventeenth. Elections for trustees to succeed those herein appointed, and authorized to be appointed after the expiration of the term for which they have been appointed, shall be held annually. At the annual election, 1890, three trustees shall be elected to hold their office for one year, three to hold their office for two years, and three to hold their office for three years. Thereafter, three trustees shall be elected annually, to take the place of those retiring, to hold their office for three years, except those elected to fill a vacancy from any cause except expiration of term, who shall be elected for the balance of the term of the trustees whose places they are elected to fill. Every trustee shall hold his office until his successor is elected and qualified.

"Eighteenth. For their acts as trustees the trustees shall not be personally liable or responsible, except for willful misconduct or neglect.

"Nineteenth. Trustees shall be elected by ballot by the owners of trust certificates, or their proxies. At all meetings the owners of trust certificates who shall be registered as such on the books of the trustees may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names; but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books shall be closed for thirty days prior to the day appointed for the annual election. A majority of the shares represented at such election shall elect.

"Twentieth. The annual meeting of the owners of said trust certificates for the election of trustees, and for other business, shall be held at the office of the trustees on the Wednesday nearest the fifteenth day of March of each year, and said meetings may be adjourned from day to day until its business is completed. Special meetings of the owners of trust certificates may be called by a majority of the trustees, at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of the holders of trust certificates, whenever requested so to do by a petition signed by the holders of twenty-five per cent. in value of such certificates. The business of such special meetings will be confined to the objects specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given by mailing a notice to the address of each certificate holder, so far as known, at least ten days before such meeting, and by public notice in one of the principal papers of the city where the office of the said trust may be located, ten days before said meeting.

"Twenty-First. At any meetings, by-laws may be made, amended, and repealed by not less than two-thirds in value of the holders of trust certificates: provided, however, that said by-laws shall not be inconsistent with any by-laws which have been, or may be, adopted by the holders of trust certificates, nor with this trust agreement.

"Twenty-Second. Whenever a vacancy occurs in the board of trustees, from any cause other than an expiration of the term of office, the remaining trustees may adopt a trustee to fill the vacancy until the next annual meeting, or, at their option, may call a meeting of the owners of trust certificates for the purpose of electing a trustee to fill the vacancy or vacancies.

"Twenty-Third. If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill a vacancy or vacancies, the trustee or trustees so appointed shall hold their or his office or offices only until his

or their successor or successors shall be appointed or elected in the manner above provided for.

"Twenty-Fourth. It shall be obligatory upon all trustees to attend each and every meeting of the board of trustees, either in person or by proxy; and in the event of any trustee absenting himself from three successive meetings, or failure to be represented by proxy at such meetings, then in such case the office held by said trustee shall be considered vacant, and the vacancy be filled as hereinbefore provided.

"Twenty-Fifth. Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof; but if, at any time, such formal transfer shall be deemed advisable or necessary, said formal transfer shall be made, and it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee, or the executor or administrator of any deceased trustee, to make such transfer.

"Twenty-Sixth. This trust shall continue for the period of twenty-five years: provided, however, that if, at any time after the expiration of one year, seventy-five per cent. of all the holders, in value, of trust certificates, or, after the expiration of five years, sixty-five and two-thirds per cent. of the holders, in value, of trust certificates, shall, at a meeting of certificate holders called for that purpose, vote to terminate the trust, they may at the same or at a subsequent meeting, called for that purpose, decide, by a vote of fifty-one per cent. of their number, the mode in which the affairs of the trust shall be wound up, and whether it shall be sold, and the value thereof distributed, or whether part, and, if so, what part, shall be delivered, and what part shall be sold, and whether such sale shall be public or private. To the parties whose property, stock, or business shall have been transferred to said trust shall be given the first privilege of purchasing the stock, property, or business by them transferred. The trustees who shall continue to hold their offices for that purpose shall wind up the affairs of the trust in the mode agreed upon by the holders of trust certificates, as aforesaid.

"Twenty-Seventh. The trustees shall have power to do whatever is necessary and proper for carrying into execution the foregoing powers, and the purposes for which this trust was organized.

"Twenty-Eighth. Should any party or parties holding certificates of this trust, or being a lessor, be desirous of operating an establishment controlled by this trust, the party or parties shall make application to the board of trustees for such privilege, stating in said application the kind and estimated time during which he or they may desire to operate such an establishment; also, the esti-

mated time during which he or they may desire to operate such an establishment; also, the estimated quantity of goods he or they may desire to produce. Then, should said specified establishment be not already in operation, the said privilege may, in their discretion, be granted by the said board of trustees on the following general terms and conditions: (1) The party or parties to whom such privilege may be granted shall pay monthly into the treasury of the trust a profit on all goods manufactured in such privileged establishment. Said profit shall equal, at least, the average profit which the trust has derived during such month from all the establishments operated by it for the period of time as covered by such privilege. (2) The party or parties privileged shall bear all expense incidental to putting that establishment in condition to operate, and furnish all capital needed to operate, the same. (3) The party or parties privileged shall furnish to the trust ample and satisfactory surety for the payment, monthly, of the above-mentioned profits. (4) The trust shall at all times retain control over such establishment, and shall cancel such privilege, whenever they may deem proper, or whenever, in the opinion of the trustees, it has operated to the prejudice of the best interest of the trust.

"Twenty-Ninth. The trust certificates may be of the following form, but may be changed from time to time by the trustees, in accordance with provision 3 of this agreement: 'No. —, Shares of \$100.00 each. Shares —, American Preservers Trust. This is to certify that — entitled to — shares in the equity to the property held by the trustees of the American Preservers Trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder, or any transferee thereof, shall be subject to all the provisions of the agreement creating said trust, and of the by-laws adopted in pursuance of said agreement, as fully as if — had signed the said trust agreement. Witness the hands of the president and secretary of the board of trustees, this — day of —, A. D. 1—, at the city of Pittsburgh. —, President. —, Secretary.' Back: 'For value received, — hereby sell and transfer to — shares of the American Preservers Trust, standing in my name on the books of said trust, and — hereby irrevocably appoint — attorney to make the necessary transfer upon the books of said trust in accordance with the regulations thereof, and upon the conditions expressed upon the face of this certificate. Dated —, 188—. In presence of —,'

"Thirtieth. The trustees, whenever the value of stock, bonds, property or business which have accumulated in their hands shall have increased in value, or when money not necessary for the uses of the trust shall have accumulated in their hands, may increase the

amount of trust certificates to the extent of such increase or accumulation, and divide the same among the certificate holders."

The court refused to admit the copy of the agreement, and, after the introduction of testimony by both plaintiff and defendant, excluded all the evidence of the defendant, and said to the jury: "The Court: Gentlemen of the jury, it becomes necessary to relieve you of this case. Of course, that may be small consideration to you for having sat here for a day or so to hear it, but, at the same time, there was no evidence introduced on the part of the defendant which shows this American Preservers Company, the plaintiff in this case, to have been in an illegal combination. It may have been so, but we can't find it so from this testimony. There is only one cause here shown, and, as it is a prima facie case for the plaintiff, I am going to instruct you as follows: The court instructs the jury that the defendant, Bishop, has failed to make out a defense, and that the plaintiff, the American Preservers Company, has made out a prima facie case. You are therefore instructed to find for the plaintiff, the American Preservers Company, and your verdict should be in the following form: 'We, the jury, find the issues for the plaintiff, and find the property described in the writ in the plaintiff, and assess the plaintiff's damages at one cent.' I will ask one of you to sign that, as foreman. You are doing that under compulsion, and you need not feel that it is your verdict, as it is a mere form. (The defendant, by his counsel, then and there duly excepted.) The Court: You are simply doing what the court tells you to do. It is not as if you went out and found such a verdict; but, at the same time, we have to go through this form." The defendant asked six written instructions to be given to the jury, but they were all refused. The jury returned a verdict in accordance with the written instructions given by the court, and judgment was rendered in favor of the plaintiff for one cent damages, after the overruling of a motion for a new trial. The appellate court has affirmed the judgment of the circuit court, and the present appeal is prosecuted from such judgment of affirmance.

Arnd, Evans & Arnd, for appellant. Moran, Kraus & Mayer (A. Leo Well, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). Upon the trial of the case below the plaintiff (the appellee here) introduced in evidence a certificate of incorporation signed by the secretary of state of West Virginia, and dated June 20, 1888, declaring six corporations therein named to be a corporation by the name of American Preservers Company, and also a bill of sale executed on July 24, 1888, by the appellant to said company, granting to it, in consideration of the transfer to him of 331 shares of its stock, the

goods, effects, and chattels described in an annexed schedule, and his business, and the good will of the same, with the appurtenances. The plaintiff then examined one B. E. Ryan, the secretary and general manager of said company, and who was also the secretary of the American Preservers Trust, and one of the trustees of said trust. Ryan testified that he made demand upon appellant for the property before bringing this suit; that he received the bill of sale from appellant, and delivered to him a certificate for 331 shares of the stock of said company, but at the same interview, and "within an hour or two," took back said shares, and delivered to appellant 662 certificates of trust of the American Preservers Trust; that as secretary of the company he delivered the 331 shares of stock; that, as secretary of the trust, he delivered the trust certificates; that he received back the 331 shares of stock as an officer of the trust; and that at the same interview, and upon receipt of the bill of sale, he then and there appointed appellant manager and custodian of the property described in the bill of sale, with directions to conduct the business, and report to him (Ryan) all the purchases and sales and receipts and disbursements. After the examination of Ryan the plaintiff rested. The defendant then offered to introduce evidence, oral and written, tending to sustain the averments of his fourth plea. Some of this evidence was rejected when offered, some of it was admitted when offered; but all of it, upon motion of the plaintiff, was finally ruled out, and the jury was instructed to find the issues for the plaintiff. We cannot notice all the objections to specific offers of testimony, nor pass upon the rulings of the court in detail. We deem it sufficient to consider the general ground upon which the action of the trial court was based, and the general theory which the defendant sought to maintain by his offered and rejected testimony.

The court below seemed to take the view that the plaintiff was an independent and legally organized corporation, and that, as the defendant had executed a bill of sale of his property and business to that corporation, and then assumed to act as its custodian and agent in the management of the property and business, he was estopped from denying the plaintiff's title or right of possession. On the other hand, it was claimed by the defendant below that a combination was formed among all the manufacturers of and dealers in fruit butters, jellies, preserves, and like products, in the United States, under the name of the American Preservers Trust, for the purpose of controlling the manufacture and sale of said products, and preventing competition therein, and raising the market price thereof, and thereby securing a monopoly therein; that this combination was organized, and sought to effect its purpose, under and in pursu-

ance of a written agreement signed by the parties to the combination; that the plaintiff company was formed in accordance with the provisions of this agreement, and for the purposes of accomplishing the objects of the trust; that those objects were illegal, and against public policy; that the agreement was illegal and void, as providing for a combination in restraint of trade in staple articles of food, in general use and demand by the inhabitants of Illinois; and that the transfer of defendant's goods and machinery and business by means of a bill of sale to the plaintiff, and the delivery of the shares of stock to defendant, and the redelivery thereof, to the trustees of the combination, in exchange for trust certificates, and the appointment of defendant as custodian of the property, and agent to carry on the business, theretofore exclusively his own, were all parts of the illegal scheme, and aids in the accomplishment of the unlawful objects of the trust. We are inclined to think that the claim thus made by the defendant, and which is set up in his fourth plea, would have constituted a good defense to the action, if he had been allowed to establish it by proper evidence.

1. A preliminary question arises as to the action of the trial court in excluding the offered copy of the trust agreement. The original agreement was not in the possession of the defendant, and it is claimed that a proper foundation was not laid for the introduction of secondary evidence. Proof of the contents of a document may be established by secondary evidence, when it is in the possession of the adverse party, who withholds it at the trial, provided that notice to produce the original has been duly served, where such notice is requisite. 1 Tayl. Ev. pt. 2, § 440; 21 Am. & Eng. Enc. Law, pp. 984, 985. Secondary evidence may be offered to prove the substance of a document which it is out of the power of the party to produce; and this rule applies to papers out of the jurisdiction of the court, provided due effort be made to obtain such papers. 1 Whart. Ev. § 130; 21 Am. & Eng. Enc. Law, p. 980. The notice to produce the original may be given either to the adverse party himself, or to his attorney. *Id.* 989. In the case at bar, notice to produce the original agreement, and the by-laws of the company and of the trust, was served upon the attorneys of the plaintiff, including Mr. A. L. Weil, hereinafter named. Subpoena duces tecum was also served upon Ryan, the secretary and manager of the company, and secretary and manager of the trust, and upon A. B. Bremer, president of the company, and one of the trustees of the trust. Ryan swears that he was present, and saw the defendant, Bishop, sign the trust agreement, and that after it was signed it was put into the hands of "the custodian of the agreement, the solicitor of the trust, A. Leo Weil,—this gentleman here,"—and that he saw it within a day or two thereafter. Weil, a resident of Pittsburgh, in Penn-

sylvania, where the principal office or place of business of the plaintiff was required by its charter to be kept, and whose name was signed to the replication as one of the plaintiff's attorneys, and who assisted in the conduct of the trial, was examined as a witness at the trial, and swore that Bishop signed the agreement; that there were two copies of the agreement; that one was deposited with a safe-deposit company in Pittsburgh; that the other was in his possession, in accordance with the terms of the agreement; that the trust had been dissolved; that a large number of papers had been left in Pittsburgh when it was dissolved; that he had caused search to be made in his office at Pittsburgh to obtain these papers, and had been unable to find them; and that the by-laws were attached to the trust agreement. Ryan and the defendant do not speak of more than one original agreement as having been signed by the defendant, but, if there was a duplicate original, it sufficiently appears that both were within the control of Well, who drew the agreement, and was the legal adviser and solicitor both of the plaintiff and of the trust, in which plaintiff was an associate member. Prior to the trial a bill in chancery had been filed by one Meyer, in the circuit court of Cook county, against the president and secretary of the plaintiff, Bremer and Ryan, and other parties, setting up the trust agreement; and Ryan had filed an answer thereto, admitting the existence of the trust agreement, in words and figures as pleaded in the bill. The defendant below, upon the trial, offered in evidence the said bill and answer, as showing a copy of the trust agreement, which had been admitted to be correct by the plaintiff, or its officers and managers. This copy was shown to the defendant when he testified, and he swore that he signed the original agreement in the latter part of May, 1888; that Ryan and Well were present; that he "never saw it but that once"; that, when he saw it, it was lying on the table, and Ryan was very particular about it, and "I think," too, it was in his hands; that they would not let him make a copy of it; that he could not compare any copy of it with the original without having the original, and never had the original, except at that time; that he read it through, but there was a great deal of it, and he could not remember its entire language; that the copy shown him, set out in said bill, "is a copy of the agreement I signed, as near as I can tell." It furthermore appears from the testimony of Mr. Well that during the trial he had a copy of the trust agreement in his possession, which he had found in the office of the plaintiff company, but he declined to produce it. We are referred by counsel for appellee to the case of *Dickinson v. Breeden*, 25 Ill. 186. There it was held that, where a party desiring to introduce secondary evidence of the contents of a deed had the knowledge of the grantee's residence, the latter's deposition should be taken to prove the existence of the original, and that it was lost, or so mislaid that

it could not be found after diligent search. We cannot see why the facts of the present case do not bring it within the doctrine of the *Breeden* Case. The existence of the original trust agreement was established by the testimony of three witnesses; and the original draftsman of the agreement, and the custodian to whose possession it had been intrusted, was examined orally as a witness, and swore that he had caused search to be made for it, and that it could not be found. But, if the evidence was not conclusive as to the loss or destruction of the original, the defendant showed that it was beyond the jurisdiction of the court, and in the possession or under the control of the plaintiff, and that the latter, after being notified, declined to produce it. We are therefore of the opinion that the trial court erred in not receiving in evidence the offered copy, if it would have been material testimony when introduced.

2. It is contended, however, by counsel for appellee, that "even had a proper foundation been laid, and proper secondary evidence of the alleged trust agreement been offered, its reception would have established no material fact, and its rejection was not error." Hence the next matter presented for consideration relates to the pertinacy or materiality of the agreement, and of the other excluded evidence offered in connection with it.

There can be no doubt that this trust agreement is an illegal contract, as providing for such a combination in restraint of trade as is forbidden by public policy. In *Craft v. McConoughy*, 79 Ill. 346, where certain firms made an agreement, by the terms of which they attempted to form a combination for stifling competition, and controlling the price of grain, cost of storage, and expense of shipment, and thereby monopolizing the entire grain trade of the town and surrounding country, we said: "That the effect of this contract was to restrain the trade and commerce of the country is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal, and void." In *People v. Chicago Gas-Trust Co.*, 130 Ill. 268, 22 N. E. 798, we held that an agreement tending to prevent competition and create a monopoly is void, by the principles of the common law, because it is against public policy, and that public policy favors competition in trade, to the end that its commodities may be afforded to the customer as cheaply as possible, and is opposed to monopolies, as tending to advance market prices, to the injury of the general public. Again, in *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, we held that contracts restraining the freedom of trade, or diminishing competition, or regulating the prices of commodities or services, are prohibited by the law, and that all combinations of capitalists, or of workmen, for the purpose of influencing trade in their special favor, by raising or reducing prices, are so far

illegal that agreements to combine cannot be enforced by the courts. To the same effect are *Case of Monopolies*, 11 Coke, 84; *Arnot v. Coal Co.*, 68 N. Y. 559; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *American Preservers Trust v. Taylor Manuf'g Co.*, 46 Fed. 152; 9 Am. & Eng. Enc. Law, pp. 884, 895, 896. The agreement recites that it is designed by its signers to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, etc., and of selling and dealing in the same in home and foreign markets. This co-operation, to be secured through the extraordinary powers conferred upon the nine trustees named in the agreement, six of whom are designated by name, and authorized to elect three others, could not result otherwise than in a grinding monopoly, controlling all trade in the business specified, and raising or depressing prices therein at the will of the trustees. Such trustees are empowered to organize corporations with all or any of the powers specified in the purposes of the agreement, and the stock of such corporations is to be issued to or purchased by said trustees. For this stock the trustees are to issue certificates of trust. The agreement is to go into effect within 60 days from the time those holding the majority of the stock in seven specified corporations, formed or to be formed, shall transfer the same to the trustees. Each signer of the agreement agrees to assign and transfer to said trustees, absolutely, all the shares which he may own in said corporations, formed or to be formed, and is to receive therefor, not money, but trust certificates equal to the appraised amount of the earning capacity of his stock, as fixed by the trustees and the stockholder. The trustees are authorized to purchase in the same way—by the issue of trust certificates—other stocks of the same companies, and also the property and business of any firm or individual engaged in the business of manufacturing and dealing in said products. The trustees are to exercise supervision over the corporations whose stocks are transferred to them, and are empowered to elect themselves directors and officers in such corporations, and procure such management of the same as will be conducive to the interests of the holders of the trust certificates. These trust certificates are divided into shares of the par value of \$100 each, and are prepared by the trustees. They provide that the holders thereof shall be bound by the terms of the trust agreement, and of the by-laws passed in pursuance thereof, and are intended to show the interest of each beneficiary in the trust. The trustees hold the stocks transferred to them in trust for the holders of the certificates, and are to receive and hold the dividends or interest upon said stocks, and are to distribute the same by declaring dividends upon the certificates. The stocks so transferred to the trustees are

to be held by them for the benefit of all the owners of the trust certificates. The trust is to continue for 25 years, subject to the right of 75 per cent. of the holders of the certificates to terminate it after the expiration of one year, and of 65% per cent. of such holders to terminate it at the end of five years; and the trustees cannot sell or surrender any of the stocks held by them during the continuance of the trust without the consent of a majority in number and value of the holders of the trust certificates. It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement into one giant combination or partnership, under the absolute dominion and control of a board of nine trustees. Its illegal purpose is apparent upon its face, and therefore, under the decisions above referred to, it must be held to be void, as being injurious to the public interest.

The object of the testimony of the defendant upon the trial below was to show that the plaintiff, the American Preservers Company, was a party to this illegal combination, and that the execution of the bill of sale to it was to enable it to carry out the unlawful designs of such combination. If this testimony, as offered, had been received, it would have tended to show, not only that the plaintiff company was under the control of this board of trustees, but that it was in a partnership with other corporations. The corporators named in plaintiff's charter, and whose names are signed to the agreement therein set out, upon the basis of which they were declared to be a corporation, were trustees in the trust. The court below ruled out testimony showing that these trustees held stock in more than a dozen different corporations in the different states of the Union, besides the stock in the plaintiff company transferred to it by the defendant and others. The agreement was illegal, as providing for a partnership among corporations. It is a violation of law for corporations to enter into partnerships. The provisions of the general incorporation act of Illinois are to the effect that every corporation organized in this state must manage its own affairs separately and exclusively, and cannot enter into any contract or relation by which it is divested of such power of exclusive management, or by which its franchises are vested in a partner or any outside board with equal power to direct its business. *Whittenton Mills v. Upton*, 10 Gray, 582; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834. The appellee here, a foreign corporation, so far as it was doing business in this state through any control which it assumed to exercise over the business transferred to it by appellant, was subject to the same restrictions and duties as corporations formed in this state, and could have no other or greater powers. 1 Starr & C. Ann. St. p. 619, c. 32, § 26. It was therefore unlawful for it to be operating in this state as a member of a partnership of corporations.

State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; Mallory v. Oil Works, 86 Tenn. 508, 8 S. W. 396; People v. Chicago Gas-Trust Co., *supra*.

But it is urged that, even if the trust agreement was illegal in the respects and for the reasons above indicated, yet its illegality could not prevent a recovery in this action of replevin, for the alleged reasons that the motive of parties forming a corporation cannot be inquired into in a collateral proceeding, that the contract evidenced by the bill of sale was an executed one, and that defendant, having received the goods as agent of the plaintiff, could not assert a claim adverse to his principal. It is not necessary to discuss the doctrine contended for by appellee,—that where a corporation, as indicated by its articles of association, is legal, and the incorporation is effected in the manner prescribed by law, the intention of the incorporators is immaterial. The purpose of the offered testimony was to show that the sale made to the appellee was an illegal sale, and that the bill of sale upon which appellee relied to show its title and right of possession was executed to accomplish an unlawful object. Such proof was entirely consistent with the *de facto* existence and legal organization of appellee as a corporation. Appellant offered to prove that he was compelled by Ryan to sign the trust agreement in May, 1888, by the threat that his business would be ruined by the manufacturers and dealers who had agreed to form the trust; and he swore that he had never heard of appellee until the following July, when Ryan came to him, and told him that he must sign the bill of sale to the company, in order to put the stock into the trust. It may be a serious question whether there was any real sale of the property described in the bill of sale. A sale presumes a vendor, on one side, and a vendee, on the other, each having life and existence, and the power and ability to contract, and each acting independently, and of his own free choice. But here the vendor, Bishop, and the vendee, the American Preservers Company, were controlled and directed by an outside force,—the trustees named in the trust agreement, acting through Ryan, their representative. Ordinarily the vendee becomes owner, and does what he pleases with his own; but here the trust agreement, in effect, directs the vendee upon what terms it shall hold the property transferred to it, and limits the further sale of the same. Ordinarily the vendor fixes the price of what he sells, but here the trust agreement virtually leaves the fixing of the value of what is sold to the trustees. The proof introduced showed that appellant had nothing to do with arranging for 331 shares of stock in the appellee company as the value of his property and business, nor did he determine that 662 certificates of trust were a fair equivalent for the stock. All this was settled and arranged beforehand by Ryan. People v. North River Sugar-Refining Co., *supra*.

But if it be assumed that appellant execut-

ed the bill of sale, and submitted himself to the control of the trustees or of appellee, voluntarily and of his own free will, then it follows that he was *particeps criminis* with them in the unlawful venture. He, as well as appellee, was a party to the unlawful contract evidenced by the bill of sale. If appellee had been an individual, instead of a corporation, and appellant had executed the bill of sale for the purpose of defrauding his creditors, it will not be contended that the bill of sale could be relied upon as a basis of recovery by either party. In *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, the action was ejectment by the grantee in a deed against the grantor therein, who was in possession of the premises. The defendant offered to show that the deed had been executed for the purpose of defrauding the defendant's creditors, but the evidence was rejected; and we reversed the case, holding that the ruling was erroneous. In that case we applied the maxim, "*In pari delicto, potior est conditio defendentis et possidentis*," and held that, where parties concerned in illegal agreements are in *pari delicto*, the law will not aid either, but will leave them without remedy against each other; and it was also there held that the above maxim applied to executed transactions as well as to those which are executory, and would be enforced by courts of law as well as courts of equity. "Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb." *Smith v. Hubbs*, 10 Me. 71. See, also, *Craft v. McConoughy*, *supra*, and *Halloran v. Halloran*, 137 Ill. 100, 27 N. E. 82. In the case at bar the appellant never parted with the possession of the property. After he executed the bill of sale he still continued his business, the same as before, though subject to the orders and direction of the trust. The beginning of the action of replevin admits his possession, as replevin does not lie against one not in possession. *Wells*, Repl. 77; *Hall v. White*, 106 Mass. 509. We see no reason why the doctrine of the *Kirkpatrick* Case does not apply here, although the action is replevin, and not ejectment, and although the property involved is personalty, and not real estate. The bill of sale rests under the ban of the law as well when executed to carry out the illegal agreement hereinbefore set forth as if it had been made for the purpose of defrauding creditors. The law will not aid the appellee to recover the property, but will leave both it and appellant where they were when the suit was begun.

Counsel for appellee claim that, by the bill of sale, appellee became the owner of the property, and then turned over the possession of it to appellant, under an arrangement by which the latter was to manage it for appellee. Under this view of the case, the agreement thus made after the sale was as unlawful as the contract embodied in the bill of sale itself, because appellant thereby agreed

to aid in carrying out the illegal purpose of the trust agreement. Letters from Ryan to appellant were introduced in evidence, but finally excluded by the court, directing appellant to advance the price on jellies in Chicago so many cents; not to sell at lower prices without referring the matter to him (Ryan); not to offer any goods in Indiana; not to go below a certain price, "but in competition with outsiders; * * * not [to] hesitate to make any price that will do the business"; to send schedules of the stock on hand, and estimates of the fruit needed for the season; how to charge paper given and received in the course of business; and how to make entries on the books, etc. These letters, and other offered proof, showed that appellant was holding the property and managing the business under the direction of the trust, and under the instructions of its secretary. The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884; *Penn. v. Bornman*, 102 Ill. 523; *Commissioners of Lake Fork Special Drainage Dist. v. People*, 138 Ill. 87, 27 N. E. 857. In *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867, we held that, where two persons contribute money to be used by one of them for the purpose of betting or wagering the same on horse races, or if they are partners in the business of betting on horse races, and the money advanced by the plaintiff to the defendant is in furtherance of such business, the plaintiff cannot recover of the defendant any money so contributed or advanced, upon the ground that betting money on a horse race is gaming, and in violation of law, and a contract in aid of the offense of gaming is prohibited by statute, and void, and no recovery can be had on it; and we there said that plaintiff and defendant, being jointly engaged in a business which was in violation of law, "were, in respect to such business, in *pari delicto*, and the law will refuse its aid to assist either, but will leave them in the positions in which they have placed themselves." *Cobbey*, in his work on the Law of Replevin (section 149), says: "One who has parted with his property under a contract which is against public policy cannot maintain replevin for it. The law will leave the parties in the situation in which they have placed themselves." In *Stout v. Watson*, 19 Or. 251, 24 Pac. 230, the action was replevin, and the plaintiff relied upon a bill of sale, in the nature of an assignment, which was void under the statute, as not being for the benefit of all the creditors; and the court held that a motion for a nonsuit made by the defendant at the close of plaintiff's evidence was improperly disallowed, because the plaintiff had no other evidence of title to the property in controversy except the bill of sale, which had been executed in violation of the statute, or contrary

to its provisions, and was therefore void. In *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804, the action was replevin to recover the possession of a horse. Plaintiff claimed that he was the owner, and entitled to the possession of the horse, and that the defendant had possession of it without right, and unlawfully detained it. There was evidence authorizing the jury to find that the plaintiff, by an executed contract, had parted with his title to, and right to the possession of, the horse, but that the contract, although fully executed by the parties thereto, was *contra bonos mores*, and void as against public policy. Verdict and judgment below were for the defendant, and the supreme court of Indiana, in affirming the judgment, said: "The law, in such a case, will leave the parties just where it finds them. If the contract has not been executed, it will not be enforced. If it has been executed, the law will not extend relief. Where a contract void as against sound morals or public policy has been fully executed by both parties, and suit brought under, upon, or against such contract, *potior est conditio defendentis*." When the issue in an action of replevin is one of title, the plaintiff must prove a title on which he can base a lawful possession. 20 Am. & Eng. Enc. Law, p. 1054.

As to the claim that the relation of agent and principal existed between appellee and appellant, we do not think that the existence of such a relation, if it had been found by the jury to exist, would authorize a recovery by appellee, if the facts offered to be proven by the defendant had been established by his evidence. It may be admitted to be true, as a general principle in the law of agency, that the agent may not dispute his principal's title, but there are exceptions to this general principle. *Mechem*, Ag. § 525. The law will not enforce the performance of an agency which has for its object, or tends directly to promote, the commission of an illegal act, or an act opposed to public policy, such as the creation of fictitious and unnatural value, or the control or monopoly of traffic in the staple articles of commerce, or the prevention of free and natural competition therein. Ordinarily, in such case, it will assist neither party. *Id.* §§ 20, 35. In illegal transactions, prohibited by law or morals or public policy, an agent cannot recover either for his services, or for his advances and disbursements, nor will the law assist the principal to recover his property or its proceeds. The guilt of both is deemed to be equal, and the maxim is, "*In pari delicto, potior est conditio defendentis*." "Each party is left precisely where he is found at the time of the controversy, to bear the burden of his own abandonment of his duty to the law of his country." *Story*, Ag. (8th Ed.) §§ 195, 330, 344. In *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499, where it appeared that a principal had employed an agent to buy and sell grain, with the illegal purpose of controlling the market and price

thereof, and this fact was known to the agent, we held that such principal would not be permitted to recover against the agent for moneys received by him in the course of such business, and it was there said: "When the employment of an agent relates to the performance of an immoral or illegal act, * * * neither party can make the contract the basis of a suit against the other. Advances for illegal purposes fall within the same rule, and cannot be recovered by the principal of the agent, or the agent of the principal." There are cases which hold that if the contract is founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, it will not be regarded as unlawful. If the promise be unconnected with the illegal act, and founded on a new consideration, it will not be tainted by the act. For instance, a principal may recover from his agent money paid to the agent by a third person, from whom such money may have been due to the principal upon an illegal transaction, because the contract of the agent to pay the money to the principal is not immediately connected with the illegal transaction. But the law will not assist the principal to recover against the agent, where the contract between them grows directly out of the illegal transaction, and the agent has been concerned in the execution of the illegal transaction, and participated in it. The maxim above quoted has application as between the immediate parties to an illegal contract. Here the offered testimony was for the purpose of showing that the agent aided and assisted the principals in carrying out the objects of the illegal combination, and was party to the contract of sale executed in the interest of the illegal transaction, and that the assumed agency, if there was one, had for its object the accomplishment of the unlawful purpose. We are therefore of the opinion that the action of the trial court in refusing to admit the defendant's offered testimony, and in excluding that which was admitted, cannot be sustained upon any of the grounds urged in support of it, and that in the rejection and exclusion of such evidence said court committed error.

Other points—some of them of much force—are discussed by counsel. These relate to the admitted abandonment of the trust, and defendant's alleged rescission of the contract, and attempted withdrawal from the trust, and the trial court's refusal to submit the case to the jury upon such proof as was before them. We do not deem it necessary, however, to discuss the questions growing out of these other matters, or to pass any opinion upon them. For the reasons above indicated the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(153 Ill. 366)

ST. LOUIS, A. & S. R. CO. et al. v.
HAMILTON.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

RECEIVERS—EJECTMENT—DECLARATION—PLEA.

1. In ejectment against a receiver, a declaration which does not allege that the plaintiff has obtained leave to sue from the court that appointed the receiver is demurrable.

2. Where defendant in ejectment pleads that he is not in possession, plaintiff cannot recover without proof of defendant's possession.

Appeal from circuit court, Jersey county; George W. Herdman, Judge.

Ejectment by Amanda L. Hamilton against the St. Louis, Alton & Springfield Railroad Company and Joseph Dickson, receiver. Plaintiff obtained judgment. The railroad company appeals. Reversed.

This was an action of ejectment brought by Amanda L. Hamilton against the St. Louis, Alton & Springfield Railroad Company and Joseph Dickson, receiver of the railroad company, to recover a strip of land, 50 feet wide, running across the fractional W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 14, township 6, range 12, Jersey county, Ill., and being the right of way of the defendant the St. Louis, Alton & Springfield Railroad Company. Joseph Dickson, receiver, etc., defendant, filed a general and special demurrer to the declaration, alleging, as special causes of demurrer: (1) That there is no allegation in the said declaration that the plaintiff, prior to the commencement of the suit, obtained leave of the court which appointed said Joseph Dickson receiver of the St. Louis, Alton & Springfield Railroad Company to institute this suit in this court; (2) that the parties defendant are improperly joined in this suit. The court overruled this demurrer, and the defendant Joseph Dickson, receiver, etc., abided by his demurrer, and did not answer further, and upon the final hearing a default and judgment were entered against him. The defendant St. Louis, Alton & Springfield Railroad Company pleaded: (1) Not guilty; (2) that it was not in possession of the land described in the declaration, and that no demand had been made upon it for possession thereof prior to the commencement of this suit,—and which plea was verified by affidavit. To this plea the plaintiff filed a replication traversing both of the allegations of the plea as to possession at the time of commencement of suit, concluding to the country. The parties, by agreement, waived a jury, and a trial was had before the court, resulting in a judgment in favor of plaintiff against both defendants, to reverse which defendants appealed.

O. B. Hamilton and O. D. Leach, for appellants. Levi Davis, Jr., for appellee.

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

CRAIG, C. J. (after stating the facts). The first question presented by the record is whether the court erred in overruling the demurrer of Joseph Dickson, receiver, to the declaration. It will be observed that Joseph Dickson was sued, not as an individual, but as a receiver. It was thus impliedly admitted in the declaration that Joseph Dickson had been appointed receiver of St. Louis, Alton & Springfield Railroad Company by some court of competent jurisdiction; and, having been thus appointed, he was an officer of the court, and his possession of the land sought to be recovered was the possession of the court. The law is well settled, where a receiver has been appointed by a court of competent jurisdiction, and has taken possession of property in his capacity of receiver, he has the right to hold such property, and dispose of it under the direction of the court; and any unauthorized interference therewith, by taking possession of the property, or instituting legal proceedings to obtain possession, without the sanction of the court appointing such receiver, is a direct contempt of court, and punishable as such. *Richards v. People*, 81 Ill. 554. Here the property was in the possession of Dickson as receiver, and, if the plaintiff desired to contest his right to hold the possession of the property, the law required her to go to the court who appointed the receiver, and obtain permission to bring an action for that purpose. *Beach*, Rec. §§ 655, 726; *High*, Rec. §§ 254, 395a, 139. In the last section this author says: "Thus, the court will not permit a claimant of real estate which is in possession of its receiver to bring an action of ejectment without first obtaining leave for that purpose. And ordinarily, when real estate is in the actual possession of a receiver, an action of ejectment will not be maintained against him in another court, but the claimant will be permitted to pursue his remedy against the receiver in the action in which he was appointed." In section 254, the author says: "And it is necessary to aver in the * * * declaration against a receiver that leave of court has been granted to bring the action, and the absence of such averment is fatal on demurrer." See, also, *Keen v. Breckinridge*, 96 Ind. 69. The question of right to bring an action against a receiver without first obtaining leave arose in *Mulcahey v. Strauss*, 151 Ill. 70, 37 N. E. 702; and, after a review of the authorities, it was held: While it was a contempt of court to bring suit against a receiver without leave of court, and while the appointing court may protect its officer by attachment, or by an injunction stopping the suit, the failure to obtain such leave is no bar to the jurisdiction of the court in which the suit is brought, in all cases where there is no attempt to interfere with the actual possession of the property held by the receiver. Here the action was brought for the purpose of obtaining

possession of the property held by the receiver, and, under the rule announced, we think the plaintiff should have averred in her declaration that she had obtained leave of the court in which the receiver was appointed to bring the action, and the court erred in overruling the demurrer to the declaration.

There is another ground upon which the judgment must be reversed: As has been seen, the defendant, by the second plea, presented an issue as to its possession of the land when the action was brought. Under this issue it devolved on plaintiff to prove that the defendant was in the possession of the premises, but no evidence whatever was introduced to establish that fact; and, as plaintiff was not entitled to judgment against defendant unless it was in possession, the court erred in rendering the judgment against the defendant the St. Louis, Alton & Springfield Railroad Company. For the errors indicated the judgment will be reversed, and the cause remanded. Reversed and remanded.

(158 Ill. 155)

STRODTMANN v. MENARD COUNTY.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

APPEAL—REVIEW—WAIVER.

1. Alleged errors to which the attention of the Illinois appellate court is not called by the appellant are thereby waived, so that they cannot be raised on a further appeal to the supreme court.

2. The question whether the appellate court decided all the questions submitted to it cannot be raised on further appeal to the supreme court, where there is nothing in the judgment of that court to show that it did not pass on all such questions.

Appeal from appellate court, Third district.

Assumpsit by John G. Strodtmann, for use of Illinois Trust & Savings Bank, against the county of Menard. Defendant obtained judgment, which was affirmed by the appellate court. 56 Ill. App. 120. Plaintiff appeals. Affirmed.

On December 19, 1892, the county of Menard, which is not under township organization, had an empty treasury. And on said day its board of county commissioners, in regular session convened, adopted the following order: "State of Illinois, Menard County—ss.: The board of county commissioners of Menard county, state of Illinois, met in regular session December 19th, A. D. 1892. As there is no money in the treasury of Menard county, Illinois, to meet and defray the ordinary and necessary expenses of the county during the current year, it is hereby ordered by the board of county commissioners of this county that two warrants, one for the payment of three thousand (\$3,000) dollars, and one for the payment of two thousand (\$2,000)

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

dollars, both due and payable on the first day of May, 1893, to the bearer thereof, be drawn and issued by the said county, under the hand and official seal of the clerk of said county, and countersigned by the treasurer of said county, against and in anticipation of the collection of twenty-three thousand five hundred (\$23,500) dollars of taxes levied by said county board on the 4th day of September, A. D. 1892, for the payment of the ordinary expenses of said county, directing said county treasurer to pay the same out of said tax levy. It is further ordered that said county treasurer set apart and hold, of said taxes, when collected, a sufficient amount to pay said warrants when presented." Prior to the passage of this order the nominal plaintiff herein, J. G. Strodtmann, had agreed to loan the county the sum of \$2,000, and the First National Bank of Petersburg had contracted to loan it the sum of \$3,000, and the order above set forth was passed in order to procure such loans. In pursuance of such agreement and order of the board, the county clerk of the county issued and delivered to said Strodtmann the following instrument in writing, or county warrant: "State of Illinois, Menard County--s.: Board of County Commissioners, December Session, 1892. No. c. 1,303. Treasurer of Said County: Pay to J. G. Strodtmann or order two thousand dollars, for money advanced, out of moneys in the treasury not otherwise appropriated. Countersigned: H. M. Levering, County Clerk. E. R. Oeltjen, County Treasurer." On the 29th day of December, 1892, Strodtmann borrowed \$3,000 from the beneficial plaintiff, the Illinois Trust & Savings Bank of Chicago, executed his note therefor, and, as collateral security for its payment, indorsed said instrument or warrant as follows: "For value received, I hereby assign the within warrant to the Illinois Trust and Savings Bank, this 29th day of December, 1892. [Signed] J. G. Strodtmann," and delivered it, so indorsed, to said trust and savings bank. The bank retained possession of Strodtmann's note, and the collateral intended to secure it, until November, 1893, when the note and warrant were sent to the First National Bank of Petersburg for collection. Strodtmann, who was a banker at Petersburg, failed to pay the note. Payment of the order or warrant was demanded of the county, and, being refused this, an action of assumpsit was instituted in the name of Strodtmann, for the use of the bank, against the county, to recover the sum of money named in the order or warrant, and in the order of the county under which it was issued. The cause was submitted to the court without a jury, and judgment rendered against the plaintiff, and in favor of the defendant county. The plaintiff thereupon appealed to the appellate court for the Third district, and that court affirmed the judgment below. To reverse those judgments this appeal is prosecuted.

Blane & Blane, for appellant. Ohas. Nusbaum and N. W. Branson, for appellee.

BAKER, J. (after stating the facts). The questions of fact involved in this suit have been conclusively settled, adversely to appellant, by the judgments of the circuit and appellate courts. Judging from the arguments of counsel, and the evidence appearing in the record, at least two principal defenses to the action were interposed in the trial court: First, want of power in the county to borrow money, and issue a warrant for the amount so borrowed; and, second, payment by the county. It does not appear, however, upon which of these two theories of defense the finding of the court against the plaintiff was based. Appellant claims in this court that the trial court erred in that it admitted incompetent testimony in behalf of appellee, and excluded competent testimony offered in his behalf. But he does not indicate what these supposed errors are, or suggest why or wherein any error was committed. We cannot, therefore, consider this assignment of error. *Rice v. Heap*, 151 Ill. 264, 37 N. E. 873; *Railway Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262; *Razor v. Razor*, 142 Ill. 375, 31 N. E. 678. And, even if the specific grounds of objection were pointed out in this court, it would avail nothing; for, although general errors were assigned in the appellate court, which would cover erroneous rulings in admitting or refusing to admit testimony, yet the attention of that court was called to no rulings in that behalf claimed to be erroneous. The appellate court, then, knew not where to look for the alleged errors, or in what they were supposed to consist. This was a waiver and abandonment on the part of appellant of that assignment of error. Supposed errors, waived or abandoned in the appellate court, cannot be revived in this court, and raised here for the first time. *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95; *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015; *Railway Co. v. McDougal*, 113 Ill. 603. To the trial court, before whom the cause was heard without the intervention of a jury, no written propositions of law were submitted to be held, as applicable to or governing the case, thus raising questions of law.

Appellant insists that the appellate court did not decide all the questions of fact submitted to it, and urges such alleged failure for error. There is nothing in the judgment order of that court to show that all the questions of fact submitted for its determination were not passed upon. And error cannot, of course, be assigned on the opinion of the appellate court. We cannot inquire whether there is error in the language used in the opinion filed by that court, but only whether there is error in the rendering of the judgment. *Railway Co. v. Wangellin*, 152 Ill. 138, 38 N. E. 760; *Pennsylvania Co. v. Versten*, 140 Ill. 639, 30 N. E. 540.

There being no question of law properly

before us for consideration, we cannot do otherwise than affirm the judgment of the appellate court, which we accordingly do. Judgment affirmed.

(158 Ill. 171)

GRAY v. TROUTMAN.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

APPEAL.—HARMLESS ERROR.—EQUITY.

Where a chancery case is submitted to a jury, who fail to agree, and the chancellor thereupon decides the case himself upon the evidence introduced before the jury, instructions given to the jury are not assignable as error, since they could not have influenced the result.

Error to circuit court, Macon county; Edward P. Vail, Judge.

Bill by Michael Troutman and Sophia Troutman, his wife, against Edwin S. Gray and O. D. Barber. Michael Troutman died pending suit, leaving Sophia Troutman his executrix and sole legatee. She obtained a decree. Defendant Gray brings error. Affirmed.

Mills Bros. and Buckingham & Schroll, for plaintiff in error. Crea & Ewing, for defendant in error.

BAILEY, J. This was a bill in chancery, brought by Michael Troutman and Sophia Troutman, his wife, against Edwin S. Gray, to set aside and cancel a deed executed by the complainants to the defendant, on the ground that at the time of its execution Michael Troutman, the principal grantor, was of unsound mind; and that by reason of such unsoundness of mind he was incapable of transacting ordinary business. The case made by the bill is substantially as follows: In January, 1891, Michael Troutman, then a resident of Decatur, Macon county, bought a farm in Coles county, consisting of some 200 acres of land, the price paid being an average of \$29 per acre, or \$5,800 in all. The land at the time was incumbered by a mortgage of \$3,000, Troutman taking the land subject to the mortgage, and deducting the amount of the incumbrance from the purchase money paid. After the purchase Troutman expended in the erection of a dwelling house and the putting in of tile drains on the farm the sum of \$4,000, thus making the entire cost of the farm to him, including the \$3,000 mortgage, about \$9,800. Troutman personally superintended the making of the improvements, and while doing so spent a considerable portion of his time on the farm. He found, as it seems, that the tiling to be done was more difficult and expensive than he had anticipated, and he became greatly harassed and worried while superintending the improvements. It is alleged by the bill that he was then a victim of a wearing and irritating disease, which, in connection with the worry and harassment of superintending the improvements, rendered him nervous and excitable,

and at length so seriously impaired his nervous faculties that he became of unsound mind, and wholly unfit for the transaction of business; that his mental unsoundness took the form of hallucinations, one of which was that his farm was going to ruin and bankrupt him; that under the influence of such hallucination he conceived the idea that he must sell the farm at any price, to avoid ruin and bankruptcy. He seems to have entered into a verbal contract with Gray, the defendant, to lease the farm to him for a term of five years, commencing at a time then in the future; and it is alleged that a part of his hallucination was that a sale of the land must be made to Gray so as to avoid complications and lawsuits with him. It appears that Gray was with Troutman more or less, both in Decatur and on the farm in Coles county; and it is alleged not only that he acquired an ascendancy over the mind of Troutman, but also that he was well aware of the diseased condition of Troutman's mind. The bill alleges that Sophia Troutman did all in her power to restore the mental equilibrium of her husband, but without avail; and that she requested Gray not to buy the farm, informing him of her husband's hallucination in reference thereto, and that there was no necessity for the sale; that notwithstanding, Gray, on or about November 4, 1891, entered into an agreement with Troutman for the purchase of the farm for \$1,000 cash and the assumption of the \$3,000 mortgage; that at that time the farm, with the improvements thereon, was worth \$50 per acre, or \$10,000; that Troutman was at times in such a frenzied condition as to attempt to commit suicide; that when he requested his wife to join him in the conveyance to Gray he said to her that if he did not sell the land he must die; and that she, fully believing that in his unsound mental condition he would commit suicide if she refused to join with him in the deed, was thereby induced finally to yield, and so joined with her husband in the execution and acknowledgment of the deed; that the actual consideration paid for the land by Gray was only \$1,000 in cash and the assumption of the mortgage. The bill alleges that the execution of the deed by Troutman was the act and deed of one wholly incapable in law of executing such an instrument. It appears that a few days after the deed was executed, a surgical operation was performed upon Troutman, by which a cancer was removed from his rectum; and that after his death, which took place January 22, 1892, a tumor of considerable size was found to have developed upon his brain. The bill prays for a decree declaring that the conveyance from the complainants to Gray is wholly void, and ordering Gray to reconvey the land to Troutman. The bill was filed January 15, 1892, and, though both Mr. and Mrs. Troutman were named as complainants, it was in fact brought by Mrs. Troutman, she joining her husband with her as co-complainant. In her prayer for an injunction restraining the tenant in possession from surrendering the lands to Gray, she

¹ [Reported by Louis Boisot, Jr., Esq., of the Chicago bar.]

alleges that her husband was then incapable of transacting any business whatever, and prays that the injunction issue upon her entering into an injunction bond alone. On the 22d day of January, 1892, Michael Troutman died, leaving a last will and testament, by which he devised and bequeathed all his property to his wife, and she thereupon suggested his death on the record, and filed her supplemental bill making herself sole complainant as the devisee and legatee of her deceased husband. The defendant answered, denying the equities of the bill, and, a replication being filed, the cause was tried twice by a jury, and at each trial the jury failed to agree, and were consequently discharged without a verdict. Upon the discharge of the second jury the complainant entered her motion that the judge of the circuit court hear and decide the case upon the evidence already heard on the second trial, without the intervention of a jury. The defendant thereupon entered his cross motion to have the question of the mental capacity of Troutman to execute the deed in question submitted to another jury, but the court overruled the cross motion of the defendant, and the motion of the complainant was allowed. The court thereupon considered the case upon the evidence adduced and heard at the second trial, and upon such hearing found, among other things, that at the time of the execution of the deed in question Troutman was laboring under the insane hallucination alleged in the bill, and wholly unfit and incapable to deal with, or in any manner dispose of the farm in question; and that the defendant, at the time he received the conveyance, was aware of Troutman's insane hallucination in relation thereto. It was thereupon decreed that the equities of the case were with the complainant; that the deed in question was null and void, and a cloud upon the complainant's title to the land; and that it be vacated, canceled, and set aside, and be expunged from the records of Coles county. The defendant was ordered to execute to the complainant a quitclaim deed conveying the land to her, and it was decreed that, in default of such conveyance, the master in chancery execute and deliver to the complainant a quitclaim deed in his stead. To reverse this decree the defendant has now brought the record to this court by writ of error.

While the refusal of the court to submit the question of the sanity of Michael Troutman to another jury for trial is assigned as error, no point is made upon that assignment of error by counsel for the defendant in their argument, and we may therefore properly assume that they are now content with the ruling of the court in that respect.

Some complaint is made of the instructions given by the court to the jury on the second trial, but we are unable to see how the defendant is now in a position to call the propriety of those instructions in question. Even if they were erroneous, the defendant could not have been prejudiced there-

by, as the jury failed to find a verdict; and, even if they were improperly instructed, and so misled, their failure to find a verdict has made it impossible that their erroneous impressions of the law could have had any unfavorable effect upon the defendant's rights. The hearing which resulted in the decree was before the court without a jury, and there is nothing in the record, and certainly nothing in the instructions given to the jury upon the abortive trial, which could furnish any legal criterion as to the propositions of law by which the court was guided in deciding the case. It must also be noticed that, while counsel have made some complaints as to the instructions, they have not taken the pains to point out wherein any instruction was erroneous, and we do not feel called upon to explore the record in search of errors which counsel have not seen fit to point out or bring to light.

The only material questions presented by the record for our consideration are mere questions of fact, and, after giving to the case such patient and careful study as we have been able, we are of the opinion that the evidence sustains the decree. The evidence is exceedingly voluminous, and to a considerable degree conflicting. No useful purpose would be served by our reviewing it in detail, even if the volume of the testimony were not an insuperable barrier to our doing so. It is to be remembered that the learned judge who rendered the decree heard the evidence of the witnesses twice, and was consequently in a much more favorable position to pass upon mere questions of fact than we can be. Our investigation, made in the light of the able and instructive briefs and arguments of counsel, has failed to develop any theory upon which we can safely and properly dissent from the conclusions of the court below. We are therefore disposed to hold that the decree is the just and proper result from the testimony, and it will therefore be affirmed. Decree affirmed.

(158 Ill. 176)

WITT v. GARDINER et al.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

WILL—ATTESTATION—CONTEST—INSTRUCTIONS.

Where, in a suit to contest a will, it appears that the testatrix, when she executed the will, was ill in bed, that the will was attested in an adjoining room, and that, although the testatrix had the physical strength to lean on the bed, or even to rise and go to the door of her room, yet she could not do so without peril to her life, it is reversible error to charge the jury that, if it was within the physical power of the testatrix to have seen the attesting, then it was done in her presence, though she did not actually see it.

Appeal from circuit court, Greene county; George W. Herdman, Judge.

Bill by Freddie T. Witt, by his guardian, against Christopher J. Gardiner and others.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Defendants obtained a decree. Complainant appeals. Reversed.

Thomas Henshaw and James M. Riggs, for appellant. Henry T. Rainey, for appellees.

BAILEY, J. This was a bill in chancery, brought by Freddie T. Witt, by his guardian, against Christopher J. Gardiner and others, to contest the will of Elizabeth Gardiner, deceased. The will was executed January 23, 1892, and the testatrix died March 1, 1894, leaving the complainant, her grandson and only heir at law, and being at the time of her death the owner and in possession of certain parcels of real estate, and also owning other property, of the aggregate value of several thousand dollars. After the death of the testatrix the will was filed in the county court for probate, but probate thereof was there denied. On appeal by the proponents to the circuit court, a hearing was had de novo, resulting in an order admitting the will to probate, and the complainant thereupon filed this bill.

No question is raised by the bill as to the testamentary capacity of the testatrix, nor is there any charge that the execution of the will was procured by undue influence; the grounds upon which its validity is called in question being (1) that it was not signed by the attesting witnesses in the presence of the testatrix, and (2) that the testator did not know the contents of the will at the time she executed it. The facts appearing from the record are briefly these: Elizabeth Gardiner, at the time the will was executed, was a woman about 80 years of age, was partially deaf, and was then confined to her bed by sickness, and under a physician's care, and had been so for about a month. During that time her physician had been visiting her twice a day, and her condition had required the attendance of watchers each night. On the day the paper was executed, Christopher J. Gardiner called upon her, and, after having her attendants all leave the room, held a consultation with her, and left the house. Later, the same day, he returned, bringing with him the will, drawn up, and also bringing R. W. Greene and L. L. Roberts to serve as attesting witnesses. When they entered her room, she was informed that the persons named were there to witness her will, and to that she assented. Christopher J. Gardiner then produced the draft of the will with the testator's name already written at the bottom of it, and she, being propped up on pillows on her bed for the purpose, executed the instrument by making her mark, whereupon the two witnesses and Christopher J. Gardiner left the bedroom, which was situated in the rear of the northerly part of the house, and went into the front room, situated on the southerly side of the house, adjoining the bedroom, and communicating with it by a door, which was left standing open, and went to a table standing in the front room,

and there signed their names to the will as attesting witnesses. There is a very considerable conflict in the evidence as to the place in the front room where the table was standing when the will was attested, the testimony of some of the witnesses tending to show that it was standing near the center of the room, a place which was within the range of the testator's vision as she was lying on her bed, while the testimony of other witnesses tends to show that it was standing at the east side of the room near a window, and where, as much of the testimony tends to show, it could not be seen from the place where the testatrix was lying, the partition between the two rooms intervening. The proponents of the will attempted to show that the attestation, though made in another room than the one in which the testatrix was lying at the time, was in fact made in her presence, by attempting to show (1) that the table on which the attestation occurred stood in the center of the room, or (2) that, even if it stood on the east side of the room, she could have seen the act of attestation by changing her position and leaning over out of the bed, or (3) if she could not have seen the act by so leaning over, it was possible for her to have arisen from her bed, and gone to the door leading to the front room, and viewed the act from that position, and, this being true, that the attestation was good without proof that she did get out of her bed and see it. Each of these several positions seems to have been urged on the jury by the proponents of the will, and evidence was given tending to show that the testatrix had sufficient strength to have made it physically possible for her, though very sick, to have arisen from her bed, and have gone to the door leading to the adjoining room. There was no evidence, however, that she in fact got out of bed, or changed her position in the least, during the time the will was being attested. Such being the evidence, the court, at the instance of the proponents, gave to the jury, among other instructions, the following: "(25) The court instructs the jury, for the proponents, that although the jury may believe from the evidence that the attesting witnesses went to an adjoining room to a table to sign their names as attesting witnesses, and that the testatrix did not actually see them sign the same, yet, if the jury believe from all the evidence and circumstances proven that it was within the physical power of the testatrix to have seen them sign the same, if she had so desired, then in law the attesting would be in compliance with the law, although the testatrix may not have actually witnessed the signing of the names of the witnesses." "(10) You are further instructed that if you believe from the evidence that at the time the witnesses signed the will in evidence the said Elizabeth Gardiner, if she had desired to do so, was physically able, by turning her head or changing her position, to have seen them sign,

then you are instructed that the attestation of the will in evidence was legally accomplished in the presence of the testatrix, as the law requires." "(8) The jury are instructed that if you find from the evidence that the witnesses signed the will in such a place that the testatrix could have seen them sign if she so desired, then you are instructed that the said will was, under the law, attested in the presence of the testatrix, and it makes no difference whether she actually saw them sign or not."

By the provisions of the statute, all wills, to be entitled to probate, must be "attested in the presence of the testator or testatrix by two or more credible witnesses." Rev. St. c. 148, § 2. The issue of fact submitted to the jury in this case was whether the attestation was in the presence of the testatrix. What constituted the "presence" of a testator or testatrix, within the meaning of the statute, has been made the subject of much discussion by the courts, but the rule supported by the weight of authority may be stated substantially in the language of a distinguished modern law writer as follows: Contiguity, with an uninterrupted view between testator and subscribing witnesses, is the indispensable element to the physical signing in the testator's presence. The subscription is not invalidated by not having been performed in the same room, or even in the same house, provided it took place within the testator's range of vision, as in case where witnesses left the testator, who lay in bed in one room, and subscribed their names at another table opposite, and in sight, through a passage, the doors being thrown open; or where a lobby intervened, but the testator might have seen the subscription made in a gallery through the lobby and a broken glass window; or where the testatrix sat in her carriage, and the will was attested in the attorney's office, but not out of her sight. In all such cases the attestation is held good, on the theory that the testator might at least have seen the signing, considering his position and the state of his health at the time of the transaction; and it is deemed immaterial that he did not see when he might have done so, for the act, being done in his presence, could not have been vitiated by his turning and looking away. On the other hand, no mere contiguity to the witnesses will constitute a "presence" within the act, if the testator's position be such that he cannot possibly see them sign, as where, for instance, he occupies his bed-chamber, and the witnesses subscribe in an outer hall, where they are necessarily hidden from sight by an intervening flight of stairs, or where his position, which he cannot readily change, is such that the witnesses are in reality out of sight. If the subscription is made in an adjoining room, with the door closed, it is not enough that the testator might have seen it had the door stood open; nor will even a subscription in the room he occupies suffice, provided that from his ac-

tual position he could not have seen it done. But unless some material obstacle obstructs the vision, we here suppose that the testator is sick and feeble, propped up in bed, and requiring some aid in order to bring him into a right position, in which case, of course, his disability is an important factor in determining whether or not he might have seen the witnesses subscribe. Thus the will of one who lay in bed with the curtains drawn while the will was attested in front of him, was admitted to probate, because he might easily have seen the act by pushing the curtain aside; but that of another was refused probate under like circumstances, upon the distinction that the testatrix was not only too weak to open the curtain herself, but lay helplessly with her back to the witnesses. In fine, the true test, as asserted by the English cases, is not whether the testator saw the witnesses sign, but whether he might have seen them sign, considering his mental condition, and his posture at the time of the subscription. Schouler, Wills, § 341. The same author further says: "Indeed, to speak generally, if the testator be ill, unable to change his position readily for himself, or confined to his bed, his posture at the time of the attestation should be such as to enable him to perceive his witnesses subscribe; and ability to perceive is here construed with some reference to his physical condition at the time of subscription. But if, while the attesting witnesses are subscribing, the testator, conscious of the act, is in an adjoining room, where, by the mere act of volition, he can witness the attestation, this constitutes a subscription in his presence." Id. § 342. In *Reed v. Roberts*, 26 Ga. 294, where the testator was in extremis, and feeble from age and disease, and racked with bodily pain, it was held that to make the attestation sufficient under the statute the testator's position should be such as to enable him, without change of situation, to see the witnesses subscribe. In the opinion the court say: "The object of the law can only be effectuated when the testator is so situated, both as to the will and the witnesses, that he may, if he chooses, see both, in the act of attestation. And it is wholly immaterial whether the attestation be in the same room or in a different room. The rule is the same in both. The will and the witnesses must be in the presence of the testator. He ought to be able, without an effort or change of position, to see them both." See, also, *Reynolds v. Reynolds*, 1 Speer, 253; *Ray v. Hill*, 3 Strob. 297; *Ambre v. Weishaar*, 74 Ill. 109.

We think it plain that the instructions above recited, and especially the one marked 25, laid down an erroneous rule, and one which was likely to mislead the jury. This is especially so in view of the testimony of the testatrix's physician that she was physically capable of getting out of bed and going to the door of her bedroom, although her doing so would have been perilous, and against

his express orders; and also in view of the contention made by the proponents of the will before the jury that she might have leaned over the front of her bed, or even got up from her bed and gone to the door of her room, and thus seen her witnesses attest the will. That instruction holds, in terms, that if it was within her physical power to see them sign the will, the signing must be deemed to have been in her presence. The jury were likely to understand this instruction as holding that, if it was within her physical power to get out of bed and go to the door, the attestation was in compliance with the law. Such, clearly, is not the rule. It is doubtful whether it would have been the rule if the testatrix had been in good health. It can scarcely be said, we think, that because a testator in health has the physical ability to follow his witnesses wherever they may choose to go, and so be present at the attestation of his will, an attestation other than in his actual presence will answer the requirements of the statute. And certainly when a testatrix, as in this case, is sick and confined to her bed, and though physically capable of arising from her bed and walking to the door of an adjacent room, yet able to do so only with great difficulty, and perhaps with peril to her life, it will not be said that an attestation which can be seen by her only in that manner took place in her presence.

Substantially the same criticism may be made upon the instruction marked 10. That instruction held that, if the testatrix was physically able, by turning her head or changing her position, to see the witnesses sign, the attestation was in her presence. It having been contended by counsel that she might have seen the attestation by leaning out of bed, or by getting up and going to the door of the adjoining room, and the evidence tending to show that she was physically able to make such change in her position, the instruction may have been, and probably was, understood by the jury as holding that, if she was physically capable of making such change of position, and thereby seeing the attestation, the will was, in contemplation of law, attested in her presence.

The eighth instruction would perhaps have been unobjectionable had it not been for the theory upon which the case was presented to the jury, but, in view of that theory, and of the other instructions given, it also was likely to mislead. It held that, if the witnesses signed the will in such place that the testatrix could have seen them sign, if she had so desired, the attestation was in her presence. In view of the contention that she could have seen them sign by leaning out over the front of the bed, or by getting up and going to the door, the jury were likely to understand the instruction as holding that, if she could have seen the act of signing in either of those ways, the attestation was in her presence. The instruction, under these circumstances, should have been modified so as to hold that,

if she could have seen the witnesses sign, from the place where she was then lying, the attestation was in her presence.

It is claimed that the error in those instructions was cured by other instructions given. Two instructions were given at the instance of the proponents, which held, in substance, that if the table on which the witnesses signed the will were in such position that it could have been seen by the testatrix from the position she occupied on the bed in the adjoining room, the attestation was in her presence. There is nothing in those instructions in any degree inconsistent with the ones we have criticised, and we are unable to see how the erroneous instructions could have been thereby cured. No instruction was given for either party which held that, if it was necessary for the testatrix to lean out over the front of her bed, or to get up and go to the door, in order to see the witnesses sign, the attestation was not in her presence.

For the errors pointed out in the foregoing instructions, the decree of the court below finding the will in question to be the last will of the testatrix will be reversed, and the cause will be remanded to the circuit court for a new trial. Decree reversed.

(158 Ill. 52)

BAILEY v. PEOPLE ex rel. ADAMS COUNTY TREASURER.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

TAXATION—PAYMENT IN COUPONS.

1. An order of the county court providing that interest coupons of certain outstanding drainage bonds "may be used by the owners of land" to pay the interest on drainage assessments does not give the right to pay taxes in coupons to one whose only interest in the land taxed is derived through a certificate of tax sale, since he is not the owner of the land.

2. Such an order, resulting from an agreement between the drainage commissioners, the landowners, and the bondholders, is not binding on the county treasurer, he not being a party thereto.

Appeal from Adams county court; Carl E. Epler, Judge.

Application of the people, on the relation of the treasurer of Adams county for judgment for delinquent taxes. Oliver J. Bailey filed objections which were overruled, and he appeals. Affirmed.

G. Edmunds, for appellant. Sprigg & Anderson, for appellee.

BAKER, J. The lands concerning which this controversy has arisen were in 1894 sold at tax sale for the delinquent taxes of 1893 and prior years. Appellant became the purchaser of the lands at such sale, and now holds the certificate of purchase; the lands not having, as yet, been redeemed. It seems that in 1879 the Indian Grave drainage district was organized in Adams county under

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

the levee drainage act of that year. The lands above mentioned are a part of the lands lying within that district. The lands comprised within the district have been subjected to two assessments for the purpose of building levee protection,—one in 1880, and the other in 1881. The levees were built, and paid for by issuing bonds upon said assessments. Afterwards, with the view to enabling the landowners to pay the assessments and the interest thereon, a compromise was agreed upon by and between the commissioners of the district, the landowners, and the holders of the entire issue of bonds under the first assessment, and of $\frac{75}{100}$ of the issue of bonds under the second assessment; and as the result of such agreement, upon the application of the commissioners and landowners, and by consent of those parties and of said bondholders, an order was on November 21, 1888, entered in the county court of said county, which recited, among other things, that the interest tax under said assessments might be paid in coupons of said bonds. Appellant sought to pay, with such coupons, the interest taxes of 1894—to the extent of the interest of the bondholders consenting to the above order—assessed against the lands for which he holds the tax certificate, but the collector of the district refused to accept them. Thereafter the county treasurer made application to the county court for a judgment for taxes against said lands, to which appellant objected on the ground that he had tendered payment. When filing his objections he renewed the tender of payment in coupons. The court overruled the objections, and entered judgment against the lands. From that judgment this appeal is prosecuted.

Neither these bonds nor their coupons purport to be receivable for taxes due to the district. Nor is there any statute making such coupons receivable for taxes. Section 154, par. 155, of the revenue act (2 Starr & C. St. p. 2074), provides that such taxes "shall be collected in gold and silver coin, United States legal tender notes and in current national bank notes, and in no other currency unless otherwise specially provided for." Appellant contends that the payment of these taxes by coupons was "otherwise specially provided for" by the compromise order of November 21, 1888. That order was the outcome of an agreement between the commissioners, landowners, and a part of the bondholders, and, if binding at all, was binding upon those parties only. The county treasurer, who applied for the judgment in question, could in no way be affected by it. He is an officer of the county, in no way connected with the district; and, when appellant's lands were returned to him delinquent, it became his duty to collect the taxes due upon them in the manner provided by law. Section 34, par. 60, of the drainage act (1 Starr & C. St. p. 929) directs him to proceed "as in ordinary collections of state and county taxes." If the treasurer were bound

to the observance of said order, even then it would not have been his duty, for reasons hereafter appearing, to accept the tender made by appellant. In the view we take of the case, it can make no difference whether the averment and proof of a tender of payment to the district collector of the amount of the taxes due would have constituted a good and sufficient objection to the county treasurer's application for judgment, since, in our opinion, appellant's offer and attempt to pay said taxes to the collector in coupons was not a good tender. If the order of November 21, 1888, made coupons receivable in payment of interest taxes, appellant could not profit by it; for it plainly appears from the order, and from the stipulation upon which it was based, that such privilege was to be enjoyed by the landowners alone. It expressly says that "the interest coupons of the now outstanding bonds may be used by the owners of land to pay interest tax at the face of said coupons." And appellant is in no sense a landowner, within the contemplation of that order. His only interest in the lands is the lien represented by his tax certificate, and is adverse to the interests of landowners. It follows, therefore, that the judgment of the court below was right, and it is accordingly affirmed. Affirmed.

(164 Mass. 506)

CITY OF NORTHAMPTON v. INHABITANTS OF PLAINFIELD.

(Supreme Judicial Court of Massachusetts. Hampshire. Nov. 4, 1895.)

SUPPORT OF POOR PERSONS—SETTLEMENT.

Pub. St. c. 87, § 34, provides that every city or town paying the expenses of a lunatic committed to the hospital shall have like rights and remedies to recover the full amount thereof from the place of his settlement as if such expenses had been incurred in his ordinary support. Chapter 84, § 14, declares that the overseers of the poor, in their respective places, shall provide for the immediate relief of persons found therein having settlements in other places, "the expense whereof, incurred within three months next before notice given to the place to be charged," may be recovered therefrom. *Held*, that a town which has paid for the support of a lunatic pauper in a state hospital may recover from his place of settlement the entire sum expended by it from the time of commitment to the date of the writ, and is not limited to the expenses incurred within three months next before notice to defendant town. *City of Taunton v. Inhabitants of Wareham*, 26 N. E. 451, 153 Mass. 192, overruled.

Exceptions from superior court, Hampshire county; John Hopkins, Judge.

Action by city of Northampton against the inhabitants of Plainfield to recover for the support of a lunatic pauper. From a ruling limiting plaintiff's recovery to the amount incurred within the three months next before notice to defendant, and interest thereon, plaintiff excepts. Exceptions sustained.

A. E. Addis, for plaintiff. F. R. Shaw, for defendant.

LATHROP, J. The question in this case is whether the plaintiff is entitled to recover the full amount expended by it for the support of the lunatic pauper from the date of her commitment to the Northampton Lunatic Hospital, on October 11, 1892, to the date of the writ, June 21, 1894, or whether it is entitled to recover only for the expenses incurred within three months next before the notice given by the plaintiff to the defendant, which was on November 18, 1892.

By Pub. St. c. 87, § 34, "every city or town paying expenses for the support or removal of a lunatic committed to either hospital shall have like rights and remedies to recover the full amount thereof, with interest and costs, of the place of his settlement, as if such expenses had been incurred in the ordinary support of the lunatic." This statute had its origin in St. 1834, c. 150, § 7, which related to the state lunatic hospital at Worcester. Section 7 gave a right of action to the trustees for the support of a patient committed to the hospital, and for his removal, against the town or city where the patient resided at the time of the application for commitment, and further provided as follows: "And such town or city shall have the same rights and remedies against all corporations and persons, to recover such expense of supporting and removing any pauper lunatic, as if such expense had been incurred by said town or city, in the ordinary support of such lunatic." This was incorporated in Rev. St. c. 48, § 10. By St. 1841, c. 77, it was enacted as follows: "Whenever any lunatic or insane person shall be committed to the state lunatic hospital, at Worcester, from any town wherein he has not a legal settlement, and such town shall pay the expense of his support at said hospital, such town may recover from the town in which he has a legal settlement the full amount of all the expense so paid to said hospital." This statute was combined with Rev. St. c. 48, § 10, in Gen. St. c. 73, § 25, where the language is the same as now appears in Pub. St. c. 87, § 34, the statute of 1841 being expressly repealed by Gen. St. c. 182. In *City of Taunton v. Inhabitants of Wareham*, 153 Mass. 192, 195, 26 N. E. 451, this court, speaking of Pub. St. c. 87, § 34, said: "It was intended by the legislature to give to towns paying the expenses of a lunatic committed to either state hospital the same rights and remedies against the place of his settlement as if the expenses had been incurred in the ordinary support of a pauper, and the same rules of law apply as if this had been a suit to recover the expense of the ordinary support of a pauper." We have no doubt of the correctness of this statement of the law, which is supported by abundant authority. See *Waltham v. Brookline*, 119 Mass. 479, and cases cited. The precise point involved in the case at bar was also decided in *City of Taunton v. Inhabitants of Wareham*, in favor of the defendant, without any discussion, relying upon the case of *Amherst*

v. Shelburne, 11 Gray, 107, as a precedent; and the plaintiff asks us to review these cases on this point. The importance of the question involved to the towns of this commonwealth has induced us to yield to this request, and to examine the statutes and authorities bearing upon the question anew.

By Pub. St. c. 84, § 14, "the overseers of the poor, in their respective places, shall provide for the immediate comfort and relief of all persons residing or found therein, having lawful settlements in other places, when they fall into distress and stand in need of immediate relief, and until they are removed to the places of their lawful settlements; the expense whereof, incurred within three months next before notice given to the place to be charged, as also of their removal, or burial in case of their decease, may be recovered by the place incurring the same against the place liable therefor, in an action at law to be instituted within two years after the cause of action arises, but not otherwise." This section, in substantially its present form, has been in force since St. 1793, c. 59, § 9. See Rev. St. c. 48, § 13; Gen. St. c. 70, § 12. Further provisions as to notice are contained in Pub. St. c. 84, §§ 28, 29, but they throw no light on the question involved, and they need not be stated. These provisions also have been in force since the statute of 1793 took effect. St. 1793, c. 59, § 12; Rev. St. c. 48, §§ 19, 20; Gen. St. c. 70, §§ 17, 18. It thus appears that the statutory provisions having any bearing upon the question before us have been the same since the enactment of the statute of 1793.

In the earlier cases in this commonwealth, it was assumed, without discussion, that where a pauper having a settlement in one town became a charge on another town, if the town furnishing support duly notified the town of settlement, and the pauper continued to be a charge, only one notice was necessary to hold the town where the pauper had his settlement for the proper expenses incurred from three months before the delivery of the notice down to the date of the writ, provided the action was brought within two years after the date of the notice. *Marlborough v. Rutland*, 11 Mass. 483, 485; *Harwich v. Hallowell*, 14 Mass. 184; *Uxbridge v. Seekonk*, 10 Pick. 150. In *Attleborough v. Mansfield*, 15 Pick. 19, the expenses were incurred from October 10, 1826, to the last of June, 1827. Notice was given on October 18, 1826. The defendant contended that it was not liable for any expense incurred after the notice of October 18, 1826, for the reason that the aid furnished was not continuous, and it had received no subsequent notice. It was held, however, that the plaintiff was entitled to recover the full amount claimed. St. 1793, c. 159, § 9, was construed as limiting the right to recover "to a period commencing three months before and continuing two years after notice given." Before this case was decided, it had been held that, if the town fur-

nishing the supplies had brought an action to recover them, it could not, without a new notice, recover for any expenses incurred after the bringing of the first action. *Hallowell v. Harwich*, 14 Mass. 186. And it was so held in *Walpole v. Hopkinton*, 4 Pick. 358, where the second action was brought while the first one was pending. So, too, it had been previously held that if, after notice given, the town of the pauper's settlement provided for him, it was not further liable for subsequent expenses incurred by the town giving the notice, without a new notice. *Sidney v. Augusta*, 12 Mass. 315. See, also, *Palmer v. Dana*, 9 Metc. (Mass.) 587. In *Attleborough v. Mansfield* these exceptions to the general rule were recognized, but it was held that the fact that the aid in that case was not continuous did not bring the case within the exceptions, and that the general rule applied. In *Topsfield v. Middleton*, 8 Metc. (Mass.) 594, the writ, as appears from the original on file in the clerk's office, was dated May 8, 1841; the notice was given on March 24, 1840; and the plaintiff sought to recover for supplies furnished before the notice, and also for supplies furnished after the notice down to April 9, 1841. The defendant tendered the amount due for supplies furnished before the notice was given, and contested its liability for the supplies subsequently furnished, on the ground that a new notice should have been given. This was the only question considered by the court, which held (Mr. Justice Dewey delivering the opinion) that no new notice was necessary, and that the plaintiff was entitled to recover the full amount claimed. In *Com. v. Dracut*, 8 Gray, 455, under Rev. St. c. 46, § 13, the law was assumed to be as above stated, and judgment in the case was rendered for the plaintiff accordingly.

In the first cases which arose under the statute of 1841, it was contended that the act in effect repealed Rev. St. c. 46, § 13; but the court held that the only purpose of the act was to determine the measure of damages, and to allow the full amount paid to the hospital; and that the act did not alter the law in regard to the time in which the action should be brought or the length of time for which a town might recover or the notice to be given. *Inhabitants of Cumington v. Inhabitants of Wareham*, 9 Cush. 585. Two actions between the same parties were tried together for the support of a pauper in the state lunatic hospital at Worcester. In the first case the plaintiff sought to recover the amounts paid by it to the hospital from December 15, 1848, to the date of the writ, which was January 15, 1850. Notice was given on March 15, 1849. It was held that the plaintiff was entitled to recover the full amount of its claim. In the second action, which was brought during the pendency of the first, on December 31, 1851, the plaintiff sought to recover the expenses paid to the hospital from December 2, 1844, the

time of the commitment of the pauper to the hospital, to the date of writ, deducting the amount recovered in the first action. Notice was given on December 9, 1850, and it was held that the plaintiff could recover from three months prior to the notice, and down to the time of bringing the action. It was also held that the fact that the previous action was pending did not obviate the necessity of giving a new notice, and this on the authority of the cases which we have already cited as establishing the exceptions to the general rule. The language of Chief Justice Shaw on this point is as follows: "It remains to consider the claim for the period which elapsed between the commencement of the former suit and the time of the commencement of this suit. This depends on different considerations. The law is very explicit that for every new action a new notice must be given, even though a former action between the same parties is still pending. *Sidney v. Augusta*, 12 Mass. 316; *Walpole v. Hopkinton*, 4 Pick. 358; *Uxbridge v. Seekonk*, 10 Pick. 150." 9 Cush. 591. So far from the case holding that the plaintiff was limited to the three months before the second notice was given, it was expressly said by the chief justice: "We think, therefore, that the time for which alone the plaintiffs in this suit can recover must be computed from September 9, 1850, three months before the notice, down to the time of bringing this action [December 31, 1851], or the time when the defendant town assumed the charge of the pauper, whichever first occurred." *Id.* 591, 592. In *Andover v. Easthampton*, 5 Gray, 390, the plaintiff sought to recover money which it paid to the state lunatic hospital at Worcester on December 2, 1854, for the support of a pauper at the hospital from December 1, 1848, to December 1, 1854. The writ was dated March 17, 1855. Notice was given on December 4, 1854. It was held that the plaintiff was entitled to recover. There is nothing in this case inconsistent with the preceding cases. The fact that St. 1841, c. 77, did not change the provisions of Rev. St. c. 46, § 13, as to notice to the defendant and the limitation of the action, was expressly recognized. The point decided was that the plaintiff did not incur the expense until it paid the hospital, and that, as the payment was within three months before, and the action was brought within two years after, the notice, it was seasonably brought. In *Amherst v. Shelburne*, 11 Gray, 107, the writ was dated April 27, 1857. The plaintiff sought to recover money paid in March and December, 1856, for the support of a pauper at the state lunatic hospital at Worcester. The notice was sent to the defendant on November 28, 1854, and was as follows: "The treasurer of the state lunatic hospital at Worcester has presented to town of Amherst a bill of \$621.40 for board and articles of clothing furnished to Norman Smith from November 1, 1848, to June 1,

1854, six years past. We shall look to you to furnish us the money to pay this bill, and also for Smith's support since June 1, 1854, and as often as the bills at the hospital become due, which is, we believe, on the first of June and first of December in each year." The notice also set forth the fact in regard to the pauper's settlement. The money paid by the plaintiff in March, 1856, was the \$621.40, specifically mentioned in the notice. It was held, as to this, that the plaintiff could recover, on the authority of *Andover v. Easthampton*. As to the second item it was said by the court: "For the sum paid by the plaintiff to the hospital in addition to \$621.40, the defendants are not liable in this action, for the reason that they have not received any legal notice of the plaintiff's claim thereto. *Inhabitants of Cummington v. Inhabitants of Wareham*, 9 Cush. 591." The case of *Amherst v. Shelburne* is in some respects an anomalous one. As to the first item, recovery was allowed, although the action was not brought until more than two years after the notice was given, whereas the general rule is that such an action must be brought within the two years. As to the second item, the court either misapprehended the language of Chief Justice Shaw in *Inhabitants of Cummington v. Inhabitants of Wareham*, or decided that the plaintiff could not recover this item, because no notice in regard to it was given within two years of the bringing of the writ. We cannot regard the case as an authority for the position that the plaintiff in an action on the statute is limited to the expenses incurred within three months prior to the notice. In *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270, support was furnished by the plaintiff to a woman from December 28, 1881, to February 13, 1882. Board was also paid for a minor child on March 1, 1882. Notice was given on January 7, 1882. The writ was dated February 9, 1884. The plaintiff was allowed to recover only for the expenses incurred during two years prior to the date of the writ, being for the board of the child and for four days' support of the woman. No notice is taken in the opinion in this case that the suit was not brought within two years after the notice was given; nor is any reason given why the plaintiff, if entitled to recover at all, was not entitled to recover for such period of time within the three months prior to the notice as aid was furnished. An examination of the briefs in this case shows that the attention of the court was not directed to either point. In *Reading v. Malden*, 141 Mass. 580, 7 N. E. 21, aid was furnished by the plaintiff from March 1, 1881, to April 1, 1882. Two notices were given,—one on March 2, and the other on March 31, 1881. The writ was dated September 15, 1883. The plaintiff contended that it was entitled to recover because the aid was begun within three months before the notice, and was ended within two years

before the action was brought; but the court held that, as the action was brought more than two years after the notice, it could not be maintained. It was said "that the cause of action arises at the time when the notice is given." The law as stated in *Attleborough v. Mansfield*, 15 Pick. 19,—namely, that "the right to recover is expressly limited to a period commencing three months before and continuing two years after notice given,"—was cited with approval. It was also said of *Townsend v. Bilberica*, 10 Mass. 411, *Hallowell v. Harwich*, 14 Mass. 186, and *Uxbridge v. Seekonk*, 10 Pick. 150: "These cases have not been overruled or modified by any subsequent cases."

This review of the authorities leads us to the conclusion that the case of *City of Taunton v. Inhabitants of Wareham*, 153 Mass. 193, 26 N. E. 451, so far as the point now before us is concerned, was erroneously decided, and should be overruled; and that the ruling requested by the plaintiff, being in accordance with the weight of authority in this commonwealth, should have been given. Exceptions sustained.

(53 Ohio St. 353)

MERCER et al. v. CUNNINGHAM.

(Supreme Court of Ohio. Oct. 29, 1895.)

ASSIGNMENT FOR CREDITORS—ALLOWANCE OF
HOMESTEAD—JURISDICTION OF PROBATE COURT
—RECOVERY FROM ASSIGNEE.

1. A probate court exercising jurisdiction over property embraced in an assignment for the benefit of creditors has power, under section 6348, Rev. St., to order an allowance out of personal property to the assignor in lieu of a homestead.

2. If such assignor omits to invoke the exercise of that power, he cannot resort to the court of common pleas by an action upon the bond of the assignee to recover the value of such property, even though he made demand therefor upon the assignee and the appraisers.

(Syllabus by the Court.)

Error to circuit court, Tuscarawas county.

Action by Mrs. Cunningham against Solomon Mercer and others. Plaintiff had judgment, and defendants bring error. Reversed.

On the 9th day of April, 1890, Mrs. Cunningham filed in the court of common pleas her petition, of which the following is a copy: "The plaintiff says that on or about the 30th day of March, A. D. 1888, she was the owner of a stock of groceries of the value of \$750, situate in a room in New Comerstown, in the county of Tuscarawas, in the state of Ohio; a few household goods, exempt to her by law; and some book accounts, amounting to the sum of about \$350, a large part of which are and have ever been uncollectible and worthless. That at the time said plaintiff executed and delivered to the defendant Solomon Mercer her deed of assignment, whereby she conveyed to him all her property in trust for the benefit of her creditors, except this: that said

deed of assignment contained a special provision therein excepting therefrom and reserving to plaintiff her exemptions in lieu of a homestead and other rights and property to which she might be entitled under the homestead exemption, or other laws of the state of Ohio. At the time of the making of said deed of assignment, and ever since, plaintiff and her husband (she being all of said time and ever since a married woman) have been residents of the state of Ohio, residing together therein, and neither said plaintiff nor her said husband being the owner of a homestead, and her said husband owning no property whatever, real or personal, and all the property owned by the plaintiff at the time of said assignment or since is that aforesaid, all of which said Solomon Mercer, defendant, ever well knew. At the time said plaintiff delivered to said Mercer said deed of assignment, he was notified by both plaintiff and her attorney that she reserved and retained from said property, and demanded that he cause to be set off to her, enough thereof to amount in value to the sum of \$500, in lieu of a homestead, and that plaintiff would at all times be ready to select and take possession of the same. Said Solomon Mercer, defendant, on or about the 30th day of March, A. D. 1888, filed said deed of assignment in the probate court of Tuscarawas county, Ohio, and was thereupon appointed and qualified as assignee of the plaintiff, and letters as such were duly issued to him by said court; and said defendants, Solomon Mercer, William E. Case, and Moses B. Kennedy, thereupon duly executed a joint and several assignees' bond, a copy of which, duly certified according to law, is hereto attached, whereby they became jointly and severally bound to the state of Ohio in the sum of \$2,500, subject to the condition that if the said Solomon Mercer should administer the said trust in accordance with the provisions of the acts of the general assembly of the state of Ohio regarding the mode of administering assignments for the benefit of creditors, and should faithfully perform all of his duties as such assignee according to law, then said obligation should be void; otherwise, the same was to be and remain in full force and virtue in law. Thereupon said Solomon Mercer entered upon said trust of said assignment, and, as such assignee, at once took possession of all the said property of plaintiff, and of the store room containing the same; and on or about the 10th day of April, A. D. 1888, by the oaths of W. E. Case, M. B. Kennedy, and Samuel W. Mercer, who had been appointed appraisers by said probate court, proceeded to make an inventory and appraisement of said property; and the plaintiff having continuously, from time to time, from the time of making said assignment, demanded of said assignee that he cause to be set off to her of said property, to the amount of \$500, in lieu of a home-

stead, and being ever ready, as said defendant Solomon Mercer well knew, to select said property whenever said Solomon Mercer, assignee, should cause the same to be set off to her, and said Solomon Mercer having ever refused to have any of said property set off or to permit this plaintiff to select her exemptions therefrom, on or about the 10th day of April, A. D. 1888, by the oaths of W. E. Case, M. B. Kennedy, and Samuel W. Mercer, who had been appointed appraisers of said estate, by said probate court, proceeded to make an inventory and appraisement of said property; and plaintiff then demanded of said assignee and of said appraisers that they should set off to her enough of said property, exempt to her by law, to amount to the sum of \$500, in lieu of a homestead; and the said Solomon Mercer, defendant, then and there well knew the plaintiff and her attorney, one A. J. Wilkin, were then and there ready to select said property so exempt to the plaintiff by law; and said Solomon Mercer, defendant, was then and there so notified of the fact, but said Mercer, disregarding said notice, and in violation of his duty as such assignee, refused to cause or permit any of said property to be set off to said plaintiff, and caused all of said property to be appraised and included in his inventory to the probate court, as assets of said estate; and said defendant Mercer afterwards, as such assignee, wrongfully and in violation of his duty as such assignee, notwithstanding said demand of plaintiff, sold all of said property, including that exempt to plaintiff, receiving therefor the sum of about \$738.75, which moneys he now has in his hands as such assignee, and, although frequently requested so to do, refuses to pay to plaintiff any part of said proceeds. Wherefore plaintiff prays judgment against the defendants in the sum of five hundred dollars, with interest thereon from the 10th day of April, A. D. 1888."

A demurrer to the petition was overruled in the court of common pleas. After answer a trial was had, resulting in a verdict and judgment for Mrs. Cunningham as prayed for. A bill of exceptions was taken, and in the circuit court the judgment of the common pleas was affirmed. No further statement of the case is necessary to an understanding of the point decided.

A. W. Patrick and A. F. Neely, for plaintiffs in error. James A. Richards and Joseph T. McCullough, for defendant in error.

SHAUCK, J. (after stating the facts). We assume that, upon the facts alleged in her petition, Mrs. Cunningham would have been entitled to an order setting off to her, in lieu of homestead, the property demanded, if she had made application therefor to the probate court. The power to make such order in a proper case is conferred upon that court by section 6348, Rev. St. Kuhn v. Nieberg, 40

Ohio St. 631. Omitting to invoke the exercise of that power, she acquiesced in the sale of the assigned property by the assignee, and the application of its proceeds to the payment of her debts. The judgment under consideration affirms her right, under such circumstances, to resort to the court of common pleas to recover from the assignee and his sureties the value of property so applied. In *Dwyer v. Garlough*, 31 Ohio St. 158, it was held that an assignment for the benefit of creditors did not exclude the jurisdiction of the court of common pleas of a subsequent suit to foreclose a mortgage upon real estate embraced in the assignment, because the statute then in force did not authorize the probate court to order the premises to be sold free of the inchoate dower of the wife of the mortgagor. The special jurisdiction which the probate court was exercising over the assigned property was not exclusive, because it was not adequate. The reason for that decision has been regarded in subsequent legislation and adjudication. All legislation affecting the jurisdiction of the probate court over assigned property has been with the view to its enlargement. The decisions of this court upon the subject sustain two propositions pertinent to this case: (1) The filing of the deed of assignment and the qualification of the assignee confer upon the probate court jurisdiction of all the assigned property. (2) The jurisdiction so conferred is exclusive in all respects in which it is adequate. *Sayler v. Simpson*, 45 Ohio St. 141, 12 N. E. 181; *Havens v. Horton* (Ohio Sup.) 41 N. E. 253. The authority of the probate court to determine Mrs. Cunningham's right to the exemption was ample, and the court of common pleas was without original jurisdiction. Judgments of the circuit and common pleas courts reversed, demurrer sustained, and petition dismissed.

(147 N. Y. 308)

MALCOLM v. NEW YORK EL. R. CO. et al.
(Court of Appeals of New York. Oct. 29, 1895.)

EMINENT DOMAIN—DAMAGES—FINDINGS.

1. It is error, on suit against an elevated railroad company for damages caused by the construction of its road, to refuse to find as a fact that land in the vicinity was, prior to the construction of the road, largely unimproved and vacant, where such fact is shown by uncontradicted evidence.

2. On suit for damages by the construction of an elevated railroad in 1878, there was evidence that the fee value in 1873 was \$70,000; in 1877 was \$60,000; when the suit was brought, in 1893, \$90,000. That in 1873 the rental value was \$7,000; in 1878-79, \$3,600; in 1886, \$6,500; in 1893, the year of the trial, \$7,217. *Held*, that the evidence did not show any damage. *Bartlett, O'Brien, and Gray, JJ.*, dissenting.

Appeal from supreme court, general term, First department.

Action by James F. Malcolm against the New York Elevated Railroad Company and others for damages from construction of its

road on an avenue on which plaintiff's property abutted. From an affirmance (28 N. Y. Supp. 1110) by the general term of judgment of the special term for plaintiff, defendants appeal. Reversed.

Brainard Tolles, for appellants. E. W. Tyler, for respondent.

FINCH, J. The premises claimed to have been damaged by the defendants' road were numbers 1213, 1215, and 1217, on Third avenue. They stood in an area substantially vacant and mainly unimproved, for, while there was some improvement on the west, towards Fourth avenue, and possibly some further north, there was none, or very little, to the east and south. The first witness on the subject called for the plaintiff was Burchell, who bought the land in 1866 and put up the buildings in 1869. He remained owner until 1887. When he bought and when he improved he describes the locality as substantially vacant. He tells us that the side streets east of Third avenue have been almost wholly constructed since the coming of the elevated road; that he is positive that none of the four or five blocks up and down Seventieth street were paved before 1878, and that there were no buildings on any of those streets. In answer to quite a leading question by plaintiff's counsel, which almost begs for an affirmative answer, and reads in the record thus: "Take the period from 1873 to 1878, isn't it a fact that the city was greatly built up on the side streets there, lower down, up towards this region, Fifty-Ninth to Seventieth streets?"—he said quite decidedly, "Not where my houses were." Freund, a real-estate expert, called for the plaintiff, said: "In that immediate vicinity Third avenue was not very much improved; less from Seventieth street down to Sixty-Sixth street. On the east side property was entirely vacant, and on the west side. The northwest corner of Seventieth street was improved, and Seventy-First street. Some frame buildings on the block between Seventy-First and Seventy-Second streets. Seventy-Third street was just about cut through at that time." On cross-examination, with his attention drawn to 1878, he said: "In fact almost all improvement has been made in that time in this immediate vicinity." So far there is no doubt about the facts. But it is claimed that they are contradicted by Curtiss, another real-estate expert called for the plaintiff, whose testimony the trial court was at liberty to believe. Where the experts on the same side neutralize each other, the prudent course may be to disregard both. The witness did make some very broad assertions, which he afterwards corrected, but in the main I think he did not change the situation, or raise a contradiction. Beginning with 1873, he said that the streets on the east side were vacant from Sixty-Fifth to Seventieth streets. In 1878 he declares

that even on the west the streets were broken; that Seventy-Second street, east of the avenue, was only partially built upon, and the same was true of Seventy-First street. He added: "If I said on my direct examination that there has been more development east of Third avenue before the elevated road, that is not true. It was west of Third avenue where the largest amount of building was. Most of the building that had taken place on Third avenue and in the side streets prior to 1877 was south of Sixtieth street." He was asked to specify the building prior to 1878, and we find this answer in the record: "Towards building up Third avenue between 1873 and 1878, the beginning of Seventy-Second street, four houses on the southwest corner of Seventy-Second street and on Third avenue, one on the northwest corner of Seventy-Second street and Third avenue, two flats on the west side of Third avenue, between Seventy-Sixth and Seventy-Eighth streets, on the west side, and a flat and a half front from Seventieth to Seventy-Eighth street, on the east side,—that is, a 100-foot flat. That is about all the new buildings I recollect in that section." If he gave some loose and vague answers, his statements of detailed facts leave it clear that from Seventieth street south to Sixtieth street Third avenue was substantially unimproved; that on the west, towards Fourth avenue, there was some building, and a little to the north, but the east was almost utterly vacant. On this state of the proof the learned trial judge was asked to find as a fact that prior to 1877 the land in the vicinity of the premises in suit was largely unimproved and unutilized. There was a refusal and exception. That the request was material is settled by the doctrine of the *Bohm Case* (N. Y. App.) 29 N. E. 802, which we have just followed in the *Case of Bookman* (N. Y.) 41 N. E. 705. The request should have been granted, since the uncontradicted evidence clearly proved the fact.

The trial court also found that the fee value of the premises had increased since the building of the road, but refused to find to the extent of increase requested, and also refused to find that the rental value had increased since the same date. The proof shows a rental of almost \$7,000 in 1873, which was a speculative point of inflated values, and then a descent, in consequence of the panic which followed, to about \$3,600 in the years 1878 and 1879, but promptly thereafter, and coincident with the construction and operation of the road, a steady and persistent rise up to \$6,500 in 1886. Mr. Kyle, who collected the rents during the year of the trial, stated that the rent per month, not including the janitor's apartments, was \$601.50, which gives for the year \$7,217, an amount larger than in any year preceding the building of the road. That fact also the trial judge refused to find as requested. The plaintiff's expert, Freund, put the fee value

in 1873, the period of inflation, at \$70,000; and the present value at \$90,000. He stated the fee value in 1877 at \$60,000, showing an appreciation since the construction of the road of about one-third. Curtiss agrees as to the last two values, and yet, with no evidence to the contrary, the trial judge refused to find the facts as requested. He does find, however, the obvious truths that the station at Sixty-Seventh street is used by a great number of people, and makes the premises more accessible, and more desirable for many business purposes.

If, therefore, the trial judge had found the facts requested, as he should have done, the legal conclusion that no damages had been proved would have followed inevitably under the doctrine of the *Bohm Case*. The railroad comes into an area substantially vacant and unimproved. It finds values and rents at the lowest ebb following the panic. It brings in population, stimulates improvement, and causes values to rise until they exceed the highest limit of the speculative period which preceded the panic. The side streets grew, and their values increased largely from the same cause, and comparison with them only indicates a more or less unequal increment of benefit flowing from the same operative cause. The authority of the *Bohm* and *Bookman Cases* requires us to hold that there was no proof of damage. The judgment should be reversed, and a new trial granted; costs to abide the event.

BARTLETT, J. (dissenting). This action is brought to recover the amount of injury to the fee and rental value of property by reason of the construction of the elevated railroad. The premises involved are Nos. 1213, 1215, and 1217 Third Avenue, at the northeast corner of Seventieth street, in the city of New York, with a frontage of 75 feet on Third avenue by a depth of 80 feet, and upon the lot are erected three four-story buildings, each containing two stores and three upper floors, used for dwelling purposes. The judgment decreed the usual injunction against operating the railroad of defendants in front of the premises in question, and as incidental relief awarded \$2,400 rental injury from the 31st of May, 1887, when the plaintiff acquired title to the premises, to the 14th of June, 1893, the date of the trial. The judgment further provided for the avoidance of the injunction on payment of \$6,000, found to be the injury done to the fee value, over and above the benefit, by reason of the construction of the railroad.

The defendants insist that the judgment is wholly unsupported by evidence, and that this appeal presents only questions of legal error. This case was tried for the second time by learned counsel of experience in this class of litigations, having before them the recent decisions of this court laying down the rules of evidence that should govern. It is now confidently urged by the appellants that the uncontradicted facts, taken in connection with the settled law

of this court, must lead to reversal. It is desirable to apprehend clearly, at the outset, the points raised by this appeal. As to fee value, it will be observed that the trial court found, at the request of both plaintiff and defendants, that it had not decreased since 1878, but had increased since the year preceding the construction of the defendants' road. There was a conflict of evidence only as to the amount of the increase in value. As to rental value, the trial court found that the injury was \$400 a year for six years, the period of plaintiff's ownership from May 31, 1887. In regard to fee value, we have presented the question whether, under the evidence, a finding of consequential damages over and above all benefits resulting from the maintenance and operation of defendants' road can be sustained in view of the fact that the fee value has increased since defendants built their road. As to rental value, the question arises whether, under the proofs, the finding as to its injury can be sustained when the fee value has increased as already stated.

I will consider the question of rental value first. The appellants contend that the uncontradicted evidence shows that the rental value of the premises has increased, and that plaintiff has failed to prove any injury. A careful reading of the record satisfies me that this contention is erroneous, and that there is evidence to sustain the finding of rental injury to the extent of \$400 a year. This court is not concerned with the weight of evidence, but has reached the limit of its jurisdiction when it finds sufficient evidence to warrant the action of the court below. As to whether the finding of injury to rental value can be sustained, notwithstanding the fee value has increased since the construction of the road, there is no rule of law prohibiting a recovery under such circumstances, where the finding is supported by competent evidence. It is by no means improbable that the fee value of premises in certain localities may appreciate while the rental value of existing buildings devoted to residential and business purposes may decrease. Whether rentals are to keep pace with fee values in a certain locality depends entirely upon the character of the buildings erected, and the purposes for which they are used. A manufacturing establishment may thrive where an apartment house would prove a ruinous investment.

I will now consider the finding of injury to fee value, and in so doing will put aside for the moment the fact that the market value of the fee has increased since the construction of the elevated road. What evidence is there in this case on which to rest the finding that by reason of defendants' interference with the easements of light, air, and access consequential damages resulted to the fee over and above all benefits? In the first place, it appears that the central portion of the street is covered by the track structure, which is 37 feet 6 inches wide. The tracks come about half way up to the second story, that is, above

the stores. There are three tracks and two outside track walks. The structure is supported by iron pillars, which are placed in the bed of the street; there is one iron pillar in front of No. 1213, the corner house, and one in front of No. 1217, two houses north. A watchmaker and jeweler, occupying one of the stores, testified he had noticed that whenever his door was open his show cases would be covered with dust very quickly, and that he had continually to wipe off the deposit. When at his bench as a watch repairer, and there was a train passing, he would have to stop his work; that the work on watches required a pretty good light, a steady light. Another witness from the residential part of the house swore that when sitting in the parlor or front rooms, and a train passed, there was a shadow or cloud created while it was passing. A witness also testified to cinders and dust. This is sufficient to show the character of evidence introduced on this point. The plaintiff supplemented this class of proof by evidence as to values on Third, Lexington, and Fifth avenues and a number of cross streets in the vicinity. There was a sharp conflict of evidence as to these values, but the question to be answered now is, what did plaintiff prove by his witnesses? It was shown that values on Third avenue had advanced since 1873 from 20 to 22½ per cent.; on the side streets, in the vicinity, and on Lexington avenue, about 100 per cent.; and on Fifth avenue very much more. It is unnecessary to go further into the details of the evidence, as plaintiff's proof showed that Third avenue property had not experienced the same advance as other property in the neighborhood by a very large percentage, and it also established that the plaintiff's premises, involved in this controversy, were worth about \$80,000 in 1873, and \$90,000 at the time of the trial, which advance was less even than the average on Third avenue. I think the evidence of interference with the easements necessarily tends to show a damage to the fee value when taken in connection with these proofs as to neighborhood values.

In the *Bohm Case*, 129 N. Y., at page 583, 29 N. E. 802, Judge Peckham said: "It seems to me plain from this review of the law that the real injury, if any, suffered by the landowner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air, and access to such land. And when they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant." Can it reasonably be said that it was not proper for the learned trial judge to consider all the evidence in this case as to interference with easements, and as to the failure of Third avenue property to keep pace with the general advance of real-estate values in

the neighborhood, and decide that the fee value of this property had been damaged to the extent of \$6,000? I think this question was properly considered at the trial and at the general term, and as the case stands it is a finding upon conflicting evidence, with which we cannot interfere. In the Bohm Case, 129 N. Y., at page 592, 29 N. E. 802, Judge Peckham further said: "The question is, what, in fact, has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred, and, if so, to what extent?" 129 N. Y. 593, 29 N. E. 802: "Where it appears that the property left has actually advanced in value, unless it can be shown that, but for the act of the defendant in taking these easements, it would have grown still more in value, the fact is plain that it has not been damaged." I come, then, to the effect on this case of the increase in fee value of the property since the elevated road was built. The Bohm Case distinctly recognizes that, even though such an increase in value has taken place, yet, if it can be made to appear that the premises would have grown still more in value had the railroad not been built, then damage has been proved. In the Bohm Case it was said to be abundantly clear on the evidence that plaintiff's property had not suffered injury, and the question of neighborhood values was of no importance. It has, however, been repeatedly held that the fee and rental values of neighboring property are competent evidence in this class of cases. If competent evidence, it is for the reason it is material and likely to be of assistance to the court in reaching a just conclusion. The practical question is, how was the plaintiff to prove his case? Had there been marked depreciation in the fee and rental values since the completion of the railroad, there would be little difficulty in making out a cause of action; but there is the other class of cases, referred to in the Bohm Case, where there has been an advance in fee value, and the owner desires to show that it would have increased even more if the easements had not been interfered with by the defendants, and the road operated in front of his property. I think a plaintiff in such a position may prove the effect of the road upon the fee and rental value of other property situated on the same avenue upon which the railroad is operated; also as to property situated on adjacent avenues and side streets; he may show the condition and growth of the neighborhood before and after the road was constructed; he may prove the direct effects upon the property of interference with the easements of light, air, and access. What more could he do? This court has said that in such a case the opinion of an expert as to what would have been the value of plaintiff's property had defendants' road not been built and operated is incompetent evidence. Roberts' Case, 128 N. Y. 455, 28 N. E. 486. The question of damage is one of legal deduction by the trial judge or

jury when the facts referred to are duly proved. The decision in the Roberts Case was placed upon the precise ground that the expert was asked to determine the very question that ought to be answered by the court or jury. It cannot be expected that a plaintiff would be able to show to a dollar the amount of damage his property has suffered by reason of the construction of the elevated road; nor can it be said, because accurate proof in this class of cases is difficult, that damages cannot be proved by showing all the surrounding facts, and allowing the trial judge or jury, in the exercise of a sound, honest judgment, to fix the amount. Such a result is not guessing or speculation, but is a judicial estimate, based upon all the known facts involved in the problem submitted for solution. It would be a new doctrine to hold that the recovery of damages is limited to those cases where absolute proof of a sum certain can be made. If such were the case, a large number of plaintiffs would be remediless in courts of justice.

There would seem to be nothing unreasonable in the proposition that residential property along the line of the elevated railroad may experience only a slight advance in fee value after the construction of the road, while property off the line, but in the immediate vicinity, may appreciate in value very largely, for the reason that it has enjoyed all the benefits conferred by the presence of the road in the locality, and the natural growth of the city due to increase of population and business, without suffering from those injuries necessarily inflicted on property in immediate contact with the road. The elevated railway companies are entitled to receive from the courts ample protection in view of the numerous actions they are called upon to defend, and the vast amounts involved in their determination, and judgments against them ought not to be upheld resting upon mere speculation unsupported by evidence; but, on the other hand, plaintiffs whose property may have experienced a small advance in fee and rental values since the completion of the elevated railroad ought not to be remediless when all the facts render it clear that property along the line of the road has been damaged by the interference with the easements of light, air, and access, and has, for that reason, failed to share the advance in values of adjacent property, manifestly due not only to the construction of the elevated system, but to that natural growth which the neighborhood would have experienced by reason of increase of population and business in a great city, even if the railroad had never been constructed.

I am thus brought to the vital question in this case, whether plaintiff was entitled to introduce evidence tending to show that the increase of his property in fee value was not as great as it would have been from natural causes if the elevated road had not been built, and was the court authorized to con-

sider that evidence in determining whether there had been an injury to fee value over all benefits? This court has held that in estimating damages to property all benefits to the rental or fee value resulting from the existence of the railway are to be considered, and that only damages over and above benefits are recoverable. *Sutro Case*, 137 N. Y. 592, 33 N. E. 334; *Bischoff Case*, 138 N. Y. 262, 33 N. E. 1073. If the value of the benefits that the elevated railroad has conferred upon the property, over and above all other benefits arising from the natural growth of the locality, without regard to the existence of the railroad, is fairly deducible by the court from surrounding circumstances, in the exercise of a sound judicial judgment, it is difficult to understand why it is not equally competent for the court to determine the amount of those other benefits which might have accrued to the property had the road never been built. In fact, it is necessary to separate these two classes of benefits which go to make up the total value of the property before the value of either can be ascertained. The appellants cannot successfully contend that the growth of the locality where this property is situated is wholly due to the elevated railroad. So in finding the value of one class of benefits, you necessarily find the other.

The rule for proving damages, as laid down in the majority opinion in this case, and more particularly in the *Bookman Case* 147 N. Y. —, 41 N. E. 705, is plausible and reasonable as an abstract proposition, and is an easy way of escape out of a wilderness of difficulties which beset the path of court and counsel in elevated railway litigations; but the ordinary facts presented in these cases are not such, in my judgment, as to justify its application. I am not aware of any locality from the Battery to the northmost limits of the city of New York which fully answers the requirements of this new rule,—“a vacant and uninhabited locality, which normal growth has not effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of growing value except such as lies in hope and expectation.” While this entire territory is not fully built up and improved, its future is assured. While I am willing to admit that the elevated railway system has been of great and lasting benefit to the city of New York, I cannot concede that we are to ascribe to it alone the marvelous growth of that city since the year 1878. We have presented in this connection a complex and difficult question, but to my mind it is absolutely clear that one of the principal factors in this matter of municipal development is the natural and irresistible increase of population and business in a commercial city like New York, whose swarming population is constantly augmented from sources foreign and domestic. It is not the elevated railways

which have created the city, but it is the city which has made these corporations possible. Every square foot of the territory within the city of New York feels the impulse of this normal growth of population and business, and I can but think it a just rule which holds that, where the elevated railway is extended into a new locality, the property owner, whose easements of light, air, and access are interfered with, should be allowed to prove, if possible, that his property would have been of greater value if it had been left to enjoy the natural growth of the city in population and business without the aid of the elevated road. In many cases it will doubtless be difficult, if not impossible, to make such proof; but it is better to let each case stand on its own peculiar facts, rather than lay down a general rule that may deprive many persons of the right to invoke the aid of the courts in a proper claim for damages. The judgment appealed from should be affirmed, with costs.

ANDREWS, C. J., and PECKHAM and HAIGHT, JJ., concur with FINCH, J., for reversal; O'BRIEN, J., concurs with BARTLETT, J., for affirmance; and GRAY, J., concurs in result.

Judgment reversed.

(142 Ind. 475; 143 Ind. 689)

LOUISVILLE, N. A. & O. RY. CO. et al. v. TREADWAY.

(Supreme Court of Indiana. Nov. 6, 1895.)

DECISION ON APPEAL—ENTRY OF JUDGMENT.

1. The Code of Civil Procedure authorizes the reversal as to one, and an affirmance as to the other, of a judgment against two defendants jointly.

2. On suit against two railroad companies jointly for personal injuries, the question against which of the defendants judgment for damages allowed by the jury is to be entered is one of law.

On motion for rehearing. Denied.

For former opinion, see 40 N. E. 807.

MONKS, J. An earnest and able petition for rehearing has been filed by the Monon Company. It is claimed “that this court erred in reversing the judgment as to the Clover Leaf Company, and affirming it as to the Monon Company, because a judgment at law cannot be reversed as to one joint defendant, and affirmed as to the other.” The authorities cited by appellant in support of the rule asserted can have no force in this state, for the reason that the question is regulated by our Code of Civil Procedure. Section 570, Rev. St. 1881 (section 579, Rev. St. 1894), provides, “Though all the defendants have been summoned, the judgment may be rendered against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them severally.” Section 568,

Rev. St. 1881 (section 577, Rev. St. 1894), provides, "Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Section 569, Rev. St. 1881 (section 578, Rev. St. 1894), provides that "In a suit against several defendants the court may in its decision render judgment against one or more of them leaving the action to proceed against the others whenever a several judgment is proper." Under these sections it has been held by this court that the trial court possessed chancery powers in adapting its judgment to the rights of the parties (*Draper v. Van Horn*, 12 Ind. 332; *Douglass v. Howland*, 11 Ind. 554; *Cutchen v. Coleman*, 13 Ind. 568); that if a plaintiff sue two or more jointly, and only prove a liability as to one, he is entitled to a judgment against that one (*Stafford v. Nutt*, 51 Ind. 535, and cases cited on page 538; *Railway Co. v. Duvall*, 40 Ind. 246; *Thornt. & B. Ann. Ind. Prac. Code*, §§ 568-570, and notes). In *Lower v. Franks*, 115 Ind. 334, on page 337, 17 N. E. 630, this court, in speaking of the foregoing sections of the Code of Civil Procedure, said: "In the case of *Hubbell v. Woolf*, 15 Ind. 204, following the case of *Blodget v. Morris*, 14 N. Y. 482, it was held, in terms, that this provision of the Code applies to all actions indiscriminately, whether founded upon contract or upon tort; that it is immaterial whether the complaint alleges a joint, or a joint and several, liability; that the right of recovery is, in this respect, to be regulated by the proof, and not by the allegations of the complaint. In other words, every complaint is, in the respect stated, to be treated as both joint and several when there are two or more defendants. That the object of the provision, obviously, is to prevent a plaintiff who proves a good cause of action against part of the defendants, but not against all, from being put to the expense and delay of a new action." In this case each appellant separately moved the court below to render judgment in its favor, which motions were each overruled, and judgment rendered against both appellants. The *Clover Leaf's* motion for a judgment in its favor on the special verdict should have been sustained, and judgment rendered by the court accordingly. The mandate of this court merely directs the court below to render the judgment that should have been rendered in the first instance. The *Monon Company* is in the same situation as if the court had sustained the motion of the *Clover Leaf Company*, and rendered judgment in its favor, and the *Monon Company* had alone prosecuted this appeal. Besides it is expressly provided by statute that this court may reverse a case in whole or in part. Rev. St. 1881, §§ 660, 661 (Rev. St. 1894, §§ 672, 673). It has been uniformly held by this court, since the Code of Civil Procedure took effect, in 1853, that a

case may be reversed as to a part of the appellants, and affirmed as to others, and such has been the uniform practice. *Railway Co. v. Duvall*, supra; *Steeple v. Downing*, 60 Ind. 478, 503, 504; *Dodge v. Dunham*, 41 Ind. 186; *State v. Mills*, 82 Ind. 126; *Lower v. Franks*, supra; *Railway Co. v. Robbins*, 128 Ind. 449, 26 N. E. 116; *Haxton v. McClaren*, 132 Ind. 235, 31 N. E. 48; *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456; *Spaulding v. Spaulding*, 133 Ind. 122, 32 N. E. 224; *Eppert v. Hall*, 133 Ind. 417, 31 N. E. 74, and 32 N. E. 713; *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358; *Irey v. Mater*, 134 Ind. 238, 33 N. E. 1018; *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13; *Duckwall v. Klsner*, 136 Ind. 99, 35 N. E. 697; *Offut v. Cooper*, 136 Ind. 701, 36 N. E. 273; *Small v. Kennedy*, 137 Ind. 299, 33 N. E. 674; *Radican v. Buckley*, 138 Ind. 582, 38 N. E. 53; *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593; *Garr, Scott & Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811.

This cause was not reversed upon the evidence as to the *Clover Leaf Company*, as stated in the petition for a rehearing, but upon the special verdict, for the reason that the facts stated in the special verdict entitle the *Clover Leaf Company* to a judgment. It is insisted that the cause should be reversed as to the *Monon Company* for the further reason "that an indivisible and inseparable part of the damages assessed by the jury was essentially assessed against the *Clover Leaf Company*." No part of the damages assessed by the jury was assessed against either company, but the amount fixed was such as, in the judgment of the jury, would compensate appellee for her injuries. It was left to the court to say, as a matter of law, whether judgment should be rendered for the same against both, or only one, of the appellants.

The other questions presented in the petition for a rehearing were fully considered and determined in the original opinion. The petition is therefore denied.

COLGROVE et al. v. BRUMMITT et al.
(Supreme Court of Indiana. Oct. 30, 1895.)

PARTIES ON APPEAL.

One of several joint judgment defendants must join with him as coappellants all his codefendants.

Appeal from circuit court, Porter county;
J. H. Gillett, Judge.

Action by William Brummitt against Aseph N. Colgrove and others. From a judgment for plaintiff against all the defendants, part of the defendants appeal. Dismissed.

Agnew & Kelley, for appellants.

PER CURIAM. William Brummitt was the sole plaintiff in the lower court, and the appellants, together with Phebe Griffith and three others, were defendants. The judgment was in favor of said plaintiff, and

against all of such defendants. The appellants, whose record was filed September 12, 1894, have not joined their codefendants as coappellants under the assignment of errors in this court. For this failure, the appeal is not properly before us, and is therefore dismissed. *Gregory v. Smith*, 139 Ind. 48, 38 N. E. 895.

(142 Ind. 354)

MOORE et al. v. MORRIS.

(Supreme Court of Indiana. Oct. 29, 1895.)

PLEADING—PLEA IN ABATEMENT—SUFFICIENCY—DEMURRER TO ANSWER.

1. In an action in H. county, a plea in abatement that defendants are residents of C. county, and are not residents of H. county, is insufficient, in that it does not show that defendants were not residents of H. county at the time the action was begun.

2. It is not error to sustain a demurrer to one of several paragraphs in an answer, where all the evidence which could be introduced under the stricken paragraph can be introduced under the paragraph or paragraphs remaining.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Elizabeth Morris against Robert E. Moore and others to set aside deeds to land, and for possession and damages. From a judgment for plaintiff, defendants appeal. Affirmed.

Urmston & Warrum, for appellants. Fertig & Alexander and Harding & Hovey, for appellee.

HOWARD, C. J. The original paragraph of the complaint in this case alleged facts going to show fraud on the part of appellants and their agents in the procurement from appellee of deeds for certain lands in Hamilton county during a time, as alleged, when appellee was of unsound mind, and incapable of transacting business; praying that the deeds be set aside, and for possession and damages. A second paragraph of complaint was afterwards filed, not alleging unsoundness of mind, but setting up the fraud in a more particular manner, asking for damages, and to have a vendor's lien on the land declared in appellee's favor. Other pleadings were filed, and there was a finding by the court and judgment for damages in favor of appellee. A vendor's lien was also awarded for any balance of the judgment left after execution against the personal estate of the appellant Robert E. Moore.

The first assigned error discussed by counsel is that the court erred in sustaining the appellee's demurrer to the appellants' plea in abatement to the second paragraph of the complaint. In *Needham v. Wright* (decided by this court at last term) 39 N. E. 510, it was said, citing numerous authorities, that in pleas in abatement, and other dilatory pleas, the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, are required. The pleader must not only answer fully what is necessary to be answered, but must also anticipate

and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea. Tried by this rule, the plea in abatement filed by appellants was insufficient, for many reasons. It will be enough to indicate one of them. The plea was based chiefly on the claim that the appellants were residents of Marion county, and could not, therefore, be sued on a merely personal action in Hamilton county. We do not think the action as stated in the second paragraph of the complaint was merely personal; but, even if it were, the averment that "the said defendants are residents of Marion county, Indiana, and are not residents of Hamilton county," would not be sufficient. For all that appears from this or any other averment in the plea, the appellants might have been residents of Hamilton county at the time the action was begun. If they had been residents of Hamilton county when process was issued and served, they could not defeat such service by moving to Marion county before the filing of the plea in abatement.

The only other assigned error discussed by counsel is that the court erred in sustaining the appellee's demurrer to the third and fifth paragraphs of the appellants' answer. This assignment, being joint as to the two paragraphs named, does not present the question as to the sufficiency of either, but of both. If, therefore, the ruling as to one of the paragraphs was correct, the assignment must fail. *Ketcham v. Barbour*, 102 Ind. 576, 26 N. E. 127; *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905. The fifth paragraph of answer was a plea of the six-years statute of limitations, as against the fraud alleged in the second paragraph of the complaint. The second paragraph of the answer, to which a demurrer was overruled, was also a plea of the six-years statute of limitations, in answer to the whole complaint, and particularly to the second paragraph thereof. In addition, at the time of filing the answer, a demurrer had been sustained to the first paragraph of the complaint, thus leaving the second paragraph as the whole complaint. As, therefore, all facts which could be proved under the fifth paragraph of the answer could also be proved under the second, the court did not err in sustaining the demurrer to the fifth, even if there were any error in sustaining the demurrer to the third, paragraph, which we do not think.

No question is raised as to the correctness of the judgment on the merits of the case. The judgment is affirmed.

(142 Ind. 373)

ZEIS v. PASSWATER.

(Supreme Court of Indiana. Oct. 29, 1895.)

ELECTIONS—MAKING BALLOTS—CONTEST—APPEAL—RECORD.

1. Where, in the preparation of a ballot, there is such departure from the strict letter of the law as that, if purposely done, the ballot could be known by the voter after casting it, such

ballot will be rejected in the count, though the departure was innocently made.

2. A ballot with two separate and distinct impressions of the stamp will be rejected, as bearing a distinguishing mark, within Rev. St. 1894, § 6248 (Elliott's Supp. § 1374).

3. That the stamp was not placed on a ballot with such precision as to make a single, perfect impression will not render the ballot invalid.

4. A ballot bearing within one of the large squares a distinct marking, as with a pencil, about one-fourth of an inch wide and five-sixteenths of an inch long, in addition to the voter's stamp, contains a distinguishing mark, and cannot be counted.

5. Rev. St. 1894, § 6248 (Elliott's Supp. § 1374), declares that ballots bearing distinguishing marks shall be void, but that, on protest of a member of the board, such ballots shall be preserved by the inspector, placed with the seals of the ballot packages in paper bags securely sealed, and so delivered to the county clerk; and that "the poll clerk shall also record on the tally sheet, memoranda of such ballots, and the condition of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence." *Held*, that the provision relating to the duty of the poll clerk is merely directory, and a failure to follow it will not preclude inquiry into the validity of ballots returned by the inspector.

6. The longhand manuscript of the evidence taken by the stenographer is, under Rev. St. 1881, § 1410 (Rev. St. 1894, § 1476), an original document, incorporated in the bill of exceptions; and original papers read in evidence, accompanying and identified by such report, may be treated as embraced therein, and properly in the record. *Railroad Co. v. Quick*, 9 N. E. 788, 925, 100 Ind. 295, followed.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Proceeding by John F. Passwater to contest the election of Charles Zeis to the office of township trustee. The board of county commissioners rendered a decision in favor of the contestant, and defendant appealed to the circuit court, where it was adjudged that neither party had been elected to the office. From this judgment, defendant appeals. Reversed.

Kane & Kane and Roberts & Vestal, for appellant. J. F. Neal and Fertig & Alexander, for appellee.

HACKNEY, J. The appellant and the appellee were opposing candidates at the November election, in 1894, for the office of township trustee. Upon the face of the election returns, the appellant received 197 votes, and the appellee 196 votes, the former being declared elected. The appellee, before the board of county commissioners, contested the election of the appellant, and obtained the decision of said board that he (the appellee) had received the highest number of legal votes. From that decision this appellant appealed to the circuit court, where, upon a trial of the issue, it was adjudged that each of said candidates had received an equal number of votes, and therefore that neither had been elected. The questions here involved relate to the validity of ten disputed ballots, nine of which were rejected by the election board of the east precinct, and one was counted in the west precinct for the ap-

pellee. Of the nine rejected ballots, the circuit court counted four for the appellee, and three for the appellant; rejecting two ballots of the five ballots stamped within the square containing the emblem of the party upon whose ticket the appellant was a candidate. The tenth disputed ballot, or that which was counted by the election board for the appellee, was held by the court not to be admissible in evidence. It will be seen, therefore, that, conceding the seven disputed ballots counted by the court to have been valid, if either of the two ballots rejected by the court was valid, or if the ballot not admitted in evidence was admissible and was involved, the appellant would prevail by a majority of one; while, if both rejected ballots should have been counted, his majority would have been two; and if both rejected ballots were invalid, and that excluded from the evidence was admissible and was valid, the appellant would have received 200 votes, and the appellee 199 legal votes. Of the seven ballots counted, there is little question. The four stamped within the square containing the emblem of the appellee's party each contained but one impression of the stamp. That impression, however, was in one instance not very clear and distinct, yet discernible; while in each of the others it was somewhat blurred, as if made by a tremulous hand. Of the five stamped within the square containing the emblem of the appellant's party, three were of the same character as the three last above described; while the other two contained each two entirely separate and distinct impressions of the stamp. These, it is conceded, were the two rejected by the circuit court. They were invalid, as containing distinguishing marks, and were properly rejected. *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204. The seven counted contained no distinguishing mark. If, in preparing the ballot, the voter manifestly endeavors in good faith to comply with the requirements of the law, he should not suffer the loss of his vote. *Bechtol v. Albin*, 134 Ind. 193, 33 N. E. 967. When, however, in the preparation of the ballot, there is such departure from the strict letter of the law as that, if purposely done, the ballot could be known by the voter after casting it, such departure distinguishes the ballot within the meaning of the law; and this is true even if the departure is made innocently. In our opinion, the slight variation from the placing of the stamp with such precision as to make a single perfect impression was not fatal to these ballots. To this point we have concurred with the trial court in concluding that upon the returns, adding the nine rejected ballots, each candidate had 200 votes.

It now remains but to determine whether the court erred in holding that the tenth ballot was not competent evidence, and whether the ballot was valid. The tally sheet of the west precinct was admitted in evidence. It contained a memorandum that five

township ballots were mutilated and destroyed, but it contained no memorandum of disputed ballots. The appellant introduced in evidence the envelope in which the seals and alleged disputed ballot were contained. It was indorsed as follows: "For marked, mutilated, or otherwise defective ballots and seals of ballot packages, as required by section 52, Election Law [Rev. St. 1894, § 6248]. To the County Clerk: This envelope contains the seals and one disputed ballot, marked 'Mutilated or otherwise defective ballots.' The condition of seals of ballot packages, at the time of opening same, was good, as indicated by the inclosed seals. Aaron Shoemaker, Inspector Clarksville Precinct, West Wayne Township." After the introduction of this certificate, it was proven, by the evidence of a poll clerk, that the ballot in question was considered by the election board, and was counted. It was then proposed to be proven by said witness that this ballot was taken from the ballot box in the regular course of the counting; that, when so taken from the ballot box, two members of the board objected and protested against the counting of the ballot, and that, over such objection and protest, the ballot was counted for the appellee; that, by agreement of the members of the election board, said ballot was placed in the disputed ballot envelope, and was certified to the clerk of the circuit court. Upon objection by the appellee, the offered evidence was rejected. It was further offered, by the appellant, to prove by said election clerk, by the clerk of the circuit court and by the county auditor, that the envelope containing said ballot and the seals had been regularly deposited by the election inspector with the county clerk, and had passed to the auditor, and had come to the lower court, at the trial, from the auditor, and that the ballot offered on the trial was the ballot considered by the election board. This offer was objected to by the appellee, and the objection sustained. The ballot in question was then offered in evidence, and was rejected by the court. It was so stamped as to constitute a vote for the appellee, but, besides one or two very delicate lines from imperfections in the paper or made with a pencil, it showed, within one of the large squares, a distinct marking, as with a pencil, about one-fourth of an inch in width, and about five-sixteenths of an inch in length. This latter marking would constitute a "distinguishing mark," within the rule already announced, and would render the ballot invalid.

Questions are discussed as to the sufficiency of the inspector's certificate of the alleged disputed ballot, without a memorandum thereof upon the tally sheet, and as to the admissibility of parol evidence to trace and identify the ballot notwithstanding the omission of such memorandum. It is provided by statute (Rev. St. 1894, § 6248; Elliott's Supp. § 1374) that "any ballot which shall bear any distin-

guishing mark or mutilation shall be void and shall not be counted: * * * provided, however, that on protest of any member of the board such ballot and all disputed ballots shall be preserved by the inspector, and at the close of the court placed with the seals of the ballot packages in paper bags, securely sealed, and so delivered to the clerk of the county, with notification to him of the number of ballots so placed in such bags and of the condition of the seals of the ballot packages. The poll clerk shall also record on the tally sheets, memoranda of such ballots, and the condition of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence." Besides the declaration of the invalidity of certain ballots, this statute provides a method of securely preserving such ballots for evidence in contests. The ballot in question was void, and should not have been counted for the appellee. In counting it, the board violated a mandatory provision of the statute. By counting it for the appellee, he would be given an office to which he was not elected by a majority of the legal votes cast, and the appellant would be deprived of an office to which he was elected by a majority of the legal votes. This result, it is contended, must prevail because of the failure—innocently, we must presume—of the poll clerk to record on the tally sheet a memorandum of such ballot. If this result may be enforced, the legal choice of the voters of a precinct may be defeated, either by the unintentional or the willful omission of an official duty devolving upon a member of the election board. We cannot believe that the legislature intended that the will of the legal voters should be thwarted by such an omission.

That the disputed ballot shall not be destroyed, but shall be preserved for judicial investigation, is a duty primarily resting upon the inspector. He takes charge of it, places it in the bag with the seals, securely seals the bag, indorses upon that a ratification to the county clerk of the number of ballots it contains, and then delivers the bag to said clerk. The memorandum which the poll clerk is required to make answers as a check, to some extent, upon the inspector and the county clerk against substituting other ballots for any that may be disputed. The seals upon the bag aid the inspector in detecting any change of the ballots after they have passed out of his hands. These are precautionary measures, and do not deny a resort to parol evidence to support or deny the genuineness of the ballots in dispute. The fact that a ballot is returned, and is not destroyed by burning, corroborates the theory of a dispute as to its validity. If one is returned, there is no provision of the statute denying the resort to parol evidence that it is not genuine, but is one which has been substituted for that which was really in dispute. These considerations lead to the conclusion that the legislature did not intend that the requirement that the poll clerk should record on the tally sheet a mem-

orandum of the disputed ballots should be mandatory. The conclusion reached by this court in *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790 (a case involving provisions of this present election law), was that "if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory if they do not affect its merits." While the provision in question was designed to be followed by poll clerks, it was not, in our opinion, intended that a failure to do so should deny inquiry into the validity of ballots returned by the inspector, though it should involve the responsibility of the officer who neglects his sworn duty. We conclude, therefore, that prima facie the ballot was admissible in evidence, and its genuineness was open to inquiry upon parol evidence.

Appellee's learned counsel have made the question that the evidence is not in the record, because the longhand manuscript of the stenographic report of the evidence contains the original ballots, and not transcriptions thereof. This question has been decided against the contention of counsel in the case of *Railroad Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, where it was said: "The longhand report of the evidence before us is not, and does not purport to be, a transcript of the evidence introduced at the trial. It is, under section 1410, Rev. St. 1881 (section 1476, Rev. St. 1894), an original manuscript or document incorporated in the bill of exceptions. It follows that original papers read in evidence, and accompanying and properly identified by such longhand report, may be treated in this court as embraced within and constituting a part of it. The exhibits in question are, consequently, before us as a part of the evidence," etc. It may be further suggested that in the present case the original ballots were, by order of the lower court, duly entered of record, made a part of the record, and were embodied in the longhand manuscript of the evidence.

For the error suggested, the judgment of the circuit court is reversed, with instruction to grant the appellant's motion for a new trial.

(145 Ind. 210)

DRAKE v. STATE.¹

(Supreme Court of Indiana. Oct. 29, 1895.)

MURDER—INDICTMENT—CERTAINTY OF DEFENDANT'S NAME—MALICE—BILL OF EXCEPTIONS.

1. An indictment charged "that Ranph" D. killed deceased, shooting at and mortally wounding her with a revolver, "which said revolver he, the said Ralph Drake, then and there had and held in his hands," of which mortal wound deceased instantly died. *Held*, that the indictment was not bad for uncertainty of defendant's name, as the words "the said Ralph Drake" might be eliminated, and yet leave the indictment sufficient.

2. In such indictment the entire allegation "which said revolver he, the said Ralph Drake,

then and there had and held in his hands," might be rejected as surplusage.

3. An indictment for murder which charges that the acts which finally resulted in the death were done feloniously, and with premeditated malice, is sufficient, though it fails to allege that the killing was so done.

4. A bill of exceptions in a criminal case does not become a part of the record unless "signed by the judge and filed by the clerk," as provided by Rev. St. 1894, § 1916 (Rev. St. 1881, § 1947); and it must appear that the bill was signed before the filing.

Appeal from circuit court, Decatur county; J. K. Ewing, Judge.

Ralph Drake was convicted of murder in the second degree under an indictment for murder in the first degree, and appeals. Affirmed.

Hacker & Remy and Corfez Ewing, for appellant. W. A. Ketcham, Chas. A. Korbly, S. H. Spooner, Merrill Moores, D. A. Myers, W. M. Waltman, and M. D. Ewing, for the State.

MONKS, J. Appellant was tried upon an indictment charging the crime of murder in the first degree and found guilty of murder in the second degree. There was a motion to quash the indictment, which was overruled, and this is complained of as error. The part of the indictment upon which the question is presented is as follows: "That Ranph Drake, on the 1st day of June, 1893, at and in the county of Bartholomew, and state aforesaid, did then and there, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one Ida Ward, by then and there, feloniously, purposely, and with premeditated malice, shooting at and against and thereby mortally wounding the said Ida Ward, with a certain deadly weapon, commonly called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said Ralph Drake, then and there had and held in his hands, of which mortal wound she, the said Ida Ward, then and there instantly died." It is earnestly insisted by appellant "that it is not certain from the wording of the indictment whether it is Ranph Drake or Ralph Drake who is charged with having committed the offense." It is not required that more be charged in an indictment than is necessary to adequately and accurately express the offense; and, when unnecessary averments or aggravations are introduced, they can be treated as surplusage and disregarded. It is a well-settled rule of criminal pleading, however, that no allegation, though it may not have been necessary, can be rejected as surplusage if it is descriptive of the identity of that which is legally essential to the case. 1 Bish. Cr. Proc. § 485. Thus, in an indictment for stealing a horse, it is alleged to be a black horse. The color need not be stated, but, if stated, cannot be rejected as surplusage, because it is made descriptive of the particular animal alleged to be stolen. In such case the color must be proven, and a variance in the proof

¹ Rehearing denied, 44 N. E. 133.

of color is fatal. But allegations not essential to constitute the offense, which might be omitted without affecting the charge against the defendant and without detriment to the indictment, are considered as mere surplusage, and may be entirely disregarded. *Kennedy v. State*, 62 Ind. 136; *Mayo v. State*, 7 Tex. App. 342; *Rex v. Morris*, 1 Leach, 109; *Rex v. Redman*, 1 Leach, 477; *Reg. v. Crespin*, 11 Q. B. 913, 63 E. C. L. 912; *Tift v. State*, 23 Miss. 567; *Greeson v. State*, 5 How. (Miss.) 42; *Com. v. Randall*, 4 Gray, 36; *Com. v. Hunt*, 4 Pick. 252; *U. S. v. Howard*, 3 Sumn. 12, Fed. Cas. No. 15,403; *Farrow v. State*, 48 Ga. 30; 1 Bish. Cr. Proc. §§ 481, 485, 487; *Whart. Cr. Pl.* § 158.

If a name is immaterial,—that is, if it is unnecessary to the statement of the offense,—it may be rejected as surplusage, and will not vitiate the indictment. *Kennedy v. State*, supra; *Rex v. Morris*, supra; *Mayo v. State*, supra; *Com. v. Hunt*, supra; *U. S. v. Howard*, supra; *Farrow v. State*, supra. In *Com. v. Hunt*, 4 Pick. 252, the indictment charged that Alva Hunt, etc., in and upon one Peddy Harvey, etc., did make an assault, and her, the said Peddy Hunt, did beat, wound, and illtreat, the said Peddy Harvey, etc., to ravish, etc. The clause, "and her, the said Peddy Hunt, then and there did beat, wound, and illtreat," was rejected as surplusage. In *Com. v. Randall*, supra, the charge was that "the defendant, with force and arms, in and upon Lucy Ann Keach, in the peace of the commonwealth then and there being an assault did make, and her, the said Lucy Ann Keach, with a ferule, which said Randall then and there in his right hand had and held, did strike divers grievous and dangerous blows upon the back and shoulders and other parts of the body [of her, the said Lucy Ann Leach, whereby the said Lucy Ann Leach was cruelly beaten and wounded, and other wrongs to the said Lucy Ann Leach then and there did and committed], to her great damage, and against the peace of said commonwealth." It was held that the mistake was clearly a clerical one; that, after striking out the part inclosed in brackets, which is the defective portion of the allegation, it charges an assault and battery upon Lucy Ann Keach. Bigelow, J., speaking for the court in that case, said: "Courts of justice are disposed to treat as surplusage all erroneous and improper averments in complaints and indictments, when the residue of the allegation sets out the offense charged in technical language and with substantial certainty and precision. The authorities are numerous and decisive of this point." In *Rex v. Morris*, supra, the indictment charged "that Francis Morris the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have; he, the said Thomas Morris, then and there well knowing the said goods and chattels last mentioned to

have been feloniously stolen, taken, and carried away." The prisoner was found guilty. It was claimed that the conviction could not be supported, for the reason that the indictment charged two different persons, one of the name of Francis, and the other of the name of Thomas. The point was reserved for the opinion of the 12 judges. Here was an error in using the word "Thomas" instead of "Francis," and the judges held that the words "the said Thomas Morris" might be struck out as surplusage, and the indictment would be sensible and good without them." The case of *Rex v. Redman*, supra, is to the same effect, except that the words rejected were not the name of the defendant. In *Mayo v. State*, supra, the indictment, omitting the usual formal portion, was as follows: "That Eli Mayo, on the 30th day of July, 1874, in the county of Houston aforesaid, in and upon one Ella Gann, a female, then and there being of the age of eight years, unlawfully, feloniously, and willfully, an assault did make; and that the said Eli Mayo, then and there being an adult male and over the age of fourteen years, did then and there, unlawfully, willfully, and feloniously, and by force, threats, and fraud then and there by him, the said Eli May, used and practiced upon said female, Ella Gann, without the consent then and there of said Ella Gann, ravish and have carnal knowledge of the said female, Ella Gann, by then and there having sexual intercourse with her, the said Ella Gann, against the peace and dignity of the state." There was a motion to quash, which was overruled. The court said: "Looking now to the indictment as copied hereinabove, we find that, if all that portion which we have italicized be treated as surplusage and stricken out, the indictment as eliminated will be amply sufficient to charge the offense. If they are immaterial and unnecessary, then, as we have seen, they may be treated as surplusage and rejected, and should be. With this unnecessary portion rejected as surplusage, the motion to quash was without substantial foundation, and the court, therefore, did not err in overruling it." In *Kennedy v. State*, supra, the indictment, after charging John Kennedy with the crime of murder, continued as follows: "And so the jurors aforesaid, upon their oaths aforesaid, say that the said Frank Kennedy, the said Clarence Hensley, in the manner and by the means aforesaid, unlawfully, feloniously, willfully, and with premeditated malice, did kill and murder, contrary to the form of the statute," etc. This court held that the indictment was complete in its charge of murder without the addition of said clause; that the same was mere surplusage, and that the word "Frank" was a clerical error; that the case was clearly within the statute providing that indictments should not be quashed for certain defects. While many of the old forms set out the hand in which the instrument used to inflict

an injury was held, it is not necessary to make the allegation or prove it if made, and the indictment is sufficient without such allegation. *Dennis v. State*, 103 Ind. 142, 2 N. E. 849; *Welch v. State*, 104 Ind. 847, 3 N. E. 860; *Com. v. Costley*, 118 Mass. 1; 1 Whart. Cr. Law, § 528; 1 Whart. Prec. Ind. 114, note 1.

Under these authorities, it is clear that the allegation, "which said revolver he, the said Ralph Drake, then and there had and held in his hands," is surplusage, and, if eliminated, the indictment would be sufficient without it; or, upon the authority of *Rex v. Morris*, supra, the words "the said Ralph Drake" might be rejected as surplusage, and the indictment would be "sensible and good" without these words. This case clearly comes under the provisions of the statutes that "no indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment or other proceedings be stayed, arrested, or in any manner affected, for any of the following defects: * * * Sixth. For any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged. * * * Tenth. * * * For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Rev. St. 1881, § 1756 (Rev. St. 1894, § 1825).

We have referred to the name in the charging part of the indictment as *Ranph Drake*, for the reason that counsel for appellant have so stated the name in their brief, although the name may be read *Rauph Drake*, and was probably so considered by the court below; but, whether the name is *Ranph* or *Rauph*, the result is the same.

It is urged that a motion to quash should have been sustained, for the additional reason that the intent or purpose to kill must be alleged; that it is not sufficient to charge that the acts which finally and eventually resulted in death were done unlawfully, feloniously, purposely, and with premeditated malice, but it must be alleged that the killing was done unlawfully, feloniously, purposely, and with premeditated malice. This is what is charged in the indictment, and the same is not open to the objection urged. The indictment charges that the appellant "did then and there, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder *Ida Ward*," etc. Indictments, however, which only charged that the acts which finally resulted in death were done unlawfully, feloniously, purposely, and with premeditated malice, have been held good in this court. *Henning v. State*, 106 Ind. 386, 6 N. E. 808, and 7 N. E. 4, and cases cited. There was no error in overruling the motion to quash.

The other errors assigned are: "(2) That the court erred in overruling appellant's motion to discharge the jury and release the

appellant. (3) That the court erred in overruling the motion for a new trial." The second error presents no question, as the same is only a cause for a new trial. It is insisted by appellee that what purports to be a bill of exceptions, containing the evidence, etc., is not properly in the record, for the reason that there is nothing to show that the same was ever filed in the court below, and that, therefore, no question is presented by the motion for a new trial. The point made is sustained by the record. The Criminal Code requires that a bill of exceptions "must be signed by the judge and filed by the clerk." Rev. St. 1881, § 1847 (Rev. St. 1894, § 1910). The statute is mandatory as to both the signing by the judge and the filing by the clerk. It is only when the bill of exceptions is "signed by the judge," and afterwards "filed by the clerk," and these facts are shown by the record, that the same constitutes a part of the record and can be considered by this court. *Stewart v. State*, 113 Ind. 505, 16 N. E. 186; *Shewalter v. Bergman*, 132 Ind. 556, 27 N. E. 159, and cases cited; *Guilr v. Gillett*, 124 Ind. 501, 24 N. E. 1036; *Mason v. Brody*, 135 Ind. 582, 35 N. E. 903; *Board v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731; *Ayers v. Armstrong* (No. 17,538; this term) 41 N. E. 522; *Wenning v. Teeple* (No. 17,078; this term) 41 N. E. 600; *Prather v. Prather* (Ind. Sup.) 39 N. E. 310; *Railroad Co. v. Meadows* (Ind. App.) 41 N. E. 398, and cases cited; *Elliot*, App. Proc. § 805. Such filing must be after the bill is signed by the judge. *Ayers v. Armstrong* and authorities cited supra. The record in this case shows that the bill of exceptions was signed by the judge on November 16, 1894, and there is nothing to show that it was filed by the clerk after it was signed by the judge. The record states that what purports to be a bill of exceptions was filed in the clerk's office November 15, 1894; but, not being at that time signed by the judge, it was not a bill of exceptions, and did not thereby become a part of the record. *Ayers v. Armstrong* and authorities cited supra. It follows that what purports to be a bill of exceptions is no part of the record. No question is therefore presented as to the action of the court in overruling the motion for a new trial. Judgment affirmed.

(143 Ind. 870)

MILLER v. EVANSVILLE & I. R. CO.¹

(Supreme Court of Indiana. Oct. 31, 1895.)

APPEAL—RECORD—BILL OF EXCEPTIONS—FILING.

Under Rev. St. 1881, § 629 (Rev. St. 1894, § 641), making it necessary to file the bill of exceptions with the clerk of the trial court after it has been approved and signed by the judge, a bill of exceptions is not properly before the supreme court on appeal where there is no entry independent of such bill to indicate that it was filed with such clerk.

¹ Rehearing denied, 43 N. E. 806.

Appeal from circuit court, Daviess county; D. J. Hefron, Judge.

Action by Sarah E. Miller, administratrix of the estate of Christopher C. Miller, deceased, against the Evansville & Indianapolis Railroad Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

Thomas H. Dillon, for appellant. Gardiner & Gardiner, Iglehart & Taylor, and F. B. Posey, for appellee.

JORDAN, J. Appellant, as the administratrix of Christopher C. Miller, instituted this action against the appellee for \$10,000 damages arising out of the alleged wrongful killing of her said decedent. The complaint is in two paragraphs, and alleges substantially that the railroad company, by its agents, carelessly, recklessly, and negligently ran its locomotive engine backward through the town of Petersburg, Ind., at a speed of 40 miles per hour, in the nighttime, without headlight or lantern, and without giving any signals of its approach, and thereby negligently, recklessly, and carelessly ran said locomotive against and over said Christopher C. Miller, whereby he was killed, etc. The cause was put at issue by appellee filing an answer in denial, and, on motion, the venue was changed from the Pike circuit court to the Daviess circuit court. A trial in the latter before a jury resulted in a verdict in favor of appellee. Over appellant's motion for a new trial, a judgment was rendered in favor of appellee, and 60 days were granted to appellant to prepare and file her bill of exceptions.

The only error assigned is that the court erred in overruling the motion for a new trial. Appellant argues and insists that the judgment is not sustained by the evidence, and is also contrary to law. Complaint is made in regard to certain instructions given to the jury, and also in relation to the court's ruling in refusing to admit in evidence a copy of an ordinance of the town of Petersburg, regulating therein the running of railroad trains. These are the only questions which appellant seeks by this appeal to present for our decision. Upon an examination, we find that the record presents none of the questions discussed by counsel for appellant. Incorporated into the transcript are what purport to be two bills of exceptions; one embracing the evidence, and the other the instructions. Neither of these bills is properly before this court, for the reason that there is no entry, independent of the bills themselves, to indicate that either was filed. Rev. St. 1881, § 629 (Rev. St. 1894, § 641), renders it necessary to file the bill with the clerk of the trial court after it has been approved and signed by the judge. It is firmly settled by the decisions of this court that the transcript of the proceedings which comes to this court must affirmatively show, independent of the bill, that the latter was filed in

the office of the clerk, and also the date of filing the same. Board v. Huffman, 134 Ind. 1, 31 N. E. 570; Mason v. Brody, 135 Ind. 582, 35 N. E. 903; Prather v. Prather, 139 Ind. 570, 39 N. E. 310; Drake v. State (at this term) 41 N. E. 799; Elliott, App. Proc. § 805. An entry or recital in the transcript at the proper place, substantially as follows (to be varied to conform to the facts in each particular case), is most generally and may be properly employed to show the filing in vacation of the bill of exceptions, and the date of filing thereof, to wit: "Be it remembered that afterwards, to wit, on the 30th day of October, 1895, the plaintiff (or defendant, as the case may be) filed in the clerk's office the following bill of exceptions, in words and figures as follows." The bill should then follow or appear as nearly as practicable immediately after this recital. We merely suggest this in the hope that litigants who prosecute appeals to this court will at least endeavor to see that the record is so prepared as will enable us to consider and decide, upon their merits, the questions involved. As neither the evidence nor instructions are in the record in the case at bar, for the reason stated, we are compelled to affirm the judgment without consideration of the merits of the controversy. Judgment affirmed.

(143 Ind. 438)

STATE ex rel. ROBERTS v. BEVER.¹

(Supreme Court of Indiana. Oct. 30, 1895.)

DRAINAGE—COLLECTION OF TAX—MANDAMUS—IS SUE OF CERTIFICATES.

1. A contractor holding a surveyor's certificate for work done under the drainage act of 1881 (Rev. St. 1894, § 5673 et seq.; Rev. St. 1881, § 4303 et seq.) cannot sue the landowner for the amount due, but must file a copy of his certificate with the auditor, who is required to place it upon the tax duplicate, to be collected as other taxes are collected. Lockwood v. Ferguson, 5 N. E. 3, 105 Ind. 380, followed.

2. Mandamus lies against a surveyor appointed to superintend the construction of a ditch under the drainage act of 1881 (Rev. St. 1894, § 5673 et seq.; Rev. St. 1881, § 4303 et seq.) to compel him to issue certificates for work done by the contractor in accordance with the specifications, and to file a copy of such certificates with the auditor, as provided by section 5675, Rev. St. 1894 (section 4305, Rev. St. 1881).

3. A contractor employed under the drainage act of 1881 (Rev. St. 1894, § 5673 et seq.; Rev. St. 1881, § 4303 et seq.) cannot compel the surveyor to issue certificates for work done, unless he has completed the contract, according to its specifications, within the time agreed upon, or within 60 days thereafter, if such extension of time has been granted by the auditor.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Mandamus, on the relation of Jasper Roberts, against Mathias H. Bever. From a judgment for defendant, petitioner appeals. Affirmed.

Lindley & Lewis, for appellant. Fred C. Board, for appellee.

¹ Rehearing denied.

JORDAN, J. The relator, Jasper Roberts, petitioned the lower court for a writ of mandate against the appellee. The petition alleges that a certain public ditch, denominated as the "Ohizum Ditch," was laid out and constructed in pursuance of an order of the board of commissioners of the county of Fountain; that the appellee was appointed by said commissioners as the surveyor and engineer to superintend the laying out and construction of the ditch in question; that at a public sale on September 24, 1892, held by the auditor of said county, the relator bid off, and agreed to construct, 10 shares or allotments of said proposed work for the sum of \$3,883.50, and entered into a contract with the auditor for the construction of the ditch in accordance with the terms given and required, and also executed a bond for the faithful performance of his contract. It is further alleged that he has completed the work, in all things, in accordance with the specifications, and that certificates are due him on his contract to the amount of \$861.70; that he has performed, upon his part, all the conditions of the contract, and has demanded of the defendant that he issue, and file with said auditor, the certificates in controversy, which he refuses to do. Appellee appeared in response to the alternative writ, and made a return thereto by a denial, and also set up, in a second paragraph of his answer, affirmative facts, and thereupon issues were joined between the parties. In the second paragraph of his answer, appellee alleged that the relator had contracted to complete his work within a specified time; that estimates and certificates were given to him from time to time, as fast as the work done would warrant; that the time for the construction of the work by the relator, under his contract, expired before the said work was completed; that the time for the completion of the same was extended 60 days by the auditor of said county; that relator still failed to complete his said work within the said extension, and said auditor notified the relator that the time for the completion of the ditch had expired, and that the work thereon must stop, and that he would receive no more estimates or certificates for work; that estimates and certificates have been made and delivered to the relator to an amount exceeding the work done by him on the ditch; and that he had been fully paid for all of the work done by him on the ditch. The matters in issue were submitted to the court, and upon hearing the evidence the relator's right to a peremptory writ of mandamus was denied, and judgment rendered against him for costs. The only questions presented and argued by counsel for appellant are those arising out of the overruling of the motion for a new trial. These, in the main, are that the judgment is not sustained by the evidence; that it is contrary to both the evidence and the law.

The merits of this appeal may be decided

of by a consideration of the evidence, which is in the record by a bill of exceptions. In the determination of the case upon the propositions raised by the parties, respectively, it is necessary to refer to the statute and the rules of law controlling in mandamus proceedings. Section 4303, Rev. St. 1881 (section 5673, Rev. St. 1894), of the law relative to the construction of drains like the one in question provides for the letting of a contract at a public sale for the construction of the drain, and requires the auditor to contract with the party to whom the allotment is sold, requiring him to construct such share or allotment in the manner set forth in the report of the viewers or re-viewers, and within such time as the auditor may fix, not exceeding 90 days from the day of sale. Section 5674, Rev. St. 1894 (section 4304, Rev. St. 1881), provides that the auditor may, for good cause, grant further time to a contractor to complete his job, not exceeding 60 days. Section 5675, Rev. St. 1894 (section 4305, Rev. St. 1881), provides that it shall be the duty of the surveyor, on being notified by a contractor that his job is completed, to inspect the same, and if he finds that it is completed according to the specifications, etc., give to the contractor a certificate of acceptance, stating that fact, and, in addition, stating the amount due to him from the owner of the land, which certificate shall be a lien upon the land assessed; and such officer is further required to file a copy of this certificate with the auditor, who shall charge the amount against the land, to be collected as other taxes. Under the decisions of this court, an action will not lie in favor of the contractor, against the landowner, for the amount due from the latter, as expressed in the certificate executed to him by the surveyor, for the reason that the statute provides that the auditor shall charge the amount mentioned in the copy of the certificate filed in his office, on the tax duplicate, against the land assessed, to be collected as other taxes are collected. *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Lockwood v. Ferguson*, 105 Ind. 380, 5 N. E. 3. This being true, and as the surveyor is charged to inspect the work, and, if he finds it properly completed as provided, to accept the same, and execute to the contractor the required certificate, and file a copy thereof with the auditor, it becomes an official duty enjoined upon him by law; and it is therefore evident, that under a sufficient showing, when the officer refuses to discharge it, he may be coerced to perform it by a writ of mandate. Otherwise the contractor would be virtually without a remedy to obtain the money for the services rendered. This remedy, although partaking of the attributes of a civil action, is nevertheless regarded as one of extraordinary character; and the rule is therefore thoroughly established, and recognized by the courts, that the writ will only be awarded where there is a clear, specific,

legal right to be enforced, which right, however, must be clearly established, as this writ is never granted in doubtful cases. *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 20 N. E. 421, and authorities there cited; *State v. Bonnell*, 119 Ind. 494, 21 N. E. 1101.

The evidence in the record tends to establish that the relator bid off, and entered into a contract with the auditor to construct, 10 allotments of the drain in controversy, for \$3,383.50; the work performed by him was upon seven of these shares, which, as he claimed, had been completed, and that the amount for his work thereon was \$2,333.50; and that there was still due him, of that sum, \$861.70. There is evidence further tending to show that at the time he commenced this action he had received, in certificates issued to him by the appellee, and by money advanced, a sum in excess of \$2,333.50. It also appears that he failed to complete his job within the time provided in the contract, and an extension of 60 days was given to him by the auditor, at the end of which time, the work being unfinished, the auditor notified him to stop work, as no more certificates would be issued to him. The relator, it appears, contracted to construct 10 allotments, and the written contract provided, in effect, that, when the entire work was completed as prescribed by law and the specifications, then he should have a full estimate on all work. The evidence does not show that the relator completed the work undertaken by him within the terms of the contract. In fact, there is evidence of witnesses introduced upon the part of the appellee showing that the relator had not completed, as claimed by him, the seven allotments in question, in this: that he had failed or neglected to throw back the dirt from the bank of the ditch to the distance named in the specifications. In any view of the case, under the evidence, the judgment of the trial court is correct.

Other points are raised and argued by the learned counsel for appellant upon intervening rulings of the court, but, under our view of the evidence, they could exert no effect upon the ultimate judgment, and must be considered as harmless. Judgment affirmed.

(144 Ind. 312)

MILLER v. BOTTENBERG et al.¹

(Supreme Court of Indiana. Oct. 29, 1895.)

PLEADING—ANSWER—FAILURE TO SET OUT IN WRITING—APPEAL—HARMLESS ERROR.

1. Under Rev. St. 1894, § 365 (Rev. St. 1881, § 362), providing that, when any pleading is founded on a written instrument or on account, the original or a copy thereof must be filed with the pleading, in an action to dissolve a partnership and for an accounting an answer alleging that plaintiff and defendant had agreed in writing on terms of dissolution and settlement is demurrable, where such contract or a copy is not filed with and made a part of the answer.

2. Where the evidence is not in the record, it cannot be said, as a matter of law, that it

was harmless error to overrule the demurrer to an answer that alleged as a defense a written contract between the parties, without setting out the same.

Appeal from superior court, Allen county; Charles M. Dawson, Judge.

Action by William Miller against Andrew J. Bottenberg and another to dissolve a partnership, and for an accounting. From a judgment for defendants, plaintiff appeals. Reversed.

W. & E. Leonard and Robert Lowry, for appellant. Colerick & France, for appellees.

MCCABE, J. The appellant, Miller, sued the appellee Bottenberg and another to dissolve a partnership theretofore existing between said parties, and for an accounting. Upon the issues joined, there was a trial finding and judgment for the defendants. The only error assigned and not waived by the appellant is upon the action of the superior court in overruling a demurrer to the third paragraph of the answer of the defendant Bottenberg. The answer admitted that such partnership had existed, but alleged that, prior to the commencement of this suit, "said defendant and said Miller agreed in writing upon terms of dissolution satisfactory to both of said parties, and that in consideration of \$450, which the said Miller agreed to pay to said Bottenberg for all his * * * interest * * * in and to all the partnership property," with certain exceptions, alleging that the assets thus excepted were then and there divided between the partners, and that on such dissolution there had been a full accounting between the partners, and that all the debts of the firm had been paid. The only objection urged to this paragraph of answer is that it alleges that the agreement of dissolution was in writing, and that the original agreement or a copy thereof was not filed with and made a part of the answer as an exhibit. The statute provides that, "when any pleading is founded on any written instrument or on account, the original or a copy thereof, must be filed with the pleading." Burns' Rev. St. 1894, § 365 (Rev. St. 1881, § 362). This requirement has been held to be imperative. *Brown v. State*, 44 Ind. 222; *Prince v. State*, 42 Ind. 315; *Wolf v. Schofield*, 38 Ind. 175; *Insurance Co. v. Walser*, 22 Ind. 73; *Montgomery v. Gorrell*, 51 Ind. 309; *Township v. Thompson*, 92 Ind. 557; *Overly v. Tipton*, 68 Ind. 414; *Old v. Mohler*, 122 Ind. 594, 23 N. E. 967; *Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319. It has been held by this court that the statute quoted applies with equal force to an answer founded on a written instrument. *Hillis v. Willson*, 13 Ind. 146; *Sayres v. Linkhart*, 25 Ind. 145; *Machine Co. v. Glidden*, 94 Ind. 447; *Landon v. White*, 101 Ind. 249; *Ashley v. Foreman*, 85 Ind. 55. We find no such writing or a copy thereof filed with the answer.

But it is earnestly contended that the error was harmless, and therefore not sufficient ground to warrant a reversal. It is provided

¹ Rehearing denied.

in the Code that "no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." Burns' Rev. St. 1894, § 348 (Rev. St. 1881, § 345). This statute was applied by this court so as to avoid a reversal where a demurrer had been, as here, overruled to a pleading founded on a written instrument, the original or a copy thereof not being filed with the pleading. *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112. The ground on which this court refused to reverse for the error in overruling the demurrer in that case was that it appeared from the whole record that the merits of the cause had been fairly tried and determined. See *Railway Co. v. Kurtz*, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303. In *Baker v. Pyatt*, supra, there was a special finding of the facts, from which this court could see that no harm had been done to the defendant by the plaintiff's failure to file the original or a copy of the deed on which the second paragraph of the complaint in that case was based, it appearing that such instrument was properly introduced in evidence. The special finding in that case shows that the identical deed described in the paragraph containing the same mistaken and incorrect description of the land intended to be conveyed thereby, had been executed, and that the wrong description was inserted by mistake, as alleged. It was therefore made to appear from the whole record that the merits of the cause had been fairly tried, though the trial court had erred in overruling the demurrer to the second paragraph of the complaint for want of sufficient facts, the only defect therein being the failure to file the original or a copy of the deed upon which the paragraph was founded.

If the evidence was in the record, and from it we could see that the written contract on which the third paragraph of the answer was founded had been properly read in evidence, and that it was a contract of the force and character ascribed to it in the answer, a very different question would be presented. We would then be called on to say, under the statutory provision quoted, whether it appeared from the whole record that the merits of the cause had been fairly determined, notwithstanding the error in ruling on the demurrer. Another section provides that "the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by such error or defect." Burns' Rev. St. 1894, §§ 401, 670 (Rev. St. 1881, §§ 393, 653), makes a similar provision. We are disposed to give full effect to these salutary provisions in all cases to which they apply. But they do not apply to this case, because the record shows that an error has been committed against the appellant; and there is nothing in the record to show that the merits of the cause have been fairly determined, as

provided in the first section quoted, or that the error or defect did not affect the substantial rights of the adverse party, as provided in the second and third sections referred to. The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the amended third paragraph of the answer.

(142 Ind. 407)

SULLIVAN ELECTRIC LIGHT & POWER CO. et al. v. BLUE.

(Supreme Court of Indiana. Oct. 31, 1895.)

APPEAL — ASSIGNMENTS OF ERROR — RECEIVER — APPOINTMENT WITHOUT NOTICE — WHEN PROPER.

1. On appeal from an order appointing a receiver at chambers, assignments of error on the action of the court in appointing a receiver without notice, and in overruling defendants' motion to vacate the order appointing the receiver on the ground that such appointment was contrary to law and the evidence, present the question of the propriety of the appointment of the receiver, without an assignment that the complaint does not state facts sufficient to constitute a cause of action.

2. It is improper to appoint a receiver of a corporation situated, and having its offices and business, in the town where the action is brought, without notice, on a verified bill which states no facts showing that irreparable or any other damages would result to the corporation by giving notice of the application, but merely shows that plaintiff apprehends that, if notice be given, defendants, who control the corporation, will do things which plaintiff wishes to prevent being done, and which he alleges will be to his detriment as a stockholder, and to the detriment of the corporation.

Appeal from circuit court, Sullivan county; John C. Briggs, Judge.

Bill by Perry H. Blue against the Sullivan Electric Light & Power Company and others for the appointment of a receiver of such company. From an interlocutory order appointing a receiver in vacation, at chambers, without notice, defendants appeal. Reversed.

John S. Bays, for appellant. W. S. Maple and John T. Hays, for appellee.

McCABE, J. This is an appeal from an interlocutory order appointing a receiver for the appellant, made in vacation, at chambers, by the judge of the circuit court. Error is assigned upon the action of the court (1) in appointing the receiver; (2) in appointing the receiver without notice; (3) in overruling appellant's motion to vacate the order appointing the receiver; that such appointment was contrary to law and the evidence, and is not sustained by sufficient evidence. It is contended by the appellee that these assignments do not present any question as to the propriety of the appointment of the receiver, because there is no assignment that "the complaint does not state facts sufficient to constitute a cause of action." In *Order of Iron Hall v. Baker*, 134 Ind. 304, 305, 33 N. E. 1128, this court said: "We think there can be but little doubt as to what the true rule in this regard is. If the appointment of a receiver is but an auxiliary to a pending ac-

tion, to keep intact a fund sought to be reached, and applied in satisfaction of a final judgment to be rendered, or to aid in carrying out the final object of the main action, the sufficiency of the complaint will not be tested on appeal from an interlocutory order appointing a receiver, in so far as it relates to its sufficiency to entitle the party to the relief asked in the main action. In that respect it is under the control of the trial court, and may be amended at any time before final judgment. But the court will look to the complaint, and test its sufficiency, in so far as it relates to the appointment of a receiver, whether the appointment be as an auxiliary to an action, or whether the suit is being prosecuted for the sole purpose of appointing a receiver. There must be some application filed on behalf of the party seeking the appointment of a receiver, and invoking the powers of the court to be exercised in that behalf. He must map out some form of pleading stating a cause for the appointment of a receiver, that the opposite party may know on what grounds the right to a receiver is claimed, and that they may know what they have to meet and defend against to prevent the appointment, and the pleadings in this behalf will bound and limit the inquiry." *Steele v. Aspy*, 128 Ind. 367, 27 N. E. 739. It results from the principles thus announced that an assignment that the complaint does state facts sufficient to constitute a cause of action in this sort of an appeal would not present any question this court could entertain, because the action is still pending in the trial court, where the complaint may be amended. The appeal is not allowed in such cases for the purpose of testing any questions on the merits, and further than they, or some of them, may become incidentally involved in determining the correctness of the court's action in appointing, or refusing to appoint, a receiver. *Steele v. Aspy*, supra; *Order of Iron Hall v. Baker*, supra. On appeal from an order appointing a receiver, no questions are considered except those involved in the appointment. *Main v. Ginthert*, 92 Ind. 180. An assignment of error upon the order of the court appointing a receiver was held good in *Main v. Ginthert*, supra.

The appointment in this case was made without notice, upon the verified complaint, and oral statements of the plaintiff under oath, as the record recites. It is contended by the appellants that the facts stated in the verified complaint as the cause for the failure to give notice of the application are not sufficient. The statute provides that "receivers shall not be appointed, either in term or vacation, in any case until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit." Rev. St. 1894, § 1244 (Rev. St. 1881, § 1230). Other sections of the statute specify the causes for appointment of re-

ceivers. Cause for the appointment is one thing, and cause for appointment without notice is another and different thing. It is contended by the appellants that no cause is shown in the complaint for the appointment, independent of the question of notice, and it is also contended that no cause is shown in the verified complaint for the appointment without notice. In view of the fact that the complaint may be amended in any respect within the general scope and purpose of the action, and, so far as the appointment is concerned, it may be supplemented and enlarged by the presentation of affidavits, or the introduction of oral testimony, in support of the application, and all will be taken into consideration in determining the right to and necessity for such appointment, it necessarily results that a very liberal construction must be given to the complaint. It cannot be construed by any harsh and technical rule, in these respects, but it must state at least a cause for the appointment of a receiver; and, in case of an appointment without notice, it must appear either in the verified complaint, or by affidavit, that there was cause for such appointment without giving notice. Otherwise such an appointment is expressly forbidden by the statute quoted.

The material facts stated in the complaint as to the right to have a receiver appointed without notice are: That the Sullivan Electric Light & Power Company is a corporation organized under the laws of Indiana, with its principal office and place of business in the town of Sullivan, in Sullivan county, Ind. That it was incorporated under the statutes of this state providing for the formation of mining and manufacturing corporations, and its articles of incorporation provide that its business and prudential affairs shall be conducted by a board consisting of 10 directors, to be selected by the stockholders. That the capital stock of said corporation is \$5,000, divided into 600 shares of \$25 each, and over 300 shares, and less than 400 shares, thereof have been issued. That said company was incorporated in 1888. That the plaintiff is and has been the owner of 40 shares of said stock ever since June 30, 1890. That the defendants James T. Reid, Robert H. Crowder, and Claude H. Crowder are also stockholders of said corporation, and this suit is brought for the use and benefit of the plaintiff, and all the stockholders of said corporation not parties hereto. That the by-laws of the corporation provide that the directors shall elect one of their number president, and also elect a secretary and treasurer, and also provide, further, that the directors shall select an executive committee, consisting of three persons, and also provide for quarterly meetings of the directors, and that the executive committee, in the interim, shall have authority to act in cases of emergency, and that their acts shall be reported to the directors at the next ensuing meeting, and be subject to the approval and confirmation of the board of directors.

That said by-laws further provide that the executive committee shall select a superintendent to operate, and superintend the usual operation of, the affairs of said corporation. The object expressed in the articles of incorporation of said company is "the manufacture, supply, and sale of electric light and power." That about the time of the incorporation of said company a contract was procured for lighting the streets, alleys, and public places of the town of Sullivan, stipulating that said company was to furnish 25 arc lights to the town of Sullivan at the price of \$100 a year, aggregating \$2,500. That said contract expired about the month of October, 1893, which constituted the principal source of revenue for said company. That since the annual meeting of 1890 there has been no lawful meeting of the stockholders held, and no directors lawfully elected. That the executive committee have taken no action since that of the year 1890 which has been reported to the directors for confirmation, or confirmed by them. That the executive committee selected by the directors after the annual meeting in 1890 elected defendant James T. Reid superintendent for the next ensuing year. That, since his election and the expiration of his term of office, no superintendent has been elected, but said superintendent continued to act without authority of law, the sanction of the board of directors, or the executive committee, as provided by the by-laws, and has greatly exceeded all authority that he could have had as such superintendent, had he been properly elected, in expending large sums of money in no wise connected with the operation of said company's business. That about the time of the annual election of 1890, defendant James T. Reid became the owner of the majority of the stock of said company, and then formed a fraudulent design of so managing the affairs and business of said corporation, as to absorb, for his own use and benefit, all the emoluments and earnings of said company, and to deprive the plaintiff and other stockholders in said company of their right to participate in the earnings and profits of said corporation, and in pursuance of said fraudulent purpose and design, from thence until the month of December, 1893, fraudulently and wrongfully managed and conducted the affairs of said corporation in an unlawful, high-handed, and autocratic manner, solely for his own use and benefit, and in the manner hereinafter alleged; that is to say: The said James T. Reid, as such superintendent, issued large vouchers payable to himself, signed the checks himself for the same, procured the money thereon to be paid to himself. That he employed himself to do various things for the company, and allowed himself exorbitant pay therefor; hired and employed his own teams to work for the company at exorbitant prices, approved the bills for himself, and paid himself therefor; rented an office of himself, and paid himself therefor. That prior to the year 1890 said company took a lease of a building and water

privilege from said Reid for a term of years, at \$20 a month; he guarantying an ample supply of water, stipulating to pay all damages for failure thereof. And that said supply of water did fail, so that the company was unable to run its lights for a considerable length of time, to the damage of the company in the sum of \$500, which said Reid, as such superintendent, neglected and failed to collect from himself. That said lease has expired, and said company has no lease for such building and water privileges. That during the time defendant Reid has been so managing the affairs of said corporation said company has been since December, 1893, earning a large sum of money over and above its legitimate operating expenses, which plaintiff charges amounts to \$10,000, for which sum said Reid has failed to account. That said money has not been disbursed among the stockholders of said company, nor any proper or sufficient report of any kind made to the president or treasurer, secretary, or directors, nor to the stockholders, showing what disposition is made of this money. That said Reid has not kept the president, stockholders, or directors informed of the financial condition of the company. That he has allowed unnecessary salaries to be paid in excess of that allowed by the board of directors, without warrant or authority, the same having been paid to himself and his son Paul S. Reid. That since the year 1890 no ledger and journal accounts have been kept of the operations of said company, showing receipts and expenditures. That in the year 1893, about the time the contract to light the town of Sullivan expired, said town advertised for bids to light said town for a period of five years more. That said Reid failed and neglected to call a meeting of the directors or stockholders, or take any action with a view of securing the new contract to light said town for said company, but fraudulently, and in violation of the trust reposed in him, put in a bid for himself, and in his own individual name and behalf, to light said town. That, by reason of such neglect and violation of duty on part of said Reid, the contract for lighting said town was awarded to and secured by one James H. Clugage for a term of five years. That said Clugage executed a bond with William H. Crowder (who is a brother of defendant Robert H. Crowder, and an uncle of Claude H. Crowder) and Fred E. Basler as sureties, in the penal sum of \$5,000, conditioned for the faithful performance of said contract to light said town. That immediately thereafter said Reid sold one-half of his stock to defendant Robert H. Crowder, amounting to 144 shares. That it was then and there agreed between defendant Reid and Robert H. Crowder that they would vote their stock together, and continue to control the affairs of said corporation in the same manner that said Reid had previously been controlling the same. That said Reid made a pretended resignation as superintendent, and said defendant Claude H. Crowder, at the instance

of Robert H. Crowder, was attempted to be appointed as superintendent of said company; and said defendants at the same time attempted to have themselves, to wit, Robert H. Crowder, James T. Reid, and Claude H. Crowder, appointed as an executive committee, and are so assuming to act at this time, with said Claude H. Crowder assuming to act as superintendent. That after the letting of the contract aforesaid to said Clugage the defendants Reid, Crowder, and Crowder, conspiring to injure the other stockholders, and without authority of the stockholders, or any meeting of the board of directors, reduced the price of lights below the cost of running the same,—making a reduction of 40 per cent. below former prices,—in order to bankrupt the competing company represented by said Clugage. That said Clugage failed to carry out his said contract with said town, by which the sureties on the bond of said Clugage (William H. Crowder and Fred E. Basler) are liable to said town in damage. That said defendants James T. Reid and Robert H. Crowder, without authority from said corporation so to do, purchased the poles erected by said Clugage under his contract to light the town, paying or agreeing to pay \$1,750, and sold a number of poles, the property of the defendant corporation. And said defendants Crowders and Reid threatened to charge the purchase of said poles to the defendant corporation, the same being useless and unnecessary. Said defendants afterwards fraudulently and corruptly offered to vote their stock to carry out a contract for the sale of the said poles so bought as aforesaid, and the good will of the defendant corporation, for \$800, charging \$2,050 for the good will of the defendant, and fraudulently undertook and agreed to vote their stock so as that the defendant corporation should go out of business, and not be a competitor to any person who would buy said poles, and threatened to appropriate said \$2,050 to themselves individually. That defendants Crowder, Crowder, and Reid have agreed to indemnify the said William H. Crowder because of loss on the bond of Clugage. That said last-named defendants are taking no steps to bid for the contract to light said town, which is advertised to be let on the 12th day of July, 1894, for the unexpired term of the forfeited Clugage contract. And said defendants have conspired together not to bid, nor permit a bid to be made, therefor on behalf of said defendant corporation. That said defendants entered into a fraudulent agreement with each other, and fraudulently undertook to induce the said William H. Crowder not to furnish money to assist said Clugage to carry out his said contract with the said town, and they promised said William H. Crowder that they would indemnify him from loss and liability on his bond aforesaid. That by reason of their undertaking to indemnify the said William H. Crowder on his bond aforesaid, and by reason of their being in control, and fraudulently and corruptly managing the affairs, of the defendant corporation, it is in

great danger of becoming insolvent, and is prevented from becoming a bidder to light said town. And their interest in indemnifying said William H. Crowder on his bond has wholly disqualified them from directing the affairs of said defendant corporation in its interest, and to the interest of its stockholders; refusing, as they do, to take the advice or direction of the board of directors, or stockholders not parties hereto, or of the plaintiff, to the damage of said corporation in the sum of \$1,000. That on account of the grievances aforesaid an accounting is due from said James T. Reid to said corporation, and said defendants Reid, Crowder, and Crowder are liable for damages, and a receiver should be appointed to take charge of the affairs of the defendant corporation until an accounting can be had, and a judgment recovered against the said James T. Reid, Robert H. Crowder, and Claude H. Crowder for the amount due from James T. Reid, and for the damages due from them, and each of them, severally, to the said corporation. That said Crowders and Reid are neglecting to keep the property of said corporation in repair, notwithstanding its earnings were much more than sufficient so to do. That they are threatening and attempting to make deals in such a way as to take said corporation out of business, to the damage of the plaintiff. That an emergency exists for the immediate appointment of a receiver without notice, in this: that, if said defendants Reid and Crowders are notified of this application before the same can be granted, they will jeopardize the interests of said corporation, by seeking to consummate said indemnity to said William H. Crowder on his bond aforesaid, and will afterwards, by their majority of stock, attempt to vote the same as an obligation upon the defendant corporation; and they will so conceal their actions as to jeopardize the rights of said corporation as to cause irreparable damage to said corporation, and to produce utter insolvency of the same.

Where there is an appearance by the adverse party to an application for the appointment of a receiver, or where there has been notice of such application to such party, the complaint and affidavits may not contain or state facts enough to warrant or justify the appointment of a receiver, and yet the oral evidence adduced may have been sufficient to enlarge the cause stated on paper so as to entitle the applicant to the appointment applied for. Not so in case of an appointment without notice. There the statute quoted has wholesomely provided that cause for an appointment of a receiver without notice to the adverse party must be shown by affidavit. That implies that it must be in writing, and filed as the cause of such an appointment. Thus, the adverse party may know the exact facts upon which the judge acted in appointing a receiver in his absence, and wresting from him the control of his property without a hearing, or an opportunity for such hearing. Without such facts being spread upon the

record, an appeal to a higher court from such an interlocutory order allowed by another section of the same statute might prove to be fruitless and unavailing. So that we must look to the facts stated on paper at the time the application in this case was made, exclusively, to find the cause, if any there was, to justify the appointment without notice. It was said by this court in *Pressley v. Harrison*, 102 Ind. 19, 1 N. E. 188, speaking about the appointment of a receiver without notice, that "unless it is shown, on account of absence, or for some other cause, process cannot be served on the defendant, the application should not be entertained until after service and notice." To the same effect is *Railroad Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823. Here it is shown that the defendant corporation was located with its office and place of business in the town of Sullivan, where the action was begun. It therefore appears affirmatively that giving the defendant notice was but the work of a few moments. No facts are stated in the verified complaint, even if we treat it as an affidavit required by the statute, that irreparable or any other kind of damages would have resulted to the corporation by the giving of notice of the application. We need not and do not decide whether the complaint stated facts sufficient to constitute cause for the appointment of a receiver, had there been notice of the application to or an appearance by the adverse party. *Railroad Co. v. Dykeman*, supra. But we do hold that no sufficient cause is shown for an appointment without notice, and that the court erred in making such appointment without notice. The interlocutory order appointing a receiver is reversed, with directions to set aside said appointment.

(142 Ind. 419)

KIRBY et al. v. KIRBY.

(Supreme Court of Indiana. Oct. 31, 1895.)

JUDGMENT—COLLATERAL ATTACK.

Where, by fraud between the contestant of a will and the next friend appointed for infant devisees to defend the suit to set aside the will, the court is imposed on, and the will set aside, the devisees, in a subsequent suit by the contestant, as heir at law, to clear his title to the land, may, by cross complaint, seek to have set aside the decree setting aside the will, as such attack is direct.

Appeal from circuit court, Decatur county; J. K. Ewing, Judge.

Suit by Robert G. Kirby against Frank B. Kirby and others, by John B. Miller, guardian. There was a judgment for plaintiff, and defendants appeal. Reversed.

John D. Miller and John H. Parker, for appellants. Wm. A. Moore and Oscar G. Miller, for appellee.

HOWARD, C. J. An abstract of the pleadings as set out in appellants' brief, and as admitted to be correct by appellee, shows substantially that the action was by appellee

against appellants, his minor children, to quiet title to real estate. A guardian ad litem was appointed for appellants, and filed an answer, and also a cross complaint, to each of which a demurrer was sustained. This ruling is assigned as error. The facts stated in the answer and in the cross complaint are the same, and are briefly as follows: That Clay M. Kirby, who was the father of appellee and the grandfather of appellants, was during his lifetime the owner of the land in controversy, and by his last will devised the same to appellants; that after the death of said testator and the probate of his will the appellee and the other children of the decedent wrongfully conspired and confederated together to deprive the appellants of said land, and to distribute the same among themselves; that in pursuance of such conspiracy they caused to be filed in the court below, against the appellee and the appellants, and also the executor of the will, a complaint by the remaining children of the said Clay M. Kirby, to contest and set aside his said will, alleging that the same was unduly executed, and that it was procured by the undue influence of the appellee over the said testator; that on the call of said cause the executor of said will and the guardian ad litem for appellants each filed an answer in general denial, while the appellee suffered default, whereupon the cause was submitted to the court for trial, and judgment was entered setting aside the will; that said judgment and decree were wrongful, and were procured by fraudulent devices and artifices, whereby the court was imposed upon and deceived, and the meritorious defense which appellants had, but which, because of their extreme youth, they were prevented from presenting to the court, was concealed and hidden; that neither the executor nor the guardian ad litem made any preparation for an actual defense to said action; that no witnesses were subpoenaed for appellants; that, although the attorney who drew the will, and also one of the attesting witnesses, were in court at the time of the trial, and the other attesting witness was near at hand, all of whom, if called, would have given evidence to the due execution of the will, and that the same was not procured by undue influence, yet none of said witnesses were called to give any evidence; that the only witness examined was one of the plaintiffs, whose competency was doubtful, and who had not been present at the writing or execution of the will, and did not testify to any fact or circumstance occurring at the time of such execution, and was not cross-examined; that no evidence of any kind was introduced for the appellants, nor was any argument made to the court in their behalf; that no exception was taken to the finding or judgment, nor any motion made for a new trial; that soon after the rendition of the decree all said land, by deeds from the children and heirs of said testator, was conveyed to appellee, and the suit to quiet title was brought, to enable him to sell the same; that all indebted-

ness of said testator has been paid, and said executor discharged. Appellants are of the ages of four and six years, respectively. We are of opinion that the allegations thus made of fraud upon the minors in the procurement of the decree setting aside their grandfather's will in their favor should have been submitted to the court for trial upon the evidence. It seems clear, either that a fraud was practiced upon the court, or that the court was itself derelict in its duty. The rights of infants are peculiarly within the custody of courts, and the responsibility so placed by the law should not be lightly regarded. Too often, also, guardians ad litem look upon their duties to the minors for whom they answer as a mere formality. If the decree complained of was wrongful, as alleged, and this wrong was due to the fault of the court or its officers, it may be that the wrong is irreparable, being secure by the judgment from collateral attack. If, however, as alleged in the cross complaint, and as admitted by the demurrer, the court was imposed upon by appellee and the other children of Clay M. Kirby, and its decree thus procured by fraud upon the minor defendants, the attack here made would be direct, and not collateral, and should prevail. *Nealis v. Dicks*, 72 Ind. 374; *Earle v. Earle*, 91 Ind. 27; *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140; 2 Pom. Eq. Jur. § 919; *Bigelow, Fraud*, 172. See, also, *Grimes v. Grimes* (Ill. Sup.) 32 N. E. 847; *Kelsall v. Kelsall*, 2 Myne & K. 409; *Richmond v. Tayleur*, 1 P. Wms. 737; *Crain v. Parker*, 1 Ind. 374; *Richards v. Richards*, 17 Ind. 686. The judgment is reversed, with instructions to overrule the demurrer to the answer and to the cross complaint, and for further proceedings.

(142 Ind. 490)

STOTSENBURG v. FORDICE et al.

(Supreme Court of Indiana. Nov. 6, 1895.)

REHEARING.

Where, on the original hearing, it was urged that, on the entire evidence, credits for excessive payments of interest should not be allowed, a motion for rehearing on the ground that the evidence did not support an allowance of certain of the credits will be denied.

On motion for rehearing. Denied.

For former opinion, see 41 N. E. 313.

HACKNEY, J. On the original hearing, it was expressly conceded by appellant's learned counsel that interest had been paid upon the note sued on in excess of the contract rate for the period of 21 years. In the judgment of the circuit court there were allowed credits for such excessive payments for 13 years. Upon the propositions stated in the original opinion, the appellant insisted that all credits so allowed were erroneous. There was no effort to discriminate between credits, but all were treated as occupying the same status, and required to stand or fall

by the strength of the propositions so stated. Now appellant seeks a rehearing, insisting that we take up two or three of the many credits, and consider the evidence with reference to them separately, and hold that they were not supported. In other words, the existence of evidence admitting credits generally was denied upon the theories stated in the original opinion, and now it is insisted that particular credits were not authorized by the evidence, upon the same theories. We held against the abstract theories of the appellant, and found evidence supporting—not merely tending to support—credits generally, upon the question of a mistake in the making of excessive payments.

Upon the question now presented, the rule of practice is well established by this court that points not specifically made in the original briefs cannot be made on petition for a rehearing. See *Elliott*, App. Proc. § 557, and authorities cited. We decline, therefore, to again look into the evidence, and upon this question hold that appellant has waived the inquiry. Other questions are suggested by counsel, but as they were fully considered and decided on the original hearing, and adhering to the conclusions then reached, the petition is overruled.

(142 Ind. 440)

WEAVER et al. v. KENNEDY.

(Supreme Court of Indiana. Nov. 1, 1895.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

In a proceeding under Rev. St. 1894, § 399 (Rev. St. 1891, § 396), to set aside a default and decree, where it appears on appeal from an order denying the application that on the hearing a certain affidavit was read in evidence, which is not copied into the bill of exceptions, and in the place where it should be copied are the words "Here insert," the supreme court cannot consider errors assigned which require a review of the evidence.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Proceeding by Henry E. Weaver and others against Martin H. Kennedy to set aside a default and decree. From a judgment for defendant, plaintiffs appeal. Affirmed.

Jas. A. McNutt, for appellants. Geo. A. Knight, for appellee.

MONKS, J. This proceeding was brought by appellants under section 396, Rev. St. 1881 (section 399, Rev. St. 1894), to set aside a default and decree taken by appellee against appellants. The court below, after hearing the evidence, denied the application, and, over a motion for a new trial, rendered a judgment for costs against appellants. The only error assigned is the overruling of appellants' motion for a new trial. The motion for a new trial assigned two reasons: (1) That the decision of the court is not sustained by sufficient evidence; and (2) that the decision is contrary to law.

The error assigned requires a consideration

of the evidence. Appellee insists that this court cannot consider the evidence, for the reason that it affirmatively appears from the bill of exceptions that it does not contain all the evidence; citing *Ward v. Bateman*, 84 Ind. 110; *Miles v. Buchanan*, 36 Ind. 490; *Morrow v. State*, 48 Ind. 432; *Powers v. Evans*, 72 Ind. 23; *Johnson v. Wiley*, 74 Ind. 233; *Shimer v. University*, 87 Ind. 218; *Clay v. Clark*, 76 Ind. 161; *Collins v. Collins*, 100 Ind. 266; *Trust Co. v. Beville*, Id. 309; *Jennings v. Durham*, Id. 891; *French v. State*, 81 Ind. 151; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Seymour, etc., Co. v. Brodhecker*, 130 Ind., at page 391, 28 N. E. 185, and 30 N. E. 528. It is settled by the authorities cited by appellee that, if a bill of exceptions purports to contain all the evidence, yet, if it shows upon its face that it does not, this court will not consider the sufficiency of the evidence to sustain the verdict of the jury or finding of the court. The affidavit of appellee was read in evidence, but was not copied into the bill of exceptions, and in the place where it should have been copied are the words "Here insert." It follows, therefore, that this court cannot consider the error assigned, as the same depends for its proper determination upon the evidence. Judgment affirmed.

(144 Ind. 82)

ALEXANDER et al. v. JOHNSON.¹

(Supreme Court of Indiana. Nov. 1, 1895.)

**TAXPAYER—CONTRACT WITH PUBLIC OFFICER—
INJUNCTION—BEST EVIDENCE.**

1. One who owns property which has been entered for taxation, and on which he is liable to pay taxes as soon as they are collectible, is a taxpayer, so as to be entitled to bring a suit for injunction against the misappropriation of public moneys.

2. Injunction will lie to restrain a school board from executing a contract with one of its own members to furnish supplies after the board has passed a resolution to purchase from said member; and it is not necessary to wait until the contract is executed.

3. Injunction will lie to restrain a public officer from entering into a contract with himself individually to furnish supplies to a public institution, as a suit on his bond would not be an adequate remedy.

4. The record of the proceedings of a school board, signed by the secretary thereof, reciting a resolution to accept the bid of one of its own members to furnish supplies, is sufficient evidence of the contract.

Appeal from circuit court, Washington county; Samuel B. Voyles, Judge.

Suit by Nathaniel T. Johnson against William R. Alexander and others to enjoin defendants, as school trustees, from executing a certain contract. From a judgment granting the relief prayed for, defendants appeal. Affirmed.

Alspaugh & Lawler and Zaring & Hottel, for appellants. Elliott & Hostetter, for appellee.

HOWARD, C. J. From the special findings of facts by the court, it appears that, at the institution of this suit by appellee for an injunction against appellants, the appellee was a resident taxpayer of the town of Salem, in Washington county; and that the appellants were the school trustees of said town. It further appears that at a meeting of said school trustees held November 8, 1894, the board, after the transaction of its business, "adjourned until November 12, 1894, for the purpose of considering bids for furnishing coal for use in the schools of said town"; that the board met pursuant to adjournment, and received the bids for coal; that one bid was that of Johnson Bros., of which firm appellee was a member, in which bid said firm offered to furnish coal for \$3.65 per ton; another bid was by one L. W. Sinclair, for \$4 per ton; and a third was by William R. Alexander, one of the appellants, also for \$4 per ton; that two of the trustees, being a majority of the board, and one of them being Alexander himself, voted to accept Alexander's bid, and the contract was awarded to him; that said acts and facts were duly entered of record upon the minute book of said school board, and not rescinded. From the facts found, the court concluded that an injunction should issue, as prayed for, forbidding the school board from purchasing or paying for coal from Alexander while he is a member of the board. Judgment was entered accordingly.

Many reasons are urged against the rulings of the court, but they are purely technical, and we can find no merit whatever in the appeal. The contract, if entered into, would be void, as counsel admit, both as against public policy, and also as against the letter of the statute, which makes such a contract between an official and himself as an individual a felony. Rev. St. 1894, § 2136 (Rev. St. 1881, § 2049); *Wingate v. School Tp.*, 59 Ind. 520; *Case v. Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238. But, say counsel, the contract was not consummated; the findings do not show that the board was threatening to consummate it, or to pay any money on it to Alexander; the finding that appellee was a taxpayer is not supported by the evidence; and, even if the contract should be carried out, the taxpayers had a remedy at law by suing Alexander on his official bond. Appellee was the owner of property which had been entered for taxation, and he was liable to pay the taxes thereon as soon as taxes were collectible by law. He was a "taxpayer" in the sense in which the word is used in the statutes. That he had not yet resided long enough in the town to have actually paid taxes can make no difference. He was liable for taxes, and had a right to bring the suit for injunction against a misappropriation of the public moneys. That the board was threatening to pay out the public funds contrary to law, and that it was about to do so, sufficiently appear from

the facts found. All the steps had been taken for that purpose. It was not necessary to wait until the moment when the board should be in the act of handing out the money.

We do not think that a suit on the trustee's bond would have been an adequate remedy in this case. The law for the protection of the public funds would have been violated, and the funds themselves illegally diminished. There might be no recovery on the bond, even if judgment should be obtained. It is true, as said in *Watson v. Sutherland*, 5 Wall. 74, cited in *Thatcher v. Humble*, 67 Ind. 444, that, "if the remedy at law is sufficient, equity cannot give relief. But it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." See, also, *Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755; *Bishop v. Moorman*, 98 Ind. 4; *Harney v. Railroad Co.*, 32 Ind. 247; *Board v. Markle*, 48 Ind. 103.

It is urged that the record of the transactions of the board of school trustees in relation to the contract for coal was insufficient, inasmuch as it was merely signed by the secretary; and that it should not, therefore, have been admitted in evidence. That it was a record of the proceedings of the board is not denied. Whether it was sufficient for the purposes for which it was introduced in evidence was for the trial court to determine. In any event, appellants are in no position to deny its sufficiency. Appellee offered to prove the facts as to the proceedings of the board by the testimony of the secretary; but counsel for appellants objected, for the reason that the record was the best evidence. We think counsel were right in this, and that the record as introduced was sufficient.

Other alleged errors we do not think need be considered. The complaint was good, and the findings were sufficient, and were supported by the evidence. The judgment is affirmed.

(142 Ind. 442)

STUMPH et al. v. MILLER.

(Supreme Court of Indiana. Nov. 5, 1895.)

CANCELLATION OF DEED—MENTAL CAPACITY OF GRANTOR—PRESUMPTIONS—EVIDENCE—INSTRUCTIONS.

1. Where, in an action for cancellation of a deed procured from plaintiff when feeble in mind and body through old age, the complaint alleges that, for three years prior to the execution of the deed, plaintiff was mentally and physically weak, evidence of his mental condition six months prior to the date of the deed is admissible.

2. The improper admission of evidence is harmless where the fact sought to be shown thereby is clearly established by other competent evidence.

3. A grantor shown to be mentally weak prior to the date of a deed is presumed to be in the same condition at its date.

4. On an issue of the mental condition of a person, opinion evidence is admissible when the

facts on which the opinion is based are given, and such facts show that witness is acquainted with, has had opportunity to observe, and has observed, such person.

5. If a request for a special finding is not made before trial, the right thereto is waived.

6. Whether a special finding requested after the introduction of evidence shall be granted is a question within the discretion of the court.

7. A request for a special finding made 11 days after the trial has commenced, and when nearly all the evidence is in, comes too late.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by Elizabeth Miller against Carrie V. Stumph and husband for cancellation of a deed which defendants procured plaintiff, by undue influence and threats, to execute when in a feeble state of mind and body. From a judgment for plaintiff, defendants appeal. Affirmed.

James E. Franklin and Geo. W. Woods, for appellants. John M. Bailey, for appellee.

HOWARD, C. J. The appellee alleges in her complaint that the appellant Carrie V. Stumph is her daughter, and the appellant Henry Stumph her son-in-law; that, at the times of the transactions herein complained of, the appellee was extremely aged, being nearly 80 years old; that she is very illiterate, and for the three years previous to the filing of her complaint, covering also the time of the acts herein alleged, she was sick and afflicted, causing mental and physical weakness, which greatly enfeebled her will power and weakened her judgment and rendered her incapable of transacting business; that, by reason of her enfeebled mind and of her age and sickness, she was incapable of exercising her own judgment, and could easily be persuaded by the use of improper influences and promises and threats to do things greatly to her disadvantage; that the appellants, well knowing the said condition of appellee, and knowing the influence which they had over her by reason of their said relationship to her, did, for the purpose of cheating and defrauding her out of the real estate here in controversy, unduly influence, intimidate, threaten, coerce, and make false promises to her, by all of which they procured her to make a deed for said real estate to the appellant Carrie V. Stumph; that no consideration whatever was given for said deed, but a consideration of \$1,000 was inserted in the deed, whereas the real estate is of the value of \$2,000. In a second paragraph of complaint, appellee sets out the same facts as in the first paragraph, and states in addition that up to June, 1892, she was living on her said lot in the city of Indianapolis with another daughter and her husband, Charles Rose, under a contract with said Rose, when, by the persuasion of the appellants, she was induced to leave her place, and go to live with appellants; that, a short time after she went to live with them, appellants began their importunities, threats, and solicitations to induce her to

deed to them her property, threatening to drive her from their home if she did not do so; that the appellant Carrie V. Stumph at times would come to appellee in tears, and seemingly in great anguish, and plead and beg and persuade her to deed the property; that, so persuaded, threatened, and coerced, she did, in August, 1892, make the deed without consideration; that, after the deed was so made, the appellants treated appellee in a cruel and inhuman manner, confined her in a room, refused her sufficient food and water when she pleaded in tears for the same, compelled her to remain undressed day and night, and took her dress out of her room, so that she could not leave the house; that, after bearing this treatment as long as she could, she stole out of the house in her night clothes at 11 o'clock at night, and walked for hours upon the streets, until some person unknown to her returned her to the home of her other son-in-law, Charles Rose. Other acts of cruelty, fraud, and deception in the procurement of the deed are alleged, and the court is asked to set aside the deed, and appoint a commissioner to reconvey the property to appellee. There was an answer in general denial, and the cause was submitted to the court. On hearing the evidence, there was a finding for the appellee. The only assignment of error discussed by counsel is the overruling of the motion for a new trial.

The complaint alleged that appellee's mental and physical health was greatly impaired for three years before the bringing of the suit, which was for over two years previous to the date of making the deed. As bearing on the question of her health, Dr. W. H. Haines, a witness for the appellee, was asked whether he saw her in the winter or spring of 1892. This was objected to, for the reason that inquiry as to appellee's mental condition should be confined to about the date of the deed, August, 1, 1892. We can see no impropriety in the question as put. It was alleged that her mental and physical condition when the deed was made was due to extreme age and to sickness. The sickness, as alleged, extended far back of the winter and spring of 1892, and it was pertinent to inquire into her condition throughout the period during which her alleged debilitated condition was coming on, so that the court might better understand her condition at the time of the transaction complained of. Imbecility due to age and ill health is brought on by causes and conditions which may extend back for some time previous to the actual weakness of mind resulting from such causes. In any event, the admission of the evidence was harmless, inasmuch as the evidence so admitted but tended to show the enfeebled condition of appellee in body and mind, which condition was abundantly proved by other evidence given without objection by the same witness, and also by evidence given by Dr. Butterfield, a witness introduced by appellants themselves. The admis-

sion of improper evidence which only tends to prove a fact otherwise clearly shown by competent evidence is harmless error. *Board v. Hammond*, 83 Ind. 453; *Holliday v. Thomas*, 90 Ind. 398; *Bank v. Adams*, 91 Ind. 280. Moreover, if appellee was feeble-minded in the spring of 1892, it would be presumed, in the absence of evidence to the contrary, that this condition continued until the 1st of August thereafter, when the deed was made. In matters of evidence, as said in *Adams v. Slate*, 87 Ind. 573, "it is a fundamental doctrine that, when a fact is once shown to exist, the presumption is that it continues to exist, and this presumption stands good till the contrary is shown or a countervailing presumption is raised. *Tayl. Ev.* § 155; 1 *Greenl. Ev.* § 41; *Whart. Ev.* § 1284; *Burrill, Circ. Ev.* 528."

It is objected that two of the witnesses, John Furnas and Samuel Friesner, were permitted to give to the court their opinions as to the mental condition of the appellee. The facts upon which the opinions of the witnesses were based were also given. It has frequently been held that, when a witness gives the facts upon which he bases his opinion as to the condition of the mind or body of a person, the opinion itself may also be given, provided the facts show that he is acquainted with the person, has had opportunity to observe and has observed him. It may be that the witness is unable to place before the court all the facts upon which he bases his opinion; but if he shows acquaintance with the person and opportunity for observation, and that he has observed, that will be sufficient upon which to base an opinion. *Colee v. State*, 75 Ind. 511; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364.

Counsel next complain of the refusal of the court to make a special finding of the facts when requested by appellants. This request was made 11 days after the trial began, after the evidence had been substantially all heard, and just before the argument. We think the request came too late. The court should have had an opportunity to take notes of the evidence, so as to make an impartial and accurate finding. By listening attentively to all the evidence the court may be enabled to make a correct general finding; but, to make a special finding of the facts, it is necessary to note carefully the evidence as it is given. This the statute provides for. *Rev. St.* 1894, §§ 548, 560 (*Rev. St.* 1881, §§ 537, 551). In *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130, it was said: "We are of opinion that, if the request for a special finding is not made at the commencement of the trial, the right thereto is waived, and thereafter it becomes a question within the sound discretion of the court whether it will make a special finding or not." See, also, *Miller v. Lively*, 1 Ind. App. 6, 27 N. E. 437. While, therefore, by the aid of the stenographer's notes or otherwise, the court may make a special finding of

the facts, when requested at any time before the entry of judgment (*Thompson v. Insurance Co.*, 139 Ind. 325, 38 N. E. 796), yet the reasoning in the case of *Hartlep v. Cole*, supra, makes it clear that it must remain discretionary with the court whether such finding shall be made in case the request does not come before the introduction of the evidence.

It is finally argued that the judgment is not supported by the evidence. Not only do we think there is sufficient evidence to sustain the judgment, but we think the evidence abundantly shows a case of unusual wrongdoing and oppression against this helpless and partially demented woman, on the part of her daughter and the daughter's husband. The case is in many respects like that of *Ashmead v. Reynolds*, 134 Ind. 130, 33 N. E. 763, and is, we think, ruled by that case and the authorities there cited. The judgment is affirmed.

(142 Ind. 456)

WINDFALL MANUF'G CO. v. EMERY
et al.

(Supreme Court of Indiana. Nov. 5, 1895.)

ANNEXATION OF TERRITORY TO TOWN—REVIEW—DISCRETION—EVIDENCE.

1. The sufficiency of the reasons for the annexation of territory to a town, as set forth in the petition, is within the discretion of the authority passing on the petition; and the exercise of such discretion will not be controlled by the supreme court.

2. In proceedings to annex territory to a town, where a remonstrance is filed by a resident, any evidence is proper which tends to show the location of the town, its improvements and surroundings, its institutions and advantage as a trading point, the various kinds of industries carried on in the town and territory to be annexed, the business relations between the owners of the land in the territory to be annexed, and the mutual benefits between the remonstrant and the town.

Appeal from circuit court, Hamilton county; *R. R. Stephenson, Judge.*

Appeal by the Windfall Manufacturing Company from a judgment annexing certain territory to the town of Windfall. Affirmed.

Blackledge, Shirley & Moon, for appellant. W. O. Dean and W. H. Dean, for appellees.

MONKS, J. This was a proceeding for the annexation of certain territory to the town of Windfall, brought before the board of commissioners of Tipton county. Appellant appeared before the board, and filed a remonstrance. A trial was had, which resulted in a finding and judgment that said territory be annexed. Appellant appealed to the circuit court. The venue was changed to the Hamilton circuit court, where the cause was tried by a jury, a verdict returned against appellant, and, over a motion for a new trial, judgment was again rendered that said territory be annexed. The only error assigned is the overruling of appellant's motion for a new trial.

One of the causes assigned for a new trial questions the sufficiency of the evidence to sustain the verdict. It has been held by this court that, as the statute does not prescribe what reasons for annexation shall be set forth in the petition, that question is necessarily left to the sound discretion of the authority passing on the same. *Catterlin v. City of Frankfort*, 87 Ind. 45; *Elston v. Board*, 20 Ind. 272; *Chandler v. City of Kokomo*, 137 Ind. 295, 38 N. E. 847. The sufficiency of such reasons being within the sound discretion of the authority to which they are addressed, this court cannot review that discretion unless, possibly, it has been plainly abused. *Chandler v. City of Kokomo*, supra. The reasons set forth in the petition for annexation in this case have not been questioned in this court by an assignment of error. It is urged, however, by appellant, that in considering the evidence we should disregard certain of the reasons for annexation stated in the petition, because they are insufficient. If we could review the exercise of discretion as to the sufficiency of the reasons stated for annexation when it had been palpably abused,—a question we do not determine,—we would be compelled to adjudge that there was no such abuse in this case. On the contrary, the sufficiency of the reasons stated is sustained by this court. *Catterlin v. City of Frankfort*, supra; *Stitz v. City of Indianapolis*, 55 Ind. 515. The objections urged by appellant to the reasons stated for annexation could only be reached by a motion to make more specific. This being true, there is evidence which supports the verdict, and under the well-settled rule we cannot weigh the evidence.

The court below permitted a witness on behalf of appellees to testify over the objection of appellant that "he was appellant's bookkeeper from March, 1891, until the 1st of June, 1892, and that during that time he kept its books at a store in the town of Windfall; that the books of appellant were at the tile factory on the 1st of April, 1893; that appellant used the streets of the town for hauling and getting a large portion of their brick; that Gifford, a member of appellant company, was engaged in the agricultural implement business in the corporate limits of the town; that the town of Windfall bought and used over \$750 worth of brick and tile made by appellant; that there was a company organized for the purpose of building a canning factory on the territory to be annexed; a part of the material is bought, and on the ground, and they are at work at it now." J. H. Zaner, a witness for appellees, was allowed, over appellant's objection, to testify as to the number of children who attended the schools in the town where they resided, and the number residing in the town, the number residing in the territory sought to be annexed and elsewhere. It is assigned as a cause for a new trial that the court erred in admitting this evi-

dence. It was proper, under the issues in this case, to give evidence concerning the location of appellant's factory with reference to the corporate limits of the town; its size and capacity; where its office was kept,—whether in town or at the factory; whether the town was a market for any part of its product; and to what extent, if any, the appellant and its customers used the streets of the town in the delivery of its products and the transaction of its business; the number of hotels, banks, elevators, mills; the different kinds and amount of business carried on in the town or in the territory sought to be annexed; the number and kind, capacity and location, of manufacturing establishments, whether in operation or in process of construction; the number of children who attend the schools, the number who reside in town, and the number who reside in the territory to be annexed or elsewhere. Any evidence was proper which tended to show the location of the town, its improvements, advantages, and surroundings, its institutions, its advantage as a trading point, its railroad and gravel-road facilities, the various kinds of industries and business carried on in the town and territory to be annexed, the business relations between the owners of the land in the territory to be annexed, and the mutual benefits between the appellant and the town, and many other matters not necessary to mention. The testimony to which objection is made was given while the witnesses were testifying in regard to matters which the jury had the right to consider. The extent to which parties in the examination of witnesses may go into the details of each subject under investigation is largely in the discretion of the trial court, and we do not think such discretion was abused in this case. It follows that there was no error in admitting the evidence to which objection was made. Judgment affirmed.

(142 Ind. 367)

RAYMOND et al. v. WATHEN et al.

(Supreme Court of Indiana. Oct. 29, 1895.)

PLEADING—DEMURRER—AMENDMENTS—EQUITY—RESCISSON—MENTAL INCAPACITY.

1. Where the complaint in a suit to set aside a deed alleges in one paragraph, as ground therefor, both mental incapacity and undue influence, in the absence of a motion to require defendant to paragraph his complaint there is no available error in overruling a general demurrer if either one of the grounds is sufficiently set forth.

2. Where the complaint in an action to set aside a deed on the ground of the mental incapacity of the grantor alleges that the grantor at the time of the execution of the deed was an enfeebled man, 82 years of age, and died within a month afterwards, and shows that the alleged mental incapacity was due to his old age, it is not demurrable for failure to allege that he continued to be of unsound mind until his death, or that he disaffirmed the deed after he became of sound mind, as there is no presumption that time gives relief from unsoundness of mind caused by old age.

3. Rev. St. 1894, § 399 (Rev. St. 1881, § 390), giving the trial court discretion to allow an

amendment "at any time," authorizes the court to allow an amendment after verdict. *Heddens v. Younglove*, 46 Ind. 212, overruled.

4. In a suit to set aside a deed on the ground of mental incapacity, an instruction that if the grantor, at the time of the execution of the deed, did not possess that degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life, the deed should be set aside, is not erroneous.

Appeal from circuit court, Davless county; D. J. Hefron, Judge.

Action by Sarah B. Raymond and others against Mary J. Wathen and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

H. Burns and J. S. Pritchett, for appellants. Gardiner & Gardiner, for appellees.

JORDAN, J. Appellees, as the children and heirs of Eberhart H. Raymond, commenced this action to avoid and set aside a certain deed executed by said Eberhart H. to appellant Sarah B. Raymond, by which he conveyed to her real estate and personal property of the alleged value of \$5,000 in consideration of \$1 and love and affection. The validity of the deed in question is assailed by the complaint upon two grounds, to wit: (1) Mental incapacity of the grantor; (2) undue influence in procuring its execution.

The complaint, among other things, alleges that the deed was executed by the said Eberhart H. Raymond on the 23d day of April, 1894, and that he died on May 28, 1894, and at the date of its execution he was of unsound mind; that at said date he was 82 years of age, and at and prior thereto he was enfeebled by age and physical and mental decrepitude. Further facts are alleged, exposing the invalidity of the deed upon the ground of undue influence exercised over the grantor at the time of the conveyance. Appellants each separately, but unsuccessfully, demurred to the complaint as an entirety upon the ground of insufficiency of facts. Upon the issues joined between the parties by an answer in denial, a trial resulted in a jury returning a general verdict for the appellees, and also special findings upon three interrogatories submitted to them, to the effect that the deed in controversy was procured to be executed by the undue influence exercised over the grantor by all of the appellants, and at the time he executed the same he did not have sufficient mind and memory to understand the ordinary affairs of life, and have a general knowledge of his property. Over the separate motions of appellants for a new trial and in arrest of judgment, the court rendered its judgment setting aside the deed.

The first error urged upon us for consideration by appellants' learned counsel is that the complaint was not sufficient in facts to withstand a demurrer, and that, therefore, the court erred in overruling the same. As we have seen, the invalidity of the deed was based upon two grounds, set forth in a single paragraph, and treated as such by the parties, as

there was no motion to require plaintiffs to further paragraph their complaint. Therefore it is evident, we think, that each ground or specification must be viewed or treated in the character of a separate paragraph; and where the demurrer does not challenge each ground specifically, but all as an entirety, in the words, "that the complaint does not state facts sufficient," etc., then, and in that event, if any one of the grounds set forth is sufficiently stated to constitute a cause of action, there will be no available error in overruling the demurrer, upon the same principle that a joint demurrer to a pleading of several paragraphs of which one, at least, is good, must be overruled. *Mustard v. Hoppess*, 69 Ind. 324; *Hilton v. Mason*, 92 Ind. 157; *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664; *Jones v. Cullen* (at last term) 40 N. E. 124; *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258. We think that the complaint as formulated and treated by the parties herein comes within the rule laid down and approved by the above decisions.

It is insisted that the pleading does not state a cause of action upon the ground of insanity, for two reasons: (1) That there is an absence of facts showing that the grantor "continued to be of unsound mind until his death, or that he disaffirmed the deed after he became of sound mind"; (2) that it does not allege that the grantor, or the appellees, as his heirs, had disaffirmed the deed prior to the commencement of this action.

In support of their first objection the appellants cite *Hardenbrook v. Sherwood*, 72 Ind. 403, and *Railway Co. v. Herr*, 135 Ind. 591, 35 N. E. 556. Neither of these cases, we think, is applicable to the case at bar upon the first proposition, in view of the facts as they appear upon the face of the complaint. In the case first cited more than 18 months had elapsed after the insane ward had executed the replevin bond (he not being under guardianship at the time of its execution) before the filing of the complaint by his guardian, and as it did not directly or inferentially appear that the mental disability therein alleged continued, etc., this court held it insufficient. By the pleading now under consideration it is shown that the grantor was 82 years of age, enfeebled by age and physical and mental decrepitude, and that his death occurred in about one month after the execution of the deed. The mental condition of the grantor, as it is apparent from the facts in the complaint, was accompanied with, and probably due to, the infirmities and decrepitude of old age; and the inference or presumption under these facts must follow that his mental condition would not improve in the short limit of his life subsequent to the execution of the conveyance in controversy. The presumption as to the continuance of insanity, when once shown, is one of fact, varying with the particular case. 2 Whart. Ev. § 1253. The rule, however, does not apply to occasional or intermittent insanity, but it does in all cases, of whatever

nature, wherever the insanity is apparently confirmed. *Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167. In passing upon a question similar to the one here involved, in the case last cited, this court, on page 319 of the opinion, said: "The complaint before us presents a case of mental unsoundness, accompanied with, and probably resulting from, the infirmities and decrepitude of old age. There is no presumption, either of law or fact, that passing years give release from such impairment of reason." We think the complaint not subject to appellants' first objection.

As the complaint was originally drafted, there was an omission of the technical averment that the grantor, or the appellees, as his heirs, prior to the commencement of the action, had disaffirmed the deed. After the motion for a new trial was overruled, and pending the motion in arrest of judgment, appellees obtained leave of court, over appellants' objections, and amended the pleading in this respect, by inserting the necessary averment, in order, as appellees contend, to conform it to the proof. With the fact of disaffirmance appearing in the complaint by virtue of the amendment, it was cured of the infirmity urged against it, and no longer open to appellants' objection, and consequently no available error resulted from overruling the demurrer to the alleged cause of action based upon the ground of the grantor's insanity. The complaint being sufficient upon this basis, and the demurrer having assailed it as an entirety, the action of the court in overruling it was proper; and therefore, in order to uphold the pleading, we are not required to consider its sufficiency in regard to the charge of undue influence.

Appellants have assigned and urge as error the action of the court in permitting the amendment of the complaint after the verdict by inserting therein the omitted averment relative to the disaffirmance of the deed. The ruling of the court in allowing this amendment, and the matter inserted into the complaint thereby, are in the record by a bill of exceptions. Appellants' contention is that by this amendment an important and entirely new issue was presented, and that they were entitled to notice thereof before trial, in order that they might be prepared to meet it with proof. By section 399, Rev. St. 1894 (section 396, Rev. St. 1881), discretionary power is lodged in the trial court to allow a party "at any time" to amend his pleading by inserting any material allegation, etc., to conform the same to the facts proved, when the amendment does not substantially change the claim or defense. These words, "at any time," as embraced in this section, have a broad meaning; and this clause has been, and may in reason be, construed to permit the amendment in furtherance of justice to be made upon a proper showing after verdict, but before the final judgment. At common law the court had power, in the furtherance of justice, to allow amendments to be made

after verdict, until final judgment; and it is not reasonable to suppose that the Code intended to restrict this power. See 1 McKinney, Enc. Pl. & Prac. pp. 604, 605; *Boyd v. Smith* (Ind. App.) 39 N. E. 208; *Elllott, App. Proc.* § 607. The amendment did not substantially change the claim or issue in the case. It resulted in adding only to the complaint a material averment to conform it to the evidence. The record does not disclose that the appellants were in any way deceived by the amendment, or prejudiced in their rights thereby. No proof was made or offered by them tending to show that they were in any manner misled or prejudiced by this action of the court. Under such circumstances it is settled that the complaining party cannot be successfully heard in this court relative to the ruling in permitting the amendment. *Child v. Swain*, 69 Ind. 230, and cases there cited; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19. There is no available error in allowing the amendment in question. The broad rule laid down in the case of *Heddens v. Younglove*, 46 Ind. 212, to the effect that the court possesses no power to permit an amendment to be made after verdict, is not tenable, and that decision must be held to be overruled to that extent.

Appellants concede that under the rules by which this court is controlled there is no such error as would justify a reversal of the judgment for want of evidence, or for the reason that it is contrary to law. They, however, insist that certain instructions, relative to undue influence and fraud, were not applicable to the evidence upon this subject. In this counsel are mistaken, as there is evidence, both direct and circumstantial, tending to support this issue, to which these instructions were applicable. The fifth and sixth instructions are criticised for the reason, as claimed, they are not limited in their terms to the particular acts of fraud or undue influence set forth in the complaint. By the fifth instruction the court gave to the jury the law in general relative to undue influence, and what were sufficient acts under certain circumstances to avoid a deed. By the sixth the court instructed the jury as to how they should apply the law to the evidence in support of the alleged undue influence. Both of these instructions were proper and correct. By the tenth instruction the court informed the jury that if it was proved by a preponderance of the evidence that the grantor, at the time he executed the deed, did not possess that degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life, then the deed should be set aside. Appellants contend that this instruction did not state the correct test of unsoundness of mind. It has been recognized by the decisions of this court that where there is an essential privation of the reasoning faculties of the person in question, or an incapacity of understanding, and acting with discretion in the

ordinary affairs of life, he is, in that event, a person of unsound mind. And where it is shown that such mental incapacity existed at the time of the execution of the deed or contract controverted, it is sufficient to avoid the same. This seems to be the true test, and correct rule, adhered to by the decisions of this court. *Somers v. Pumphrey*, 24 Ind. 231; *Darnell v. Rowland*, 30 Ind. 342; *Clark, Cont.* § 141; *Ewell, Lead. Cas.*, footnote to page 558. The instruction complained of substantially stated a correct exposition of the law relative to the degree of insanity sufficient to set aside the deed in controversy.

The next proposition presented, arising out of the alleged error in overruling the motion for a new trial, is the court's refusal to submit to the jury interrogatories 3, 4, 5, and 6 requested by appellants. The first, second, and seventh interrogatories requested by them, relative to the execution of the deed having been procured by undue influence, and as to the persons who exercised said influence, and embodying the facts pertaining to the grantor's mental capacity, or one's equivalent thereto, were submitted to and answered by the jury. By the third interrogatory the jury was asked to specifically find "how much influence was exercised," and it is obvious, we think, that this was properly rejected. Had the fourth, fifth, and sixth been answered by the jury, they would have exerted no influence upon the final result or decision in the case, and for that reason alone there was no prejudicial error in the court's refusal to submit them. *Elllott, App. Proc.* § 651.

The court did not err in overruling the motion in arrest of judgment. We have not considered the question raised by appellees to the effect that the evidence is not in the record, but, in our consideration of the points involved dependent upon it, we have treated it as being properly before us. No error being disclosed by which the substantial rights of appellants were prejudiced, the judgment is affirmed.

(142 Ind. 422)

JORDAN v. STATE.

(Supreme Court of Indiana. Oct. 31, 1895.)

ARSON—INDIOTMENT—ALLEGATION OF OWNERSHIP
—WITNESS—HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.

1. An indictment for burning a certain "flouring, grist, and corn mill house" sufficiently alleges the burning of building.

2. An indictment for arson alleging the building burned as the house "of" a certain person sufficiently alleges that it was the property of such person.

3. The Civil Code (Rev. St. 1894, § 504 et seq.; Rev. St. 1881, § 496, et seq.) provides that husband and wife are incompetent to testify as to communications made to each other. The criminal procedure act (Rev. St. 1894, § 1865 et seq.; Rev. St. 1881, § 1796 et seq.) provides that the rules of evidence as prescribed in civil cases shall apply in criminal cases, except as further provided, and further provides that the "party injured by the offense committed" shall be a com-

petent witness. *Held*, in a prosecution for arson against the wife, the husband, as the party injured, being a part owner of the property burned, may testify against his wife as to communications between them.

Appeal from circuit court, Knox county; George W. Shaw, Judge.

Louise Jordan was convicted of arson, and appeals. Affirmed.

H. Burns and J. S. Pritchett, for appellant. Wm. A. Ketcham, Atty. Gen., Cullop & Kessinger, and John T. Goodman, for the State.

HACKNEY, J. By indictment, the appellant was charged with having "unlawfully, feloniously, willfully, and maliciously set fire to and burned a certain flouring, grist, and corn mill house, of Samuel A. Jordan, Aaron G. Jordan, and Winfield S. Lane," etc. A motion to quash the indictment was overruled, and, upon a trial by jury, the appellant was found guilty as charged. The only assigned errors of the trial court are in overruling the motion to quash the indictment and in overruling a motion for a new trial. It is contended that the indictment was insufficient in failing to charge the burning of a building, and in failing to charge that such building was the property of another. The statute defining the crime of arson provides that "whoever willfully and maliciously burns or attempts to burn any dwelling house or other building, * * * being the property of another, * * * is guilty of arson." Rev. St. 1894, § 2000 (Rev. St. 1881, § 1927). "Mill house" has no meaning not implying a building. By the ordinary use of the word "house," it is understood to mean a building; and when taken in connection with the words "flouring," "grist," "mill," etc., it is capable of but one meaning. This has been very clearly decided in a case similar to the present. See *Ford v. State*, 112 Ind. 373, 14 N. E. 241. The charge that it was the "mill house of Samuel A. Jordan," etc., sufficiently charged that such mill house was the property of those named. This exact question was decided against the views of the appellant in *Wolf v. State*, 53 Ind. 30. The two objections to the indictment thus stated could not have been passed upon in any other manner in view of the statutory provisions that "the words of an indictment * * * must be construed, in their usual acceptation, in common language" (Rev. St. 1894, § 1805; Rev. St. 1881, § 1736); and that an indictment is sufficient if "the offense charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case" (Rev. St. 1894, § 1824; Rev. St. 1881, § 1755).

The next question arising upon the motion for a new trial is the alleged error of the court in permitting Aaron G. Jordan, the husband of the appellant, to testify as a witness on behalf of the appellee that, prior to the burning of the mill, the appellant had declared to him her intention to burn the mill, and that after its destruction she had told him that she did

burn it. The objections made at the trial and repeated in this court are that such communications from the wife to the husband are privileged, and that he was therefore an incompetent witness as to such communications. By the Civil Code (Rev. St. 1894, §§ 504, 505; Rev. St. 1881, §§ 496, 497), all persons, except those specifically exempted, are made competent witnesses in civil actions. Of those specifically declared incompetent are "husband and wife, as to communications made to each other." By the criminal procedure act (Rev. St. 1894, §§ 1865-1867; Rev. St. 1881, §§ 1796-1798) it is provided that "the rules of evidence prescribed in civil cases and concerning the competency of witnesses shall govern in criminal cases, except as otherwise provided in this act." It is further provided that "the following persons shall be competent witnesses: * * * Second. The party injured by the offense committed." There can be little doubt, we think, that the effect of these various provisions is that, with reference to criminal procedure, the "husband and wife, as to communications made to each other," are incompetent witnesses, except that, if either is "the party injured by the offense committed," he or she is a competent witness. Such was the holding of this court in *Doolittle v. State*, 93 Ind. 272. Appellant's learned counsel concede that this is the effect of these provisions, but they seek to limit the application of the phrase "the party injured by the offense committed," so far as it includes husband and wife, to such injuries as result from the personal violence of either upon the other. This insistence is upon the theory that at common law the wife was competent to testify against her husband, and the husband against the wife, only in cases involving the personal safety or liberty of either; that the rule of the common law should be so sacredly upheld, in the interest of the marriage relation, that a legislative intention to abridge that rule must be clearly and explicitly stated before the courts will give it recognition. This intention, it is urged, is not apparent from the statutory provisions above quoted. This position was denied as early as the case of *Hutchason v. State*, 67 Ind. 449, where the wife was permitted to testify to the acts of the husband in the commission of the arson there charged. It was held that "the legislative intent was so apparent, and the language of the statute so explicit, that no room existed for construction, and that such intent was to make the wife competent as to everything excepting communications." In *Doolittle v. State*, supra, it was expressly held that the phrase "the party injured by the offense committed," together with the context, created an exception to the rule of incompetency as to "communications." So we find that the adjudged meaning of our statutes is to admit either the husband or the wife to testify in criminal prosecutions against the other when he or she is "the party injured by the offense committed," whether the evidence in-

volve communications or acts which are part of the *res gestæ*.

It is further claimed by appellant's counsel that the husband was not "the party injured by the offense committed," since the offense was in destroying property, and that, too, in which he was but an owner in common with others. To this proposition is cited *Bassett v. U. S.*, 137 U. S. 498, 11 Sup. Ct. 165, a case where the husband was prosecuted for bigamy; and it was held that, under the statute of Utah, the wife could not testify to the husband's confessions of guilt made to her, for the reason that while the offense was one of disloyalty to the marital relation, and a deep humiliation to the wife, it was, nevertheless, but a crime against the relation, and not against the wife. There the statute considered as excluding husband and wife as witnesses contained an exception as "to criminal action or proceeding for a crime committed by one against the other." This provision, however, was in the Civil Code, and, as will be observed, was negative in form. There the Criminal Code contained the following provision: Witnesses competent in civil actions are competent also in criminal proceedings, "except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to which one or both are parties." *Comp. Laws Utah 1888*, p. 743. It will thus be seen that the negative exception of the Civil Code was construed as granting no right to the wife to testify in a criminal prosecution against her husband when the Criminal Code expressly excluded her as such witness. So far, therefore, from constituting an authority in favor of appellant's contention, we think it has no bearing upon the question. Our statute very plainly makes the husband or wife a competent witness where he or she is "the party injured by the offense committed." The word "injured," as employed, must be construed in its plain, ordinary, and usual sense. *Rev. St. 1894*, § 240 (*Rev. St. 1881*, § 240). It is not to be limited to personal or physical injuries; but, in its plain, ordinary, and usual sense, it signifies the privation of a legal right; a wrong; a tort. *And. Law Dict.* "Injury" means, in general, any wrong or damage done to a man's person, rights, reputation, or goods." 11 *Am. & Eng. Enc. Law*, p. 1, note 1. In *People v. Howard*, 17 Cal. 63, one of the statutes in review provided that "the party or parties injured shall; in all cases, be competent witnesses"; and the court, speaking by Mr. Justice Field, said: "By 'injured party' is meant the person who is the immediate and direct sufferer from the offense committed." The husband was an injured party, and to hold that his competency must turn upon and be defeated by the fact that others were likewise injured by the arson would be unduly technical and narrow.

Objection is further made that the evidence did not support the verdict. In this, we think,

counsel are in error. There was evidence reasonably supporting the verdict in every material element of the charge. Finding no error in the judgment of the circuit court, the same is affirmed.

(142 Ind. 383)

BRADFORD v. FRANKFORT, ST. L. & T. R. CO. et al.

(Supreme Court of Indiana. Oct. 30, 1895.)

RAILROAD COMPANIES—CONSOLIDATION—ESTOPPEL.

Where a stockholder and the corporation which voluntarily became incorporated with another participated in all the necessary proceedings in such consolidation, and have permitted the *de facto* corporation so formed to control the corporate business and property, and third persons to purchase the mortgage bonds of the new company, and to acquire other rights and interests based on the existence of the *de facto* corporation, the fact that the stockholder, at a foreclosure sale under the mortgage bonds issued by the *de facto* company, notified purchasers that he would contest the consolidation, does not prevent the stockholder and the corporation from being estopped to attack such consolidation.

Petition for rehearing. Overruled.

For original opinion, see 40 N. E. 741.

HACKNEY, J. The appellee the Frankfort, St. Louis & Toledo Railroad Company has presented an earnest petition for a rehearing. The only question presented which did not receive full consideration on the original hearing is as to the effect of a notice given by Moses Bradford, at the time of the foreclosure sale mentioned in the original opinion, to the purchasers, to the general effect that he held paid-up stock in said company; that he had paid taxes voted in aid of the construction of said road; that the then existing consolidation of said company with the Toledo, Delphos & Burlington Railroad Company and the Toledo, Cincinnati & St. Louis Railroad Company was not legal; and that he would "contest the validity" of the alleged consolidation. The effect of this notice, it is insisted, was to preclude the purchasers, the subsequent consolidated companies, the mortgage bondholders, and the public from asserting the estoppel held by us in the original opinion to be effective against this petitioner. At most, this general notice could not affect the public interests, which are held of paramount importance. Nor are we advised of its effect upon subsequent investors by consolidation and by purchase of bonds, who are not claimed to have been advised of it. The weakness of the notice is not alone in its failure to advise of a single instance in which any of the original proceedings for and of consolidation were irregular or involved; but its further weakness is in the declaration of claimed rights, not of the petitioner, but of Bradford, whose own participancy in the acts of which he complained was then known, and has since been held to close his mouth to question their validity. As to the rights of the petitioner, and as to

those of Bradford, we can as well say, the notice gave no warning not contained in the corporation records, as disclosed by the allegations of the answers. We are not advised by the record, or by argument of counsel, that the Bradford notice put any one upon inquiry of matters not apparent upon the face of the proceedings of consolidation, and, conceding that the petitioner may avail herself of Bradford's notice, its effect was but to advise of those things set up in the answers, which we have held sufficient against the charge of invalidity. Above all, however, this notice could not excuse the petitioner against her six years of silence and inactivity, which have permitted public interests to attach, which public interests, as we held in the original opinion, forbid the present attack upon the new corporation by consolidation. This result was, we think, correctly reached, upon the theory that it was unimportant whether the organization of the board of directors, consisting of five members, was valid or not, and whether their call of the stockholders' meeting was regular or not. It is therefore unimportant to consider now the regularity of that board's proceeding, as insisted upon by the petitioner. The petition for a rehearing is overruled.

(142 Ind. 448)

PERRINE v. BARNARD et al.

(Supreme Court of Indiana. Nov. 5, 1895.)

SALE—VENDOR'S LIEN.

On suit to foreclose a vendor's lien, it appeared that plaintiff frequently sold lumber to defendant's vendor; that, when a sale was made, the plaintiff would set the lumber purchased apart in his own yard, where it would remain till, by agreement with the purchaser, the plaintiff hauled it to cars for shipment, receiving nothing for hauling, but two dollars per car for loading; that the sales were for cash; that the possession held by plaintiff was recognized by such purchaser as security for the price; that defendant, without plaintiff's knowledge, went to the yard, saw the lumber thus sold set apart, and purchased it from such purchaser. *Held*, that he took it subject to plaintiff's lien for the price.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Cyrus Barnard and another against Van B. Perrine for the balance due as the purchase price of lumber, and to foreclose a vendor's lien. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

T. E. Ellison, for appellant. M. E. Forkner and W. O. Barnard, for appellees.

JORDAN, J. Appellees, Cyrus Barnard and Ambrose Barnard, partners doing business under the firm name of "C. Barnard & Son," instituted this action for the recovery of money, and to enforce a seller's lien upon certain described lumber, which, as they alleged, was in their possession. In the first paragraph of their complaint, they state substantially that in May, 1893, they owned and operated a sawmill and lumber yard in the town of Greensboro, Henry county, Ind.;

that they had upon their yard a large amount of oak and other lumber; that prior to May, 1893, at divers times, they sold to one Herbert V. Root 300,000 feet of lumber, which, as it was agreed upon between the parties, should be paid for by Root when it was taken possession of by him; that such had at all times been the course and custom between them of dealing in their said business; that this lumber was measured and placed on sticks in plaintiff's yard, and left in their possession; that Root, during his life, paid the purchase price of said lumber, except \$315, which is unpaid; that plaintiffs have at all times been in possession of the lumber, and still hold the same as a security for the unpaid balance of the money; that Root has sold and assigned the lumber to the defendant, Perrine; and they demand judgment for the enforcement or foreclosure of their alleged lien. The second paragraph sets up that they agreed to sell Root the lumber in question; that it was measured and placed upon sticks in their yard, and left in their possession as a pledge and security for the purchase price, and that they still hold and have the possession thereof; that Root sold and assigned the lumber to Perrine, subject to their lien; and the death of the former is alleged, and they ask for a foreclosure of the lien. The third paragraph avers that they sold to Root at divers times over \$6,000 worth of lumber, as shown by a bill of particulars filed; that it was the uniform dealing and understanding between them and the former that he should, at his pleasure, measure and separate the several kinds of lumber, and place the same on sticks in their yard, and leave it there in their possession until he had paid for the same; that on May 20, 1893, in pursuance of said course of dealing, they sold to Root a specified number of feet of lumber, and also on August 1, 1893, they, in like manner, sold him a certain number of feet as therein mentioned. It is averred that the lumber was measured and piled upon sticks, and left in their yard, in their possession, until paid for, and that all of said lumber known as "Cooper oak" remains in their possession; that on the — day of August, 1893, there was due to the plaintiffs, upon the lumber sold, \$315, and it was therefore agreed between the plaintiffs and Root that this Cooper oak lumber shall remain in their possession and be held by them until the full payment of the purchase money, and that the same yet remains in their possession, and has not been delivered; that Perrine purchased the lumber from Root, who is now dead. Prayer for the enforcement of their lien, etc. There was an answer in denial, and also setting up affirmative facts in avoidance of plaintiffs' cause of action. A trial resulted in the court rendering a judgment in favor of appellees, foreclosing their lien.

The principal question presented for our

consideration by appellant's learned counsel, and in fact the only one argued by him, is that the finding and judgment of the trial court is contrary to law, and is not sustained by the evidence. We have read and examined the evidence, and find that it tends to establish substantially the following facts: That appellees, at and prior to the commencement of this action, were engaged in operating a sawmill and lumber yard in Henry county, Ind., as alleged in their complaint; that Root and appellant resided in Ft. Wayne, Ind., both of whom were engaged in the business of buying and selling lumber. For several years prior to this action, he (Root) had been in the habit of buying lumber of appellees. When he purchased lumber from them, it would be measured out, and they would place it on sticks in their mill yard, where it remained in their possession until they, under an agreement with Root, would haul it to the railroad, and place it in the cars to be shipped to points directed by him. The hauling of the lumber to the railroad by appellees was at their own expense, but they were paid two dollars per car extra by Root for placing the lumber in the car. At the beginning of the dealings between these parties, he paid cash for all lumber purchased by him. Subsequently, at times, he would give his note to appellees, with the agreement that they should discount it, and he would stand the discount in order to make it the same to appellees as a cash payment. There is also evidence showing that in February, 1893, appellant gave Root an order for 180,000 feet of Cooper oak lumber, to purchase the same anywhere he could, and, when it was turned over to appellant, the latter was to pay for it; and that the lumber in question appears or is claimed by appellant to be a part of that purchased by Root from appellees. Some few days prior to August 3, 1893, appellees were in need of money. Root came to see them, and informed them that he could not raise the money, and did not know when he could, but further said: "There is enough lumber here [meaning that purchased by him] to make you safe, but, if you people are not satisfied, I can send you ten thousand dollars security." The \$315, the amount in suit, was not embraced in any note or anything of that character, and was unpaid. Root died some time prior to the beginning of this action, leaving the balance of the purchase price, in suit, unpaid. Appellant frequently bought lumber of Root in this manner. He would give the latter an order for a bill of lumber, and Root was privileged to purchase the same from whomsoever he pleased. Appellant would advance money to him, and there was a running account between them, and when he purchased lumber of the latter, he would give him credit upon his account. At the time of the conversation between Root and appellees about the lumber being enough to se-

cure them, they had no knowledge that any of it had been sold by Root to appellant. Before appellant purchased the lumber in question, he visited the lumber yard of appellees, and saw the situation there; and at the time he purchased the same, as stated by him, he knew it was in the yard of appellees on sticks. Appellees did not know that appellant was claiming to have purchased the lumber from Root until after the latter's death, etc.

There is evidence to some extent tending to controvert the facts above stated, but the weight to be given to the evidence in the cause was a matter resting with the trial judge. Considering the material facts given above as established, the question arising is, do they, under the law, sustain the judgment of the lower court? The chief contentions of appellant's counsel are (1) that the lumber in question was actually delivered to Root when sold; (2) that the lumber was sold by appellees to Root on credit, and that in either event, under the law, no lien existed in favor of appellees. In order to reach a proper determination of the questions herein involved necessitates an examination of some of the principles of law pertaining to liens of the character of the one under consideration.

A seller of goods has a lien upon them for the purchase money unpaid so long as they remain in his possession, and this lien exists only when the property in the goods has passed to the buyer, as no man can have a lien upon his own goods. As the seller's right of lien depends upon actual or constructive possession, he cannot maintain it, generally speaking, after the property sold has come into the possession of the purchaser. The authorities sustain the proposition that there may be such constructive delivery of the goods or chattels as will suffice to pass the title, but will not destroy the lien. If the property sold be counted out and set apart for the purchaser, there is such a constructive delivery of the same as to vest the title thereto in the purchaser, and the property will be at his risk, but the seller will retain the right to refuse to deliver it without payment, provided the sale was not upon credit. In support of these several principles as above stated, see 1 Jones, Liens (2d Ed.) §§ 800, 806, 807; Story, Sales, §§ 281-283; Lawson, Rights, Rem. & Prac. p. 5061, § 3106; 21 Am. & Eng. Enc. Law, pp. 601-611, inclusive; Express Co. v. Stannard, 44 Mo. 71; Arnold v. Delano, 4 Cush. 33; Holderman v. Manier, 104 Ind. 118, 3 N. E. 811; Walls v. Long, 2 Ind. App. 202, 28 N. E. 101, and cases there cited. The lien, if it once exists, will continue in favor of the seller, as against a subpurchaser, if the former has in no way assented to or induced the resale of the property, so as to be estopped by the application of the rule that, where one of two innocent persons must suffer by the act of the third, he who has enabled such third person to occasion the loss must bear it himself. See Jones, Liens, §§ 841, 846, 847. Applying the

principles above stated to the evidence in the case at bar, and the conclusion follows that the judgment below must be upheld as being sustained thereby in accordance with the law. It appears from the summary of the evidence which we have set out that, when appellees sold lumber to Root, it would be measured and set apart upon sticks in their mill yard, and there it remained until they would haul it to the railroad station, and place it upon the cars for shipment; and the labor of hauling the lumber to the cars and putting the same aboard, as it appears under the arrangement between the parties, devolved upon them, and not upon Root, he paying them two dollars extra per car, not for hauling to the station, but for placing it in the car ready for shipment. The sales seem to have been made for cash, or that which was to appellees equivalent thereto. It is stated in evidence by appellees that the price of the lumber involved in this suit was not embraced in any note given by Root. This apparently eliminates the question of credit from the case. The fact that the lumber was in the possession of the appellees seems to have been recognized by Root, when he said to them, in the conversation to which we have referred, that "there is enough lumber here to make you people safe." The lumber in question was, at the time of the commencement of this action, still in piles upon sticks in appellees' mill yard, with the amount of the purchase price involved unpaid. We therefore think, and so hold, that, under the facts, appellees had such a possession of the lumber as to entitle them to their lien as against Root.

The question then arises, did it exist at the time they instituted this action as against the appellant, who claims to be a subpurchaser from Root for value paid? From the authorities of law herein cited, it appears that, where the seller has not assented to or induced the resale of the property, his lien is not destroyed, and such subpurchaser takes it subject thereto. It appears, as we have seen, that appellant was a wholesale dealer in lumber, and had what is termed a running deal or account with Root; that he would advance money to the former, and then, when he would give him an order for lumber and receive the same, he would give Root credit for it upon his account. Up to the death of the latter, appellant had advanced him, on a general account, some \$4,000 and over; and, as security for the same, he held an insurance policy for \$4,000 on Root's life; and at his death he was owing appellant a balance on account of money advanced him on lumber transactions, in the sum of about \$5,300. The appellant was not able to fully state upon his examination on the trial as to how he paid Root for the lumber in controversy,—whether by cash or by giving him a credit upon the account which he was owing him. Shortly before appellant gave Root an order for the purchase of lumber, as we have seen, he visited the mill yard of appellees, and saw the situation of the lumber;

and, when he purchased it from Root, he admits that he knew it was on sticks in the appellees' yards. It does not appear that appellees had any knowledge of the sale of the lumber to appellant, or induced him to buy the same. The first knowledge that they seem to have of appellant's claim to it was after the death of Root. Appellant states that he purchased of Root 180,000 feet of lumber. In other words, he gave an order for him to fill to that amount, and Root had the privilege to purchase from appellees or from other parties. In fact, it does not clearly and specifically appear what lumber appellant did purchase of Root, or that he had title to the particular lumber herein involved. The facts that appellant visited the yard of appellees before he purchased the lumber, and saw the situation of the same, and knew it was in their yard upon sticks, and at least apparently in their possession, we think, were sufficient to put him upon inquiry; and, had he made inquiry of them, we must presume that he would have ascertained that they had possession of the property, and were claiming a lien thereon for unpaid purchase money. Where one has received knowledge of such facts as should put him on inquiry, the law enjoins upon him the duty to do so with diligence and in good faith. In any view of the case as it is disclosed by the evidence, we think that it is manifest that appellees retained their lien, and the trial court was warranted in rendering judgment in their favor. Judgment affirmed.

(142 Ind. 397)

STEELE v. EMPSON.

(Supreme Court of Indiana. Oct. 30, 1895.)

DRAINAGE—CONDEMNATION PROCEEDINGS—AMENDMENT OF STATUTE—OBJECTIONS TO REPORT—APPEAL—REVIEW.

1. Rev. St. 1894, § 5656, 5662, 5663 (Act 1893, p. 329), amending Rev. St. 1881, §§ 4286, 4292, 4293, providing that benefits to public highways from drainage shall be assessed to the township, and paid out of the road fund, instead of assessed to the county, and that notice should be given by publication, instead of posting, without any saving clause, did not affect the jurisdiction of the commissioners in pending cases, but merely changed the mode of proceeding therein.

2. An objection to the report of a board of viewers for a public drain, that one of the board was also a surety on the bond of the petitioner, is waived by failure to make such objection to the report before the board of commissioners.

3. Objections to a report of a board of viewers for a public drain not affecting the jurisdiction of the commissioners cannot be urged for the first time in the circuit court.

4. A statement by the court that evidence would not be admitted under certain grounds of remonstrance against the acceptance of a report of a board of viewers is not subject to exception.

5. Where grounds of remonstrance urged against the acceptance of the report of a board of viewers are covered by previous questions already determined in the cause, which are not triable by jury, or are included in other grounds of remonstrance, the exclusion of evidence to support them, if error, is harmless.

6. Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), provides for appeals from orders of the

board of commissioners determining that a drain will be conducive to the public welfare, that the route thereof is practicable, that assessments made for the construction are in proportion to the benefits to be derived, and allowing damages. *Held* that, where a verdict specially found that a ditch would be for the benefit of the public, that the route was practicable, that the assessments were in proportion to the benefits derived, and found generally with the commissioners for the construction of the ditch as specified in the report of viewers, a venire de novo was properly refused.

7. Where one appealing from the report of a board of viewers under Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), which provides four grounds of appeal, succeeds only on one ground, she is entitled to judgment only for one-quarter of her costs.

8. The fact that property has already been appropriated for one public use is no objection to the appropriation, on a proper proceeding, for another public use not inconsistent with the former.

9. The objection that property taken for the construction of a public ditch under the drainage act has already been appropriated for a railroad can only be urged by the railroad company.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Petition by Azariah Empson against Beldora Steele and others for construction of a drain. From a judgment affirming the order of the board of commissioners establishing the drain, defendant Beldora Steele appeals. Affirmed.

Burrell & Branaman, for appellant. Applewhite & Applewhite and W. K. Marshall, for appellee.

MONKS, J. On the 14th day of December, 1892, appellee filed his petition before the board of commissioners of Jackson county, praying for the establishment of a drain, under the provisions of the act approved April 21, 1881 (Acts 1881, p. 410; Rev. St. 1881, §§ 4285-4317; Rev. St. 1894, §§ 5655-5688). Viewers were appointed by the board on the same day, to report before the next term. At the March term, 1893, of the board, the viewers not having filed any report, the case was continued until the next term. Sections 2, 8, and 9 (being sections 4286, 4292, and 4293, Rev. St. 1881), of the drainage act, under which this proceeding was brought, were amended by an act which took effect March 4, 1893 (Acts 1893, p. 329; Rev. St. 1894, §§ 5656, 5662, 5663). By the amended sections it was provided that the benefits to public highways should be assessed to the township and paid out of the road fund, while the original section provided the benefits should be assessed to the county. The amendatory section provided that the notice given should be by publication, while the section amended provided that it should be by posting. On April 8, 1893, the viewers filed their report, and at the June term of the board appellant filed a motion to continue the cause, for the reason that proper notice had not been given to the owners of the land assessed for benefits, which motion the board sustained, and continued the case for publication of the notice as the law

now requires." At the next term of the board, in September, proof of publication of notice in a newspaper was made, and thereupon appellant filed her remonstrance, and reviewers were appointed, who reported at the December term, 1893, approving the action of the viewers in all things, and the board entered an order establishing the ditch. Appellant appealed to the circuit court, and there filed a plea in abatement in which it was alleged "that the court had no jurisdiction, for the reason that this proceeding was commenced under the old law, and since that the statute has been amended by the legislature of 1893, changing the liability of certain parties to the assessment, and there is no provision saving pending cases." A demurrer for want of facts was sustained to this plea. Appellant then orally moved the court to strike out the report of the viewers, for the reason, stated by appellant, "that Morris B. Singer, after his appointment as such viewer by the board, and before the report was filed, became one of the sureties on the bond of the petitioner for the payment of the costs and expenses in said proceeding, and thereby became interested, and not competent to act as viewer," which motion the court overruled. Thereupon appellant filed his written motion to dismiss the cause. This motion was also overruled. The cause was tried by a jury, a verdict returned, and, over a motion for a venire de novo, and a motion for a new trial, judgment was rendered establishing the proposed work. Appellant also moved the court to modify the judgment, which was overruled. Exceptions were properly reserved to all the rulings of the court.

The first error assigned is "that the court erred in sustaining the demurrer to the answer in abatement." Appellant contends that, when the act of 1893 (Acts 1893, p. 329; Rev. St. 1894, §§ 5656, 5662, 5663; Rev. St. 1881, §§ 4286, 4292, 4293) took effect, the jurisdiction of the board of commissioners was ousted, for the reason that said act contained no provision saving pending cases, and that therefore the court erred in sustaining the demurrer to the plea in abatement. The act of 1893, *supra*, did not oust the jurisdiction of the board of commissioners over said cause, but the same, from the time said act took effect, was governed by its provisions, and it was necessary that all steps taken and proceedings had after that time should comply with the requirements of said act. The report of the viewers was filed April 8th, after said act was in force, and should have conformed to all the requirements thereof. At the June term of the board of commissioners, on motion of appellant, the case was continued, that notice might be given as required by said act. At the September term of the board proof was made, and the board found that notice had been given as required by said act, and thereupon appellant filed her remonstrance.

It is not shown that any provision of the amendatory act was not complied with. There was no error in sustaining said demurrer.

The second error assigned is that the court erred in overruling appellant's motion to reject and strike out the report of the viewers. The reasons assigned for the motion have been heretofore stated. At the time the viewers were appointed Singer was not on the bond named, and it is not claimed that he was not then a disinterested person. The report was filed April 8th, and on the same day the bond was filed. This court cannot say, from the record, which was filed first, or that the bond was not signed and filed after the report was signed and filed. No motion was made by appellant to reject or strike out the report before the board of commissioners for this cause. The objection, therefore, if tenable when properly raised, was waived. It is a well-settled rule that questions not properly presented to the board of commissioners, except such as go to jurisdiction over the subject-matter, cannot be made for the first time in the circuit court. *Budd v. Reidelbach*, 128 Ind. 145, and cases cited on page 147, 27 N. E. 349; *Metty v. Marsh*, 124 Ind. 18, and cases cited on page 24, 23 N. E. 702. The motion was properly overruled.

The third error assigned calls in question the action of the court in refusing to sustain appellant's motion to dismiss the cause. This motion sets out six reasons why said motion should be sustained. None of them are jurisdictional, but, if true, are mere irregularities, which would not affect the jurisdiction of the court over the subject-matter. *Updegraff v. Palmer*, 107 Ind. 181, and cases cited on page 185, 6 N. E. 353. Besides, no such motion was made before the board of commissioners, and the same could not, therefore, be made in the circuit court. *Budd v. Reidelbach*, and authorities cited, *supra*. There was no error in overruling this motion.

The fourth error assigned is "that the court erred in indicating, on appellant's remonstrance, at the suggestion of appellee, on which items therein he would permit appellant to give evidence to the jury." It is set forth, in the bill of exceptions, "that, after the jury had been sworn, and before any evidence had been given, appellee moved the court to indicate what items of the remonstrance evidence would be submitted to the jury upon, and to the motion of appellee, appellant objected, and over the objections of appellant the court indicated and said he would not permit evidence to be introduced to the jury to support items numbered 2, 3, 4, 5, 10, 11, 12, 13, and 14, to which appellant excepted." No question is presented by this assignment of error. The items of the remonstrance were not stricken out. They remained a part of the remonstrance, after the statement of the court, the same as before. The statement of the court

that evidence would not be admitted under the items named was not a ruling to which an available exception could be taken. It amounted to no more than an announcement in advance of what his ruling would be if such evidence were offered. None was offered. The question could only be presented by an offer to prove facts in support of said items. If such evidence had been excluded by the court when properly offered, an exception could then be taken to the ruling of the court, and not before. We have carefully examined said items, however, and think it would have been proper to have excluded such evidence if it had been offered. Said items either presented questions already determined by the court, and not triable by jury, or were causes of remonstrance which were more fully stated in other items than those named. The error, therefore, if any was committed, was harmless. For the same reason it would not have been error if the court had stricken out said items on motion.

After the return of the verdict, appellant filed a motion for a venire de novo, which was overruled by the court. The verdict of the jury is as follows: "We, the jury, find that the ditch in controversy will be conducive of public health, convenience, and welfare, and that the proposed route in the viewers' report will be practicable, and that the assessments set out in said report are in proportion to the benefits to be derived from said ditch, except that the assessment against Mrs. Steele's land is in excess of the benefits to be derived by her in the sum of \$20, and we assess her damages in that sum, and in all respects, except the assessment of that amount of damages in her favor, we find generally in favor of Azariah Empson, and in favor of the construction of the ditch as specified in the report of viewers on file in this cause. Leroy M. Mains, Foreman." An appeal lies from the orders of the board of commissioners as provided by section 4301, Rev. St. 1881 (section 5671, Rev. St. 1894), only in regard to the following questions: "First. Whether said ditch will be conducive to the public health, convenience or welfare. Second. Whether the route thereof is practicable. Third. Whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom. Fourth. The amount of damages allowed to any person or persons or corporation." The verdict finds specially upon each of the four questions stated, the only ones submitted to the jury. *Denton v. Thompson*, 136 Ind. 448, 457, 459, 35 N. E. 264; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033. While the verdict might have been more definite and certain in regard to the question of appellant's benefits and damages, yet it is easily understood. The rule is that a verdict is not bad for informality if the court can understand it. It is to have a reasonable intentment, and is to receive a reasonable construction, and must not be avoided except from necessity. *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Daniels*

v. McGinnis, 97 Ind. 549; Chambers v. Butchers, 82 Ind. 508. There was no error in overruling the motion for a venire de novo. Denton v. Thompson, 186 Ind., on page 459, 35 N. E. 284; Budd v. Reidelbach, supra.

After the court overruled the motion for a venire de novo, appellant filed a motion "for judgment, on the verdict, discharging her property from the lien of the assessment for benefits as made by the viewers, and for damages in the sum of \$20, and for her costs." This motion the court overruled. It is clear from the verdict that the \$130 benefits assessed by the viewers was to stand and be paid by appellant, and that she was allowed \$20 damages. It follows that the appellant was not entitled to the judgment she asks the court, by her motion, to render. Judgment was rendered on the verdict, establishing "the proposed work," etc., "and that appellant be allowed \$20, and that appellee recover of appellant three-fourths of his costs, and that appellant recover of appellee one-fourth of her costs, and that the viewers shall meet and apportion the payment of the \$20, as provided by section 4300, Rev. St. 1881 (section 5670, Rev. St. 1894), and the amendments thereto." Appellant moved to modify the judgment, so that she recover her costs, instead of one-fourth thereof. Appellant had only succeeded as to one issue,—that of damages,—while all the other issues were found against her. She was not, therefore, entitled to recover all her costs. Rogers v. Venis, 137 Ind. 221, 225, 36 N. E. 841; Zigler v. Menges, 121 Ind. 99, and cases cited on page 108, 22 N. E. 782; Watkins v. Pickering, 92 Ind. 332, 335.

One of the causes specified for a new trial is that the verdict is not sustained by the evidence. Although there is some conflict in the evidence, there is evidence which supports the verdict on every issue in the case, and, under the firmly-settled rule, this court cannot reverse a case on the weight of the evidence. Lawrence v. Van Buskirk (Ind. Sup.) 40 N. E. 54.

It is earnestly insisted by appellant that there was no proof that the notice required by section 3, p. 331, Acts 1893 (section 5663, Rev. St. 1894; Section 4293, Rev. St. 1881), was ever given, and that, therefore, the verdict was not sustained by the evidence. The question of notice was not to be determined by the jury, but by the court. The board of commissioners found that proper notice had been given. No party to this proceeding, either before the board or in the circuit court, whether they remonstrated or not, can question the jurisdiction of the board or the circuit court. Appellant cannot question the jurisdiction, because she waived the defects in the notice, if any, by filing her remonstrance. The other parties cannot, for the reason that, as there was some notice, the finding of the board of commissioners that notice was given, and the judgment of the circuit court in the case, are conclusive in a collateral attack. Perkins v.

Hayward, 132 Ind. 95, 103, and cases cited on page 104, 31 N. E. 670; Muncey v. Joest, 74 Ind. 409.

It is claimed by appellant that the ditch is partly located on the right of way of the O. & M. R. W. Co., and that such location is not authorized, for the reason that property once taken and appropriated to one public use cannot again be appropriated to another public use, citing City of Valparaiso v. Chicago & G. T. Ry. Co., 123 Ind. 467, 24 N. E. 249. The rule urged by appellant only applies when the second public use would naturally injure or destroy the uses for which such right of way was employed, and when the same could not exist without impairing the first uses. Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490, and cases cited on page 492, 38 N. E. 167. It is not claimed, nor does the evidence show, that the location of the drain upon the right of way would in any way interfere with the uses of the railroad company. On the contrary, it was found by the viewers, reviewers, and jury, and adjudged by the lower court, that the same would be a benefit to said right of way. The railroad company named was a party to the proceeding, and assessed with benefits, and raised no objection to such location or assessment. If it were conceded that such objection could be successfully made by the railroad company, it does not follow that appellant can do so. The rule is that appellant can only bring before the court such questions as affect her rights, not such as affect the rights of others. Zigler v. Menges, 121 Ind., on page 108, 22 N. E. 782. The railroad company, having been a party to the proceedings, and having raised no objection to the same, cannot successfully assail such location of the ditch, even if erroneously made. Perkins v. Hayward, supra. What we have said concerning the proof of notice and the location of the ditch on the right of way of the railroad company disposes of the question presented by the court's refusal to give the instructions requested by appellant. There is no available error in the record. Judgment affirmed.

(148 Ind. 353)

DE HART v. BOARD OF COM'RS OF JOHNSON COUNTY.¹

(Supreme Court of Indiana. Nov. 1, 1895.)

BILL OF EXCEPTIONS—TRANSCRIPT OF EVIDENCE—INCORPORATION IN RECORD—BURDEN OF PROOF—INSTRUCTIONS.

1. The filing of a bill of exceptions, as required by Rev. St. 1894, § 641 (Rev. St. 1881, § 629), is essential to its consideration on appeal.

2. It must affirmatively appear that the manuscript of the evidence was filed in the clerk's office, as required by Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410), before it will be considered on appeal.

3. A so-called bill of exceptions, attached to the transcript after the clerk's certificate, and after the assignment of errors, and not certified to be a bill of exceptions by the clerk of the trial court, is not entitled to be considered as part of the record.

¹ Rehearing denied.

4. An instruction that plaintiff must "prove all the material facts in the complaint by a preponderance of the evidence" was not improper.

5. When the evidence is not in the record, instructions given by the court cannot be regarded as erroneous, if they are correct upon any state of facts admissible under the issues.

Appeal from circuit court, Bartholomew county; Francis T. Hord, Judge.

Action by Margaret De Hart against the board of commissioners of Johnson county, to recover damages for personal injuries. Defendant had judgment, and plaintiff appeals. Affirmed.

M. L. Herbert and Hacker & Remy, for appellant. T. W. Woollen, for appellee.

McCABE, J. The appellant sued the appellee in the Johnson circuit court to recover damages for personal injuries alleged to have been received by her, the proximate cause for which, she alleged, was the negligence of the appellee in leaving unguarded, by railing, an approach to a county bridge in said Johnson county. The venue of the cause was changed to the Bartholomew circuit court, where a trial of the issues joined resulted in a verdict and judgment for the defendant, over plaintiff's motion for a new trial.

The only question presented by the assignment of error arises out of the action of the trial court in overruling the plaintiff's motion for a new trial. The errors complained of in the motion for a new trial are the giving, and refusal of the court to give, certain instructions, the admission of certain evidence, and that the verdict was contrary to law and the evidence. To determine most of the questions thus raised it is essential that we have the evidence before us. There is attached to the transcript what purports to be a bill of exceptions, properly signed by the trial judge, incorporating into said bill what purports to be the original longhand manuscript of the evidence. But there are several reasons why it is not, and cannot be, considered a part of the record:

1. There is no statement anywhere in the transcript that the bill of exceptions was ever filed in the clerk's office. This is required to be done before it can become a part of the record. Rev. St. 1894, § 641 (Rev. St. 1881, § 629); *Shulze v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Loy v. Loy*, 90 Ind. 404; *Steward v. State*, 113 Ind. 505, 16 N. E. 186; *Downey v. Head*, 138 Ind. 503, 38 N. E. 169; *Commissioners v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Guilr v. Gillett*, 124 Ind. 501, 24 N. E. 1036; *Shewalter v. Bergman*, 132 Ind. 556, 27 N. E. 159; *Railroad Co. v. O'Brien* (at this term) 41 N. E. 528.

2. There is nothing to show that the longhand manuscript was ever filed in the clerk's office before it was incorporated in the bill of exceptions. This the statute requires to be done. Rev. St. 1894, § 1470 (Rev. St.

1881, § 1410). This statutory requirement has an important significance, because the same section authorizes and requires the clerk, when it has been so filed, "to certify the said original manuscript of evidence when the same shall have been incorporated in a bill of exceptions, to the supreme court or other court of appeal, instead of a transcript thereof." It is a general principle of law that public records must be identified and authenticated by the keeper and legal custodian thereof. *Painter v. Hall*, 75 Ind. 208; 20 Am. & Eng. Enc. Law, 514, 515, and authorities there cited. Unless the longhand manuscript has been filed in the cause with the clerk before it is incorporated in the bill of exceptions, he cannot certify the original thereof to this court, and identify and authenticate it, as the statute cited requires, because he has not been made the legal keeper or custodian of the original longhand manuscript, as such, but has been made the custodian of the bill of exceptions incorporating it; and the original of that document the statute, as a general thing, does not authorize him to certify to this court.

3. And what purports to be the bill of exceptions in the case before us is not incorporated into the transcript, but is attached to the transcript after the clerk's certificate, and after the assignment of errors, nor is it certified to be, nor identified as, the bill of exceptions by the clerk of the trial court. Any one of these reasons is sufficient to prevent it being considered as a part of the record. The evidence not being in the record, we must presume that the instructions asked were refused because they were not applicable to the case made by the evidence. *Jenkins v. Wilson*, 140 Ind. 544, 40 N. E. 39; and authorities there cited; *Holland v. State*, 131 Ind. 568, 31 N. E. 359; *State v. Beackmo*, 8 Blackf. 246; *Ruffing v. Tilton*, 12 Ind. 259; *Railroad Co. v. Cox*, 37 Ind. 325; *Blizzard v. Bross*, 56 Ind. 74; *Stout v. Turner*, 102 Ind. 418, 26 N. E. 85; *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627.

The court gave 23 instructions, to the giving of 22 of which exception was taken. The first one told the jury: "It devolves on the plaintiff to prove all the material facts in the complaint by a preponderance of the evidence, and if she fails to do so you should find for the defendant." In support of the objection to this instruction we are cited to *Long v. Doxey*, 50 Ind. 335. The instruction there condemned told the jury, in effect, that they must find for the defendant if the plaintiff had failed to establish all the facts alleged in the complaint. That is a very different thing from requiring the plaintiff to prove all the material facts alleged in the complaint. In *Lime Co. v. Griffin*, 139 Ind., at page 147, 38 N. E., at page 411, speaking of a similar objection to an instruction, this court said: "Other charges, stating the theory of the action, the burden

of proof, and the requirement that less than all the facts pleaded by the plaintiff would not support a recovery were given, when considered in connection with that to which exception is taken, presented the question fairly that upon the whole case a preponderance of the evidence must be found in favor of the material facts of the complaint before a verdict for the plaintiff could stand." That decision is exactly applicable to and decisive of the objection to the instruction now before us. We have examined all the other instructions objected to, and find that many of them in the abstract are fully as favorable to the appellant, if not more so, than she had a right to demand. When the evidence is not in the record, instructions given by the court cannot be regarded as erroneous if they can be considered correct upon any state of facts admissible under the issues. *Hilker v. Kelley*, 130 Ind. 356, 30 N. E. 304; *Joseph v. Mather*, 110 Ind. 114, 10 N. E. 78; *Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Rapp v. Kester*, 125 Ind. 79, 25 N. E. 141, and cases cited in each; *Abrams v. Smith*, 8 Blackf. 95; *Murray v. Fry*, 6 Ind. 371; *Ruffing v. Tilton*, 12 Ind. 259; *List v. Kortepeler*, 26 Ind. 27; *State v. Frazier*, 28 Ind. 196; *Railway Co. v. Powell*, 40 Ind. 37; *Keating v. State*, 44 Ind. 449; *Insurance Co. v. Johnson*, 46 Ind. 315; *Higbee v. Moore*, 66 Ind. 263; *Association v. Houghton*, 103 Ind. 286, 2 N. E. 763; *Railroad Co. v. Rowan*, *supra*. There are none of the other instructions that would be erroneous under any state of facts admissible under the issues. The evidence not being in the record, the admission of evidence complained of is not before us, nor is the question whether the verdict is contrary to the law or the evidence presented. The errors complained of not being shown by the record, the judgment is affirmed.

(142 Ind. 460)

KERLIN et al. v. REYNOLDS, Auditor, et al.
(Supreme Court of Indiana. Nov. 5, 1895.)

TOWNS—TAXATION—SALARIES OF OFFICERS.

1. Property situated within and taxable by a city is not taxable for township purposes by the township in which the city is located. 36 N. E. 693, affirmed.

2. Act March 31, 1879, § 82, providing that township trustees shall receive for actual services \$2 per day, payable out of the township fund, and that for all services as overseers of the poor, such trustees shall be paid from the county treasury, was not impliedly repealed by Acts March 6, 1889, March 7, 1891, and March 4, 1893, each of which provided that township trustees should receive \$2 per day as full compensation for all services performed in any capacity. 36 N. E. 693, affirmed.

3. The expenditures of a township trustee for blanks, records, fuel, rent, attorney's fees, etc., are not expenses in which the urban and suburban population of a township are interested in common, and do not constitute a charge against the township fund.

4. The service to be performed by a township trustee in reference to the township library, established by Act March 6, 1865, is in his capacity

as school trustee, and is not a service for which the urban population of the township may be taxed.

Petition for rehearing. Overruled.

For decision on appeal, see 36 N. E. 693.

HACKNEY, J. The appellee has presented an extended, earnest, and able petition for a rehearing. With one or two exceptions the questions argued are those passed upon in the original opinion. It is insisted that we were in error in holding that the services of a trustee as overseer of the poor are compensated from the county treasury and not from the township fund. It is claimed that the acts of March 6, 1889, March 7, 1891, and March 4, 1893, repeal section 82 of the act of March 31, 1879 (Acts 1879, p. 142), which provided that: "The per diem of township trustees shall be as follows: For each actual day's service they shall be allowed to be paid out of the township fund, \$2.00: Provided, that for all services as overseer of the poor, said township trustees shall be paid out of any funds in the county treasury not otherwise appropriated, on the order of the board of county commissioners." The alleged repealing statutes each contained the provision "that each trustee of any township in this state, shall receive for the time he is necessarily engaged in the discharge of his duties, the sum of two dollars per day and this shall be full compensation for all services that they shall in any capacity and in any manner perform." By the same sections salaries are provided for trustees in townships having populations from 75,000 to 100,000. Laws in conflict with these provisions are expressly repealed, but there is no provision expressly or by implication repealing the former provision,—that made by the act of 1879, *supra*,—for the payment of such per diem from the township fund, and as overseer of the poor from the county treasury. As we said in the original opinion, the poor system is distinctly a county system, in the manner and source of its support, and this is verified by reference to the statute. Rev. St. 1894, §§ 8142-8190 (Rev. St. 1881, §§ 6066-6114). By section 8145, Rev. St. 1894 (section 6069, Rev. St. 1881), the support of the poor is expressly charged upon the counties, and the boards of commissioners are directed to raise the moneys for that purpose. This obligation extends to the transient, as well as the permanent, or resident, poor. Settlements by the overseer are made with the county commissioners, and the moneys expended by him are drawn on the order of the board from the county treasury. Rev. St. 1894, §§ 8160, 8163, 8164 (Rev. St. 1881, §§ 6084, 6087, 6088). This theory of the law was clearly outlined, both as to services performed, and as to compensation, in the cases of *Board v. Bromley*, 108 Ind. 158, 8 N. E. 923, and *Board v. Fischer*, 86 Ind. 139. To take the charge of compensation to the overseer, from the county, and to place it against the township, breaks the uniformity of the system as a county charge,

without any reason for so doing. There being no reason for so doing, and, the language of the act not disclosing an intention to do so, we cannot presume that the legislature desired or intended to repeal the provision of the act of 1879 that compensation as overseer should be paid from the county treasury. The law does not favor the repeal of statutes by implication, but requires clearly repugnant language to effect such repeal. *Hunt v. Railway Co.*, 112 Ind. 69, 13 N. E. 263; *Chamberlain v. City of Evansville*, 77 Ind. 542; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Blain v. Bailey*, 25 Ind. 165; *Spencer v. State*, 5 Ind. 41. We conclude, therefore, that the salary of the trustee, acting as overseer of the poor, is payable from the county treasury, and that it is not a charge against the township fund.

It is further insisted that the office expenses of the trustee, such as blanks, records, light, fuel, office rent, and attorney's fees, constitute an expenditure in which the urban and the suburban population of a township are interested in common, and that they constitute a charge against the township fund. Counsel have not advised us as to the authority under which a trustee may incur these various items of expense, and charge them to the township fund. We know of no statutory provision authorizing the expense of office rent, fuel, and light, and conclude, therefore, that no authority exists. *Board v. Axtell*, 96 Ind. 384; *State v. Mill* (at the present term) 41 N. E. 1026. If blanks and records are required, they are chargeable to the fund in whose interest they are required to be kept, and are not a charge against the united urban and suburban population, unless required for the united purposes of such populations, and these we hold do not exist. As to attorney's fees, if the employment were on behalf of the roads, if authorized at all, it would be a charge to the road fund, and if on behalf of the schools, a charge against the school fund, etc. But, without some joint interest existing between such populations, there could be no joint liability, and no necessity for a joint fund. If, however, any or all of such expenditures are proper, they are such as to enable the trustee to assign them to the particular interest requiring them. Their existence does not prove that both populations must bear them jointly. It is suggested, also, that a service performed for the people of the cities and those of the country is that of making a registry of dogs, as required by Acts 1891, p. 453. That act was approved March 5, 1891, and by its first, sixth, and eighth sections created a method for the taxation of dogs, to the exclusion of all other methods of taxation for such animals. On the 6th day of March, 1891, a later act was approved (Acts 1891, p. 199), sections 47 and 53 of which provided another and antagonistic method of taxation for such animals. The latter act repealed the former by necessary implication, and the services of the trustee contemplated by the former act are not required to be performed.

It is further contended that the trustee is required to perform, for such two populations, in common, the service of controlling the township library, and to this proposition are cited section 4527, Rev. St. 1881 (section 6018, Rev. St. 1894). These sections are from the general school law of March 6, 1865 (Acts 1865, p. 1). By section 182 of the act the libraries are denominated "township school libraries." They were purchased, not by the townships, but by the state, and were distributed to the townships on the basis of school population. The trustees are required, "at the commencement of each school term, at each schoolhouse in their respective townships, to cause a notice to be posted up, stating where the library is kept, and inviting the free use of the books thereof by the persons of their respective townships," etc. Every implication from the provisions of the act is that the legislature intended the library system to constitute a part of the educational or common-school system of the state, and that the service to be performed by the trustee, in connection therewith, is in his capacity as school trustee. This conclusion is aided by the provisions, in other laws,—Rev. St. 1894, §§ 6013-6017 (Rev. St. 1881, §§ 4524-4526); Acts 1891, p. 35,—for the establishment, maintenance, and control of city and town libraries, on behalf of such corporations, independently of the civil or school townships. Very clearly, we think, the attention, if any, which a trustee may devote to the township school libraries is not a service for or in which the population of a city within the civil township is interested, or may be taxed to support. The 30 years which have elapsed since such libraries were established, and during which no funds have been provided for their renewals and additions, have, in most instances, probably, made such libraries institutions of the past, and have rendered the provisions of the act of 1865 as to trustee's care a dead letter. In any event, the service required is on behalf of his school township; and if no compensation is provided from the school revenues, a question upon which we venture no opinion, that fact should be no reason for taxing populations not within the school township to raise funds to pay such compensation.

Again, counsel discuss what they claim to be an injustice to the suburban population to require their property to bear the entire burden of taxation for a township fund. It is upon the theory that the benefits derived from the sources to which such fund is expended accrue to such populations exclusively, that such burden is required to be so borne. If those not benefited shared the burdens, the injustice would result to them. To insist that, as to the gathering of the township fund, the urban population, though not sharing in the benefits, should share in its burdens, supplies equally the argument for contending that the suburban population should aid in supporting the schools and the streets and alleys of the cities. Such a contention, however, would

make the injustice of such a rule manifest to the members of the suburban population. After a second full investigation of the question, we are convinced that we were not in error in our original conclusions. The petition for a rehearing is overruled.

(13 Ind. App. 401)

MAIN v. FIELD.

(Appellate Court of Indiana. Oct. 31, 1895.)

REHEARING—RES JUDICATA.

On appeal in an action to recover money collected by defendant on a note in violation of an injunction, a rehearing will not be granted because the court failed to pass on the rejection of evidence that defendant had transferred the note before the issuance of the injunction, and that collection was made by the transferee, where it appears that the same matter was set up as a defense, and determined against appellant, in the injunction suit.

On rehearing. Denied.

For former opinion, see 40 N. E. 1103.

REINHARD, C.J. Appellant's learned counsel complain that we did not, in our former opinion, pass upon all the questions presented by them in the record. The only undisposed-of question discussed in appellant's brief for a rehearing relates to the rejection of certain testimony proposed to be given by the appellant. He offered to prove by himself and another witness that he did not violate the order of the court embraced in the injunction after the same was finally determined, for the reason that he had previously given and transferred the note sued on to one Parks, of Louisville, Ky., a nephew of the appellant, and that it was in fact said Parks who instituted and carried on the suit in the Louisville law and equity court, and not the appellant, although the suit was carried on in the name of the latter, but without his knowledge and consent; that, as soon as appellant was informed of the suit, he disclaimed any interest therein, and thereafter it was prosecuted in the name of said Parks, who was the real party in interest; and that the money was in reality collected by said Parks, the appellant receiving none of it, and having no interest therein. We think the court properly excluded this proposed testimony. The record shows that substantially the same defense was set up by the appellant's answer in the injunction suit. It was there averred, in substance, that Main had given and transferred the note in question to said Parks, and that appellant did not commence, or instigate the commencement of, the action or proceedings in the Louisville law and equity court, and that he had no knowledge of such suit except such as he derived from the complaint, a copy of which had been served upon him with the restraining order; that he had no connection with said suit, and had not attempted, and was not then attempting, directly or indirectly, to collect such note, or any note, claim, debt, or judgment whatever, from said Field, and that he had no in-

terest or property in said note transferred by him to his nephew, Parks. The issue tendered by this answer was tried by the court, and determined against the appellant. He is therefore concluded by the same, and could not, by the introduction of the proposed testimony, again put in issue the questions so determined against him. Petition overruled.

(13 Ind. App. 340)

VERNON INS. CO. OF INDIANAPOLIS v. GLENN.

(Appellate Court of Indiana. Oct. 29, 1895.)

MOTION TO STRIKE OUT EVIDENCE—PRACTICE.

Where an answer is given before an objection is made, the proper practice is to move to strike it out, not to interpose an objection.

On petition for rehearing. Overruled.

For original opinion, see 40 N. E. 759.

LOTZ, J. The appellant, in support of its petition for a rehearing, insists that this court did not consider the entire error presented by the record in admitting evidence to which objection was made. We desire to say that we gave the alleged error full consideration. We endeavored to group the objections all under one proposition, and dispose of them all at the same time. That counsel may be convinced that we did not overlook any part of the evidence objected to, we set out that portion material for the determination of this question: "Q. Do you know whether he [Zimmer] sold this stock of goods to Glenn? A. I do. (Objection by counsel for defendant to the question, for the reason that it is immaterial and irrelevant. Objection overruled.) A. Well, sir, about the first of April—somewhere about that date—Mr. Glenn came to me and told me. (Objection overruled.) Counsel for Plaintiff: We want to show further by this witness that this party took part in these negotiations, and that he acted for the party, and that is really all he knows about the trade. Q. You may state whether or not a sale was made by Zimmer to Glenn of that stock of goods, and how you know. (Objection by counsel for defendant, for the reason that it asks for a conclusion. Objection overruled. Exceptions allowed defendant.) A. I know that he purchased the stock of goods from Mr. Zimmer. Q. When? A. Somewhere about the 15th of May. Q. Do you know the terms of that purchase, Mr. Koerner? A. I did. Q. State to the court what it and what they were. (Objection by the defendant, as asking for a conclusion and as asking for hearsay testimony. Objection overruled. Exceptions granted defendant.) A. The terms were that he was to pay one thousand cash on the stock of goods, and the balance as it could be spared." It will be seen from this that the fact of a sale was testified to before any objection was made. If the answer was made before an objection could be interposed, the proper practice would

have been to move to strike it out; but no such motion was made. The first objection came too late, and when made it was too general to be valid. It is difficult to see how reversible error could be predicated upon the admission of evidence concerning a fact when that fact is already in evidence without any valid objection being interposed. Whether or not the testimony to which the objection was timely made was admissible we need not and do not decide. But there are authorities which indicate that it is admissible. Thus a witness may state the fact that an agreement or contract had been made. *Lawson, Exp. Ev. p. 534; Lockett v. Mims, 27 Ga. 205.* There was no reversible error in admitting the evidence complained of under the circumstances of this case. Petition overruled.

(13 Ind. App. 381)

FAULKNER v. JONES.

(Appellate Court of Indiana. Oct. 30, 1895.)

RIGHT TO EXEMPTIONS—WAIVER.

The rule that, upon an assignment for the benefit of creditors, the right of exemption is waived unless, at the time of the appraisalment, the assignor selects such property as he desires to have set off to him under Rev. St. 1894, § 2907 (Rev. St. 1881, § 2670), does not apply where the assignor foregoes the right of selecting specific articles out of a retail stock of merchandise, in pursuance of an agreement with the assignee that, in lieu of such property, he shall have the proceeds thereof to that amount in money when the stock is sold. *Graves v. Hinkle, 21 N. E. 328, 120 Ind. 157, distinguished.*

Appeal from circuit court, Hendricks county; J. V. Hadley, Judge.

Action by John A. Faulkner against John R. Jones to recover the amount of an exemption allowed by statute out of property assigned to defendant as assignee for the benefit of creditors. From a judgment for defendant, plaintiff appeals. Reversed.

R. T. Hollowell and C. M. Zion, for appellant. Brill & Harvey, for appellee.

DAVIS, J. In July, 1893, the appellant, who was then a debtor in embarrassed and failing circumstances, made an assignment of all of his property for the benefit of his creditors to the appellee as trustee. The property so assigned consisted of a stock of hardware and farming implements, real estate, notes, and book accounts. In the deed of assignment the appellant reserved the right to the exemption to which he was entitled as a householder under the law. The appraisers set off to appellant articles of personal property selected by him to the amount of \$220, and in their appraisalment they specified the articles of property, and their value, so taken by him, and reported that, in addition thereto, "the appraisers hereby set off to the assignor \$380 out of the proceeds of the property assigned." The appellant, Faulkner, afterwards received from said assignee, at its appraised value, the real estate named in the

schedule of \$25, and one share of stock in the Brownsburg Canning Company at the appraised value of \$17; making a total of \$262 received by him on his exemption. No part of the balance of \$388 to which he was entitled on account of his exemption has been set off or paid to him. At the November term, 1893, of the Hendricks circuit court, the appellee reported that said sum still remained due him on his exemption. The appellee testified on the trial that when the appraisalment was made the appellant was informed by him, or in his presence, that he could have the residue of his exemption in money, if he so desired. The only question presented for our consideration is whether, under the facts, which are undisputed, the appellant is entitled out of the proceeds of the property now in the hands of the appellee to the residue of his exemption. Counsel for appellee insist that the decision in *Graves v. Hinkle, 120 Ind. 157, 21 N. E. 328*, is decisive of the question before us. In that case the real and personal property amounted to something in excess of \$1,050. The personal property was duly appraised at \$206.90, and the whole of it was set off to the assignor as exempt under the statute. In his deed of assignment the assignor reserved "money and property of the value of \$600 as exempt from execution." Nothing appears to have been said or done relative to his exemption except setting off to him the personal property until after the sale of the real estate, when he made an application asking the court to order paid over to him the sum of \$393.10, the remainder of the \$600 which he was entitled to claim or exempt. In that case it was held that the failure of the assignor to assert his right of exemption at the time and in the manner prescribed by statute will be deemed a waiver of his privilege. The only material difference between that case and the one in hand is that in this case it appears the assignor did not waive his privilege, unless the failure to select the articles of property in the appraisalment which he desired should be set off to him as exempt is held to be conclusive against him, notwithstanding the agreement then made between himself and the assignee that he should have the residue of the amount in money out of the proceeds of the property. In the absence of an agreement to the contrary, the right of exemption may be held to have been waived, under the authority cited, unless at the time of the appraisalment the assignor selects such property as he desires to have set off to him. Rev. St. 1894, § 2907 (Rev. St. 1881, § 2670). But, in our opinion, this rule does not apply where the assignor waives or foregoes the right of the selection of specific articles of property out of a retail stock of merchandise in pursuance of an agreement with the assignee that in lieu of such property he shall have the proceeds thereof to that amount in money when the stock is sold. *Eisenhauer v. Dill, 6 Ind. App. 188, 33 N. E. 220; Coppage v. Gregg, 1 Ind. App. 112, 27 N. E. 570; Doherty v. Ramsey, 1 Ind. App. 530, 27*

N. E. 879. In this case the assignor was claiming his exemption. Had it not been for the promise of the assignee to pay him the amount to which he was entitled out of the proceeds of the stock when sold, the assignor would doubtless have selected, at the time of the appraisement, such property as he desired to have set off to him. Under the circumstances, he did not waive his right to the exemption by reason of the fact that he did not select the property he desired to have set off to him. Having waived his right to the specific property to which he was entitled as exempt, he is, in view of the promise of the assignee, entitled to the proceeds of such property now in the hands of the assignee. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(13 Ind. App. 392)

JONES v. CITY OF TIPTON et al.

(Appellate Court of Indiana. Oct. 30, 1895.)

JURISDICTION ON APPEAL.

An action to review a judgment, being purely statutory, and incidental to the original action, is cognizable on appeal only by that court which alone would have had jurisdiction of an appeal from the original judgment.

Appeal from circuit court, Tipton county.

Action by Hannah E. Jones against the city of Tipton and another to review a judgment. From a judgment for defendants, plaintiff appeals. Transferred to the supreme court.

Oglebay & Oglebay and Joshua Jones, for appellant. Waugh, Kemp & Waugh, for appellees.

REINHARD, C. J. This is an action to review a judgment. The original action was by the appellant against the appellee Akers to set aside a tax sale of certain real estate, and declare it null and void, and to quiet the plaintiff's title to real estate as against said Akers' claim for taxes. Akers filed a cross complaint, in which he set up his purchase of the real estate for taxes, alleging, also, that he had paid subsequent taxes thereon, and asked that, in the event plaintiff's title be quieted, a lien be declared upon said real estate for all such taxes, penalty, and interest due him, etc. The cause was submitted for trial to the court, and there was a finding and decree quieting appellant's title, and declaring a lien on such real estate in favor of Akers for the amount due him on his purchase and for taxes, etc. In the present action, which, as we have said, was brought to review the former judgment, the city of Tipton is made a defendant. The ground upon which relief is asked is that of the discovery of material new matter since the rendition of the judgment. Rev. St. 1894, § 628 (Rev. St. 1881, § 616).

The action to review a judgment was originally a chancery proceeding, but, under our practice, it is purely a statutory one, and is treated as an incident to the original action.

Hence, if in the original action the supreme court alone would have had jurisdiction on appeal, it follows that in the action to review it also has exclusive jurisdiction. The same is true with reference to the appellate court, had the jurisdiction been in it in case of an appeal from the original judgment. In the present case the original action was such as would, on appeal, have gone to the supreme court, and consequently the jurisdiction of this appeal is in that court also. Ordered transferred.

(13 Ind. App. 389)

MARTIN v. STATE.

(Appellate Court of Indiana. Oct. 30, 1895.)

ASSAULT—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault, it appeared that prosecutor, defendant's brother-in-law, went to the door of a house in which defendant was, with a screen door closed. There was evidence that defendant "started at him," and, raising a stick of wood over his head, said, "I'll knock your d—d head off," or "I'll knock your d—d brains out"; that prosecutor backed off, and went out of the yard, saying to defendant, "You would not hit a dead man, would you?" and that defendant then repeated that he would knock his head off, and prosecutor retreated. Held, that a verdict of guilty would not be disturbed.

Appeal from circuit court, Henry county; Eugene F. Bundy, Judge.

Lloyd Martin was convicted of assault, and appeals. Affirmed.

Jas H. Jones, for appellant. W. A. Ketcham, Atty. Gen., and Frank E. Beach, for the State.

REINHARD, C. J. The appellant was tried for and convicted of an assault. The only question presented by the record is whether there was sufficient evidence to support the verdict of the jury. Our statute defines an assault as an unlawful attempt, coupled with the present ability, to commit a violent injury. Rev. St. 1894, § 1983 (Rev. St. 1881, § 1910). To conform to the requirements of this statute, which somewhat limits the common-law definition, it must appear that there was some unsuccessful effort on the part of the defendant to do physical violence to the party complaining, and that the defendant must possess the ability to commit such violence. Klein v. State, 9 Ind. App. 365, 36 N. E. 763. There must be some movement towards corporal violence. A mere purpose to injure, however vigorously expressed, is not sufficient, unless it be accompanied by an effort to carry it into immediate execution. Gillett, Cr. Law, § 222.

There seems to be no disagreement between the parties as to the facts proved. The only thing about which they do not agree is as to the inference to be drawn from those facts, or some of them, by the jury. It appears that the appellant is a brother of the wife of one Philip Jester, the latter being the person upon whom it is alleged the assault was committed. Jester and wife were

living separately and apart. By some sort of judicial proceeding, an order was obtained from the proper circuit court that the wife should have the care, custody, and control of the child, Holly Jester, subject, however, to the right of said Phillip Jester to visit and see said child at all reasonable times. At the time of the difficulty in question, the child Holly Jester was in the appellant's house, being dressed by its mother, when Phillip Jester, the father of the child, came up to the door just inside of which the mother and child were sitting. Some words passed between the husband and wife, the former expressing a desire to take the child with him, and the latter refusing to let him do so. Jester thereupon endeavored to open the screen door, at the same time demanding of the mother that the child be turned out to him. Appellant, who was then in the house, and heard what took place, seized a stick of wood, the size of which and where he obtained it not being shown, and told Jester, perhaps with an imprecation, that, if he did not go away from there, he would knock his head off. There was evidence to show that at this point the appellant "started at him" (the prosecuting witness), and, raising the stick over his head, said, "I'll knock your d—d head off," or "I'll knock your d—d brains out"; and that Jester backed off, and went out of the yard, saying to the appellant, "You would not hit a dead man, would you?" when the appellant repeated that he would knock his head off, and Jester retreated. This is all the evidence of an assault, and we think it is very meager and unsatisfactory. Indeed, it is difficult to see how the jury and the trial court could come to the conclusion from it that an unsuccessful attempt at personal violence had been made by the appellant. Yet we doubt not that the jury had the right to infer from the acts and circumstances proved that such an attempt was actually made. If, as a matter of fact, the appellant approached Jester, and at the same time endeavored to strike him with the stick in his hand, being prevented from executing his purpose only by the retreat of Jester, he was guilty of an assault. Whether such fact is inferable from the testimony alluded to depends much, of course, upon the manner and demeanor of the witnesses on the stand, as well as upon the words used by them. Even a gesture may sometimes go far to illustrate or impress a statement. For this reason, the jury and trial court are in a much better position than we are to draw inferences and deductions from such statement. We do not feel warranted in disturbing the judgment. Judgment affirmed.

(13 Ind. App. 417)

PLATTER v. ACKER.

(Appellate Court of Indiana. Oct. 31, 1895.)

EXECUTORY CONTRACT OF SALE—REPLEVIN.

A contract reciting that the first party "has this day sold and conveyed" to the second

party his stock of goods; that the vendee agrees to give in part payment thereof one note, made by R., and the balance in two equal installments, at three and six months from date, to be evidenced by the vendee's note; that the goods in salable condition are to be invoiced at cost, while those shelfworn are to be invoiced at such price as the vendor and a person selected by the vendee shall agree upon, etc.—is an executory contract, under which title is not to vest till the goods have been invoiced and the notes delivered; and until then the vendee, though he may have made full tender of performance on his part, cannot maintain replevin against the vendor.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Action of replevin by William H. Acker against Peter Platter. From a judgment for plaintiff, defendant appeals. Reversed.

O. H. Montgomery, Wm. K. Marshall, and J. B. Black, for appellant. Applewhite & Applewhite and A. N. Munden, for appellee.

GAVIN, J. The appellee recovered judgment in replevin for the possession of a stock of merchandise and fixtures. His sole claim thereto, taking that view of the evidence most favorable to him, rests upon the fact that appellant had entered into a contract for the sale of the goods to appellee which appellant refused to consummate, although appellee had made full tender of performance upon his part. The contract was clearly executory. It reads as follows: "This contract and agreement, made and entered into this 26th day of February, 1894, between Peter Platter of the first part, and William H. Acker of the second part, both of the county of Jackson, and state of Indiana, witnesseth: That the said party of the first part has this day sold and conveyed to the said party of the second part all his stock of goods, wares, and merchandise and fixtures now located in the storeroom in the Duhme Building in the city of Seymour, Indiana, consisting of books, stationery, etc., and such shelving and such other goods and fixtures as belong to the said party of the first part, and located in said room. The party of the second part hereby agrees to make the following payments on said goods, viz.: One note for \$900, drawing 6 per cent. interest, payable annually. Said note is made by Rosa L. Rottger, dated March 29, 1893, due four years from date, to be indorsed by said Acker; and the balance is to be paid in two equal installments, at three months and six months from date, to be evidenced by note signed by the party of the second part, and his father as surety. It is agreed by the parties that the goods are to be invoiced at cost, such as are in good, salable condition, and have not depreciated in value since purchased. All shelfworn goods and damaged goods to be invoiced at such price as the party of the first part and a man selected by the party of the second part to represent him may agree upon as being a fair price; and, if they cannot agree, then some other disinterested person shall

be selected to set the price, which shall be final; and the same agreement is made in regard to show cases and other fixtures. One show case of Herbert Platter not to be invoiced; also one broken show case not to be invoiced. Said Peter Platter also guarantees said show case to be free from executions, judgments, liens, and chattel mortgages." There is little in this contract to indicate that it was intended to be an executed contract of sale except the use of the words, "has this day sold and conveyed." This phraseology imports, indeed, a present transfer; but, when all the terms of the agreement are considered, they cannot be deemed controlling. The appellant remained in possession of the goods until replevied. We are well satisfied that the right of possession and title were not to vest in the purchaser at the time of making this contract, but that these were to be postponed until the consummation of the contract by the invoicing and ascertainment of the amount of and quality of the goods, and the price thereof, and the delivery of the notes provided for. *Dixon v. Duke*, 85 Ind. 434; *Lester v. East*, 49 Ind. 588; *Straus v. Ross*, 25 Ind. 300; *Williams v. Smith*, 7 Ind. 559; *Olson v. Mayer*, 56 Wis. 551, 14 N. W. 640; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150; *Sherwin v. Mudge*, 127 Mass. 547; *Lingham v. Eggleston*, 27 Mich. 324; *Nicholson v. Taylor*, 31 Pa. St. 128; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292. As a general rule, replevin will not lie where there is an executory and unexecuted contract of sale, although there may have been a tender of performance in strict compliance with the contract; the parties, in such cases, being left to their action for the breach of the agreement. *Morgan v. East*, 126 Ind. 42, 25 N. E. 867; *Boutell v. Warne*, 62 Mo. 350; *Graves v. Damrow* (Neb.) 44 N. W. 235; *Cobbey*, Repl. § 289; 2 Benj. Sales (Corbin's 4th Am. Ed.) § 1305; *Tiff. Sales*, 5. Judgment reversed, with instructions to the trial court to grant a new trial. The death of the appellee having been suggested, the reversal is ordered as of the date of the submission.

(13 Ind. App. 393)

ZINNS v. STATE.

(Appellate Court of Indiana. Oct. 30, 1895.)

FALSE MEASURES—DUPLICITY—EVIDENCE.

1. A complaint under Rev. St. 1881, § 2201 (Rev. St. 1894, § 2349), making it unlawful for any person to sell any property, giving false weight thereof, reciting that defendant "did * * * report a certain false * * * weight" of property "then and there sold" by him to another, charges but one offense, if any.

2. Evidence that defendant certified that the last coal removed from a car load contained 25 bushels, but that in fact it contained less; that said coal was delivered to the consumer, and a proportionate part of the price paid therefor was returned to him,—is not sufficient to sustain a charge under Rev. St. 1881, § 2201 (Rev. St. 1894, § 2349), providing that any person having charge of scales for the purpose of weighing, who

knowingly reports any false weight, whereby any person may be defrauded or injured, shall be fined, etc.

Appeal from circuit court, Vanderburgh county; Robert V. Richardson, Judge.

William Zinns was convicted, under Rev. St. 1881, § 2201 (Rev. St. 1894, § 2349), of reporting certain false weights, and appeals. Reversed.

Logsdon & Mason, for appellant. John W. Spencer, John R. Brill, and W. A. Ketcham, Atty. Gen., for the State.

ROSS, J. Appellant stands charged with having violated section 2201, Rev. St. 1881 (section 2349, Burns' Rev. St. 1894), which reads as follows: "Whoever knowingly sells, or directs or permits any person in his employ to sell, any property, and makes or gives any false or short weight or measure of such property; and any person owning or having charge of scales, measures, or steelyards for the purpose of weighing or measuring any property, who knowingly reports any false or untrue weight or measure, whereby any person may be defrauded or injured,—shall be fined not more than one hundred dollars nor less than ten dollars." The affidavit upon which appellant was arrested and convicted in the court below charges that on the 10th day of March, 1894, at the county of Vanderburgh, he, having "charge of a certain pair of scales for the purpose of weighing coal, did then and there unlawfully, falsely, and knowingly report a certain false and untrue weight and measure of a certain load of coal then and there weighed, sold, and delivered by the said Zinns to one William Harvey, by then and there unlawfully, falsely, and knowingly representing and reporting to the said Harvey that said load of coal contained 25 bus., or 2,000 lbs., of coal, whereas, in truth and in fact, said load of coal did not contain 25 bus., or 2,000 lbs., but that the said load of coal contained only 1,920 lbs., or 24 bus., of coal, and no more, to the damage of the said Harvey in the sum of ten cents, contrary to the form of the statute," etc. The specifications of error assigned in this court question the sufficiency of the affidavit, and the ruling of the court in overruling the motion for a new trial. The appellant insists that two offenses are charged in the one count or affidavit, namely: First, in "reporting false or short weight"; and, second, for "selling coal at a less weight than that prescribed by law." On the other hand, counsel for appellee insist that but one offense is charged; that the offense charged is in falsely reporting "a certain false and untrue weight and measure of a certain load of coal." We think appellee's contention must prevail. Section 2201, Rev. St. 1881 (section 2349, Burns' Rev. St. 1894), defines two offenses; and the affidavit under consideration charges the commission of an offense, if one is charged, under the second provision of the section. When an offense is defined by the statute, it is usually sufficient to charge its commission in the language of the statute.

Taney v. State, 9 Ind. App. 46, 36 N. E. 295; Benham v. State, 116 Ind. 112, 115, 18 N. E. 454, and cases cited. In the case of Blanchard v. State, 3 Ind. App. 395, 29 N. E. 783, Blanchard was charged with having unlawfully sold 22½ bushels of coal as and for 25 bushels, under section 2202, Rev. St. 1881 (section 2350, Burns' Rev. St. 1894). In considering the sufficiency of the evidence to sustain the verdict in that case, this court said: "We do not think that the mere naked sale, regardless of the intention of the seller, and regardless of the question whether the purchaser was prejudiced thereby, is enough to warrant a conviction under the statute upon which the prosecution is founded."

The evidence in this case shows that at the time in question one William H. Mason was engaged in the coal business in Evansville, and was unloading coal from cars, and, after weighing it, delivered the same to his customers; that the load which it is charged the appellant falsely reported the weight of was the last coal of a car load, and that when appellant had weighed it he informed Mr. Mason that it contained but 24 bushels, but at the request of the latter he made out a slip certifying that it contained 25, Mr. Mason at the time telling him that the additional 90 pounds could be taken from the next load. After the driver of the wagon had proceeded some distance down the street towards the place where the coal was to be delivered, one William D. Crane, a detective, stopped the driver, took from him the slip given by appellant to Mr. Mason, and by the latter given to his driver, and then caused the load of coal to be weighed, and found that the slip he took from the driver called for 25 bushels of coal, while there were but 24 bushels on the wagon. Shortly after this, Mr. Mason delivered the load of coal to one William Harvey, who had previously ordered from and paid him for 25 bushels; that, not having the slip given him by the appellant, he (Mason) made out a duplicate himself, and handed it to Harvey, informing him that there were but 24 bushels of coal unloaded, and returned to him, of the amount paid for the 25 bushels, the cost of 1 bushel. The evidence wholly fails to make out the offense charged in the affidavit. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(14 Ind. App. 598)

REDDICK v. BOARD OF COM'RS OF PULASKI COUNTY.*

(Appellate Court of Indiana. Oct. 31, 1895.)

AGREED CASE—APPEAL—RECORD.

1. Though the parties agree to the facts, reduce them to writing, and submit the case to the court, such stipulation does not constitute an "agreed case," within Rev. St. 1894, § 562 (Rev. St. 1881, § 553), providing that parties may submit any matter of controversy between them to any court on an agreed statement of facts to be made out and signed by the parties, accompanied by an affidavit that the controversy is real and the proceeding in good faith.

* Rehearing denied, 43 N. E. 233.

2. In a trial on an agreed statement of facts, as the evidence in the case, such statement does not become part of the record on appeal unless made so by bill of exceptions or order of the court.

Appeal from circuit court, Pulaski county; George Burson, Judge.

Action by John H. Reddick against the board of commissioners of Pulaski county to recover for labor performed. From the judgment therein entered, plaintiff appeals. Affirmed.

Steels & Hathaway and Duncan & Smith, for appellant. John C. Nye, for appellee.

ROSS, J. Appellant, who was county superintendent of schools for Pulaski county, Ind., filed a claim with the board of commissioners of that county, asking an allowance in the sum of \$60 for labor performed which he claimed was not a part of his duties as such superintendent of schools. The claim was disallowed, and appellant appealed from the decision of the board to the Pulaski circuit court, where the cause was submitted to the court. The facts were agreed to and reduced to writing, and, upon these facts, the court concluded that appellant was not entitled to recover for a number of the items in the account, but that, as to some of the items, he was entitled to recover, and thereupon rendered judgment in his favor in the sum of eight dollars. The appellant prosecutes this appeal upon the assumption that because the parties agreed upon the facts, and had reduced them to writing, and then submitted the case to the court upon the facts thus agreed to, the case is an "agreed case," under section 553, Rev. St. 1881 (section 562, Rev. St. 1894).¹ Counsel for the appellee insists, however, that this is not an agreed case under the statute, and that no question is presented for our consideration, because the facts agreed to are not properly in the record, not having been brought in by bill of exceptions or order of the court.

This action had its origin in the commissioners' court, and the circuit court acquired jurisdiction by appeal, and not otherwise. Simply agreeing to the facts, and thus avoiding the introduction of evidence, did not make it an "agreed case," under section 553 (562), supra. The case of Booth v. Cottingham, 126 Ind. 431, 26 N. E. 84, is not in conflict with our holding that this is not an agreed case under the statute. In that case, on appeal to the supreme court, both parties

¹ Rev. St. 1894, § 562 (Rev. St. 1881, § 553), reads as follows: "Parties shall have the right in all cases, either with or without process, by agreement to that effect, to submit any matter of controversy between them to any court that would otherwise have jurisdiction of such cause, upon an agreed statement of facts, to be made out and signed by the parties; but it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties; whereupon the court shall proceed to try the same, and render judgment as in other cases."

insisted that the case was an agreed one under the statute; and the court said that, inasmuch as the parties were agreed that it was such a case, they would accept that as the theory of the case, without investigating to see whether it was true, and would decide the case upon that theory. When the parties agree upon the facts, as in this case, they do nothing more than to simplify the trial by obviating the necessity for making proof; and such facts, when agreed to, do not constitute a special finding of facts; and an exception to a conclusion of law based upon such facts presents no question on appeal to this court. *Henes v. Henes*, 5 Ind. App. 100, 31 N. E. 832. The statement of the facts agreed to, when the case is not an agreed one under the statute, is mere evidence, and nothing more. It is an agreement that the evidence would establish the facts embodied in the statement. *Robbins v. Swain*, 7 Ind. App. 486, 34 N. E. 670. "In a trial upon an agreed statement of facts, as the evidence in the case, such statement does not become a part of the record unless made so by bill of exceptions or order of the court." *Pennsylvania Co. v. Niblack*, 90 Ind. 149. Judgment affirmed.

(13 Ind. App. 848)

REICHERT v. KRASS et al.

(Appellate Court of Indiana. Oct. 29, 1895.)

ACTION ON CONTRACT—COUNTERCLAIM FOR BREACH—RES JUDICATA.

In an action by a contractor on a building contract, in which plaintiff alleges full performance, defendant, if he claim damages for breach of such contract, must do so by way of counterclaim, or he will be barred from afterwards recovering for such breach.

On petition for rehearing. Overruled.
For prior report, see 40 N. E. 706.

LOTZ, J. The appellant has filed a petition for a rehearing, and earnestly insists that the judgment of this court in affirming the cause is erroneous. After a more careful consideration of the questions involved, we have reached the conclusion that our former opinion contains some erroneous statements, and it is now modified in accordance with the views hereinafter stated.

The appellant cites and relies upon the cases of *Abernathy v. Allen*, 132 Ind. 84, 31 N. E. 534; *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7; *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, and 33 N. E. 861; *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996; *Ross v. Hobson*, 131 Ind. 166, 26 N. E. 775,—and earnestly contends that these cases are controlling here. We have examined all the cases cited, and think there is a marked distinction between them and the case at bar. The case most nearly in point is that of *Lindley v. Sullivan*, supra. The set-off or cross complaint there grew out of a subsequent and different transaction and contract from that declared upon in the com-

plaint. In the case at bar the complaint declares upon, and seeks a recovery under, a special written contract, and it is alleged that the plaintiff has fully complied with all the terms and conditions of that contract. This same contract is made the basis of the counterclaim, and damages are sought for the breach of one of its conditions. The plaintiff was not entitled to a recovery until he showed performance on his part, and when he showed performance he showed that he had not violated the contract in any respect. Appellant's counsel, in support of their petition for a rehearing, say: "The matters set up by the defendant in his cross complaint were pleaded because he was compelled to make answer to the plaintiff's action, or lose his day in court. If he had not defended, and a judgment had been rendered against him upon the complaint, he could not thereafter maintain an independent action upon the matters set out in his cross complaint. He was compelled to make his defense, or lose his remedy. If he had not done so, a plea of former adjudication would have barred any action which he might have attempted to maintain thereafter upon such facts."

We are impressed with this argument, and believe it is supported by the authorities. The case of *Goble v. Dillon*, 86 Ind. 327, was an action against a physician for malpractice. The physician answered that prior to bringing the action for malpractice he had instituted a suit against the plaintiff, before a justice of the peace, to recover the value of his services, being the same services out of which the alleged malpractice arose; that the plaintiff appeared to that action, and filed an answer of general denial; that the cause was tried, and he recovered judgment for his services. It was held that the action for malpractice was necessarily involved in the action to recover for the services, and that the judgment rendered was a complete adjudication of the claim for damages on account of the alleged malpractice. The principle announced in this case has been frequently followed by the supreme court and by this court. *Allen v. Jones*, 1 Ind. App. 64, 27 N. E. 116; *Howe v. Lewis*, 121 Ind. 110, 22 N. E. 978. It is true, as appellant's counsel points out, that by section 412, Burns' Rev. St. 1894 (section 409, Rev. St. 1881), it is provided that issues of fact in equitable proceedings shall be tried by the court, and that all other issues of fact may be tried by a jury, and that, in the case of joinder of equitable causes of action or defenses with other causes of action or defenses, the former shall be tried by the court and the latter by a jury, unless waived, and the trial of both may be at the same or different times, as the court may direct. And it is also true that section 354, Burns' Rev. St. 1894 (section 351, Rev. St. 1881), provides that, if any defendant personally served with notice omit to set up a counterclaim, he cannot afterwards maintain an action thereon,

except at his own costs. Still, these sections must receive a reasonable construction. If two stipulations in a contract are entirely independent of each other, an adjudication of the breach of one does not necessarily adjudicate the breach of the other. But, if the issues are so formed as that a counterclaim is in fact litigated, the defendant will not be permitted afterwards to sue and recover upon the same. Such questions as are within the issues, or such as are essential to a complete determination of the points presented by the complaint, are, of necessity, adjudicated. *Howe v. Lewis*, 121 Ind. 110, 22 N. E. 978. This action is not a suit on a common count, to recover money due under a special contract, but it is a suit on the contract itself, alleging full performance on the plaintiff's part. The breach set up in the counterclaim was necessarily involved in the complaint. But it does not necessarily follow from this that the appellant was not entitled to a jury trial. This depends upon the nature of the issues joined on the complaint. If those issues were strictly legal, and not of an equitable character, then the appellant was entitled to a jury. If, however, the issues were of an equitable character, the issues joined on the counterclaim were, of necessity, drawn into equity. The foreclosure of a mechanic's lien is an equitable proceeding, and the matters contained on the counterclaim were necessarily drawn into equity. If appellant's contention should prevail, we might have this anomalous condition: The court, in trying the issues joined on the complaint, might find that the plaintiff had fully complied with the contract on his part, and the jury, in trying the issues joined on the counterclaim, might find that the plaintiff did not comply with all the conditions of the contract, and assess damages for the breach. We would then have two separate, distinct, and contradictory findings and adjudications of the same matter in the same action. Such a condition was never contemplated by our Code. Petition overruled.

(13 Ind. App. 420)

PETERSON v. MURRAY.

(Appellate Court of Indiana. Oct. 31, 1895.)

SLANDER—IMPUTING WANT OF CHASTITY.

1. A single act of illicit intercourse does not constitute a woman a whore.
2. A plea of justification for calling a woman a "whore" must show that she was one at the time the words were spoken.
3. Evidence that plaintiff had illicit sexual intercourse with her husband before marriage will not sustain a plea of justification in an action of slander for calling her a whore after her marriage.

Appeal from circuit court, Newton county; D. B. McConnell, Special Judge.

Action by Mary V. Murray against John P. Peterson for slander. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Allen and Joseph D. Brown, for appellant. Fraser & Isham, for appellee.

LOTZ, J. The appellee sued the appellant to recover damages for slanderous words spoken. It was alleged that the defendant called the plaintiff a "whore." The answer was in two paragraphs—First, a general denial; and, second, justification, that prior to the speaking of the words the plaintiff had illicit carnal connection with divers persons. The cause was tried by a jury, which returned a general verdict assessing plaintiff's damage in the sum of \$300, on which judgment was rendered. The only assignment of error is the overruling of appellant's motion for a new trial.

It is insisted that the court erred in refusing to give certain instructions asked by appellant, and that the verdict is contrary to the law. The instructions asked and refused are as follows: "(5) If you find that the defendant spoke the words alleged in the complaint, and you also find that at the time said words were spoken, that the plaintiff, prior to the speaking thereof, had sexual intercourse with some person not her husband, then I say to you that the plaintiff would be a whore, and your finding should be for the defendant. (6) If you find that the defendant spoke the alleged slanderous words as charged in the complaint, or words of similar import, and that, prior to the speaking thereof, the said plaintiff had sexual intercourses with one Sam. Murray, who was not then her husband, but who afterwards married the plaintiff, then I instruct you that the plaintiff would be a whore, and you should find for the defendant. (7) I charge you that any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom; and, if the plaintiff has committed a single act of this kind, then I say to you that she would be a whore; and, if you so find from all the evidence and circumstances in this case, then your verdict should be for the defendant." "(11) The court further instructs the jury that if you find from the evidence that the plaintiff, at the time of her marriage with Robert M. Snyder, was pregnant with child, and that such pregnancy was the result of sexual intercourse while she was an unmarried woman, then, in law, she would be guilty of whoredom, and she cannot recover in this case, and your verdict should be for the defendant. (12) The court further instructs the jury that if you find from the evidence that the plaintiff, at the time of her marriage with William Reynolds, was an unmarried woman, and pregnant with child, then the law in such cases would be that she was guilty of whoredom; and, if you so find your verdict, it should be for the defendant. (13) The court instructs the jury that if you find from the evidence that, since the marriage of the plaintiff and Samuel Murray, the plaintiff has had sexual intercourse with any person other than

her husband, such conduct would render her guilty of whoredom, and she could not recover in this case."

These instructions require us to determine whether or not a single act of illicit sexual intercourse constitutes a woman a whore. The facts assumed in each of these instructions are treated as an absolute bar of a recovery under the second paragraph of the answer, and are not treated in mitigation of damages. If one seeks to justify slanderous words spoken of another, the justification must be as broad and comprehensive as the charge. *Tull v. David*, 27 Ind. 377. To justify the appellant's slanderous words, the appellee must have been a whore at the time the words were spoken. A "whore" is a woman who prostitutes her body for hire. The word is generally used as synonymous with "harlot," "courtesan," "prostitute," and "strumpet." Cent. Dict. The word, in its most general meaning, includes a woman who practices or holds unlawful sexual intercourse either for hire or to gratify a depraved passion; and, possibly, proof of such acts, under this definition, would constitute a justification of the charge. In any event, we cannot say, as a matter of law, that one act of illicit sexual intercourse constitutes a woman a whore.

It is true, as appellant's counsel urge, that in an early case in this state it was held by a divided court that one act of illicit sexual intercourse committed by a woman ever after rendered her a whore.—*Alcorn v. Hooker*, 7 Blackf. 58; and this decision was approved in *Rodebaugh v. Hollingsworth*, 6 Ind. 339. The correctness of these decisions may well be doubted. A woman who has been seduced under a promise of marriage, and thereafter leads a chaste and virtuous life, is not esteemed to be a whore. *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372. There is nothing in the evidence in this case except vague rumor and hearsay that tended to show that the appellee had been guilty of indiscriminate sexual intercourse. Even if it be true that she had sexual intercourse with the men who afterwards became her husbands, it does not follow that she was a whore at the time the words were spoken. There was no error in refusing the instructions requested, and we are of the opinion that the verdict is not contrary to the law. Judgment affirmed.

(13 Ind. App. 428)

WILBER v. SCHERER.

(Appellate Court of Indiana. Oct. 31, 1895.)

EXAMINATION OF WITNESS—REFRESHING MEMORY—DOCUMENTARY EVIDENCE.

1. In suit on account the plaintiff may, as a witness, refresh his memory as to the items of the account by referring to entries made at the time of the transactions in his own books of account.

2. In suit on account the admission of plaintiff's books of account in evidence, if error, is harmless where plaintiff has testified specifically to each item of account from recollection refreshed by reference to such books.

Appeal from circuit court, Dearborn county; O. W. Stapp, Special Judge.

Action by John L. Scherer against William T. Wilber on account. From a judgment for plaintiff, defendant appeals. Affirmed.

Coles & Hall, for appellant. McMullen & McMullen, for appellee.

DAVIS, J. This action was brought by the appellee against the appellant on an ordinary book account. The appellee sought to recover an alleged balance of \$209.45. Appellant answered in two paragraphs: First, general denial; second, payment. A trial by jury resulted in verdict and judgment in favor of appellee for \$92. The only error assigned is the action of the court in overruling appellant's motion for a new trial. Two questions only are argued in this court, to wit: (1) The admission of improper evidence. (2) That the verdict is excessive, the recovery being too large.

We have carefully read the evidence, and find it in some respects conflicting. The charges in appellee's bill of particulars against appellant amounted to \$437.95, and the credits to \$228.50. The correctness of some of the items in the charges was controverted by appellant, and he introduced evidence, a part of which was uncontradicted, showing that he was entitled to more credits. Giving the evidence, as we are required to do on this appeal, the most favorable consideration in behalf of the appellee, it is not clear the jury was not warranted in finding there was a balance of \$92 due appellee. Therefore this court, under our practice, would not be warranted in disturbing the verdict of the jury on the evidence. On the trial the appellee, as a witness in his own behalf, testified that he ran a saw-mill, and that he sawed lumber for appellant; that he kept a book in his business, in which he kept the account, and that he set the items down every night after he did the work, and set them down correctly. He then turned to the account in his book, and, over appellant's objection and exception, testified to the items set out in his bill of particulars, stating that he did not think he could testify to the dates and amounts alone from memory without reference to the book. Appellee afterwards, during the progress of the trial, over objection of the appellant on the ground that the evidence was incompetent, read the account in his book against the appellant, including both charges and credits, to the jury. Counsel for appellant insist that the court erred in admitting the entries in the account book in evidence. In support of their position they cite *De Camp v. Vandagriff*, 4 Blackf. 272; *Railroad Co. v. Noel*, 77 Ind. 110, 121; *Bank v. Williams*, 4 Ind. App. 501, 31 N. E. 370. Counsel for appellee contend that the ruling of the court was right, and that, in any event, the introduction of the entries on the book did the appellant no harm; citing *Fleming v. Yost*, 137 Ind. 95, 30 N. E. 705; *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086. In many of the states a party's

own books of account and original entries are now received as evidence of a sale and delivery of goods to, or of work done for, the adverse party. The general rule is prescribed by statute, and is, in substance, that such evidence—entries in books of merchants, shopkeepers, etc.—must be supported by oath, preliminary to its introduction, that the goods so charged were actually sold and delivered, and the services performed; that the items were entered at the time of the delivery of the goods or the performance of the services, or immediately afterwards; that the book tendered is the book of original entries, and that the book was correctly kept. 2 Am. & Eng. Enc. Law, "Books as Evidence," p. 467, under subdivision "Books of Original Entries," and authorities there cited. There is no statute on the subject in this state. It is apparent from the record in this case that appellee first testified to the account between himself and appellant as set out in his bill of particulars by looking at his account book, in which he states he made correct entries at or about the time of the different transactions. We are not able to see that there was any error in this, as, in our opinion, he had the right, if he desired to do so, to refresh his memory, when on the stand as a witness, by reference to the entries previously made by him. The record disclosed that appellee testified specifically concerning each and every item in the account between himself and the appellant as set out in his bill of particulars filed with the complaint. It appears that he was cross-examined in relation to the account, and that he testified on such cross-examination that he did not believe he could have testified to the amounts and dates of the respective items without reference to his book. It is apparent that his testimony was largely based on his recollection as refreshed by reference to his book. After he had so testified to the items in the account as embraced in the entries made by him in his book, the only effect, as shown by the record, of reading the entries from the book to the jury, was to repeat his testimony on the subject. The appellant was present, and testified to his version of the dealings between the parties. He claimed in his testimony that he was not liable for all the charges against him, giving his reasons for such claim. He testified that he was not liable for the entire charge; that another was to pay a part of it; and he also testified that he was entitled to credits in addition to those appearing in appellee's bill of particulars, and which the jury appeared to allow him. Assuming that the court erred in permitting appellee to introduce in evidence that part of his private account book setting forth the various items and charges against the appellant, the record, as we view it, shows, under the circumstances, that the error was a harmless one. The decision in *De Camp v. Vandagriff*, supra, enunciates the doctrine that has prevailed in actions in assumpsit in this state for many years. In *Fleming v. Yost*, which, however, was not an

action in assumpsit, a different doctrine seems to be approved, but *De Camp v. Vandagriff*, supra, is not referred to therein. In this connection, however, it may be observed that the rule as enunciated in *Faxon v. Hollis*, 13 Mass. 427, and cited with approval by our supreme court in *Fleming v. Yost*, supra, and *Culver v. Marks*, supra, is not governed by any statute, and is in direct conflict with the rule enunciated in *De Camp v. Vandagriff*, supra. We are not, as at present advised, prepared to say that the supreme court in the later cases has overruled by implication the case of *De Camp v. Vandagriff*, supra. On a careful reading of the entire record in this case, we are of the opinion that no error appears which would justify a reversal of the judgment of the trial court. The bill of particulars was a copy of the book account, and appellee's testimony as to the account is the same as shown by the bill of particulars, except he testified that the appellant was entitled to additional credits. Judgment affirmed.

(13 Ind. App. 442)

CROXTON et al. v. FOREMAN.

(Appellate Court of Indiana. Nov. 1, 1895.)

SUPPORT OF CHILD—SUFFICIENCY OF EVIDENCE.

In an action against an insane widow and her guardian to recover for board of such widow's minor child, it appeared that plaintiff got the child when she was a few months old from one who had taken her from an infirmity; that he kept her and treated her as his own child until she was about 10 years old, when there was appointed for her a guardian, who took her away from him; and that the guardian of the insane mother gave him at different times small amounts of money and clothing, aggregating about \$200, to aid him in caring for the child. *Held*, that plaintiff was not entitled to recover.

Appeal from circuit court, Steuben county; S. A. Powers, Judge.

Action by James Foreman against William G. Croxton, guardian of Mina C. Day, a person of unsound mind, and Mina C. Day, to recover for board and clothing furnished by plaintiff to the minor child of defendant's ward. From a judgment for plaintiff, defendants appeal. Reversed.

Frank M. Powers, for appellants. Woodhull & Gilbert, Daniel I. Link, and Frank S. Robey, for appellee.

LOTZ, J. This was an action by the appellee against Mina C. Day, a person of unsound mind, and William G. Croxton, as guardian of said Mina, to recover for board and clothing furnished to Dora Day, the minor child of said Mina. The facts essential to the determination of this controversy, as shown by the undisputed evidence, are substantially as follows: Samuel Day, the husband of Mina C. Day, died in 1882, leaving his wife and three infant daughters surviving him. Dora was then a few months old. In December, 1882, Mina C. Day was adjudged to be a person of unsound mind, and is still insane, the appellant Croxton being her guardian. After the

mother was declared insane, the family was broken up, and Dora was taken to the infirmary of Steuben county to be cared for. Shortly afterwards, a man by the name of Welch, living in the county, went to the infirmary, and got the child, and took her into his family, where he kept her a few months. The appellee was then a married man, having a wife, but no children, in his home. Welch being about to take up his residence in Ohio, and the appellee, being desirous of having a child in his family, procured Dora from Welch, and took her to live with him in his family. She continued to live with him as a member of his family for the period of about 18 months, when the appellee was divorced from his wife. After he was divorced, he lived alone for about three years, during which time he hired the child boarded at a neighbor's where it was convenient for him to see her. During this time he clothed her, and paid from \$1.25 to \$2 per week for her board. Appellee remarried, and took the child into his family, where she was treated in all respects as a member of his family. He taught her to call him "father," and his wife "mother." He taught her, of evenings, to read and write, and sent her to the district schools of the neighborhood, and gave her such advantages for procuring an education as were in his power. He provided her with comfortable apparel, and such other necessities as his means and circumstances would reasonably permit, and treated her in all respects as if she were his own child. Appellee testified that he took the child into his home because he had no children of his own, and wanted a child in his family; that he had no contract with any one to pay him for the care and expense he would bestow upon her; and that he had no intention of making any charge for the care and expense incurred on her account; nor had he any expectation of receiving any pay therefor when he first took her into his family. The child had been in his family and under his care for about 10 years when a guardian was appointed for her, and the guardian took her away from him. The appellee also testified that he would like to have the child with (him) yet, and that, when he is through with it, what little property he has left will go to the child; that he would not have filed this claim if he had not a mortgage upon his farm, which he was desirous of paying off. Samuel Day, the father of Dora, was a soldier in the late Civil War, in 1888 the guardian of the mother received a widow's pension for his ward. Before this time the mother was entirely destitute. The pension money in the hands of the guardian is about \$3,800. A portion of the pension money, according to the United States pension laws, is paid to the guardian on account of the infant children of the deceased father and soldier. The guardian of the insane mother has at different times given to appellee small sums of money, and contributed clothing, to aid appellee in caring for the child, aggregating in all about \$200. Upon these facts, the

court below found for the appellee, and rendered judgment in his favor in the sum of \$395. Appellants' motion for a new trial was overruled, and this ruling is the error assigned in this court. Appellants' contention is that the finding and judgment are contrary to the law, and contrary to the evidence.

It is apparent from the facts stated that, during the time the appellee's claim for compensation accrued, the family relation existed between him and Dora Day. It is the settled law of this state that where such relation exists, whether natural or assumed, there is, in the absence of an express agreement or circumstances from which an agreement may be fairly inferred, no obligation to pay for board and necessities, on one hand, nor for work, on the other. *Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709; *James v. Gillean*, 8 Ind. App. 472, 30 N. E. 7; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Marquess v. La Baw*, 82 Ind. 550. It is true that, if there be any evidence tending to establish an express contract or circumstances from which it may be inferred that there was an agreement or understanding that compensation was to be made, then this court will not disturb the finding or verdict upon the weight of the evidence, for the existence of such contract or understanding is a question of fact for the court or jury trying the case. *Forester v. Forester*, 10 Ind. App. 680, 38 N. E. 426; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, and 34 N. E. 611. But in the case at bar we are of the opinion that there is no evidence whatever tending to prove a contract, or from which it might be legitimately inferred there was an agreement or understanding that compensation was to be made. The services and necessities furnished by the appellee were voluntary. It is manifest that the pleasure of the society of the child was considered by the appellee as an equivalent for the cost of her support and education. *Webster v. Wadsworth*, 44 Ind. 283. Nor do we think the assistance given by the guardian to the appellee, in the light of the other facts and circumstances, can be considered as tending to prove a contract or that compensation was intended. The aid furnished was to Dora herself, rather than to the appellee. Judgment reversed, with instructions to sustain the motion for a new trial.

(12 Ind. App. 432)

MAYNARD et al. v. EAST et al.

(Appellate Court of Indiana. Nov. 1, 1895.)

MECHANICS' LIENS—SUFFICIENCY OF NOTICE.

Notice of a mechanic's lien claim in which the property is described as "the north part" of a specified lot in a named addition, "as well as the one-story frame dwelling house recently erected thereon by you," is insufficient.

Appeal from circuit court, Madison county; A. Ellison, Judge.

Action by John A. Maynard against Henry J. Phillips and wife and Charles W. East and wife, in which defendant East filed a cross

complaint against plaintiff and William S. Diven and wife to enforce a mechanic's lien. From an order overruling demurrer of Diven and wife to the cross complaint, they appeal. Reversed.

Diven & McMahan, for appellants. Reardon & Thornburg, for appellees.

REINHARD, C. J. Maynard brought this action against Henry J. Phillips and Dora Phillips, his wife, and Charles W. East and Henry East were made defendants. The defendants East and East filed a cross complaint against the plaintiff, Maynard, and one William S. Diven and his wife, Laura M. Diven, who were made defendants to the cross complaint, and appeared and filed separate demurrers to each paragraph thereof, which were overruled and exceptions taken. The cross complaint is in four paragraphs, but in respect of the question to be decided by us these are not materially different. It is averred therein that Laura M. Diven, through her husband, the said William S. Diven, contracted with Maynard for the erection and construction of certain dwelling houses upon the property of said Laura, and that the cross complainants, East and East, sold and furnished to said Maynard certain materials to be used, and which were used, in the erection and construction of said houses. The cross complaint seeks to foreclose a material man's lien upon the houses and the real estate upon which the same are situated, it being also averred that proper notices were duly filed of the intention of said cross complainant to hold such liens. The cross complaint proceeds upon the theory of an action purely in rem as against said Diven and wife. It does not seek to hold them or either of them personally liable.

The particular objection urged by the Divens against the cross complaint is that the description of the real estate upon which the houses were erected as contained in the cross complaint and lien notices is too uncertain and indefinite, and therefore insufficient. The description in one of the paragraphs and notices therein set forth is as follows: "The north part of lot number twenty (20) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the one-story frame dwelling house recently erected thereon by you." The description contained in another paragraph and exhibit is as follows: "The south part of lot number twenty (20) and the north part of lot numbered nineteen (19) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the frame dwelling house recently erected thereon by you." The following is the description in the remaining paragraph and notice: "The south part of lot numbered nineteen (19) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as upon the one-story frame dwelling house erected thereon

by you." There is no attempt to reform the description, nor to aid the same by averments such as would admit extrinsic evidence. The description would be clearly insufficient in a complaint to foreclose a mortgage on real estate. *Buck v. Axt*, 85 Ind. 512. When the description is so indefinite as to necessitate the institution of an extrinsic inquiry in order to determine what property was in fact sold or mortgaged, the description is insufficient. *Bowen v. Wickersham*, 124 Ind. 404, 24 N. E. 983. Courts have given the mechanic's lien law a liberal construction, so as to effectuate the purpose for which it was enacted. It is the rule in such cases as the present one that, if the description in a lien notice is sufficiently definite to enable a person familiar with the locality to identify the premises intended to be described, the description, though perhaps too indefinite to convey title, may be rendered sufficient if it can be aided by extrinsic evidence, the proper averments having been laid in the complaint to allow such evidence to be introduced. *Dalton v. Hoffman*, 8 Ind. App. 101, 35 N. E. 291, and authorities cited. From the descriptions given in the cross complaint and exhibits, it is possible, we think, that a person familiar with the locality might be able to locate the houses; and, if extrinsic facts were averred, the descriptions might be reformed, or at least serve as a basis upon which to formulate another (sufficient) description for the decree of foreclosure and sale. But, standing by themselves, the descriptions in the cross complaint and notices are wholly insufficient to convey title in a sale upon the decree, for by them neither the exact location nor the boundary of the real estate to be sold can be determined. We think the court erred in overruling the demurrer of Diven and wife to each paragraph of the cross complaint. As to the appellant Maynard, nothing is said in the brief which shows that he is entitled to a reversal. Indeed, it is difficult to determine from such brief whether the counsel who wrote the same appear for him at all or not. Judgment reversed as to William S. Diven and Laura M. Diven, and affirmed as to John A. Maynard.

(13 Ind. App. 393)

EMPERLY v. STATE.

(Appellate Court of Indiana. Oct. 30, 1895.)

KEEPING A HOUSE USED FOR GAMING—WHAT CONSTITUTES—INFORMATION—SUFFICIENCY.

1. Under the Criminal Code (Rev. St. 1881, § 1756, subd. 8; Rev. St. 1894, § 1825, subd. 8), providing that no indictment shall be deemed invalid for, inter alia, "omitting to state the time at which the offense was committed in any case in which time is not of the essence of the offense; nor for stating the time imperfectly unless time is of the essence of the offense,"—an information which charges defendant with keeping a house to be used for gaming "on the — day of" a certain month and year is good.

2. Rev. St. 1894, § 2173 (Rev. St. 1881, § 2079), prescribes the same penalty against one

who keeps a building to be used or occupied for gaming, or "knowingly" permits the same to be used or occupied for gaming, or, being the owner, rents it for such purpose, the word "knowingly," being inserted in the revision of 1881. *Held*, that an indictment which failed to allege that defendant "knowingly" permitted a house to be used for gaming was insufficient.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Oliver M. Emperly was convicted of keeping a house used for gaming, and appeals. Reversed.

Clodfelter & Thompson, for appellant. W. A. Ketcham, Atty. Gen., Dumont Kennedy, Pros. Atty., and Saml. H. Spooner, for the State.

GAVIN, J. The appellant was convicted of keeping a house to be used for gaming. The offense was charged to have been committed on the — day of January, 1895. Under common law, it was requisite that, in charging a crime, a day, month, and year be specifically averred. This was held to be the law under the Code of 1852, although it was not required that the proof should conform to the allegation. *Clark v. State*, 34 Ind. 436; 2 *Gavin & H. St. p. 402*, § 56. By the revision of the Criminal Code in 1881, however, the law was still further removed from old-time technicalities, it being provided that no indictment should be deemed invalid nor quashed for the following, among other reasons: "Eighth. For omitting to state the time at which the offense was committed in any case in which time is not of the essence of the offense; nor for stating the time imperfectly unless time is of the essence of the offense." Rev. St. 1881, § 1756, subd. 8 (Rev. St. 1894, § 1825, subd. 8). This statute has been given full force by the courts. The affidavit is not therefore bad for want of definitely stating the time, that not being of the essence of the offense. *State v. Sammons*, 95 Ind. 22; *Myers v. State*, 115 Ind. 554, 18 N. E. 2.

The statute upon which this prosecution is based (section 2173, Rev. St. 1894; section 2070, Rev. St. 1881), prescribes in the same section the same penalty against him who keeps a building to be used or occupied for gaming, or knowingly permits the same to be used or occupied for gaming, or whoever, being the owner, rents it for such purpose. Three offenses are thus embraced in the various clauses of this section. *Davis v. State*, 100 Ind. 154. An attempt has been made to charge in the affidavit facts bringing the defendant within both of the first two clauses. His guilt under the first—keeping a building to be used or occupied for gaming—is sufficiently charged, in the language of the statute. *Fisher v. State*, 2 Ind. App. 365, 28 N. E. 565. The averments are not, however, in the language of the second clause, nor do they cover the essential facts therein specified. Under this second subdivision, knowledge is an essential ingredient of the offense. It is now made so by the letter of the statute, into which

the word "knowingly" was inserted by the Revision of 1881. Being thus in the statute, we must regard it as material to the affidavit. 1 Bish. Cr. Proc. (New) § 522, subd. 4. Even under the former statute, which omitted the word "knowingly," proof of knowledge was held to be an essential requisite upon the trial. *Padgett v. State*, 68 Ind. 46; *Barnaby v. State*, 106 Ind. 539, 7 N. E. 231. This knowledge was, of course, provable, like any other fact, by either direct or circumstantial evidence. *Rodifer v. State*, 74 Ind. 22; *Morgan v. State*, 117 Ind. 569, 19 N. E. 154; *Voght v. State*, 124 Ind. 358, 24 N. E. 680. The court, in its charges, authorized the jury to convict upon proof going to establish his guilt under the second subdivision,—for permitting the house to be used for gaming. In this there was error, as that offense was not properly charged, and the appellant was not on trial therefor. We cannot, under well-established rules, say that this error was harmless, in the face of the defendant's positive denial of his guilt. He was entitled to go to the jury upon the one charge made against him, and was not called upon to meet that which was insufficiently alleged. Judgment reversed, with instructions to sustain the motion for new trial.

(13 Ind. App. 345)

J. F. SEIBERLING & CO. v. TATLOCK.

(Appellate Court of Indiana. Oct. 29, 1895.)

WARRANTY—ALLEGATIONS OF BREACH—COUNTERCLAIM—SUFFICIENCY.

1. In an action for the price of a machine, the answer alleged that plaintiff warranted that it was well made, and of good material; that it would work well, and as well as any machine in the market; that if it did not give satisfaction, and work better than the old machine, which defendant delivered to plaintiff as part of the price, defendant need not pay for it, and plaintiff would return to him his old machine, or its value in cash; that the new machine was not well made, or of good material, and did not work as well as other machines in the market; that it did not do better work than such old machine; that it was given a fair trial; and that defendant returned it in good repair to plaintiff, and demanded the return of his machine. *Held*, that such answer was sufficient.

2. In an additional paragraph the answer alleged the same facts in substance, and that plaintiff refused to return to appellee his old machine, for the value of which defendant asked judgment. *Held*, that such paragraph was sufficient as a counterclaim.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by J. F. Seiberling & Co. against John H. Tatlock for the price of a machine sold by plaintiff to defendant, in which defendant set up a breach of warranty and a counterclaim. From a judgment for defendant, plaintiff appeals. Affirmed.

Harvey, Morris, Alsbaugh & Lawler, and John A. Bradley, for appellant. Zaring & Hotel, for appellee.

ROSS, J. This action was brought by the appellant upon a parol contract to recover the

purchase price of a reaping machine sold by it to appellee. To the complaint, which is in two paragraphs, the appellee filed an answer in several paragraphs and a counterclaim. The first, second, third, and fourth specifications of error assigned are made to question the rulings of the court below in overruling the demurrers to the third, fourth, and sixth paragraphs of appellee's answer and his counterclaim. Counsel for appellant, after considerable argument, and the presentation of numerous authorities to show that the third and sixth paragraphs of the answer are insufficient, admit that no question is presented on the rulings relative to these two paragraphs, for the reason that the finding of the court rests upon the other paragraphs, and not upon these. For that reason we do not consider or pass upon the sufficiency of either the third or sixth paragraph of the answer. The only demurrer filed to the counterclaim tested its sufficiency as an answer to the complaint. Query, Does such a demurrer test its sufficiency as a counterclaim? In the fourth paragraph of the answer, after admitting the purchase of the machine at the price alleged in the complaint, a part of the purchase price being the exchange of an old machine then owned by appellee, it is alleged that the appellant warranted that the machine was well made, and of good material, and that it would work well,—as good as any machine in the market; and that, if it did not give perfect satisfaction, and do as good work as any machine in the market, and work better than the old machine which appellee delivered to appellant, appellee need not keep or pay for it, and that appellant would return to him his old machine, or its value in cash. It is then alleged that the new machine did not fulfill or comply with the conditions of said warranty; that it was not well made, or of good material; that it did not work well, and that it did not work as well as other machines in the market, and did not do better work than the old machine which was taken in exchange for the new one. The pleader then sets out specifically wherein the machine is defective, and the kind of work it would do, and the reasons why the work which it did was not well done. It is also alleged that the machine was given a fair trial; that appellant's agent who sold the machine to appellee was present when it was tested, but failed to remedy its defects, or make it do the work which it was warranted to do; that appellee refused to keep the machine, and returned it in good repair to appellant at the place where purchased, and demanded the return of his old machine; that the new machine was of no value or account whatever for the purpose for which purchased.

It is urged against the sufficiency of this answer that it fails to show the machine was entirely worthless; that it does not show that appellant was notified that it did not work, and given an opportunity to repair it; and, further, that there is nothing alleged to show that it was given a fair trial or test. We think

the objections untenable. It is alleged that the machine was warranted to do certain work, but that it would not do the work which it was warranted to do; and then the manner in which it did the work is specifically described, which shows that the work was not well done. This was sufficient to show a breach of the warranty, and to advise appellant of what issue must be met. As to the question of notice, and an opportunity to make the machine work as warranted, the allegations of the answer are that appellant's agent who sold the machine was present when it was tested, and failed to remedy its defects, or to make it work satisfactorily. The duty, under the terms of the warranty alleged in the answer, rested upon the appellant to see that the machine sold would do the work as warranted. If the selling agent was present when it was tested, and failed to make it do the work properly, no other or further notice was necessary. There was no error in overruling the demurrer to this answer.

The facts alleged in the counterclaim are in substance the same as those alleged in the fourth paragraph of the answer, with the additional allegation that appellant, too, refused to return to appellee his old machine, and then asks judgment for the value of the machine. We think the counterclaim sufficient.

The court did not err in overruling appellant's motion for a *venire de novo*. "A motion for a *venire de novo* reaches matters of form only, and is effective only when the finding or verdict is so defective that no judgment can be rendered thereon." *Sloan v. Gravel-Road Co.*, 6 Ind. App. 584, 33 N. E. 997. That the findings contain the evidence, and not the ultimate facts, is not cause for a *venire de novo*. *Railroad Co. v. Branyan*, 10 Ind. App. 570, 37 N. E. 190. The facts found by the court in the main support the facts alleged in the answer and counterclaim, and are sufficient to sustain a judgment in his favor. We find no reversible error in the record. Judgment affirmed.

(13 Ind. App. 355)

LAKE ERIE & W. R. CO. v. MATTHEWS.

(Appellate Court of Indiana. Oct. 29, 1895.)

ACTION FOR WILLFUL TORT—DUTY TO TRESPASSER
—EXPULSION OF PASSENGER—UNNECESSARY
FORCE—NEGLIGENCE.

1. Where a complaint alleged that defendant's conductor assaulted plaintiff, and forcibly ejected him from a car while the same was in motion, it was not necessary to allege defendant's negligence or plaintiff's freedom from contributory negligence, even though it appeared that plaintiff was a trespasser on the train.

2. Though a carrier has the right to expel a trespasser from its train, it will be liable if its servant in so doing uses unnecessary force and violence.

3. In an action to recover damages for a violent assault and forcible expulsion of plaintiff from a train, it is not necessary that the verdict show defendant's negligence or plaintiff's freedom from contributory negligence.

4. In an action to recover for being forcibly expelled from defendant's freight train it was

proper for plaintiff to show that defendant's station agent informed him of the time of arrival of the next freight train, and represented that it carried passengers, for the purpose of proving that plaintiff boarded the train in good faith, supposing that it carried passengers; and such statements may be shown though they were made in a place other than the office of said agent.

Appeal from circuit court, Madison county; A. Ellison, Judge.

Action by Christopher C. Matthews against the Lake Erie & Western Railroad Company for personal injuries. There was judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Hackedorn, John B. Cockrum, and Chipman, Keltner & Hendee, for appellant. Blackledge, Sherley & Moon, for appellee.

REINHARD, C. J. We are asked to reverse the judgment in this case on account of the alleged insufficiency of the complaint, to which a demurrer was filed and overruled. The complaint is for a personal injury. It counts upon a violent and forcible expulsion of the appellee from appellant's freight train by the conductor. It is insisted that the complaint shows the appellee to have been a trespasser. Granting this to be so, it does not follow that the appellant's servant had a right to use the violence to which he resorted in order to eject the appellee. The theory of the complaint is that the appellee entered the car in the bona fide belief that it carried passengers. He had been informed by the station agent, it is alleged, that a freight train passing the station about the time of the arrival of this train would carry passengers to the station to which appellee desired to go. It is averred that the conductor violently assaulted the appellee, and beat him, forcibly throwing him from the car while the same was going at the rate of 10 miles an hour, and seriously injuring him. In such a complaint it is not necessary to allege negligence on the part of the carrier and freedom from negligence on the part of the traveler. The wrong charged is in the nature of a willful injury, and, if the appellee was guilty of negligence, or was even guilty of being a trespasser, a willful or wanton injury would not be justifiable. If the appellee was not entitled to ride upon the train, the conductor should have requested him to alight. It was time enough to resort to force and violence when the same became necessary. While it is true that a carrier owes no special duty to a trespasser upon its train, "every member of the community owes to every other the duty of not wantonly exposing him to danger." Busw. Pers. Inj. § 71.

Nor is there any merit in the objection that the complaint fails to show that the conductor was acting within the scope of his authority or duty. It was the duty of the conductor to expel the appellee from the train if he was there in violation of the company's rules, and,

had he done so in a lawful manner, the appellant would have been protected. But because the conductor exceeded his authority in this respect, and accomplished that which it was his duty to do lawfully in an unlawful manner, the company will not be exonerated. Busw. Pers. Inj. § 33; Railway Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219.

The next two errors assigned and discussed are considered together. They relate to the ruling of the court in overruling the appellant's motions for judgment on the verdict and for a venire de novo. The appellant insists the verdict is defective because it fails to show that appellee was free from contributory negligence. As the action is for a willful tort, it was not necessary for the finding to show either negligence on the part of the appellant or freedom from negligence on the part of appellee. Railroad officials are not privileged to knock men down and drag them out because they inadvertently board a wrong train, although, technically speaking, they may be trespassers. What we have said in passing upon the sufficiency of the complaint applies with equal force to the special verdict.

The overruling of the appellant's motion for a new trial is assigned as error. The appellant vigorously assails the verdict of the jury, and insists that it is unsupported by the evidence. We are of a different opinion. In support of the motion for a new trial it is also contended that the court erred in admitting improper testimony. This consisted of some statements made by the appellant's station agent at Orestes, in response to an inquiry made of him by appellee. The statement contained some information concerning the arrival of the next freight train, and that it would carry passengers. There was no error in the ruling. If he had information that a freight train arriving about that time would carry passengers to the station to which he wished to go, and if in good faith he boarded appellant's train believing it to be the one the agent spoke about, such information was proper to be considered to show the animus of the appellee when entering the train. The agent had a right to give such information, even if he was in a billiard saloon at the time, in place of his office. It is not claimed that the information which the appellee received from the agent was incorrect. If the appellee made a mistake, and got in the wrong train, we see no good reason why he should not be allowed to prove it. Had appellee entered the train with the avowed intention of committing some aggressive wrong, would not the appellant have had the right to show this, and would the counsel not have insisted upon it? It would certainly make some difference in the measure of damages to which a plaintiff in such an action is entitled whether he boarded the car in good faith, though mistaken in his rights, or with some sinister purpose or intention, and knowing that he was violating the rules of the company. Judgment affirmed.

(13 Ind. App. 384)

CITY OF LEBANON v. TWIFORD.

(Appellate Court of Indiana. Oct. 29, 1895.)

STATUTE OF LIMITATIONS—PLEADING EXCEPTIONS—SUFFICIENCY OF SPECIAL VERDICT—INSUFFICIENT DRAINS—LIABILITY OF CITY.

1. Where plaintiff alleged that defendant constructed a drain, which was barely sufficient to carry off the waters conducted to it, and that defendant afterwards constructed lateral drains, which emptied into the main drain, and thereby caused the waters to overflow on to plaintiff's land, the statute of limitations was to be computed from the time of the construction of the lateral drains.

2. Limitations must be pleaded, and it must be shown that the case is not within any exception, unless the complaint on its face shows that the action is barred, notwithstanding the exceptions.

3. Where, in an action for overflowing plaintiff's land, the jury, in a special verdict, assessed damages to plaintiff's crops in a certain amount, but left blank a space for the amount of damage to the land, and a space for the total amount of damages, and, after being directed to correct the verdict, the same was returned unaltered, it was proper to enter judgment for the amount assessed as damages to the crops.

4. In an action against a city for causing the overflow of plaintiff's land by the construction of an insufficient drain, it was not necessary to negative freedom from contributory negligence.

5. A city is liable for collecting waters and failing to furnish a sufficient outlet therefor, whereby they were cast upon plaintiff's land.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Action by Andrew J. Twiford against the city of Lebanon to recover damages caused by overflowing waters. Plaintiff had judgment, and defendant appeals. Affirmed.

Artman & Lewis, for appellant. Abbott & Ratcliff, for appellee.

LOTZ, J. The appellee brought this action against the appellant to recover damages for injuries done his real estate caused by overflowing waters. The first assignment of error calls in question the sufficiency of the complaint. The complaint alleges, in substance, that for 25 years the plaintiff was the owner of a tract of real estate, consisting of about one acre, situate within the corporate limits of the city of Lebanon; that said real estate is what is known as low or swamp land, and was used by the plaintiff for gardening purposes; that, prior to the grievances complained of, the plaintiff had the lands sufficiently drained by tile drains; that a large portion of the city of Lebanon is situate upon adjoining and higher lands, and that the surface waters of a part of said city naturally drained into the valley where plaintiff's lands were situated, and then emptied in Prairie creek, a natural water course; that, about 10 years before the commencement of this action, the defendant constructed a tile drain through said valley, and near plaintiff's land, to carry the surface waters from the streets and alleys to Prairie creek, and constructed in said drain a catch-basin near plaintiff's lands; that such tile drain, as constructed, was barely sufficient in capacity to carry off the surface waters

naturally draining into said valley; that, subsequently to the construction of said tile drain, the city constructed other lateral drains, which emptied in the said main tile drain above the catch-basin, and so graded its streets and alleys, and the gutters thereof, as that the surface waters were collected into a body and cast in the lateral drains; that the city so constructed its streets, alleys, and gutters in other portions of the city as that the surface waters, which naturally flowed in another direction, were diverted and caused to flow into the lateral drains; that the main drain did not have sufficient capacity to carry off the waters thus thrown into it; and that the waters thus collected into the main drain overflowed at the catch-basin, and thence over plaintiff's lands, rendering them unfit for cultivation, and destroying his crops.

The only objection made to the complaint is that the cause of action is barred by the six-year statute of limitations. It is insisted that the complaint shows that the action accrued at the time of the construction of the main drain, and, as that was more than six years before the action was instituted, the cause is barred. We do not concur in this insistence. It does not appear that the lateral drains were constructed more than six years before the commencement of the action. Again, there are exceptions to the six-year statute; and the rule is that the exception must be answered, unless the complaint on its face shows that the plaintiff is barred notwithstanding the exception. *Christian v. State*, 7 Ind. App. 417, 34 N. E. 825; *DeVay v. Dunlap*, 7 Ind. App. 690, 35 N. E. 195. The complaint here does not disclose that the plaintiff is barred notwithstanding the exceptions to the statute. There was no error in overruling the demurrer.

The appellant answered the complaint by the general denial and the six-year statute of limitations. The appellee replied the general denial to the second paragraph, and also filed a special paragraph of reply. The appellant moved to strike out the second paragraph of reply, and, upon this motion being overruled, filed a demurrer for want of facts. This demurrer was overruled. These rulings are assigned as error. The second paragraph of reply was only an argumentative general denial, and there was no available error in overruling the motion to strike out, or in overruling the demurrer to it.

The cause was tried by a jury, and a special verdict returned. The appellant made a motion for a venire de novo. The motion was overruled, and this ruling is one of the errors assigned. Several causes for the motion were assigned, but the only one discussed by appellant's counsel is that the special verdict fails to assess the plaintiff's damages. That portion of the verdict relating to the assessment of damages is as follows: "The plaintiff's said real estate is thereby overflowed, and thereby reduced in value the amount of \$—, and his crops growing thereon in the past six years, prior to the 8th of March, 1894, have

been damaged in the amount of \$25. If, from the foregoing facts, the law is with the plaintiff, we find for the plaintiff and assess his damages at — dollars. If the law is with the defendant, we find for the defendant." When this verdict was returned, and before it was received by the court, the appellee moved the court to require the jury to return to the jury room and correct the verdict by assessing plaintiff's damages, which motion was sustained, and the court instructed the jury to correct the verdict in accordance with the motion. The jury retired for further consideration, but again returned the same verdict. It is the duty of a jury trying a cause to assess the damages. If it fail to do so, the court cannot make the assessment. But, whenever the intention of the jury is manifest, so that the finding upon a point can be determined, it is the duty of the court to mold the verdict into proper form, and give it due legal effect. 2 Elliott, Gen. Prac. § 947. If the verdict find such facts as leave nothing for the court to do but to make a mathematical calculation, it may then fix the amount of damages or recovery. *Wainright v. Burroughs*, 1 Ind. App. 893, 27 N. E. 591; *Johnson v. Bucklen*, 9 Ind. App. 154, 36 N. E. 176. Here the appellee asked damages for injury to his real estate and to his crops. The jury, in one item, assessed the damages to the crops, and failed to assess any damages as to the lands. The clear intention of the jury was to assess the plaintiff's damages in the sum of \$25, and it was for this amount that the court rendered judgment. There was no error in overruling the motion for a venire de novo.

The appellee and the appellant each moved for a judgment in his favor on the verdict. The appellee's motion was sustained, and the appellant's overruled. These rulings are assigned as error. The appellant insists that the facts found in special verdict fail to show that the appellee was free from contributory negligence,—that he took no measures to prevent the overflow. He was not required to negative contributory negligence. The appellant was charged with having committed a positive, aggressive, wrong,—the maintenance of a nuisance,—and it was liable to the appellee, independently of the question of negligence. *Stein v. City of Lafayette*, 6 Ind. App. 414, 33 N. E. 912. The special verdict finds every fact essential to support the judgment for the \$25 damages to the crops. It shows that the appellant collected the waters in a channel or drain, failed to furnish a sufficient outlet, and cast them on appellee's lands, and damaged his garden and crops.

The last assignment of error relates to the overruling of the motion for a new trial. It is contended that the verdict is contrary to the evidence and contrary to the law. While the evidence is conflicting on some of the material matters, we are of the opinion that there was some evidence tending to support the verdict in every material respect. Judgment affirmed.

(13 Ind. App. 436)

DOTSON v. DOTSON.

(Appellate Court of Indiana. Nov. 1, 1895.)

PLEADINGS—APPEAL—HARMLESS ERROR.

1. Where the sufficiency of a complaint is questioned for the first time on appeal, its defects will be considered cured by the verdict unless it omits some fact which was material.

2. There was no reversible error in overruling a motion to compel plaintiff to paragraph his complaint.

Appeal from circuit court, Elkhart county; H. D. Wilson, Judge.

Action by Emiline Dotson against Alexander Dotson to recover damages for slander. There was judgment for plaintiff, from which defendant appeals. Affirmed.

Dodge & Hubbell, for appellant. Chamberlain & Turner and Jonas O. Hoover, for appellee.

DAVIS, J. The first assignment of error discussed by counsel is that "the amended complaint does not state facts sufficient to constitute a cause of action." When the sufficiency of a complaint is called in question for the first time in this court, the defect in the complaint will be deemed to be cured by the verdict, unless it wholly omits the averment of some material fact essential to the cause of action attempted to be stated. In such case, if the omitted fact is such as can be inferred by reasonable intendment from the other facts alleged, and the other facts expressly stated in connection with the facts fairly inferable therefrom are together sufficient to render the judgment a complete bar to another suit for the same cause of action, the complaint will be held sufficient. *Lockhart v. Schlottenback* (Ind. App.) 40 N. E. 1109. Measured by this rule, the complaint under consideration is good after verdict, so far as any objection thereto has been suggested. There was no reversible error in overruling the motion to strike out the supplemental complaint, nor in overruling the motion to compel appellant to paragraph the complaint. Neither can we reverse the judgment on the ground that the damages assessed are excessive. There was no available error in the admission of testimony in behalf of appellee over appellant's objection. The instructions, when considered together, as an entirety, were not unfavorable to appellant. On a careful reading of the entire record, in the light of the argument of counsel, we fail to find any error that would justify this court in reversing the judgment of the trial court. Judgment affirmed.

(13 Ind. App. 437)

SCHELLENBECK et al. v. STUDEBAKER.

(Appellate Court of Indiana. Nov. 1, 1895.)

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM—JUDGMENT—ENTRY ON SPECIAL VERDICT.

1. Before plaintiff can have judgment on a special verdict, it is essential that every fact

necessary to his recovery be contained in such verdict.

2. Where defendants in an action on a note, alleged to have been executed by one of them for the firm, enter a plea of non est factum, the burden is on plaintiff to show the authority of the one executing the note to bind the firm.

3. The execution of a note for the purchase price of a team of horses is not within the implied powers of either partner of a firm engaged in the dairy business.

Appeal from circuit court, St. Joseph county; L. Hubbard, Judge.

Action by Clement Studebaker against Emil Schellenbeck and one Snyder on a note executed in the name of a firm formerly composed of defendants. There was judgment for plaintiff, from which defendant Snyder appeals. Reversed.

F. J. Lewis Meyer, for appellant. Geo. E. Clark, for appellee.

GAVIN, J. The appellee sued appellant Snyder and Schellenbeck upon a note purporting to be executed by "Emil Schellenbeck & Co." Appellant Snyder filed a sworn answer of non est factum. The jury return a special verdict, upon which appellee had judgment. Snyder prosecutes this appeal. The material facts, briefly stated, are these: Schellenbeck executed the note sued on, being commercial paper, in consideration of a team of horses purchased by him from appellee, on whose land he was then farming upon his own account. Upon this land he used the team, solely in his own business, and never in the firm's business. Schellenbeck & Snyder were also engaged as partners in the dairy business under the firm name of Schellenbeck & Co. and were the owners of cattle, cows, and three teams of horses, used in delivering the milk produced by the cows. Snyder did not authorize the execution of the note, had no knowledge thereof until after the dissolution of the partnership, and, upon being apprised of it, immediately repudiated and disavowed it. At the time of the execution of the note, Schellenbeck represented that he and Snyder were partners, and that the horses were to be used in the partnership business. Appellant "relied upon these representations."

It will be noted that, under this statement of the facts, there was no express authority given by Snyder to execute the note. It does not appear that either the execution of the note or the purchase of the horses was necessary to the transaction of the firm's business, nor is it shown that the execution of such notes was usual in the dairy business generally or customary in the conduct of that particular dairy. It does affirmatively appear that the firm derived no benefit whatever from the purchase. Under such circumstances the judgment cannot be sustained, unless the law implies the authority to execute such paper from the existence of the partnership. It is the law, as declared in Indiana, that one partner is liable for what the other does in the firm name, within the

general scope of the business of the partnership. *Todd v. Jackson*, 75 Ind. 272; *Jackson v. Todd*, 56 Ind. 406; *Graves v. Kellenberger*, 51 Ind. 66; *Bays v. Conner*, 105 Ind. 415, 5 N. E. 18. By the general scope is meant, not only the actual, but the apparent, scope of the partnership. *Porter v. Wilson*, 113 Ind. 350, 15 N. E. 676; *Hoffman v. Toll*, 2 Ind. App. 287, 28 N. E. 557. Before the plaintiff can have judgment upon a special verdict, it is essential that every fact necessary to his recovery be contained in such verdict either by direct finding or necessary inference. *Becknell v. Hooser*, 10 Ind. App. 5, 37 N. E. 580. To justify a recovery by the appellee over the plea of non est factum, he was required to establish that the giving of the note was within the general scope of the partnership business. *Graves v. Kellenberger*, supra; *Lucas v. Baldwin*, 97 Ind. 471; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973. In determining whether or not the act is within the general scope of the partnership business, and therefore such as that the law implies the right to execute the paper, we must look to the character of the partnership. There is a marked distinction between the rules of law governing the members of trading or commercial partnerships and those of nontrading or noncommercial partnerships. In the former class, each partner is by law regarded as invested with authority from his copartners to execute negotiable notes and bills of exchange in the firm name, the use of such paper having been established as appropriate under the law merchant. *Hedley v. Bainbridge*, 3 Adol. & E. (N. S.) 315; *Lee v. Bank (Kan.)* 25 Pac. 196; *Friend v. Duryee*, 17 Fla. 111; *Milling Co. v. Lewis (Ariz.)* 32 Pac. 263; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687. But, as is said by the supreme court of the United States, this doctrine is "generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common custom or usage of such business to bind the firm by negotiable paper, or it is necessary for the due transaction thereof." *Dowling v. Bank*, 145 U. S. 512, 12 Sup. Ct. 923; *Story, Partn. § 102a*. Both the adjudged cases and the text-books generally sustain the same rule. *Hedley v. Bainbridge*, supra; *Garland v. Jacomb*, L. R. 8 Exch. 218; *Judge v. Braswell*, 13 Bush. 69; *Tanner v. Hyde (Colo. App.)* 31 Pac. 344; *Walker's Adm'r v. Walker's Estate (Vt.)* 29 Atl. 146; *Lee v. Bank (Kan.)* 25 Pac. 196; *Harris v. Mayor, etc. (Md.)* 20 Atl. 111; *Dear-dorff v. Thatcher*, 78 Mo. 128; *Smith v. Sloan*, 37 Wis. 285; *Pease v. Cole*, 53 Conn. 53; *Ulery v. Ginrich*, 57 Ill. 531; *Levi v. Latham*, 15 Neb. 509, 19 N. W. 460; 1 *Bates, Partn. §§ 345, 352*. From these cases last cited, as well as from those referred to in our own state, we think the law to be that, under the plea of non est factum, the burden is upon the plaintiff to show the authority. This burden is sustained by the presumption

of law when the partnership is a commercial one, but, when it appears that the partnership is of the nontrading class, then it devolves upon him to go further, and show such additional facts as are necessary to establish the right, either directly, by proof of express authority, or inferentially, by proof of usage, custom, or necessity therefor. In *Kimbrow v. Bullitt*, 22 How. 256, it is said that, "wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership." By "buying and selling," in this connection, we understand buying to resell. It is not sufficient, to constitute a trading partnership, that the firm should, in the course of its business, buy some articles, such as wagons, horses, feed, etc., not to sell again, but simply for use in its business. Many kinds of partnerships have been adjudged nontrading. That most nearly analogous to this under consideration is 'farming. *Tanner v. Hyde*, supra; *Prince v. Crawford*, 50 Miss. 344; *Walker's Adm'r v. Walker's Estate*, supra; *McCrary v. Slaughter*, 58 Ala. 230; *Greenslade v. Dower*, 7 Barn. & C. 635. That this was a nontrading partnership we have no doubt. Many of the adjudged cases hold that, in such partnerships, one member cannot be deemed to have authority to bind the others by a negotiable note, even though it be given for a debt of the firm. We are not required to, and do not, go so far, but we simply hold that, under the circumstances of this case, there are no facts which establish an express authority, or any necessity, usage, or custom, justifying the use of the firm name, nor is the partnership such a one as that the law will imply the authority to so do. We have given consideration to the cases cited by appellee, and do not find them sufficient to overthrow the principles and conclusion above announced. Many of them relate to purchase, and not to the execution, of negotiable paper. Judgment reversed, with instructions to render judgment for the appellant, Snyder.

(13 Ind. App. 365)

**MANCHESTER FIRE ASSUR. CO. v.
GLENN et al.**

(Appellate Court of Indiana. Oct. 30, 1895.)

INSURANCE—ASSIGNMENT OF INTEREST IN POLICY
—WAIVER OF OBJECTIONS.

1. An assignment of a policy of insurance made with the consent of the company's agent creates a new contract between the company and the assignee, the terms of the old policy being the basis thereof.

2. An insurance company may waive the indivisibility of one of its policies.

3. Defendant company issued a policy of insurance on a certain store building, owned by a partnership, and the fixtures and stock therein, owned by one of the members of the firm, knowing at the time that the ownership was thus divided. Subsequently the fixtures and stock were sold, and defendant's agent drew up a form of

assignment, which was signed by the vendor, transferring his interest in the policy to his vendee. *Held*, that the assignee might recover on the policy.

Appeal from circuit court, Manchester county.

Application for rehearing. Denied. Defendant, Manchester Fire Assurance Company, had issued a policy of insurance to a firm composed of one Koerner and Frank Zimmer on a store building, the fixtures and stock contained in which were owned by said Zimmer; these being included in the policy. Afterwards, but while the policy was in force, Zimmer sold the stock and fixtures to James E. Glenn, and subsequently, by a written indorsement on the policy, assigned to said Glenn all his interest therein, so far as it covered and embraced the stock and fixtures, defendant's agent himself preparing the written form of assignment.

For former report, see 40 N. E. 920.

LOITZ, J. The appellant has petitioned for a rehearing in this case, and in support thereof says: "The court has not apprehended our position in this case. It is not a question of ultimate liability of the company. It is a question of procedure, a question of pleading. So far as the question is concerned, the question of the ultimate liability of the company is not involved. What we desire to present is that, under the pleadings in this case, Mr. Glenn cannot recover, because there has never been any policy of insurance issued to him that he has declared upon." In this contention we do not concur, for a contract of insurance was entered into with Glenn. Counsel seem to overlook the fact that the assignment of a policy of insurance is the creation of a new contract between the company and the assignee, the terms of the old policy being the basis of the new contract. This proposition is abundantly sustained by authority. *Moffitt v. Insurance Co. (Ind. App.)* 38 N. E. 835, *New v. Insurance Co.*, 5 Ind. App. 82, 31 N. E. 475; *Insurance Co. v. Munns*, 120 Ind. 30, 22 N. E. 78. This court, in speaking of the assignment of a policy in *New v. Insurance Co.*, supra, used this language: "Such consent is equivalent to the creation of a new contract between the assignee and insurer according to the terms of the policy assigned. It is not strictly an assignment, but the creation of a new contract."

If we understand appellant's further contention, it is that there can be no recovery upon the policy in favor of Glenn alone until it and the assignment are reformed; that there can be no reformation, for there is no ambiguity or uncertainty apparent; that the contract fully expresses the intentions of the parties, and there is no occasion for a reformation. No reformation was asked or obtained, and, if appellant's position is correct, none could be decreed. Here again the appellant overlooks the fact that this action is based upon the new contract. The new contract

was between the company and Glenn. Koerner and Zimmer had no interest in the new contract. The assignment apparently covered Zimmer's interest in the realty and personality. The averments in reference to the ownership were intended to show that the appellant waived certain conditions of the policy. "Issuing or continuing a policy of insurance with full knowledge by the company of existing facts which, according to a condition of the contract, make it voidable, is a waiver of the condition." *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137. If, as a matter of fact, the new contract embraced or covered other property than the personalty, the appellant cannot complain if the appellee only seeks to recover for the personal property destroyed.

It is further contended that the policy or contract is an entirety and indivisible; that the assignment to Glenn rendered the contract void. The cases of *Havens v. Insurance Co.*, supra, and *Insurance Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, are again urged upon our consideration. It occurs to us that appellant's counsel misapprehend the force of those decisions. When the risk or property insured is an entirety, no change can be made in any part of it without affecting the risk on the whole. Thus, if a portion of it be mortgaged, or additional insurance be taken upon it, or if the title or ownership of a portion be changed without the consent of the insurer, such changes affect the entire risk, and cause a forfeiture. In these instances the hazard may be increased, and, being done without the consent of the company, render the contract void. But this principle has no application here, for it is alleged that the company consented to the assignment. These conditions were conditions for its benefit, and it certainly had the power to waive them. No principle is better settled than this. Here again appellant's counsel overlook the fact that this is a contract directly between Glenn and the company. Nothing has been done to increase the hazard under the new contract. Nothing appears in this case which in the remotest degree calls for the application of the rule contended for. Petition overruled.

(13 Ind. App. 372)

MANCHESTER FIRE ASSUR. CO. v. KOERNER et al.

(Appellate Court of Indiana. Oct. 30, 1895.)

On rehearing. Denied.

For former opinion, see 40 N. E. 1110.

LOTZ, J. What is said in the case of *Assurance Co. v. Glenn* (Ind. App.) 40 N. E. 928, disposes of all the questions raised on the petition for a rehearing except three—the waiver of the arbitration, the sustaining of the demurrer to the plea in abatement, and the sustaining of the demurrer to the second paragraph of the answer. We see no occasion for changing our opinion as to the waiver of the arbitration. The facts pleaded constitute a waiver. As to the rulings sustaining the demurrers to the plea in abatement and the second paragraph of answer, it must be remembered that the contract sued upon by Glenn

was a separate and distinct contract from the one in suit. It was a new contract, in which Glenn alone was the insured, and in which the appellees had no interest, and were not necessary parties. They were not bound to file a cross action upon another and distinct contract; nor could any judgment rendered therein in the absence of such pleading constitute an adjudication. Petition overruled.

(15 Ind. App. 355)

MORROW, County Surveyor, v. GEETING et al.¹

(Appellate Court of Indiana. Oct. 29, 1895.)

REPAIRING DRAINS—DUTY OF COUNTY SURVEYOR—ASSESSMENTS.

1. Rev. St. 1894, § 5631 (Elliott's Supp. § 1193), provides that after the construction of a drain the county surveyor shall keep the same in repair to the full dimensions as required in the original specifications. *Held*, that the fact that a drain was not completed under an original petition therefor, but was finished under a second petition for a drain to be constructed over the course outlined in the original petition, did not deprive the county surveyor of the right to clean out at least the portion originally built.

2. Rev. St. 1894, § 5631 (Elliott's Supp. § 1193), provides that the cost of repairs shall be apportioned on the land adjudged benefited by the construction of the drain "in like proportion" as benefits were assessed against the land for the construction of the work. *Held*, that assessments for repairs are to be assessed in proportion to the benefits received therefrom, and not merely in proportion to the amount assessed for the construction of the drain. *Parke County Coal Co. v. Campbell* (Ind. Sup.) 39 N. E. 149, followed.

3. Where it is shown that a county surveyor had jurisdiction to make repairs to a drain, it will be presumed that the assessments therefor were proportionate in the absence of a showing that they were excessive.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Jackson Morrow, county surveyor, against Lawrence K. Geeting and others to recover for certain assessments. Defendants had judgment, and plaintiff appeals. Reversed.

Blackledge, Shirley & Moon and Bell & Purdum, for appellant. Elliott & Overton, for appellees.

DAVIS, J. The case here presented arises on an appeal from an assessment made upon appellees' lands for the purpose of reimbursing the county treasury for moneys paid out for the cleaning and repairing of a certain ditch in Howard and Cass counties, Ind. The court below made a special finding of facts on which the court stated conclusions of law in substance and to the effect that the surveyor had no authority to make the repairs, and that the assessments made by him against the lands of appellees were void. The appellant excepted to the conclusions of law. Judgment was thereupon rendered against the appellant for costs. The errors assigned in this court bring in review the question whether the trial court erred in the conclusions of law on the facts found.

The special finding shows, among other

¹ Rehearing denied, 44 N. E. 58.

things, the following facts: In October, 1882, John Davis filed in the clerk's office of Howard county a petition for the construction of a drain in the counties of Howard and Cass. The entire length of the proposed Davis drain was 27,000 feet. Stake 0 in Howard county was the commencing point. The stakes were numbered consecutively down stream, being placed at a distance of 100 feet apart, until stake No. 270 of the main drain, being its outlet in Cass county, is reached. The petition also included a tributary known as the "Houser Tributary," 4,100 feet in length. The drain was duly established, assessments therefor made, and the commissioner of drainage was charged with the construction of the work, who proceeded to have the drain constructed as ordered. In March, 1886, the commissioner reported to said court that said Davis drain had been duly constructed and received, except from stake 0 to a point 80 feet below stake 39, which report was duly approved by the court. In October, 1886, the commissioner reported that he had collected and expended all of the assessments in the construction of the work, except \$25, and that said drain had not been completed, and could not be completed, under said proceedings, because of the lack of funds; and that, in order that the parties benefited thereby should receive the proper drainage of their lands, a new petition would be necessary. This report was approved, the commissioner discharged, and the work under said proceedings discontinued. The proceedings were had under sections 4273-4284, inclusive, Rev. St. 1881. Thereafter, in the same month, Charles R. Templeton and others filed in the clerk's office of Howard county their petition, under the statute above cited, asking for the construction of a drain following the same line precisely of the Davis drain from stake 0 to stake 178 of the Davis drain. Such proceedings were had that this drain was duly constructed. It appears from the special finding that more than two miles of the lower end of the Davis drain, including the Houser branch, were completed and received under the original proceedings, and that the residue of the drain as originally proposed was completed and received under the supplemental proceedings. In other words, under the Davis petition and the Templeton petition the entire system of drainage as originally described and contemplated in the Davis petition was fully constructed and received. The drain thus constructed was completed in accordance with the plans and specifications from stake 0 to stake 270 as one continuous drain. The appellant, as surveyor of Howard county, in 1890 caused that portion of the Davis drain commencing at stake 178, in Howard county, and extending thence to its outlet, in Cass county, at stake 270, to be cleaned out and repaired. The surveyor proceeded under sections 1198, 1212, Elliott's Supp. (sections 5631, 5642, Rev. St. 1894). From the assessments made by the surveyor the appellees, as before stated, appealed to the Howard

circuit court. So far as the questions involved on this appeal are concerned it is not necessary to refer to the special findings of the court with more particularity.

Counsel for appellees insist that the assessments made by the surveyor for the purpose of cleaning out and repairing the drains are illegal for two reasons: (1) Because he had no jurisdiction to make such repairs; (2) because in making such assessments he did not apportion and levy the same upon all the lands assessed for the construction of the John Davis drain. The contention that the surveyor had no jurisdiction to make such repairs is predicated on the fact that the entire Davis drain from stake 0 to stake 270 was not constructed in said original proceedings. It does appear, however, as we have seen, that from stake 178 to stake 270 said drain was constructed in said original proceedings, and that the assessments in question were made for cleaning out and repairing the drain from stake 178 to stake 270. Moreover, it appears that in the two proceedings the entire drain has been fully constructed in accordance with the plans and specifications from stake 0 to stake 270. In the view we take of the case, whether the drain was constructed under one or more proceedings, it was the duty of the surveyor, when completed, to keep at least the portion in controversy in repair. Section 5631, *supra*.¹ If, however, it was true that the drain had been constructed only from stake 178 to stake 270, and the residue of the work—the upper end of the ditch—had in fact been discontinued and abandoned, it was the duty of the county surveyor to have the specific portion so constructed under the original Davis petition kept in repair, and jurisdiction was conferred upon him to do so. *Artman v. Wynkoop*, 132 Ind. 17, 31 N. E. 468. In either view of the case, the surveyor, in our opinion, had jurisdiction to make the repairs.

The second proposition of appellees' counsel has also been settled adversely to them by a recent decision of the supreme court. *Parke County Coal Co. v. Campbell* (Ind.) 39 N. E. 149. It is decided in the case cited that the assessments for such repairs are to be assessed in proportion to the benefits received therefrom. Lands assessed for the original construction of the drain not benefited by the repairs are not to be assessed for such repairs. Therefore the assessments in question are not

¹ Rev. St. 1894, § 5631 (Elliott's Supp. § 1193) provides as follows: "After the construction of any such work the county surveyor of the county in which the proceedings were had for the construction thereof, shall keep the same in repair to the full dimensions, as to width and depth, as required in the original specifications, and certify the cost thereof, including his own per diem. * * * To raise the necessary money to reimburse the treasury, he shall apportion and assess the cost of such repairs upon the lands adjudged by the court benefited by the construction of the ditch, in like proportion as benefits were assessed against said lands for the construction of said work * * *."

void on the ground that all the lands assessed for the construction are not assessed for the repairs. No complaint was made by the appellees in the court below that any man's land was assessed in excess of the amount of benefits received by him on account of such repairs. When it is shown that the surveyor had jurisdiction to make the repairs, the presumption is that the assessments were made by him against the landowners affected thereby in proportion to the benefits received by such repairs. If appellees desired to question the amounts of the assessments on the ground that the assessments were not made on the basis of the benefits received from such repairs, or that there was some error in making the assessments on this basis, the burden rested on them to show that on this basis the assessments against them were excessive. *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841; *Conwell v. Tate*, 107 Ind. 171, 8 N. E. 36; section 5031, *supra*. In our opinion, the surveyor had jurisdiction to make the assessments. The assessments are not illegal because all the lands assessed for the construction are not assessed for the repairs. It is not shown that any of the lands of appellees are assessed in excess of the benefits received from such repairs. Therefore the judgment is reversed, with instructions to restate the conclusions of law confirming the assessments made by the surveyor, and for further proceedings in accordance with this opinion.

(15 Ind. App. 524)

SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD v. EDWARDS.¹

(Appellate Court of Indiana. Nov. 5, 1895.)

FRATERNAL INSURANCE ASSOCIATION — PLEADINGS — FAILURE TO SET OUT COPY OF WRITTEN INSTRUMENT — REPRESENTATIONS AND WARRANTIES — SPECIAL VERDICT.

1. Under an allegation that defendant order of Knights of Pythias issued its certificate of membership in the "Endowment Rank," it will be presumed that a certificate purporting to be issued by that "Rank" was in fact issued by defendant.

2. Where a policy recited that it was issued in consideration of the representations made in the application, and an answer in an action on the policy averred that it was issued on certain representations contained in answers to questions propounded when the application was made, and which were set out and alleged to be false, it will be presumed that said representations were in the application, in the absence of an averment that they were made outside thereof; and the answer as to that part will be held bad for failure to attach a copy of the application thereto, as required by Rev. St. 1881, § 362 (Rev. St. 1894, § 365).

3. Where an application for insurance referred to certain statements therein made as "warranties," and the certificate recited that it was issued "in consideration of the representations and declarations" made in the application, such statements should be considered as representations only.

4. Insufficient answers to special interrogatories are not ground for reversal, where the interrogatories were such that no answers which could have been made would have controlled the general verdict.

¹ Rehearing denied.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Susan E. Edwards against Supreme Lodge Knights of Pythias of the World on a certificate of insurance. Plaintiff had judgment, and defendant appeals. Affirmed.

McBride & Denney, for appellant. Finch & Finch, for appellee.

GAVIN, J. The appellee sued appellant upon a certificate of membership in its "Endowment Rank," and recovered judgment thereon. The appellant insists that the complaint was bad on demurrer, because the certificate does not, upon its face, purport to be issued by the Supreme Lodge of the Knights of Pythias, but rather by the Endowment Rank of that order, and invokes the familiar principle that, where there is a conflict between the complaint and the written contract upon which it is founded, the latter must control. *Hines v. Driver*, 100 Ind. 315. The complaint avers that the appellant "issued" to her husband, now deceased, "its certificate of membership in the Endowment Rank of the Order of Knights of Pythias of the World, whereby said defendant promised to pay to plaintiff the sum of two thousand dollars" upon due notice, etc. The certificate is sealed with the seal of the Supreme Lodge, signed by "J. A. Hinsey, President Board of Control," and "W. B. Kennedy, Supreme Secretary of the Endowment Rank." These averments are, we think, sufficient to show the execution of the certificate by the appellant. While we cannot take judicial notice of the organization of the insurance department of the Knights of Pythias, and declare (without reference to these averments) that this is the regularly authorized mode of execution of such contracts by appellant, we cannot, on the other hand, assume that there is a separate corporation styled the "Endowment Rank of the Knights of Pythias," instead of its being a mere instrumentality or subdivision of the Supreme Lodge, created for the purpose of carrying on a particular branch of appellant's business, viz. that of insurance. Under the authorities, the express allegations of the complaint that appellant did execute the contract must be deemed controlling, in the absence of a plea of non est factum. They are equivalent to an averment that the appellant executed the certificate by the name and style in which it is signed. *Lucas v. Baldwin*, 97 Ind. 471; *Napier v. Mayhew*, 35 Ind. 276; *Jackson v. Burger*, 28 Ind. 36; *Farley v. Harvey*, 14 Ind. 377; *Hunt v. Raymond*, 11 Ind. 215; 4 Thomp. Comm. Corp. § 5037.

We must regard the amended second paragraph of answer as founded upon the application. The certificate states that it is "issued in consideration of the representations and declarations made in his application." The answer avers that "the policy was issued upon certain representations contained in the an-

swers to two questions propounded when the application was made, and which are set out and alleged to be false and fraudulent." In the absence of any averment that these representations were made outside of the application, they will be presumed to be those referred to by the certificate, and therefore in the application. No copy of the application being filed with the answer, it was rightfully held bad. *Landon v. White*, 101 Ind. 249.

It is urged that the court erred in overruling the demurrer to the reply to the fourth paragraph of answer. The error in this ruling depends, as is conceded by counsel, upon whether or not the answers to certain questions contained in the medical examination are to be considered as warranties or representations. Counsel say: "The policy and application in this case must be read together, as together evidencing the contract. In the application appears the terse, plain, and emphatic statement, referring directly to the answers in question, that they are warranted to be true, and are offered to the Endowment Bank as a consideration of the contract." There is also contained in the application proper, on the other side of the sheet on which is the medical examiner's report, etc., this statement: "I declare, furthermore, that all the above statements are true to the best of my knowledge and belief, and that I have not concealed or omitted to state anything regarding my health, past or present, affecting the expectancy of my life, and that I hereby consent and agree that any untrue statement made in this application or to the medical examiner touching my health or expectancy of life shall work a forfeiture to all my rights." In the certificate itself there is no mention of any warranties, but it is expressly said that it is issued in consideration of the "representations and declarations made in the application," and the payment of the entrance fees, dues, etc. Thus, we have these statements of the insured referred to as "warranties" at one time, and as "representations" at another. Under such circumstances, they must, upon the authorities, be construed to be representations only. As we said in *Insurance Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190: "By reason of their stringent character, warranties in insurance policies are not favored in law. The court will construe as a warranty that only which the parties have plainly and unequivocally declared to be such." *Supreme Lodge v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Insurance Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582; *Rogers v. Insurance Co.*, 121 Ind. 570, 23 N. E. 498; *Insurance Co. v. Willer*, 100 Ind. 92; *Insurance Co. v. Martin*, 133 Ind. 378, 33 N. E. 105; *Insurance Co. v. Norman* (Ind. App.) 40 N. E. 111d. When, considering both policy and application together, it is left uncertain or ambiguous whether statements are to be taken as warranties or representations, the construction most favorable to the policy holder is to be adopted. The opinion rendered by Judge Davis in the case of *Insurance Co.*

v. Rundell, 7 Ind. App. 426, 34 N. E. 588, discusses this proposition at length. In *Rogers v. Insurance Co.*, supra, there was, as here, an express provision that the statements of the application should be warranties; yet, because it was also stated in the policy, as here, that the insurance was "based upon the representations" in the application, they were decided to be representations, and not warranties, just as we here decide. The case of *Moulou v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, is of the same character. The ruling in *Insurance Co. v. Rundell*, supra, has been approved in the cases of *Insurance Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927, and *Insurance Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779. With the law as we have thus found it to be, the objections advanced to the reply and instructions of the court cannot be sustained.

Complaint is made concerning the character and insufficiency of the answers of the jury to certain interrogatories returned with the general verdict. These interrogatories were such that no answers which could have been made to them could have controlled the general verdict, when taken in connection with the answers returned to other interrogatories propounded. This being true, there was no such error regarding them as would authorize a reversal. *Stone Co. v. Stewart*, 7 Ind. App. 563, 34 N. E. 1019; *Railway Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183; *Railway Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243.

After consideration of all the points presented by appellant's learned counsel, we find no just cause for reversal. Judgment affirmed.

(13 Ind. App. 424)

DAVIS et al. v. McMILLAN et al.

(Appellate Court of Indiana. Oct. 31, 1895.)

CORPORATIONS—LIABILITY OF STOCK SUBSCRIBERS
—PLEADINGS—MECHANIC'S LIEN—
HARMLESS ERROR.

1. Plaintiffs contracted to build a factory for a number of persons who were about to form a corporation, the price to be paid on completion of the work. The contract was signed by defendants, as subscribers, opposite the name of each being set forth the number of shares subscribed by him, and the amount of stock to be issued to him after incorporation; and it was agreed that each stockholder should be liable only for the amount of his subscription. *Held*, that the contract was several, and that a complaint against all the subscribers, for a balance due plaintiffs on the factory, which failed to show any individual defendant in default on his subscription, was insufficient.

2. Where, in an action to foreclose a mechanic's lien, no notice of intention to hold a lien, or a copy thereof, is filed with the complaint, the latter is insufficient.

3. Where a complaint which wholly fails to state a cause of action is not demurred to, and plaintiff appeals from the judgment after trial, intervening errors are harmless, and the judgment will be affirmed. *Manufacturing Co. v. Booth*, 37 N. E. 818, 10 Ind. App. 364, followed.

Appeal from circuit court, Jennings county;
T. C. Batchelor, Judge.

Action by Daniel J. Davis and another against Jarius B. McMillan and others on a subscription contract, and to enforce a mechanic's lien. From a judgment for less than their demand, plaintiffs appeal. Affirmed.

The contract declared upon provided that plaintiffs should erect a butter factory for a stipulated sum, which the undersigned subscribers would pay upon its completion. The subscribers agreed to incorporate as soon as such amount was subscribed, and it was further agreed that each stockholder should be liable only for the amount subscribed by him.

Geo. F. Laurence, Benj. F. Tweedy, and O. Bundy, for appellants. Overmyer & Little and L. Dixon, for appellees.

REINHARD, C. J. The appellants, Davis and Rankin, sued the appellees on an alleged contract, in which said appellants had agreed with the appellees to build a butter factory, of a certain description and quality, and for a certain price. The contract was signed by Davis and Rankin, and all the appellees, except the North Vernon Creamery Company, as subscribers, each of the latter signing under the following superscription:

Names of Subscribers.	No. of Shares.	Amount of Stock, after Incorporation.
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Opposite the name of each subscriber is set forth the number of shares subscribed by him, and the amount of stock to be issued to him after incorporation. The shares were \$100 each, and no subscriber took more than one share, except J. B. McMillan, who subscribed for five shares. It is averred in the complaint that Davis and Rankin completed the butter factory as required, and that the subscribers accepted the same, and paid thereon the sum of \$3,400 of the contract price, leaving due the appellants the sum of \$350, with interest. The complaint also declares upon a mechanic's lien, and asks to have the same foreclosed. There was no demurrer to the complaint. The appellees answered in several paragraphs, and the appellants filed separate demurrers to the fourth and sixth paragraphs of the answer, each of which was overruled, and an exception was saved to the ruling in each instance. The errors assigned relate to the ruling upon the demurrers to the fourth and sixth paragraphs of answer, in striking out some of the paragraphs of reply, and in overruling the appellants' motion for a new trial.

At the threshold of this case we are met by the contention of appellees' counsel that the complaint itself is fatally defective, and that the appellants' demurrer should have been carried back and sustained to the complaint, which being true, it is further argued that all subsequent errors were harmless. The complaint and contract declared upon are similar to those in *Manufacturing Co. v. Booth*, 10 Ind. App. 364, 37 N. E. 818; *Davis & Rankin Bldg. & Manuf'g Co. v. Hillsboro*

Creamery Co., 10 Ind. App. 42, 37 N. E. 549; *Manufacturing Co. v. McKinney* (Ind. App.) 38 N. E. 1093. In the present case one of the defendants, the North Vernon Creamery Company, is not a subscriber to the contract, and the complaint utterly fails to show any liabilities on its part. There is no cause of action shown against any of the appellees severally, as the complaint does not show any individual defendant to be in default on his subscription. The complaint is bad, also, as a complaint to foreclose a lien, for the reason that the transcript fails to show that the notice of intention to hold a lien, or a copy of such notice, was filed with the complaint. At the end of the complaint, in the transcript, the clerk has made a note, in red ink, as follows: "See mechanic's lien set out, beginning on page 164, line 23, and ending page 167, line 24." The page to which the clerk refers contains a statement of the introduction in evidence of "the original mechanic's lien against the creamery property, and filed in the recorder's office of Jennings county, Indiana, which mechanic's lien is in the words and figures, to-wit." Then follows the notice, as introduced in evidence. The rule of pleading in such cases, under our practice, is that, where it is averred that a copy of the instrument declared on is filed with the complaint, and an instrument corresponding with the one described is in its appropriate place, the complaint is sufficient in this particular; but where no copy of the instrument appears in the record as accompanying the complaint, the latter is insufficient, although it is averred therein that such copy was filed. *Old v. Mohler*, 122 Ind. 594, 23 N. E. 967; *Conwell v. Clifford*, 45 Ind. 392. The fact that the instrument, or a copy thereof, appears in the transcript as having been given in evidence will not obviate the necessity of copying such instrument in the transcript in connection with the complaint or pleading with which it is filed, unless it were shown that the instrument or copy referred to was in fact filed. If the copying of the instrument filed with the pleading were dispensed with in the transcript, the appellate tribunal would not be in a condition to determine whether the instrument filed with the pleading is the same as that given in evidence. Moreover, the note of the clerk, if it proves anything in the present case, shows that no notice or copy of notice was filed with the complaint, although it also shows that such a notice was placed in evidence. The notice to hold a mechanic's lien is the foundation of the action to foreclose, and the original, or a copy thereof, should be filed with the complaint. *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333; *Wasson v. Beauchamp*, 11 Ind. 18. The complaint, failing to show a personal joint liability, and being insufficient as an action to enforce a mechanic's lien, is not good for any purpose; and had a demurrer been addressed to it,

the court would have been in duty bound to sustain the same.

The appellants obtained a small judgment in the court below. They bring this case here on appeal, insisting that their judgment should have been for a larger amount. But, under the averments of their complaint, appellants were not entitled to any relief in this action, and therefore any intervening error is harmless, and must be disregarded, in the consideration of, and as applied to, the facts disclosed by the record in this case. *Manufacturing Co. v. Booth*, supra; *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66; *Palmer v. Road Co.*, 108 Ind. 137, 8 N. E. 905. Had the appellees appealed from the judgment rendered against them, and raised the question as to the sufficiency of the complaint, the judgment could not be sustained, for, as is well said by an eminent author, "where a complaint or declaration wholly fails to state a cause of action, the judgment should not be allowed to stand, for it is difficult, if not impossible, to conceive how a judgment can stand where there is no actionable wrong, and, surely there can be none where there is no cause of action. An unsupported judgment is a foundationless structure." *Elliott*, App. Proc. § 471. If, then, the appellants could not, on appeal by the appellees, have sustained the small judgment which they recovered against the latter, neither could they, upon the same complaint, have supported a larger one. Hence, in no event could the rulings complained of be harmful to the appellants. Judgment affirmed.

(158 Ill. 75)

ANDERSON v. SCHUBERT, Clerk of Criminal Court.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

COSTS IN QUASI CRIMINAL CASES—APPEALS FROM JUSTICES—MUNICIPAL CORPORATIONS.

One who has been convicted before a justice of the peace of violating a city ordinance, and has appealed therefrom to the criminal court of Cook county, where the case is triable de novo, cannot be compelled to pay a docket fee in the criminal court, as a condition precedent to having his case docketed in that court, since 1 Starr & C. St. c. 53, § 40, which provides that costs in prosecutions under city ordinances may be paid by the city, in the discretion of the council, does not give a defendant who is acquitted any absolute right to recover his costs, and *Id.* § 33, which provides that in cases of appeals from justices the appellant shall pay a docket fee, has no application to criminal and quasi criminal cases. *McArthur v. Artz*, 21 N. E. 802, 129 Ill. 352, followed.

Appeal from appellate court, Third district.

Motion by Julia Anderson for an order directing John C. Schubert, clerk of the criminal court of Cook county, to docket a certain case. The motion was overruled, and this

ruling was affirmed by the appellate court. 55 Ill. App. 227. The defendant appeals. Reversed.

Joseph B. David, for appellant.

BAKER, J. On March 29, 1894, appellant was tried before a justice of the peace in the city of Chicago for the violation of a municipal ordinance, found guilty, and fined \$100, for which sum, and the costs in the case, judgment was entered against her. On April 2d she and her counsel, with the proper papers, sought to perfect an appeal from said judgment to the criminal court of Cook county. The clerk of that court approved the bond, but refused to docket the case because appellant would not pay, in advance, the fee of \$10 demanded by him. On April 7th appellant moved the court for a rule on the clerk that he docket the said cause without the payment by her in advance, to him, of any costs or docket fee. The motion was denied, and exception taken. From the order entered denying the motion, an appeal was taken to the appellate court. That court affirmed the ruling below, and allowed an appeal to this court, certifying to the importance of the question involved. That question is whether or not appellant is entitled to have her appeal docketed in the criminal court without first paying to appellee, the clerk of that court, the fee demanded by him.

In *McArthur v. Artz*, 129 Ill. 352, 21 N. E. 802, it was held that where a person is charged before a justice of the peace with the commission of a criminal offense, and is fined by the justice, he need not, in case he appeals from the judgment of the justice, pay any costs in advance, in order to have the cause docketed in the court to which such appeal is taken. The ground upon which this decision was based was that inasmuch as a defendant who is to be tried upon a criminal charge cannot, in the event he is acquitted, be required to pay costs, he is therefore not required to advance them, since he could not, in such event, recover them back, where the proceeding is in behalf of the people. Does the case at bar come within the reason of this decision, so as to be governed by it? This is a quasi criminal prosecution, for the violation of a city ordinance. No statute, in express terms, makes the city liable for costs therein, in the event the suit results in the acquittal of the defendant. In section 40, c. 53, entitled "Fees and Salaries" (1 Starr & C. St. p. 1139), it is provided: " * * That the costs in criminal and quasi criminal prosecutions for the violation of an ordinance of an incorporated city or town, where the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may be paid by such city or town, in the discretion of the city council or board of trustees of such incorporated cities or towns." Under this statute it is left to the discretion of the municipal authorities to pay the costs

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

or not. It has been held in *Town of Nokomis v. Harkey*, 31 Ill. App. 107, and in numerous subsequent appellate court decisions, that a municipal corporation is not liable for costs made in prosecuting supposed violators of its ordinances, and that a judgment for costs cannot be entered against it when the defendant in any such prosecution is acquitted. And in *Holmes v. City of Mattoon*, 111 Ill. 27, it was said that municipalities, such as counties, cities, towns, etc., "are the instruments of the state to carry out its powers for the public welfare, and in exercising their powers and enforcing public rights they act as agents, and may have extended to them the same exemptions in suits as belong to the state. Municipal bodies act for the state, and, to the extent authorized, exercise the powers of government; and when so exercising such powers they may, when so authorized, do so without conforming to all of the requirements imposed by the practice on natural or artificial persons created for the purpose of business or gain." The decision in the case last cited, and the decisions of the appellate court, are based upon the same principle, and we approve of the decisions made by the latter court. The city of Chicago, therefore, would not be liable for payment of the costs made in this case, if appellant should be acquitted on the trial of her appeal. Hence, if appellant should advance the costs demanded by appellee, she could not, in the event of her acquittal, recover them back from the city. We think this case comes within the rule laid down in *McArthur v. Artz*, *supra*, and that appellant is not required to pay to appellee any costs before it becomes his duty to docket her appeal. Otherwise, if she should be acquitted, she would be out of pocket the amount so advanced, and it would be neither just nor reasonable that she should be compelled to pay the costs of court in a prosecution upon a charge of which she was found not guilty.

Appellee relies upon section 33, c. 53, p. 1135, 1 Starr & C. St., as amended in 1893 (Laws Ill. 1893, p. 104), as warranting his action and sustaining his contention. Said section, which applies only to counties having a population exceeding 70,000 inhabitants, provides, among other things, that in all cases of appeal from a justice of the peace, where the appellant shall file in the office of the justice of the peace in such counties his bond required by section 62 of the chapter entitled "Justices and Constables," he shall also, at the same time, pay to the justice, for the use of the clerk of the court to which the appeal is taken, the sum of \$10, to be taxed as costs in the suit, and that upon failure to do so it shall be the duty of the justice not to allow the appeal. The amendment referred to consisted in changing the amount of the docket fee from \$6 to \$10. In the light of what we have said, it is plain this section has no more application to the case we are now considering than it had to

McArthur v. Artz, *supra*. It follows, then, that the criminal court of Cook county erred in overruling appellant's motion. The judgments of that court and of the appellate court are therefore reversed, and the cause remanded to said criminal court. Reversed and remanded.

(158 Ill. 149)

ORR v. HANOVER FIRE INS. CO.¹

(Supreme Court of Illinois. Oct. 14, 1895.)

FIRE INSURANCE—CONDITIONS OF POLICY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Under a clause providing that the policy shall be void "if the property, or any interest therein, be sold or transferred," a general assignment by the insured for the benefit of creditors avoids the policy.

Appeal from appellate court, Third district. Assumpsit by Abner R. Orr, assignee of W. B. Cauble, insolvent, against the Hanover Fire Insurance Company. Plaintiff obtained judgment, which was reversed by the appellate court. 56 Ill. App. 621. Plaintiff appeals. Affirmed.

Calhoun & Steely, for appellant. Thomas Bates and Lawrence & Lawrence, for appellee.

CRAIG, C. J. This was an action brought by Abner R. Orr, assignee of W. B. Cauble, against the Hanover Fire Insurance Company, to recover the loss sustained by the burning of a certain two-story brick business building in the town of Sidell, in Vermillion county, which was insured against loss by fire in said company. The policy was issued February 14, 1893, to W. B. Cauble, to run one year; amount, \$2,000. In the circuit court the parties waived a jury, and on a trial before the court a judgment was entered in favor of the plaintiff, which, on appeal to the appellate court, was reversed, and a remanding order denied.

The policy upon which the action was brought contained the following provision: "If the interest of the insured be other than the entire, unconditional, and sole ownership of the property for the sole use and benefit of the insured; or if the property be incumbered by any lien, deed of trust, judgment, mortgage, or otherwise; * * * or if the property, or any interest therein, be sold or transferred, or any change takes place (other than by the death of the insured) in the interest, title, or possession, whether by legal process, or by judicial decree, or voluntary transfer by the assured, * * * then in every such case the policy shall be void." The policy further provided as follows: "If the property become subject to any lien or incumbrance by virtue of any mortgage, deed of trust, judgment, or decree, then in every such case this policy shall be void, unless otherwise provided by agreement." On the

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

4th day of August, 1893; five days before the fire, W. B. Canble made a voluntary assignment of all his property for the benefit of creditors to Abner B. Orr, the person who instituted this suit. The assignee, Orr, on the day the assignment was executed, took possession of the property, and remained in the possession thereof until the property was destroyed by fire. Prior to the fire it appears that five judgments, aggregating \$1,497.18, had been entered against the insured, Canble, in the county and circuit courts of Vermillion county by confession. The policy, which is the contract between the parties, contains no ambiguity, and its language is plain and easily understood. If the insured had sold and conveyed the property by absolute deed before the fire without the knowledge or consent of the insurance company, it is plain, under the terms and conditions of the policy, no recovery could be had, for the reason the policy expressly provides, if the property insured be sold or transferred, or any change takes place in the interest, title, or possession, the policy shall be void. Here the insured did not make a sale of the property, as that term is ordinarily understood, but he made an assignment under the statute for the benefit of creditors, and by deed of assignment duly executed he transferred the property embraced in the policy to an assignee, and the question presented is whether that was such a transfer or change in the title as would render the policy void.

When an assignment is properly executed, acknowledged, and recorded, it is well settled that the title to the property, both real and personal, of the assignor, passes to the assignee. In other words, as was said in *Freydendall v. Baldwin*, 103 Ill. 828: "It is a proposition that needs nothing in its support, if the voluntary assignment made by the failing debtors was valid, all the property, real and personal, which they owned at the time, passed to their assignees, under the provisions of the statute. If, therefore, the title to the property, under and by virtue of the deed of assignment, passed from the insured to the assignee, it is plain there was a change in the title of the property, caused by the voluntary act of the insured, and by the plain terms of the policy it became void." *May, Ins. § 264*, says it is a general principle that the insured cannot recover unless he has an interest in the property at the time of the loss, and that an absolute alienation works a forfeiture, whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss; that a transfer to the assignee, by decree of court, of a bankrupt's estate, under the bankrupt laws of the United States, upon a bankrupt's petition, is an alienation. In such case the property is vested in the assignee, and, though the proceedings may be stayed, and the property

may revert in the bankrupt, this is a contingency too remote to be considered the foundation of an insurable interest in the bankrupt, and he adds: "And, of course, a voluntary assignment for the benefit of creditors is equally a transfer, unless possession be retained by the assignor." In the case of *Dadmun Manuf'g Co. v. Worcester Fire Ins. Co.*, 11 Metc. (Mass.) 429, the assured made a general assignment, under the statute, for the benefit of creditors. Suit was brought by the assignee upon a policy of insurance which had been issued to the assignor, and which provided that: "The alienation, in any way, of any property insured under this policy, shall ipso facto make the policy void, unless notice of the alienation shall be given to the company, and indorsed on the policy." In the decision of the case it is said: "The facts in this case are that the insured, being embarrassed, assigned their property, including the premises insured, to Dadmun, Church & Lord, to sell the same, and pay the debts secured by the assignment, and the deed of assignment contained only a qualified release of the assignors. This deed, it is now said by the plaintiffs, was fraudulent and void against creditors, by force of the statutes of 1836 and 1838. However that may be, it does not now lie with the assignors to aver their fraud in making that deed in order to void the title made by them under it, and thus be allowed to fall back upon their former title. * * * No notice of the conveyance was given to the defendants, nor did any assignment of the policy take place. This was a violation of the tenth rule of the defendants, of which they may avail themselves. It is said that this conveyance was in trust, to pay debts, which the property was more than sufficient to cover, but this fact does not alter the character of the conveyance, nor make it less an alienation." See, also, *Young v. Insurance Co.*, 14 Gray, 150; *Perry v. Insurance Co.*, 61 N. Y. 214. But it is said in the argument that the conveyance in this case was in the nature of a mortgage or trust for the benefit of creditors, and "that there was no change in the fact of title, but only in the evidence of it." We do not concur in that view. Upon the execution and delivery of the deed of assignment all the title and interest originally held by the assignor passed from him to the assignee. His legal interest was gone; the right of possession was gone, and the assignee was clothed with the right and power to sell and convey the property and distribute the proceeds among the creditors. After the assignment, the assignor has no more control over the property than he would have in case of an absolute sale. In conclusion, we are satisfied the appellate court reached a correct conclusion, and its judgment will be affirmed. Affirmed.

(153 Ill. 111)

STEVENS v. PEOPLE.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

RAPE—EVIDENCE—HEARSAY.

On trial for assault with intent to commit rape it is error to allow witnesses to whom the prosecuting witness made complaint to testify that she told them in defendant's absence that he was the person who assaulted her.

Error to circuit court, Rock Island county; Arthur A. Smith, Judge.

Indictment of William E. Stevens for assault with intent to commit rape. Defendant was convicted, and he brings error. Reversed.

This is an indictment against plaintiff in error for assault with intent to commit rape upon one Philomena Berkins. The jury, upon the trial of the case, returned a verdict of guilty, and fixed the punishment at one year in the penitentiary. Motions for new trial and in arrest of judgment were overruled, and judgment was rendered upon the verdict. This writ of error is sued out for the purpose of reviewing such judgment. A motion was made before this court by plaintiff in error at the October term, 1894, that the writ of error be made a supersedeas. This motion was granted at that time, and plaintiff in error was then admitted to bail pending the consideration of the case here.

The offense is alleged to have been committed in Moline on Tuesday, the 22d day of August, 1893. The plaintiff in error is a man of family, 54 years of age, and for 14 years prior to his conviction was engaged in the real-estate and insurance business at Moline. The prosecutrix is a married woman, the wife of one Martin Berkins. She is more than 35 years old, and came to this country from Belgium on April 27, 1893. She had lived at Ghent, in Belgium, and was there divorced from her first husband. She married her present husband, Martin Berkins, in Rock Island, on June 6, 1893. She says that she had known Berkins 10 years, and came to America to marry him. Berkins was also a Belgian, born in 1861, and had lived in this country about two years at the time of the trial. The prosecutrix admits that she kept a saloon in Ghent alongside of a house of ill fame; that she was 25 years old when she first kept a saloon, and, the last time she kept it, kept it 14 months, and 5 years before that kept a saloon in connection with a lodging house; and that she had no other business in Ghent besides keeping a saloon and lodging house. A witness named John Deeling, at whose house the prosecutrix stopped when she first came to Moline, and for whom she acted as cook for a short time, swears that he knew her in Belgium, and that her general reputation there, in the neighborhood where she lived, for truth and veracity and for virtue and chastity, was bad;

that she was talked of in the saloons in Ghent as a bad woman, and as the keeper of a house of ill fame; and that since coming to this country she had told him that she ran a house of ill fame in Ghent, and had kept a saloon in connection therewith, making her living thereby. Two other witnesses swear that the prosecutrix had stated to them that she had kept a house of ill fame in Ghent, Belgium, before she came to this country. Two witnesses produced by the prosecution swore that they had known her as a saloon keeper in Belgium, and had been in her saloon there, and that she did not keep a house of ill fame there, and that her reputation for chastity was good. One witness for the prosecution, who had known her here for something more than a year, but had no other acquaintance with her than to pass the salutations of the day, swears that her general reputation for truth and veracity was good.

The proof shows that the prosecutrix and plaintiff in error had met only three or four times before the alleged assault was committed. As to the first time she saw him, she says that she was at the house of a neighbor, named Braum, sitting on the porch, peeling apples, and Stevens was "alongside of her," on his knees; that he took hold of her breasts, and sat down, and put his hand under her clothes upon her leg, and she gave him a slap, and he "got up" and went away, and made a motion to her with his hands, indicating that he would pay her money, but that she continued to sit there, and said nothing to her husband about it, because she was afraid; and that all this occurred about five minutes after she saw him for the first time. The date of this first meeting was Thursday, August 17, 1893. As to what then occurred plaintiff in error says that he came into Braum's yard, and saw her sitting on the steps; that she addressed him by name, and appeared to know him, and spoke to him as if she was intimately acquainted with him; that her appearance indicated that she was not a pure woman; that he sat down on the porch because there was no other place to sit, and was close enough to push her without getting up; that he only remained there a minute or two; that Mrs. Braum's little girl was sitting on the porch, and Mrs. Braum was passing to and fro; that he merely brushed her on the thigh with his hand, outside her clothes, and the only thing she did was to shake her head, having a knife in one hand and the apple dish in her lap. Plaintiff in error was again at the house of Braum, who had been doing some work for him, on Sunday, August 20th. Prosecutrix and her husband were there at the time, drinking coffee. He remained but a few moments, and nothing passed between them. She says that on the next day, Monday, August 21st, about half past 12 o'clock, Stevens came to her house, to get her husband to do some work upon a well near Braum's house; that her husband was eating his dinner; that Stevens

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

made lewd motions to her behind her husband's back, and showed her money; that she was busy undressing herself, and Stevens went after her in another room, and asked her if she wanted money; that he then went away, and her husband went to work; that about 2 o'clock in the afternoon Stevens came back to the back door; that she was in the kitchen, and saw him coming, and thought she heard him knock, and jumped through the window, and ran to one of the neighbors, and saw him no more that day. Two witnesses swear that in giving an account of this day's transactions the prosecuting witness spoke of having gone into a room and got a revolver, but she says that she said nothing about a revolver. The plaintiff in error says that he has no recollection of being at the house of the prosecuting witness but once on Monday; that he went there to get Berkins to help a man who was digging a well, as Berkins had told him the day before, at Braum's house, that he wanted work; that he knocked, and was invited in, and found Berkins and his wife in the kitchen; that she motioned to her husband to go into the sitting room, which he did; that he sat down to the table to eat his dinner, saying that he would go to the well as soon as he finished his meal; that when he finished he went into another room, and closed the door after him; that the prosecutrix motioned with her hand to the door of the room where her husband had gone, and said to plaintiff in error in broken English, "You come to-morrow." The next meeting took place on Tuesday morning, August 22d, at her house, at which time the assault is alleged to have been made. She swears that on that day Stevens came to her house about 8 o'clock in the morning, while her husband was working for him near Braum's; that he did not knock; that there was a mosquito door in front, which was open; that the bedroom window was open (there was a dwelling on one side of the house, 52 feet distant, and another on the other side, 90 feet distant); that Stevens asked if her husband was at work, and she said, "Yes"; that he then came in, and closed the door; that she was sitting in a rocking chair, knitting stockings, and there was a low kitchen chair in front of her, on which her foot rested; that he began to talk to her, and sat down upon the chair in front of her; that she said nothing, but was busy fixing her stockings; that he put his hand under her clothes, and she slapped him on the fingers; that he then began taking liberties with her again; that she said it was warm, and rose up to open the door; that he then put one hand under her chin and one under her clothes, and held her; that the rocking chair tipped over, and broke the hinge on the buttery door; that he threw her over the chair; that she scratched him, and as soon as she scratched him he let her loose; that after she was loose she took the poker and struck him, and he commenced to cry, and said, "Forgive me"; that his hat fell in the water, and he took it and ran away; that she

ran over to one of the neighbors, and showed her with a stick how she had struck him; that she went to her husband, and told him what Stevens had done. Upon her original account of the transaction she made no statement that the plaintiff in error exposed his person to her, but at a subsequent telling she swore that such was the fact. She made no outcry. The plaintiff in error testifies, in regard to the occurrences of Tuesday, that he went to the house of the prosecutrix on that morning about 9 o'clock, and knocked; that she said to him "Come in"; that she was mending stockings, and motioned to him to take the chair in front of her, saying, "Take a chair"; that her chair was by the window, and the back of his was against the wall; that he did put his hand under her clothes, upon her thigh; that she sat there, and he took his hand away, and sat back in his chair; that she then raised both her hands, and scratched and tore his face, and swore at him, and said she would make him pay, and motioned to him to leave; that he left as soon as he could; that she did not strike him with a poker, or any other weapon; that he did not expose his person to her in any way, nor put his hand on her throat; that when he went out of the house she went out and picked up a piece of kindling wood, and made a motion as if to throw it at him; that he got into his buggy, and went to the place where her husband was working; that after a little while she came there, and she and her husband went to Braum's house, where he followed them, and left them. That day the prosecutrix went before a justice, and swore out a warrant for the arrest of plaintiff in error. It seems that in the evening of that day plaintiff in error and one Verdict, a Belgian, went to Berkins and his wife, to see if the matter could be settled, neither party seeming to be aware that they were doing anything wrong by making a settlement. Berkins wanted \$50. Mrs. Berkins said they would take \$25. Finally Berkins agreed "to let it go for \$20." Stevens then "put \$20 on the trunk. Mrs. Berkins took the money."

The plaintiff in error assigns as errors: (1) That the evidence does not establish his guilt; (2) that the court permitted the prosecution to prove not only that the prosecutrix made complaint to others shortly after the alleged assault, but that she made complaint to others that she had been assaulted by plaintiff in error; (3) that the state's attorney, in his argument to the jury, made improper remarks; (4) that both the jury and the bailiff in charge of the jury were guilty of improper conduct; (5) that the court refused to give defendant's instruction No. 11; (6) that the court refused to permit the prosecutrix to be cross-examined as to certain convictions for crime alleged to have been obtained against her, and certain punishments for crime alleged to have been inflicted upon her, in Belgium, before coming to this country; (7) that the court refused to permit the prosecutrix to answer a question put to her by the defense upon her cross-examination, as

to whether she did not occupy the same bed with Berkins, her present husband, from April 27, 1893, when she arrived in this country, up to June 6, 1893, when she was married to him,—that is to say, as to her cohabitation with him before marriage.

William Jackson and J. M. Beardsley, for plaintiff in error. M. T. Moloney, Atty. Gen., for the People.

MAGRUDER, J. (after stating the facts). The offense charged in this case is assault with intent to commit rape. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Rev. St. (Crim. Code) c. 38, div. 1, § 20. There is no doubt that the plaintiff in error here was guilty of taking improper liberties with the prosecutrix, but upon the question whether he was guilty of an assault upon her with a felonious intent to have carnal knowledge of her by force and against her will, the case is an exceedingly close one. In *Barr v. People*, 113 Ill. 471, we said, in reference to the crime of assault with intent to commit a rape: "Before the accused could be rightfully convicted, it should appear from the evidence he made an unlawful assault upon the prosecuting witness with intent feloniously and forcibly to ravish and carnally know her against her will." To establish the crime, it must appear from the evidence not merely that there was an assault, not merely that the prisoner was trying to persuade the prosecutrix to yield to his embraces, but that his intention was, if it became necessary, to force a compliance with his desire at all events, and regardless of any resistance made by his victim. *Com. v. Merrill*, 14 Gray, 415; *State v. Priestley*, 74 Mo. 24; *Reynolds v. People*, 41 How. Prac. 179; *White v. State* (Ind. Sup.) 36 N. E. 274; *Irving v. State*, 9 Tex. App. 68. Although the aggressor may have been guilty of indecent, or even violent, familiarity with the person of a female, he has not been guilty of assault with intent to commit rape upon her if the proof shows that it was not his object or intent to accomplish his purpose by force, against her will, and without her consent. *Outlaw v. State*, 35 Tex. 481; *Irving v. State*, supra; 19 Am. & Eng. Enc. Law, p. 969. It must appear that he intended to use whatever amount of force was necessary to overcome her resistance, and compel her to submit to his passion. *State v. Hagerman*, 47 Iowa, 151; *State v. Kendall*, 73 Iowa, 255, 34 N. W. 843. As a general rule, consent on the part of an adult woman deprives the act of the character of an assault, unless her consent has been procured by fraud. *Rosc. Cr. Ev. marg. p. 306*; 1 Bish. Cr. Law (7th Ed.) § 261; 2 Bish. Cr. Law, §§ 35, 36; 1 Am. & Eng. Enc. Law, p. 784. Ordinarily, the accused and the prosecutrix are the only parties who have any actual knowledge of the facts where the crime charged is rape, or an attempt to commit rape. The conviction in most

cases is brought about by the testimony of the woman alone. Long ago it was said by Lord Hale, in regard to the charge of such a crime, "that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Hale, P. C. 635. Accordingly, the testimony of the prosecuting witness must be scrutinized with caution, and, when the defendant denies the crime, her evidence should be corroborated. Her general reputation for chastity may be shown as bearing upon the question of consent. If she made outcry at the time of the occurrence, or made complaint immediately thereafter, such facts may be shown as corroborating circumstances. 1 Russ. Crimes, marg. pp. 688, 689; *State v. Hagerman*, supra; 19 Am. & Eng. Enc. Law, pp. 958-963, and cases in notes. Examined in the light of these principles, the evidence in this record cannot be said to so clearly preponderate in favor of the prosecution as to lead us to the conclusion that no harm was done by the erroneous admission of the evidence hereinafter referred to. Where the evidence upon the question of guilt is not such that all honest minds of ordinary intelligence must necessarily come to the same conclusion after giving it proper consideration, the defendant is entitled to have it passed upon by a jury instructed with substantial accuracy as to the law applicable to it. *Hoge v. People*, 117 Ill. 35, 6 N. E. 796. So where the evidence is conflicting, and the case is close upon its facts, no incompetent testimony should be permitted to reach the jury which might improperly influence their verdict. *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

The only assignment of error which we deem it necessary to notice is the second. The testimony therein alleged to have been improperly admitted is that of Martin Berkins, the husband of the prosecutrix, and that of Winnie Dunlevy, both witnesses for the state, as to the complaint made to them by the prosecuting witness after the alleged assault was committed. The testimony of Martin Berkins, which is objected to, is as follows: "On the road from your work up to Braum's, you may state if your wife made complaint to you that she had been assaulted. Answer yes or no. (Objection by defendant. Overruled. Exception.) A. Yes, sir. Q. Did she tell who assaulted her? Answer yes or no. (Objection by defendant. Overruled. Exception.) A. Yes, sir. Q. Who was he? By the Court: Simply tell his name. (Objection by defendant. Objection overruled. Exception.) A. Stevens, she says. Q. Was it Stevens, the defendant? (Objection. Overruled. Exception.) A. Yes, sir." The testimony of Winnie Dunlevy upon this point, which was objected to, is as follows: "Q. You may state whether or not she made complaint to you that she had been assaulted. Answer that yes or no. A. Yes, sir. Q. In that complaint, did she state who had assaulted her? (Objection. Overruled. Exception.) A. Mr. Ste-

vens." The objection to this testimony is that these witnesses for the state were allowed to say that Mrs. Berkins told them that Stevens had assaulted her. The statements were made in the absence of Stevens, and, of course, under the ordinary rules of evidence, were mere hearsay. In case of a prosecution for rape, or for an assault with intent to commit rape, it may be proven by the testimony of third persons that the prosecutrix made complaint to them, provided such complaint was made as soon as was practicable, or without any inconsistent delay. 3 Greenl. Ev. § 212. This is an exception to the general rule that hearsay evidence is inadmissible. The law allows the exception upon the generous supposition that a woman thus wronged will be prompted to express her indignation at the injury inflicted upon her. The fact that the prosecutrix made a complaint immediately after the occurrence is allowed to be proven, because it tends to corroborate her testimony as given on the trial. It is not admitted for the purpose of proving the commission of the offense, and cannot be introduced at all if the prosecutrix is not a witness. Accordingly, a witness to the fact of the complaint may state where and to whom it was made, but he cannot state the name of the person charged with the offense, nor any of the details of the transaction as communicated by the prosecutrix. On the direct examination the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive in answer only a simple yes or no. If the defendant desires to inquire into the particulars of her narration, he can do so upon cross-examination; or such particulars may be proven by way of confirming her testimony after it has been impeached. 3 Greenl. Ev. § 213; 1 Russ. Crimes, marg. p. 689; 19 Am. & Eng. Enc. Law, p. 959, and cases in notes; State v. Jones, 61 Mo. 232; Scott v. State, 48 Ala. 420; Baccio v. People, 41 N. Y. 265. "In Reg. v. Osborne, Car. & M. 622, 41 E. C. L. 338, after the witness had testified that the prosecutrix made complaint, and charged a particular person with the commission of the rape, it was proposed to ask her whose name was mentioned by the prosecutrix, and the court held that it was not permissible." State v. Niles, 47 Vt. 82. In Thompson v. State, 38 Ind. 39, it was held that the prosecutor may show that the prosecuting witness made complaint of the outrage recently after its commission, and when and where and to whom it was made, but "that he cannot be allowed to prove the name of the person charged with the crime, or the particulars as narrated by her." While it may be true, as is claimed by counsel for defendant in error, that there are cases which hold to the contrary of the rule above stated, yet in this state we have already recognized the doctrine announced by the foregoing authorities as the correct one. In Bean v. People, 124 Ill. 578, 16 N. E. 656, where the indictment was for rape, this court said: "The

complaint made by the witness was proper evidence only of the fact of making complaint, and not of who the person was that committed the offense." Here Martin Berkins and Winnie Dunlevy were allowed to testify on behalf of the state, not merely that Mrs. Berkins made complaint to them, but that she told them, in the absence of plaintiff in error, that plaintiff in error had assaulted her. Clearly, this was hearsay evidence, and inadmissible under the rule announced. We are unable to say that the jury did not accept this hearsay testimony, and act upon it as original and substantive evidence to prove the truth of the statements of the prosecuting witness, and to establish the charge against the accused. If it had that effect, it operated seriously to his prejudice and injury. For the error thus indicated the judgment of the circuit court is reversed, and the cause is remanded to that court. Reversed and remanded.

(157 Ill. 321)

AURAND v. AURAND.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

DIVORCE—CRUELTY—ALIMONY—ATTORNEY'S FEE.

1. Slight acts of violence by a wife towards her husband are not cause for divorce on the ground of cruelty so long as there is no reason to suppose that he will not be able to protect himself by a proper exercise of his marital powers. 55 Ill. App. 426, affirmed.

2. An allowance of \$150 as solicitor's fees, where there is both a bill and a cross bill, is not excessive. 55 Ill. App. 426, affirmed.

3. Where the husband has a salary of \$125 a month, and owns no property except 10 acres of land, costing \$1,350, from which he receives no income, and there are no children, and he left his wife \$1,000 and some furniture when he abandoned her, an allowance of \$50 per month for alimony is excessive, and should be reduced to \$30. 55 Ill. App. 426, affirmed.

Appeal from appellate court, First district. Bill for divorce by Ambrose J. Aurand against Eva Aurand. Defendant obtained a decree, which was modified by the appellate court. 55 Ill. App. 426. Complainant appeals. Affirmed.

W. H. Martz, for appellant. F. S. Murphy, for appellee.

MAGRUDER, J. This is a bill for divorce, filed by the appellant, the husband, against appellee, the wife, asking for a divorce upon the ground of extreme and repeated cruelty. Appellee answered the bill, denying the charges; and filed a cross bill for separate maintenance, which was answered by appellant. After hearing had upon evidence introduced by both sides, the circuit court rendered a decree dismissing the original bill of divorce filed by appellant for want of equity, and granting to the appellee relief upon her cross bill. Upon the issue made by the cross bill the decree found that the appellant left his home on

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

March 14, 1893, and refused to live with appellee, without a just and reasonable cause, and has since continued to live separate and apart from her without fault on her part; and the decree ordered that appellee should pay to appellant the sum of \$50 per month until the further order of the court, and to her solicitor the sum of \$150 for solicitor's fees. An appeal was taken from the decree of the circuit court to the appellate court. The appellate court affirmed the decree of the circuit court upon the issue formed upon the original bill for divorce and the answer thereto, but upon the issue made upon the cross bill reversed the decree, and remanded the cause to the circuit court, with directions to the latter court to so modify its decree as to reduce the monthly allowance to be paid by appellant to appellee from \$50 to \$30. The present appeal to this court is prosecuted by the appellant for the purpose of reviewing the whole decree.

We think that the decree was correct in dismissing the original bill for want of equity. Where a husband asks a divorce from his wife upon the ground of extreme and repeated cruelty, he must make out a clear case. It is not sufficient to show slight acts of violence on her part towards him, so long as there is no reason to suppose that he will not be able to protect himself by a proper exercise of his marital powers. *De La Hay v. De La Hay*, 21 Ill. 252; *Fritz v. Fritz*, 138 Ill. 436, 28 N. E. 1058. The evidence here does not make out a clear case of cruelty, nor does it establish such a course of bad conduct on the part of the wife towards the husband as to satisfy the court that it is unsafe for him to cohabit with her. *De La Hay v. De La Hay*, supra. The testimony shows that the appellant is a conductor upon one of the railroads running out of the city of Chicago, and receives a salary of \$125 per month, and that the only property which he owns, is a tract of 10 acres of land in Florida, for which he paid \$1,350 and from which he receives no income. It also appears from the evidence that when he abandoned his wife he left \$1,000 in money and a small amount of household furniture with her. The parties had no children. We are unable to say that the amount of the solicitor's fee as fixed by the decree is unreasonable in view of the services rendered as shown by the evidence. In suits for separate maintenance the statute provides that "the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce." 1 Starr & C. St. p. 1281. The court may, in the exercise of judicial discretion, allow a reasonable solicitor's fee; and, while its orders in that behalf are subject to review, yet the exercise of its discretion will not be interfered with, unless the allowance is excessive, which is not the case here. *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891.

As to the amount directed to be paid to ap-

pellee each month, appellant claims that the appellate court erred in allowing \$30 a month, while appellee assigns it as a cross error that the appellate court reduced the amount allowed by the circuit court from \$50 to \$30 per month. We are not disposed to disturb the ruling of the appellate court. While the allowance of alimony is said to be discretionary, yet the discretion in such cases must be judicial, and not arbitrary, and its exercise is subject to review; and yet a decree fixing the amount to be paid in such cases for the support of the wife will not be disturbed unless there is a strong and decided difference of opinion upon the subject between the appellate court and the circuit court. *Foot v. Foot*, 22 Ill. 425. We have said that in such cases an appellate court is only authorized to reverse upon the ground that the allowance is excessive, where "the difference in judgment between the appellate and circuit court is strong and decided." *Foss v. Foss*, 100 Ill. 576. The action of the appellate court shows that such a difference in judgment here existed between that court and the trial court, and, in view of the circumstances of the case, we are inclined to the opinion that the amount fixed by the appellate court is reasonable and fair. We do not, however, regard the case of *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600, as an authority for any such reduction in the allowance as has been made here. In the *Umlauf* Case, supra, the question was not whether the monthly award there made for the support of the two children there named was or was not too great, but the amount which had been ordered to be paid to the mother for the support of two children was reduced one-half solely because the custody of one of the children was taken from her and given to their father. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 385.)

CHICAGO & A. R. CO. v. HEINRICH.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—EVIDENCE—PLEADING—MISNOMER.

1. In an action against a railroad company for an accident at a crossing, plaintiff testified that the accident occurred while he was driving along Oakley avenue. Several witnesses spoke of the avenue as a street, and testified that there was quite an accumulation of wagons thereon, waiting for the crossing to be cleared. Held sufficient to go to the jury as tending to show that Oakley avenue was a public street. 57 Ill. App. 899, affirmed.

2. Evidence that an engine was stopped just at the edge of the crossing, and the engineer then called to plaintiff to come on; that just as plaintiff's horses reached the rails the engineer blew off steam very hard, whereupon plaintiff's horses took fright and ran away,—sufficiently shows that the engineer negligently

¹ Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

blew off steam, and that this negligence caused the accident. 57 Ill. App. 399, affirmed.

3. Misnaming the defendant in the introductory part of the declaration is cured by verdict, especially where the defendant has pleaded in bar by its right name. 57 Ill. App. 399, affirmed.

Appeal from appellate court, First district.

Action on the case by August Heinrich against the Chicago & Alton Railroad Company. Plaintiff obtained judgment which was affirmed by the appellate court. 57 Ill. App. 399. Defendant appeals. Affirmed.

Defendant's ninth instruction, which was refused by the court, was as follows: "(9) And the court instructs you that there is no proof of the existence of a public street or highway in what has been called 'Oakley Avenue,' at the place in controversy, in either one of the three ways above mentioned; and therefore, on this point, the plaintiff having failed to establish his case, you are instructed by the court to find a verdict for the defendant." Defendant's fourteenth instruction was as follows: "(14) The plaintiff, by the first count of the original declaration, and the first and third counts of his amended declaration, has made it a material question of fact in issue in this case that the railroad in controversy was the Chicago, Alton & St. Louis Railroad, and unless he has proved that fact—that it was the Chicago, Alton & St. Louis Railroad, or was known as such—he cannot recover under those counts; and it is not sufficient for him to prove that it was the Chicago & Alton Railroad Company." This instruction the court modified by striking out the words in italics, and then gave the instruction as modified.

W. E. Hughes (Wm. Brown, of counsel), for appellant. J. J. Coburn and Geo. W. Brown (Case, Hogan & Case, of counsel), for appellee.

BAKER, J. At the trial in the superior court of Cook county of this action on the case, brought by August Heinrich, to recover damages for personal injuries, the court, by its instructions, excluded from the consideration of the jury all of the counts of the declaration, except the first of the original counts, and directed them to consider that count only, and the allegations therein contained. A verdict of guilty was returned, in which the damages were assessed at \$2,500; and a judgment was rendered on that verdict, and the judgment afterwards affirmed in the appellate court.

The substance of said first count is that the plaintiff was riding in his wagon, drawn by his team, upon and along Oakley avenue, a public street in the city of Chicago, and was about to cross the defendant's railroad at the crossing of said avenue and said railroad, when the defendant then and there, by its servants, carelessly, negligently, and improperly allowed steam to escape from its locomotive engine, making such loud and unusual noise that by and through the improper, negli-

gent, and careless conduct of the defendant, by its servants, in that behalf, the horses of the plaintiff became frightened and ran away, and overturned the wagon in which the plaintiff, with due care and caution, was riding on said public street, whereby the plaintiff was thrown upon the ground and injured. It is urged it was error to allow the case to go to the jury upon this first count, and to refuse the fourth instruction proffered by appellant, which was as follows: "The court instructs the jury to find the defendant not guilty." This contention is based on three claims: First, that there was no proof that Oakley avenue was a public highway; second, that there was no proof that the defendant carelessly, negligently, and improperly allowed steam to escape from the locomotive, thereby making loud and unusual noises; third, that there is no evidence to prove that, through the negligence in that behalf, plaintiff's horses became frightened and ran away.

There is no merit in the first claim. Appellee, Heinrich, testifies that he was driving on Oakley avenue, south of where Thirty-Sixth street and Oakley avenue come together, and that both go over the railroad at the same point. Both he and Louis Meltz speak of Oakley avenue as a street. Frank C. Smedley testifies that Oakley avenue was about the usual width of the streets,—about 50 or 60 feet. The evidence is that there was on it a plank crossing for teams, etc., over the railroad tracks; that while the crossing was blocked for 15 or 20 minutes by the freight train attached to the locomotive, passing to and fro over the crossing, there was occasioned quite an accumulation of wagons, etc., waiting for the crossing to be cleared; and that the train was finally backed so that the locomotive would clear the crossing, and the engineer or fireman, or both, then called to those waiting: "Come on now, boys. The crossing is open." This, and other testimony of like character found in the record, was sufficient to go to the jury as tending to show that Oakley avenue was a public street. And, besides, this appellant admits in the record it is a public highway; for in the instructions given at its own instance the jury was told that the escape of steam, under stated circumstances, "was one of the risks that plaintiff was bound to expect, and did assume, while using the public highway intersecting and crossing said railroad at the place in controversy."

Nor do we think that there is merit in either the second or third of the above-mentioned claims. The testimony of the witnesses Heinrich, Meltz, Smedley, Schultz, and Fixel is to the effect that, after the blockade of 15 or 20 minutes, the engine was stopped at the edge of the crossing, just clearing the crossing, and the engineer and fireman (one or both) called to those in waiting to come on,—that the crossing was open; that just as the horses of Heinrich struck the rails, and were on the first plank in front of the engine, "they let off steam from the top of the

engine, and from both sides"; and that the horses of appellee immediately became frightened and ran away, and appellee was thrown to the ground, and the wagon ran over both of his legs, and caused the injuries for which the suit was brought. Their evidence is that horses other than those of appellee were also frightened by the noise, and ran away. One of the witnesses says, "They let steam off as bad as they could let steam off"; another says, "They blew it off, and pretty hard, too; it made every horse dance"; and still another says, "The engine made lots of noise." And we are, moreover, unable to see in their testimony any evidence of negligence or want of care on the part of appellee. We think the evidence introduced for the plaintiff fairly tended to show the negligence charged in the first count of the original declaration, and that such negligence caused the injury. The trial court did not err in submitting the case to the jury, or in refusing to direct a verdict of not guilty.

It was not error to refuse to give instruction 14 in the form in which it was asked by appellant, but it was error to give it in even its modified form. The error, however, was not to the injury of appellant, but for its benefit, and appellee has assigned no cross errors. The defendant, the Chicago & Alton Railroad Company, was misnamed in the commencement or introductory part of the declaration, it being there named as the Chicago, Alton & St. Louis Railroad Company. It, however, pleaded by its right name in bar, and thereby waived the misnomer; and, besides this, the defect was cured after the verdict by the statute of amendments and jeofails. In the body of the first count, where the statement of the substance of the cause of action is found, it is not alleged that the injury was caused and received at the crossing of the Chicago, Alton & St. Louis Railroad, but that it was caused and received at the crossing of "the railroad of the defendant"; and so there is no place for the application of the doctrine in regard to matters of essential description. The legal principle involved in instruction 12, and the whole substance of that instruction, were fully covered by instruction 11, which was given, and it was not error to refuse said instruction 12. We have already held, herein, that appellee was not required, in this suit, to show that Oakley avenue, either by condemnation or by dedication or by prescription, was legally established as a public highway; and it follows that the court properly refused to give instruction 9. At the trial in the superior court the law of the case was given in the instructions of the court more favorably for appellant than it was entitled to have it given.

In respect to the facts of the case, we may look at the evidence for the purpose of determining the question of correctness of the rulings in refusing and admitting testimony, and upon the instructions, and also, where

the question is preserved in the record, of deciding, as a question of law, whether or not the case should have gone to the jury. But, other than for these or like purposes, we are, in a case such as this, bound by the judgment of the appellate court. Practice Act, §§ 88, 90. By the statute the conclusions of the appellate court are final and conclusive upon all questions or matters of fact. But the appellate court is not bound by the judgment of the trial court, or by the verdict of the jury. It is true, all questions of fact are for the jury, but the trial court has a supervisory power over their verdict. At common law, and under the law as it was in this state prior to the act of July 21, 1837 (Laws 1837, p. 109), the granting or refusing a new trial rested in the discretion of the court before which the case was tried, and could not be assigned for error; but by that act it was provided that exceptions should be allowed to opinions or decisions overruling motions for new trials, and that "the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding." And under that act, the substance of which has been retained in section 61 of the present practice act, it has always been held that the court of review may inquire whether the judgment should be reversed upon the ground that the verdict is against the weight of the evidence. *Hill v. Ward*, 2 Gilman, 285. Of course, this rule is modified, as to this court, in certain classes of cases, by sections 88 and 90 of the practice act. But it has in no way been modified or changed as to the appellate courts. It is the right and the duty of the appellate courts, under the law as it exists in this state, to reverse the judgments of trial courts, and the verdicts of juries, where, upon consideration of the testimony, they find that such judgments or verdicts are clearly against the weight of evidence. We must presume, however, that in this case the appellate court has faithfully performed that duty, and has found that the evidence sustains the verdict and judgment. We find herein no sufficient ground for reversing the judgment of the appellate court, and it is affirmed. Affirmed.

(157 Ill. 382)

HILL v. PEOPLE.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

LARCENY—EVIDENCE—VARIANCE—INSTRUCTIONS.

1. An indictment for larceny alleging the stolen goods to have been the property of "Thorn Downey," and proof that the owner's name was Thornton J. Downey, though he was commonly called "Thorn," do not constitute a variance.

2. Proof that a man bought some hogs intending to sell them again, and to share the profits with another man, together with whom he had formerly bought hogs, but with whom he had no general partnership, does not show

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

joint title in the two to the first-mentioned hogs, where it is not shown that the other man assented to their purchase.

3. Under Rev. St. 1893, c. 38, § 167, which defines larceny as "the felonious stealing, taking and carrying, leading, riding or driving away of the personal goods of another," instructions which omit the word "stealing" in describing the offense are erroneous.

4. Where the title to the stolen goods is disputed, an instruction which assumes that they belonged to the person named as owner in the indictment is erroneous.

5. An instruction that the possession of property recently stolen is of itself *prima facie* evidence that the person in whose possession the property is found is the actual thief, and, unless this presumption is rebutted, then it is the duty of the jury to find defendant guilty, is erroneous as directing the jury to find the defendant guilty without submitting an hypothesis, based on the evidence, embodying all the facts necessary to establish his guilt.

Error to circuit court, Iroquois county; O. B. Starr, Judge.

Indictment of John Hix for larceny. Defendant was convicted, and he brings error. Reversed.

Morgan & Orebaugh and C. H. Payson, for plaintiff in error. M. T. Moloney, Atty. Gen., for the People.

BAILEY, J. The defendant was indicted at the November term, 1894, of the circuit court of Iroquois county, for the crime of larceny; the indictment charging him with feloniously stealing, taking, and carrying away one fat hog, of the value of \$12, the goods and chattels of Thorn Downey. On trial the jury found the defendant guilty, and fixed his punishment at imprisonment in the penitentiary for the term of one year. Sentence having been pronounced against him in accordance with the verdict, he now brings the record to this court by writ of error.

The first point raised by counsel for the defendant is that the prosecution failed to prove that the hog alleged to have been stolen was the property of Thorn Downey, as charged in the indictment. The prosecuting witness, when on the stand, testified that his name is Thornton J. Downey, but on cross-examination he testified that everybody called him Thorn Downey. While in cases of this character it is essential to a conviction that the name of the person whose property is alleged to have been stolen should be proved as laid in the indictment, it is sufficient to prove that he is well or usually known by that name, although it may not be his true name. We think there was no failure of proof in this respect.

Again, it is claimed that the property stolen is shown by the evidence to have belonged to Downey and one Loveless jointly. If that were a fact, there would be a fatal variance between the indictment and the proof. But we do not think that the evidence shows that the hogs stolen were the joint property of Downey and Loveless. The testimony of Downey tends to show that he and Loveless had made a joint purchase of 75 hogs, but

there is no evidence that there was any general partnership in the business of dealing in hogs between them, or that they had any joint interest in any hogs other than the 75 above mentioned. Downey's testimony tends to show that he alone, and without the consent of Loveless or any conference with him, concluded to buy enough more hogs to make two car loads, with the intention that, if the venture turned out to be profitable, Loveless might share in the profits. The hogs alleged to have been stolen were among those thus purchased by Downey, but there is no evidence that, at the time they were stolen, Loveless had assented to their purchase, or that any interest therein had become vested in him. Under these circumstances, for all the purposes of this prosecution, they must be regarded as the individual property of Downey.

It is next contended that the verdict of guilty is not warranted by the evidence. The evidence tending to charge the defendant with the larceny is mainly circumstantial, but there was sufficient evidence to make the matter of his guilt or innocence a fair question for the jury; but, as the judgment must be reversed on other grounds, we refrain from expressing any opinion as to the weight of the evidence, leaving that matter to the consideration of another jury, uninfluenced by anything we might say on that subject.

We are of the opinion that there was error in several of the instructions given to the jury at the instance of the prosecution.

The first instruction given was as follows: "The court instructs the jury that larceny is the felonious taking and carrying away the personal goods of another." As defined by the statute, "larceny is the felonious stealing, taking and carrying, leading, riding or driving away of the personal goods of another." 1 Starr & C. Ann. St. p. 800. It is evident that the definition of the crime as given by the instruction is materially defective, in that it omits the word "stealing." That, as applied to larceny, is a technical word, and is absolutely essential to a proper definition of the crime. The mere taking and carrying away of the personal goods of another are no crime, even though charged to be felonious. It is, at most, but a trespass. To charge the felony, it must be alleged that the defendant feloniously stole, took, and carried away the personal goods of the prosecutor.

The second instruction given at the instance of the state's attorney was as follows: "The jury are further instructed that if you believe, from the evidence, beyond a reasonable doubt, that the defendant took the hogs in question from the owner, Thorn Downey, with felonious intent, then it is your duty as jurors to find the defendant guilty." This instruction is liable to substantially the same criticism as the preceding. It holds that if the defendant took the hogs in question from the owner with felonious intent, whether that intent was to steal the same or otherwise, the offense of lar-

mony was made out. This is clearly erroneous. The statute having defined the offense, no element of the statutory definition can be omitted. But this instruction is subject to the further objection that it assumes that Thorn Downey was the owner of the hogs alleged to have been stolen,—a question of fact that was in controversy before the jury.

The eleventh instruction given at the instance of the state's attorney was as follows: "You are further instructed that the possession of the property recently stolen is of itself prima facie evidence that the person in whose possession the property is found is the actual thief, and unless this presumption is rebutted by the good character of the accused, or that he fairly acquired the property by purchase, or in some other way lawfully came into the possession thereof, it is your duty as jurors to find the defendant guilty." An instruction which directs the jury, in case certain facts are proved, to find the defendant guilty, must submit to the jury an hypothesis, based upon the evidence, embodying all the facts necessary to be proved to establish the defendant's guilt. This instruction closes with a direction to find the defendant guilty, but it contains no hypothesis based upon the evidence. That part of it preceding the direction to find the defendant guilty is wholly abstract, making no reference to the evidence, and not being based upon it. It starts out with the abstract proposition of law that the possession of property recently stolen is prima facie evidence that the person in whose possession it is found is the actual thief. The proposition thus enunciated is doubtless a sound one; but if it is to perform the office of a part of an hypothesis, warranting a direction to find a defendant guilty, it is, in effect, an assumption that the property described in the indictment had been stolen, and that, shortly after the commission of the larceny, it was found in the possession of the defendant. The jury are not required to find any of those facts from the evidence, but, for all the purposes of the instruction, they are assumed to be true; and the jury are instructed that, unless the presumption of guilt arising from the facts thus assumed was rebutted in one of the ways pointed out, it was the duty of the jury to find the defendant guilty. The necessary effect of an instruction of this character must have been to mislead the jury to the prejudice of the defendant. Instructions should be based upon the evidence, and this is especially important in case of instructions which contain a direction to the jury as to the character of their verdict. A direction to find the defendant guilty should never be given, except as the result of a finding from the evidence, beyond a reasonable doubt, of all the facts which are necessary to establish the defendant's guilt.

For the error in giving the foregoing instructions, the judgment will be reversed, and the cause will be remanded to the circuit court for a new trial. Judgment reversed.

(187 Ill. 462)

CORYELL v. KLEHM et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

EQUITY—JURISDICTION—PLEADING—TRUSTS—LIMITATIONS—BANKRUPTCY—LACHES.

1. A court of equity has jurisdiction of a suit to establish a trust in land, and to obtain a conveyance from the defendants, who hold the legal title, although some of the defendants are in possession of the land, and the bill also prays for possession.

2. Where the bill states the causes of and the excuses for delay, the defense of laches may be raised by demurrer.

3. Complainant made a loan to one who appeared to have perfect title to land, and had a trust deed given by him to secure the loan. Four years later she learned that there was a cloud on the title, and vainly endeavored to obtain a release of it. Five years thereafter she acquired the title of the grantor of the trust deed, and she then waited a year before bringing suit to establish her title. *Held*, that complainant was not guilty of laches.

4. A bill to enforce a trust alleged that a certain party held title in trust for complainant; that such party became bankrupt, and his title was sold by his assignee to a purchaser who had notice of the trust; and that said purchaser was agent for one of the defendants, for the benefit of whom he conveyed the land to another defendant. *Held*, that the bill sufficiently showed notice to all said parties.

5. Allegations made in a bill in the form of direct and positive statements of facts with the additional words, "as your orator is informed and believes," are averments of the facts together with a statement of the complainant's source of knowledge, and not merely averments of his confidence in the truth of the representations.

6. Rev. St. U. S. § 5057, which bars after two years all suits "between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee," has no application to a suit to enforce a trust as against a grantee of such an assignee, where it appears that the bankrupt always recognized the trust; that the land subject to it was not scheduled among his effects; that the assignee, when applying to the court for leave to sell the land, described the title vested in him as a cloud on the title of a large number of owners of different parts of the land, who had applied to him to sell; and that the deed given by the assignee conveyed the land "subject to all liens and incumbrances," since the interest of the assignee never became adverse to the cestui que trust.

7. An allegation in a bill that a deed was executed by a certain man "as assignee in bankruptcy," and that it was "in due form of law," shows that he executed the deed in his official capacity, and in conformity with all the prerequisites necessary to pass title.

8. The beneficiary of a trust deed given by one who had only an equitable title acquired the title of the grantor in such deed, and then brought suit against the trustee and the holder of the legal title to have them compelled to convey to him. *Held* that, although the complainant had not acquired the title of the trustee before bringing suit, he was still entitled to the relief sought, since he brought the trustee into court, and asked that he be compelled to convey, and equity regards that done which ought to be done.

Appeal from superior court, Cook county; W. G. Ewing, Judge.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Bill by Mary E. Coryell against George C. Klehm, Esther Klehm, Charles Harms, Matilda Harms, Antonia Harms, and George Chambers. The bill was dismissed on demurrer. Complainant appeals. Reversed.

This is a suit in equity to declare and establish a trust and for other relief, prosecuted in the superior court of Cook county by Mary E. Coryell, complainant below and appellant here, against George C. Klehm, Esther Klehm, Charles Harms, Matilda Harms, Antonia Harms, and George Chambers, defendants below and appellees here. The original bill was filed on March 24, 1886. On May 29, 1893, the amended bill was filed; and on October 18, 1893, by leave of court, the complainant filed a supplemental bill, joining as a defendant one Antonia Harms, who, it is alleged, acquired an interest in the premises in question from the defendant Klehm since the filing of the original bill. To this amended bill and the supplemental bill the defendants filed general demurrers, which, on January 3, 1895, were sustained by the superior court, and, complainant electing to stand by her amended and supplemental bills, the same were dismissed for want of equity. From that decree the complainant prosecutes this appeal, the only question in the record being as to the sufficiency of the amended and supplemental bills, the sufficiency of the latter depending entirely on that of the former.

The substantial facts alleged in the bill, briefly stated, are as follows: On November 27, 1872, Silas B. Gassett conveyed to one Thaddeus B. Beecher the premises known as "Lot Three (3) in La Frambois Reserve"; said lot 3 consisting of 310 acres of land, of which the premises in question composed 20 acres. On December 21, 1872, a burnt-record proceeding was begun in the superior court of Cook county, Ill., to confirm title in and to said premises, and such proceedings were had therein that on November 12, 1873, the title to the premises in question was confirmed in said Beecher. One month prior to such confirmation, namely, on October 12, 1873, Beecher was adjudged a bankrupt, and Bradford Hancock was appointed his assignee. The premises in question were not scheduled in the bankruptcy proceedings, nor was any action in reference thereto taken by the assignee until on or about the 1st day of July, 1875. In the meantime, on January 12, 1875, Beecher (the bankrupt) executed a deed of the premises in controversy to John E. Sayles and Albert H. Walker; said deed being one of special warranty, and recorded January 18, 1875. On January 23, 1875, by deed recorded same day, Walker and wife conveyed to said Sayles; and Sayles, by trust deed, recorded March 24, 1875, conveyed the premises in trust to defendant Chambers by the usual form of trust deed, to secure \$3,000 loaned said Sayles by the complainant. At the time said loan was made it appeared by the abstract of title presented to complainant's solicitors that Sayles was the owner of

said premises in fee simple. That complainant has learned, since making her said loan, and since October 25, 1880, that the defendant Harms, with other persons, has contrived to cloud complainant's title by having executed by Bradford Hancock, as assignee in bankruptcy of Thaddeus B. Beecher and Wilbur F. Chatfield, a certain deed dated April 24, 1876, to one William C. Grant, purporting to state that on July 1, 1875 (nearly four months after said trust deed was recorded), said Bradford Hancock, assignee of Beecher, filed a petition in the United States district court for the sale of said premises as such assignee. Said petition stated that Beecher appeared to have some interest in said lot 3, embracing the 310 acres, by virtue of said deed from Gassett, but that no mention whatever was made of said premises in the said Beecher's schedule; that he (said assignee) was informed and believed that the said deed was a cloud upon the title of a large number of individual owners of different portions of said 310 acres; that said owners were farmers in possession of portions of the premises, and had applied to said Hancock to advertise and sell the interest of said Beecher in said premises, and offered to pay therefor such a sum as would pay all the expenses attending the sale. Pursuant to said petition, the said assignee procured an order for the sale of his interest in said premises, caused publication of notice to be made, and on February 29, 1876, sold said premises to William C. Grant for \$100, being a little more than 50 cents per acre. In the deed from said assignee to Grant said assignee purports to convey to said Grant all the right, title, interest, claim, and demand of said Beecher, which said Beecher had on October 18, 1873, and also all right of said assignee, subject to all unpaid taxes and to all liens and incumbrances. Grant, it is alleged in the bill, represented defendants Klehm and Harms, and conveyed to Klehm on January 28, 1883, which title, it is alleged in the bill, was so taken by Klehm and held by him in trust for Harms. On August 20, 1878, Sayles, the grantor in the trust deed to Chambers (which trust deed was given to secure the complainant's loan) was adjudged a bankrupt, and on May 26, 1879, Robert E. Jenkins was appointed his assignee. On October 20, 1880, Jenkins sold and conveyed the premises in question to Henry K. Brown, and on February 11, 1885, Brown and wife executed a deed to the complainant. It is alleged in the bill that the consideration for the conveyance from Gassett to Beecher was furnished by Sayles and Walker, and that Beecher merely held the title in trust for them; that Beecher's assignee took only the apparent title to the premises; that in equity the premises then belonged to Sayles and Walker, under whom complainant claims; and that Grant and the defendants claiming under him had notice that the said assignee was not vested with the real ownership of said premises, and were

instrumental in procuring said sale by said Hancock, which was made upon information furnished by Grant, and which it is alleged was untrue. The bill further states that the defendants Esther Klehm and Matilda Harms claim an inchoate dower right in said premises as the wives of said defendants George C. Klehm and Henry Harms. The prayer of the bill is that the defendant George C. Klehm be required to release and convey to the complainant all right, title, and interest in the premises acquired through the deed from Beecher's assignee, and answer for the rents and profits; that Chambers, the trustee in the trust deed securing complainant's loan, be required to quitclaim to complainant any title or interest which he may still hold under said trust deed; that all the parties be restrained from asserting any claim of title or interest in said premises; that complainant be put in possession thereof; and for other and further relief.

Harbert & Daley, for appellant. H. S. McCartney, for appellees.

BAKER, J. (after stating the facts). In *Webber v. Clark*, 136 Ill. 256, 26 N. E. 360, and 32 N. E. 748, the controversy was in regard to another portion of the tract of land known as "Lot 3," containing 310 acres, in La Frambois reserve. The conclusion there was that Beecher held the property in trust for Sayles and Walker; that Hancock, the assignee in bankruptcy of Beecher, took subject to their equitable interests; and that Grant, the purchaser at the assignee's sale, took with notice of and subject to their equities. In this case the equities in favor of Mary E. Coryell, the appellant, are, or at all events at one time were, in one respect stronger than were the equities of the complainant and appellant in that case. There some of the defendants claimed an interest of title existing prior to the sale made by the assignee, and sought to impeach the validity of the burnt-record proceeding for fraud; while here the titles and claims of the defendants are based on the conveyance made by the assignee, and on that alone. But, on the other hand, the right of the now appellant to enforce her equities at this time and in this suit is beset by complications that were not found in the other litigation, and that afford ground for grave consideration. Some of the defendants to the bill are in possession of the 20 acres of land in controversy, but, since the principal objects of the bill are to establish a trust in Harms and Klehm, and secure conveyances from them, and to obtain a deed from Chambers, the trustee in the trust deed, on the theory that appellant cestui que trust under said trust deed is now the owner of the equity of redemption, there can be no doubt of the jurisdiction of a court of chancery to entertain the bill. Indeed, the legal title to the premises being vested in certain of the defendants, it is manifest that appellant has

no remedy at law by action of ejectment or otherwise.

It is claimed that the laches of appellant has barred her from seeking relief in equity. Whatever may be the rule in other jurisdictions, it has long been the general rule in this state that a defendant, in order to avail himself of the defense of laches, must set up such defense by plea or answer, so as to afford the complainant opportunity to amend the bill by inserting allegations accounting for the delay. *Trustees v. Wright*, 12 Ill. 432; *Zeigler v. Hughes*, 55 Ill. 268; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Darst v. Murphy*, 119 Ill. 343, 9 N. E. 887; *Dawson v. Vickery*, 150 Ill. 398, 37 N. E. 910. In *Hall v. Fullerton*, 69 Ill. 448, it is held that this rule will not be extended to a case where the bill undertakes to account for the delay in bringing suit, and the proofs do not support the grounds of excuse that are alleged. It is there said that the reason of the rule does not apply to such a case. And *Williams v. Rhodes*, 81 Ill. 571, and *Simpson v. McPhail*, 17 Ill. App. 499, are of like tenor. It is to be remarked that all of the cases we have thus far mentioned are cases in which there were answers to the bills, and the question of a defense growing out of the delay of the complainant arose at the hearing. We find no case in which it has been directly held in this state that the defense of laches cannot be availed of by a demurrer when the laches to bar the suit appears in the bill itself. In *Beach v. Shaw*, 57 Ill. 17, the defendant did not rely in his answer on laches, and the court followed the general rule above stated, but took occasion to say that it was not altogether satisfied with such rule when applied to cases in which the laches appears upon the face of the bill. And in *Harris v. Cornell*, 80 Ill. 54, the circuit court had dismissed the bill on demurrer, and in the argument in this court it was claimed the complainants had been guilty of laches; and this court, though it said "that question is usually presented by answer," yet proceeded to show that the defense of laches was not applicable to the case, and reversed the decree and remanded the cause. Upon consideration of all the cases in this state, this much is clear: that while the general rule is that the defense of laches must be made by plea or answer, yet such rule does not apply when the bill already states the causes of and excuses for delay. In the case at bar, as in *Hall v. Fullerton*, supra, and in *Williams v. Rhodes*, supra, the complainant undertakes to account for her delay in bringing suit, and makes in that behalf numerous allegations; and there is, therefore, no occasion for either plea or answer setting up laches. The truth of these matters of excuse is admitted by the demurrer. Why, then, any necessity for the delay, trouble, and expense of proving such matters by testimony? Why may not the insufficiency of the excuses for delay be urged on demurrer? Here the whole issue as to laches turns upon the legal sufficiency, from the standpoint of

a court of equity, of these matters pleaded by way of excuse for delay. It is said in *Hall v. Fullerton* that the general rule above stated is one not to be extended to a case where the reason for the rule does not apply; and the reason for the rule has no more application in this case than in that. The doctrine in equity in regard to the statutes of limitations is that such statutes may be taken advantage of by demurrer where the bar appears on the face of the bill, unless equitable grounds in avoidance of the bar are alleged. *Henry Co. v. Winnebago Drain Co.*, 52 Ill. 299; *Ilett v. Collins*, 103 Ill. 74; *Bell v. Johnson*, 111 Ill. 374; *Bonney v. Stoughton*, 13 Ill. App. 562. And the course we have indicated is in analogy to that doctrine, but necessarily modified so as to conform to the rule in respect to the defense of laches as announced in former decisions.

At the time appellant loaned her money and took the mortgage security, in March, 1875, the abstract of title was examined by her attorneys, and it showed that Sayles was the owner of the premises. On April 24, 1876, Hancock, the assignee in bankruptcy of Beecher, deeded to Grant, but she did not learn of the bankruptcy of Beecher, and the proceedings that resulted in said deed, until after October 25, 1880. Said deed was not in the chain of title upon which the trust deed to Chambers, her trustee, was based; Beecher having made a deed to Sayles and Walker on January 12, 1875. When she learned of the bankruptcy proceedings and the deed to Grant, she applied to Grant to have him release to her the part of the premises in which she was interested, and proposed to pay him his expenses and proper charges in the matter, and for some time expected him to accept her proposition, and was prepared to arrange the matter with him accordingly. Grant afterwards advised her that he was under some obligations to other parties as attorney, trustee, or otherwise. From the time she first had notice of the bankruptcy of Beecher and the deed to Grant until February 11, 1885,—a little more than a year before the filing of her bill,—she was not the owner of the equitable title that had been vested in Sayles and Walker, but that title belonged to Henry K. Brown, to whom it had been conveyed by Jenkins, assignee in bankruptcy of Sayles. That equitable title and interest, however, was under mortgage to Chambers, as trustee, to secure the \$3,000 that she had loaned to Sayles. She filed her bill on March 26, 1886, having then recently learned that Grant had, by a quit-claim deed, conveyed the premises to Klehm on January 26, 1883.

These statements of fact, made in the bill, do not show a strong case for appellant in explanation and excuse for not sooner bringing suit. We think, however, that when they are considered in the light of the complications in and by which her interest in and lien upon the premises were involved, and also in the light of the facts alleged in regard to no-

tice to appellees of the Walker and Sayles equity, which are hereinafter separately considered, the conclusion should not be, upon this demurrer to the bill, that she has delayed asserting her claim for so unreasonable a length of time and under such circumstances as should preclude her from obtaining relief, and especially so as it does not appear that the defense of laches was either pointed out in the demurrer or relied upon in the argument thereof in the court below. If there are equities in appellees requiring a court of equity to contract the limits prescribed by the statute for barring the complainant, they do not appear in this record. A court of equity applies the doctrine of laches in denial of relief only where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled will presumptively be inequitable and unjust, because of the delay. *Stiger v. Bent*, 111 Ill. 328. And a demurrer for want of equity cannot be sustained unless the court is satisfied that no discovery or proof properly called for by or founded upon the allegations in the bill can make the subject-matter of the suit a proper case for equitable cognizance. *Bleeker v. Bingham*, 3 Paige, 246; *Le Roy v. Veeder*, 1 Johns. Cas. 427.

In order to entitle appellant to relief, she must show notice of the parol trust or equity to each of the parties through whom the title passed from Beecher down. It is urged that the statements of notice found in the bill are insufficient. It appears from the bill that Beecher always recognized the title of Sayles and Walker to the property, and that neither the schedule in bankruptcy of said Beecher nor the schedule of Chatfield and Beecher made any mention whatever of any interest in the premises. Hancock, the assignee in bankruptcy of Beecher, took the estate of the bankrupt as a volunteer, and subject to all the liens, incumbrances, and equities existing against it in the hands of the bankrupt. The bill contains specific allegations showing the manner in which Beecher acquired title and held the same in trust for Sayles and Walker, who furnished and paid the purchase money for the land. The bill then states: "That the said William O. Grant, before and at the time of his said pretended purchase from said Bradford Hancock as assignee, had notice that said Thaddeus B. Beecher had not, at the institution of said bankruptcy proceedings against him, any actual interest in the aforesaid property of your oratrix, save as trustee as aforesaid." The bill further charges: "That the said Grant, in making said purchase, was acting as the agent of said Charles Harms, and that the said conveyance to said Klehm was made and the pretended title so acquired by him was held in trust for said Charles Harms; that said Grant was the solicitor for said Harms, * * * and as agent and attorney for said Harms was instrumental in procuring the sale by said assignee." And also charges that "said Klehm, in receiving

said deed from said Grant, had notice that said Grant was not a bona fide purchaser"; that he, "in taking said deed, was chargeable with notice of the rights and equities of Sayles and Walker, and of the rights and equities of your oratrix." Notice to an agent touching the subject-matter of his agency is notice to his principal, and notice to an attorney is notice to his client. Klehm was a mere naked trustee, and his cestui que trust had notice; and, moreover, it appears that when he took the deed from Grant he had notice of the defect in the title, and that said Grant was not a bona fide purchaser, and that the title conveyed was chargeable with notice of the rights and equities here in question. The conveyance of Klehm to Antonia Harms was subsequent to the commencement of suit and the service of process; and a lis pendens is notice to all the world of the equities of the complainant in the subject-matter of the suit. We think that notice of the equities of appellant sufficiently appears upon the face of the bill.

It is claimed that the title acquired under Hancock, assignee of Beecher, was adverse to the equitable title claimed by Sayles and the mortgage interest claimed by appellant thereunder, and that, therefore, said equitable title and said mortgage interest are barred by the two-years limitation contained in the federal bankrupt law. Rev. St. U. S. (2d Ed.) p. 975, § 5057, reads as follows: "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." In order to bring the case within the statute, the suit must involve "property or rights of property transferable to or vested in such assignee," and the interest claimed must be "adverse," as between the assignee and other person or persons. Appellant insists that this litigation does not relate to property or rights of property transferable to or vested in the assignee, and relies on Rev. St. U. S. § 5053, which provided that "no property held by the bankrupt in trust shall pass by the assignment." It is urged that the bill shows an express trust as well as a resulting trust. The only suggestion of an express trust that we find in the bill is contained in these statements: "That the said Beecher, as your oratrix is informed and believes, had in fact, by some writing in due form, recognized and confirmed the right of said Sayles and Walker in and to said premises before the petition in bankruptcy was filed by or against said Beecher; that for some cause to your oratrix unknown such writing or document seems not to have been placed on record." It here appears that the facts to constitute an express trust are not within the knowledge of the appellant, and she therefore is not within the general rule

that requires a complainant to state them positively. *Campbell v. Railroad Co.*, 71 Ill. 611. Where the allegations are made in the form of direct and positive statements of facts, with the additional words, "as your oratrix is informed and believes," it would seem that there is more than a simple averment of the complainant's confidence in the truth of the representations, and they may be regarded as averments of the facts, together with a statement of the source from which knowledge of those facts was derived. *Lucas v. Oliver*, 34 Ala. 626. We are inclined to limit, rather than either extend or strictly adhere to, the technical rules of pleading, and especially so in the absence of a special demurrer. If answer had been filed to the bill, and issues formed, there can be no question but that complainant might properly have introduced in evidence, under the frame of her bill, a written acknowledgment of trust signed by Beecher prior to his bankruptcy.

It is further insisted that, whether the trust was an express trust or a trust arising from implication of law, there was, in either event, a trust estate, and it was within the operation of the statute, and did not pass by the assignment; and that, therefore, no title or interest passed by the assignee's deed to Grant upon which the limitation law of two years could operate. No authority is cited to show that a constructive trust is within the federal statute, which provides that no property held by the bankrupt in trust shall pass by the assignment made to the assignee in bankruptcy proceedings. It would seem that the rule is that express trusts only, and not those created by mere operation of law, are within that statute. *Hosmer v. Jewett*, 6 Ben. 208, Fed. Cas. No. 6,713. But, be it as it may with respect to this section 5053 of the statute, the question arises, did the equity upon which the claim of appellant is based ever become adverse, as between the holder of that equity and the assignee of Beecher? As we have already seen, Beecher always recognized and admitted the equitable title of Sayles and Walker to the property, and it was not scheduled as a part of the bankrupt's property, and the assignee took it, if at all, as a volunteer, and subject to all the liens, incumbrances, and equities existing against or in the same in the hands of the bankrupt. *Webber v. Clark*, 136 Ill. 256, 26 N. E. 360, and 32 N. E. 748, and authorities there cited. The assignee was a mere trustee, and, unless he assumed a hostile attitude towards his cestui que trust, his naked legal title never was or became adverse to the interests of the beneficiaries in the trust. If, on the other hand, at any time while the title was in him he shook off the trust, and claimed an interest adverse to the interest of the beneficiaries, then the two-years limitation began to run against the right under which appellant claims, and it continued to run after the title passed to Grant by the assignee's deed, and until it became a complete bar. *Greene v. Taylor*, 132 U. S. 415, 10 Sup. Ct. 138; *Gifford v. Helms*, 98 U.

S. 248; *Bank v. Jenkins*, 104 Ill. 143. The contention of appellee is that when, in 1875, Hancock, the assignee, filed his petition for the sale of the 310 acres of land, he thereupon assumed an absolute adverse attitude with respect to the premises here in question; and, the title then being in him as assignee, the limitation statute commenced to run, and continued to run when he conveyed the same title to Grant. There would be much force in this contention if the proceeding in the bankrupt court and the subsequent sale and conveyance by the assignee had been for the purpose of realizing on an asset of the estate. It would have been a disclaimer of the trust. But these averments are made upon the face of the bill, and are admitted by the demurrer: "And the said Hancock, in applying to the court in bankruptcy for leave to make the sale, stated that neither the schedule of the said Beecher nor the schedule of the said Chatfield and Beecher made any mention whatever of any interest in the aforesaid premises; but the said Hancock, in his petition, in connection with said application, further stated that he was informed and believed that the said deed was a cloud upon the title of a large number of individual owners of different portions of the three hundred and ten acres aforesaid, and that said owners were farmers in possession of portions of the premises, and had applied to said Hancock to advertise and sell the interest in said Beecher in said premises, and offered to pay therefor such a sum as would pay for all the expenses attending the sale." The bill further shows that the tract of 310 acres was sold by the assignee to Grant for \$160,—about 50 cents an acre,—and that the deed made by the assignee only purported to convey the right, title, and interest of Beecher and all right of the assignee, but "subject to all unpaid taxes and to all liens and incumbrances, and also subject to all the terms and conditions of said sale." The assignee solemnly came into court, and in a formal petition addressed to the court stated that he was informed and believed that the very deed upon which his whole title and interest depended was a cloud upon the title of the individual owners of different portions of the 310-acre tract. That fact alone affirmatively and sufficiently shows not only that he did not himself claim to be the owner, but that he fully recognized and admitted the title of the individual owners of the different portions of the tract. And when he asked, at the instance and upon the application of all or some of the owners, that his title and interest and that of his assignor in bankruptcy should be sold to the owners or their representatives for "such a sum as should pay for all the expenses attending the sale," and this upon the ground that the deed upon which his title depended was a cloud upon the title of the real owners, it is perfectly manifest that he had no intention whatever of claiming adversely to the real owners of the different and respective portions of the tract. It is evident that the sole in-

terest and object that the assignee had in view in procuring the order of the court, and in making the sale that was intended for the benefit of either himself, as assignee, or the estate of the bankrupt, was that the sale should be made for a sufficient sum to pay off all the costs and expenses of the sale. This object he accomplished by selling the tract of 310 acres in solido to Grant, when 20 acres of that land was considered ample security for a loan of \$3,000. The title and interest that was vested in the assignee was sold and conveyed "subject to all liens and incumbrances." There was no interest in him other than the legal title, and there was no incumbrance upon the legal title that had passed from Beecher to his assignee other than the incumbrance of the tract for the benefit of the beneficial owners. The title was subject to that trust, and the trust was an incumbrance upon the title; and the assignee was bound to take notice of that incumbrance, and Grant had actual notice of it. When the assignee in bankruptcy conveyed to Grant, the two-years limitation statute had not commenced to run against the equitable title and interest of Sayles and Walker and those claiming under them; and by that conveyance the title and the property or right of property were removed beyond the possibility of being affected by the provisions of that statute. After the delivery of the deed to Grant, there was no property or right of property in the assignee to which any interest claimed by any other person could be or could become adverse. The interest must necessarily become adverse in the assignee, for by the very terms of the statute the cause of action must accrue "for or against the assignee." And to hold otherwise, and that the statute could begin its course after the title and interest had passed out of the assignee, would be to give the statute a scope beyond the purview of the power delegated to the federal congress to establish uniform laws on the subject of bankruptcies throughout the United States. In *Roby v. Colehour*, 146 U. S. 153, 18 Sup. Ct. 47, Roby, while holding the title to certain property in which the Colehours were interested, went into bankruptcy, and afterwards purchased the property at a sale by his assignee. Some years later the Colehours brought suit against Roby to enforce the recognition of their interests in the property, and obtained a decree, which was affirmed by this court, and from here taken to the supreme court of the United States. That court says: "If at the time of filing his petition in bankruptcy he was bound by his relation to the Colehours, although holding the legal title, to account to them for their portion of the land as defined in a previous declaration of trust to which he was a party, or to which he assented, or by which he was bound, he was not discharged from that application by merely purchasing the lands from his assignee in bankruptcy. * * * The conveyance to his assignee passed into the latter only such interest as he in fact had; and when he bought from the assignee

he purchased only such as he could have conveyed originally to his assignee." We fail to see what better position these defendants, who purchased with notice of the trust relation, could occupy than the trustee himself.

A point is made that under the assignment in bankruptcy of Sayles, his assignee, Jenkins, took the equity of redemption, an estate, and that he took such estate, not in his individual capacity, but in his capacity as assignee, an officer of the court in bankruptcy; that the deed made by him to Henry K. Brown, appellant's grantor, without any order of court, could pass nothing more than the naked legal title, if that, to the equity of redemption; and that, therefore, appellant is not the real owner of said equity of redemption, but that it is still in the assignee, or has reverted to the bankrupt. The conclusion reached is incorrect, and this, even if for no other reason, owing to the incorrectness of the premises assumed. The allegations of the bill are: "That afterwards, to wit, on the 25th day of October, A. D. 1880, the said Robert E. Jenkins, as assignee in bankruptcy of said John E. Sayles, did, by deed in due form of law, then executed by the said Robert E. Jenkins, as such assignee, convey the said land for a valuable consideration to Henry K. Brown." Since said deed was executed by Jenkins "as assignee in bankruptcy," and "in due form of law," it follows that it was executed in his official capacity, and in conformity with all the prerequisites necessary to pass to the grantee all the title and interest of the assignee.

It is contended by appellees that the claim of appellant to relief, if it is based on the deeds conveying Sayles' equity of redemption, is barred by the two-years limitation statute that we have already considered in another connection. We think this contention well grounded. The assignment in bankruptcy to Jenkins was made on June 20, 1879; and before that date the Beecher-Hancock title and interest under which appellees hold had, in the hands of Grant, he having disclaimed the trust assumed by Beecher for the benefit of Sayles and Walker, become adverse to the Sayles equity of redemption. So, the statute began to run in favor of the Grant title, as against said equity of redemption in the hands of Jenkins, as assignee, on said June 20, 1879; and when, on October 25, 1880, Jenkins deeded to Brown, it still continued to run, and in June, 1881, it tolled the right to maintain a suit based on the interest that had been vested in the assignee, Jenkins, as against the Grant title and interest.

A further contention is made by appellees which we think is well grounded. It is that appellant, in her attitude of beneficiary under the trust deed that was made by Sayles on his equitable title and interest to Chambers, in order to secure the \$3,000 that she loaned to Sayles, is not entitled to a

conveyance to herself of the title that was placed in Beecher in trust for Sayles and Walker, and that such relief could be asked only by the absolute owner of the Sayles-Walker title. If appellant, instead of taking a conveyance of the equity of redemption from Brown, had foreclosed the trust deed—a mortgage—by virtue of her equity as holder of the note secured thereby, and by means of the deed executed in consummation of such foreclosure had become the owner of the entire equitable title and interest, we think it plain that under the other circumstances disclosed by the bill of complaint she would have been entitled to a conveyance of the Grant-Klehm-Harms title and interest. But she did not do this, and the complications attending the enforcement of her equities are largely owing to her failure so to do. But appellees, in claiming that appellant stands before the court in two attitudes, and that as holder of Sayles' equity of redemption she is barred by the statute, and as beneficiary in the trust deed is not entitled to the relief sought, because of her failure to obtain title by foreclosure, sale, and deed, do not exhaust the whole measure of the rights and equities that are vested in appellant. As shown by her bill, she stands in three attitudes, instead of two only. Sayles, through the deed from Walker, became the owner of the entire equitable estate, and by the trust deed to Chambers he conveyed to him the legal title to the equitable estate and interest in the 20 acres of land in controversy. Chambers held this title to the equitable estate as trustee for the purpose of the trust created by the trust deed. Appellant, being already possessed of the equity that accrued to her by virtue of her being the holder of the note secured by the trust deed, afterwards became the owner of the equity of redemption of Sayles, the grantor in the trust deed; and this latter result was accomplished by means of the Sayles bankruptcy proceedings, and the deeds executed by Jenkins as assignee, and by Brown. A conveyance of the trust property by the grantor in a deed of trust to the party whose debt is secured by the same passes the equity of redemption, but not the legal title, and the latter still remains in the trustee; and the grantee in such case has the right to require a conveyance of the legal title from the trustee. *Meacham v. Steele*, 93 Ill. 135. And where the legal title is vested in the trustee it requires a reconveyance to place the legal title back in the grantor, his heirs or assigns. *Vallette v. Bennett*, 69 Ill. 632; *Kirkland v. Cox*, 94 Ill. 400. Here, appellant, being the owner of both her original equity and of the equity of redemption, became and was entitled to a conveyance of the legal title by Chambers, the trustee; and she therefore made said Chambers a party defendant to this bill, and asked that he be required to convey to her the title

and interest which he has under said trust deed, it being the legal title to the equitable estate. Appellant is now in court asking a conveyance from Chambers, her trustee; and in a court of equity that which ought to be done is considered as done. *Rankin v. Rankin*, 36 Ill. 293; *Lombard v. Congregation*, 64 Ill. 477. Appellant, then, must be considered in this litigation as the owner and holder of, and as vested with the legal title to, the equitable or beneficial estate in the 20 acres of land in controversy.

When appellant purchased the equity of redemption, that equity, and her prior equity as owner and holder of the note secured by the trust deed, did not merge, because it would not be for her interest that such merger should take place. *Campbell v. Carter*, 14 Ill. 286; *Edgerton v. Young*, 43 Ill. 464; *Richardson v. Hockenhull*, 85 Ill. 124; *Meacham v. Steele*, 93 Ill. 135; *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245; *Watson v. Gardner*, 119 Ill. 320, 10 N. E. 192. And see, also, *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60, where the question at issue between Mitchell and the Louisville Banking Company was analogous to the question now under consideration.

There can be no claim that the bar of the two-years limitation law found in the federal statute has any application whatever to the legal title to the equitable estate, because that title passed out of Sayles more than three years before he was adjudged a bankrupt, and never was property, or a right of property, transferable to or vested in Jenkins, his assignee. And for like reason the original equity with which appellant was invested by the trust deed never came within the domain of that statute. And when, afterwards, appellant became vested with all three interests in the equitable estate, the merger that took place was not a merger of the legal title and of the equity as holder of the note in the equity of redemption; but the equity of redemption and the equity as holder of the note secured by the trust deed became merged in the legal title, and this because the legal title is the greater of the three. *Talcott v. Draper*, 61 Ill. 56; *Dexter v. Harris*, 2 Mason, 531, Fed. Cas. No. 3,862; *Cohn v. Hoffman*, 45 Ark. 376; *Jones, Mortg.* § 873. The title to the equitable estate and beneficial interest is vested in appellant, and the equity of redemption and all other equities have fallen into that title, and been merged in it. Identically the same thing has been accomplished that would have resulted from foreclosure sale to appellant by the master, and execution and delivery of deed to her upon expiration of the time allowed by statute for redemption; and neither the appellees, nor any one or more of them, has any such interest as would give the right to redeem. The title of appellant, as we have already seen, is not barred or affected by the limitation statute. She is now, so far as this 20

acres of land is concerned, the absolute owner of the entire interest in the equitable and beneficial title, interest, and estate that was in its inception vested in Sayles and Walker. And she is entitled to a conveyance of the Grant-Klehm-Harms title, provided the material facts alleged in her bill of complaint are proved, and no valid defense is established.

The decree of the superior court is reversed, and the cause is remanded, with directions to overrule the demurrer to the bill, and to allow the bill to be amended if the complainant therein shall so desire, and to give the defendants leave to answer if they shall be so advised by counsel. Reversed and remanded.

(157 Ill. 372)

ILLINOIS CENT. R. CO. v. REARDON.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

APPEAL—REVIEW—VERDICT—DEATH BY WRONGFUL ACT—INSTRUCTIONS AS TO DAMAGES—WITNESS.

1. Where the sufficiency of the evidence to sustain plaintiff's case is not raised in the trial court as a question of law, the supreme court cannot examine into the sufficiency of the evidence.

2. Whether certain persons were fellow servants is a question of fact, on which the decision of the Illinois appellate court is final.

3. Where, in an action for a tort, defendant pleads not guilty, a verdict finding the issues in favor of plaintiff will sustain a judgment in his favor, since it is equivalent to a verdict of guilty.

4. In an action for wrongful death of an unmarried minor, where the jury is instructed that "the damages, if any, must be confined to the pecuniary loss which the evidence may show has been sustained by the father and rest of kin, and should be such compensation under the statute as the jury may believe from the evidence is just and right," it is proper to refuse to instruct, "in making up the verdict, to take into consideration the age of [the decedent], and the fact that, had he lived, his father would, in law, be only entitled to his wages and earnings until he should become 21 years old"; since such instruction gives undue prominence to one of several elements of damage.

5. Rev. St. 1893, c. 51, § 2, which prohibits parties from testifying when the adverse party sues or defends as administrator, does not render an administrator an incompetent witness in his own behalf. 56 Ill. App. 542, affirmed.

Appeal from appellate court, Second district.

Action on the case by Cornelius Reardon, administrator, against the Illinois Central Railroad Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 56 Ill. App. 542. Defendant appeals. Affirmed.

R. H. McClellan, for appellant. D., T. J. & J. M. Sheehan, for appellee.

BAILEY, J. This was an action on the case brought by Cornelius Reardon, administrator of the estate of Frank Reardon, de-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ceased, to recover damages for the death of the plaintiff's intestate. The case was tried on a plea of "Not guilty," and the jury, by their verdict, found the issues in favor of the plaintiff, and assessed the plaintiff's damages at \$2,300. For that sum and costs, the court, after overruling the defendant's motion for a new trial, gave judgment in favor of the plaintiff. That judgment has been affirmed by the appellate court on appeal, and this appeal is from the judgment of affirmation.

Frank Reardon, the plaintiff's intestate, was killed August 15, 1892, while endeavoring to couple cars in the defendant's yard, in the city of Freeport. The switch yard where the accident occurred contains some 11 tracks, built on a descending grade of over 20 feet to the mile, so that unsecured cars running from one end of the yard to the other would, from their own weight, attain considerable speed. Prior to August 13, 1892, two engines and their crews, each consisting of a foreman and two helpers, attended to the switching in the yard. On the evening of that day, each crew seems to have been reduced to a foreman and one helper, and for that reason the foreman of each crew refused to go out with his engine. William J. Reardon, a brother of the deceased, was one of the helpers and joined in the refusal. He and his foreman were thereupon discharged from the defendant's service by the general yard master. The foreman of the other engine was then given a full crew, and, to make up that crew, Frank Reardon, then a little less than 19 years of age, was employed as a helper. He worked that night and the night following, and, while in the performance of his duties on the third night, met with the accident which caused his death. In the morning of the day on which he was killed, there came to the defendant's yards at Freeport a car loaded with assorted timbers, the property of the defendant, the timbers being loaded on a coal car, without any means for preventing their shifting about. The timbers had shifted so as to extend over one end of the caboose to which the car was attached, and the car was thereupon delivered in the yard for the purpose of reloading. During the day it was reloaded, and returned back into service, but no means were used to prevent the timbers from against shifting; and, in the process of handling the car that evening, the timbers were again shifted or moved from their place so as to extend over the end of the car in such a way as to make the operation of coupling onto another car extremely dangerous. While the car was in this condition, standing on the track, the deceased attempted to couple it to some cars which were kicked up against it. He was on the cars being kicked up the track, and, when approaching the car loaded with lumber, he jumped off, and ran ahead to make the coupling, and, while attempting to couple the cars together, he was caught by the projecting

timbers, and killed. The negligence charged against the defendant consisted (1) in loading the car with timbers in the careless and dangerous manner above stated, and in attempting to transport the timber in that condition; (2) in employing the deceased, a minor, unfamiliar with the dangers surrounding the situation, and without the consent of his parent or guardian; and (3) in failing to instruct him as to the unusual danger of the work which he was thus employed to do. On the other hand, the defendant seeks to charge deceased with contributory negligence in getting off the car on which he was riding, and running ahead, for the purpose of effecting the coupling of the cars, and in the manner in which he attempted to couple them together.

Whether the defendant is, under the evidence, chargeable with negligence as is alleged, or the deceased with contributory negligence, are questions of fact, as to which the decision of the appellate court is conclusive. These questions, therefore, are not open for decision in this court. We are therefore compelled to assume that the defendant is shown by the evidence to have been guilty of negligence, causing the death of the deceased, as charged; and that the deceased was free from contributory negligence.

The learned counsel for the defendant, while admitting the conclusiveness of the judgment of the appellate court as to the facts, insists, notwithstanding, that it is proper for this court to consider all the evidence; and, if it should come to the conclusion that the facts as found in the appellate court do not constitute a cause of action, the judgment should be reversed. We are a little at a loss to know precisely how counsel intends to be understood. The facts which we must assume have been found by the appellate court are those ultimate facts upon which the verdict of the jury necessarily rests; namely, that the deceased was killed by the negligence of the defendant in manner and form as charged in the declaration, and that the deceased was free from contributory negligence. But the reasoning of counsel, if we understand him, amounts to this: That we should look at the evidence, and if, in our opinion, it fails to warrant a finding of the ultimate facts above stated, we should hold that no cause of action is shown, and reverse the judgment for that reason. To do this would, in all its essential features, be an adjudication upon the facts,—a thing not within our jurisdiction. The point as to whether there was any evidence sufficient to warrant a verdict for the plaintiff might, perhaps, have been presented in the record, so as to be open for consideration here, by a demurrer to the evidence, or its equivalent,—a request to the court to take the case from the jury, and instruct them to find a verdict for the defendant. No such instruction, however, was asked, and the question as to the sufficiency of the evidence can in no point of

view be regarded as presenting anything but a question of fact, upon which the decision of the appellate court is final.

Some complaint is made of the rulings of the court in the instructions to the jury, and it is also claimed that the verdict in form is insufficient to warrant the entry of judgment thereunder. The only instruction given at the instance of the plaintiff was as to the form of the verdict in case they found in favor of the plaintiff. The form thus prescribed was as follows: "We, the jury, find the issues in favor of the plaintiff, and assess the plaintiff's damages against the defendant at the sum of ——— dollars." The verdict rendered was precisely in the form suggested by the instruction, filling the blank with \$2,300, the amount of damages assessed; but it is claimed that this instruction is erroneous, and the form of the verdict insufficient, because, the defendant's plea being "Not guilty," the verdict should be "Guilty" or "Not guilty." Doubtless, the appropriate verdict in a case of this kind, where the jury find for the plaintiff, is one of "Guilty," but it can scarcely be doubted that the verdict actually rendered was tantamount to one of "Guilty." The plea being a plea of "Not guilty," the issue thus presented was whether the defendant was guilty or not guilty in manner and form as charged in the declaration; and the verdict, finding the issue in favor of the plaintiff, is necessarily a finding that the defendant is guilty.

Nearly all of the instructions asked on behalf of the defendant were given as asked, and complaint is now made only of the ruling of the court in refusing to give the defendant's ninth instruction as asked, and in giving it to the jury in a modified form. As asked, it was as follows: "The court instructs the jury that, in case they find for the plaintiff, they can only assess pecuniary damages for pecuniary loss; that they cannot give any damages for the grief and mental suffering of the father and mother, or any one else. The damages, if any, must be confined to the pecuniary loss which the evidence may show has been sustained. And if the evidence shows that said Frank Reardon was a minor, and fails to show he left a wife and child, if the jury find any damages, they should, in making up their verdict, take into consideration the age of said Frank Reardon, and the fact that, had he lived, his father would, in law, be only entitled to his wages and earnings until he should become 21 years old. And the jury are further instructed that the plaintiff claims and avers in his declaration that said Frank Reardon was 18 years and 11 months old, and cannot now claim he was younger, and his father would only be entitled to his earnings from the time of his death until he should have reached the age of 21 years. This fact should be considered by the jury in case they find any damages." As given, it was as follows: "The court instructs the jury that, in case

they find for the plaintiff, they can only assess pecuniary damages for pecuniary loss; that they cannot give any damages for the grief and mental suffering of the father and the mother, or any one else. The damages, if any, must be confined to the pecuniary loss which the evidence may show has been sustained by the father and rest of kin, and should be such compensation under the statute as the jury may believe from the evidence is just and right." We think no injury was done the defendant by the modification of the instruction. As asked, it was objectionable in making unduly prominent the fact that the father of deceased, had the latter lived, would have been entitled to his wages up to the time of his majority, and no longer; and the jury might have been led to believe from the prominence thus given that fact, and the silence of the instruction as to the other considerations which might properly enter into the estimate of damages, that the only pecuniary loss which the father and the rest of the kin of the deceased sustained by his death was the loss of his wages during the period, of a little over two years, which would have elapsed before his attaining his majority. That the loss of the right to receive his wages until majority is not the only element of pecuniary loss, or the only thing to be considered by the jury in assessing damages, is settled by the repeated decisions of this court. *City of Chicago v. Keefe*, 114 Ill. 229, 2 N. E. 267; *Railroad Co. v. Slater*, 129 Ill. 100, 21 N. E. 575; *City of Chicago v. Scholten*, 75 Ill. 470; *Railroad Co. v. Delaney*, 82 Ill. 198.

Objection was made at the trial, and is still insisted upon, that the plaintiff was not a competent witness in his own behalf, and that the admission of his testimony was error. We think he was competent. The statute retains the common-law disqualification by reason of being a party to the suit, or interested in the event thereof, in cases where the adverse party sues or defends as administrator of the deceased person, etc. Here, the plaintiff was himself suing as administrator of the deceased person, and was competent to testify in his own behalf.

The point is made that the deceased and the other servants of the defendant through whose negligence he was killed were fellow servants, and that the case is one in which the maxim "respondeat superior" cannot be invoked. Whether the relation of fellow servants existed between them is a question of fact, which has been conclusively settled adversely to the defendant by the decision of the appellate court. No complaint is made of any rulings of the trial court on that point in the instructions to the jury or otherwise, and therefore no question is presented in relation to that branch of the case which we can consider.

After carefully considering the case in the light of such suggestions as counsel have submitted in their briefs, we are unable to find

any error in the record, and the judgment of the appellate court will accordingly be affirmed. Judgment affirmed.

(157 Ill. 543)

SPRING VALLEY COAL CO. v. PEOPLE.¹
(Supreme Court of Illinois. Oct. 11, 1895.)

TAXATION—ASSESSMENT—PRACTICE—MUNICIPAL
CORPORATIONS—SCHOOL DISTRICTS—
LIBRARY TAX.

1. An excessive assessment for taxation is not in itself evidence of fraud. *Hotel Co. v. Lieb*, 83 Ill. 602, distinguished.

2. A property owner who has appealed to the town and county boards, and obtained from them a reduction of the assessment made by the assessor, cannot complain, on application for judgment for delinquent taxes, that the assessment made by the assessor was fraudulent.

3. Where the annual appropriation ordinance specifies fully the purposes for which appropriations are made, a reference to such ordinance in a subsequent tax-levy ordinance, instead of a statement therein of the details of the appropriation, is an informality that does not affect the substantial justice of the tax itself, and which, therefore, by the terms of Rev. St. 1893, c. 120, § 191, does not vitiate the tax.

4. Under Rev. St. 1893, c. 81, § 1, which declares that library taxes shall be levied in like manner as the general city taxes, a levy of a library tax which is not included in the general appropriation ordinance is invalid.

5. A school district was controlled by a board of education consisting of a president and six other members, and at a special meeting of the board, at which the president and five other members were present, a resolution was adopted appropriating certain sums for school and building purposes, and directing that such sums be certified to the township treasurer. The certificate was only signed by two members of the board who described themselves as directors, though all members present at the meeting voted for the resolution, and would have signed the certificate had they known it was necessary. *Held*, that on objection to the tax, on application for judgment for delinquent taxes, the county court might permit the certificate to be amended by having it signed by the members of the board. *People v. Smith*, 38 N. E. 971, 149 Ill. 549, distinguished.

6. Under Rev. St. 1893, c. 120, § 191, which declares that, on application for judgment for delinquent taxes, the court shall hear objections and pronounce judgment as the right of the case may be, the court, on determining that a school levy is excessive, may reduce its amount.

Appeal from Bureau county court; Robert R. Gibbons, Judge.

Application of the people, on the relation of J. H. Henderson, treasurer of Bureau county, for judgment for delinquent taxes. The Spring Valley Coal Company filed objections, which were overruled, and it appeals. Modified.

A. R. Greenwood, for appellant. W. A. Johnson, for the People.

BAKER, J. This is an appeal from the judgment and order of sale rendered by the county court of Bureau county, upon the petition and application of the collector for such judgment and order, for delinquent taxes.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

The appellant company is the owner of the coal underlying the surface of about 13,904.35 acres of land in the town of Hall, and underlying the surface of about 8,868.23 acres of land in the town of Selby, in said Bureau county. This includes the coal underlying a number of tracts of land the surface of which is owned by the company. Appellant is also the owner of certain coal mines or shafts located on said lands, and known as No. 1, No. 2, No. 3, and No. 4, respectively; and likewise of numerous buildings, towers, engine and boiler houses, blacksmith shops, machine shops, stables, tenement houses, and other improvements situated thereon. In making the assessment for the taxes of 1893, the assessor for Hall township assessed the coal rights owned by the company or coal underlying the surface of lands at \$15 per acre, and also assessed the coal mines or shafts and other property of the appellant much higher than it had theretofore been assessed for taxation. Appellant appeared before the town board of review, and made complaint that the assessment of its properties was too high. Such proceedings were there had as that the assessment of the coal rights or underlying coal belonging to the company was reduced from \$15 per acre to \$3.50 per acre; and the assessment of one tract of land owned by the company was also reduced. Still considering itself aggrieved, appellant appealed to the county board of the county. In the board of supervisors of the county, the committee to which the matter had been referred recommended that the underlying coal should be placed at \$7.50 per acre; but the conclusion of the majority of the board was that the assessment should be put at \$3.50 per acre, the amount fixed by the board of review. The board, however, reduced the assessment on shaft No. 1 from \$40,000 to \$25,000, the assessment on shaft No. 2 from \$30,000 to \$20,000, and the assessment on shaft No. 3 from \$25,000 to \$18,000.

It is claimed by the appellant that the assessments and valuations of these shafts and these coal rights made by the assessor of the town of Hall were fraudulent, and therefore void, and that the county court, on the application of the collector for judgment, should have held them to be fraudulent and void, and should have refused to render any judgments against these properties for any part of the taxes assessed against them. The claim is also made by appellants that the assessment of their coal rights in the town of Selby, while not so flagrantly fraudulent as that made in Hall township, is, nevertheless, sufficiently so, by reason of the increase of assessment over prior years, without reason, to render the assessment void. It seems that these coal rights in the town of Selby were assessed for the taxes of 1892 at \$2 per acre, and for the taxes of 1893 at \$3 per acre.

Fraud is never presumed; and we find in the record no sufficient evidence of a fraudulent intent on the part of the assessor of Hall

in fixing the valuations of the property of appellant, and a fortiori no evidence of fraud on the part of the assessor of Selby. The assessor of Hall, while sitting as a member of the board of review, no doubt expressed his opinion quite strongly that the assessments on the property of appellant should not be reduced; but he at the same time stated that, if they would produce evidence that it had been valued too high by him, he, as a member of the board, would be willing to make a reduction. The evidence of the alleged intimidation of the clerk of the board of review by threats of prosecution in the event he voted for reduction does not impress us strongly. It is plain from the testimony of the clerk that he did not understand what was said to be such a threat; and, as matter of fact, very material reductions in some of the assessments were made by the board of review. Great stress is laid upon the remark made in *Hotel Co. v. Lieb*, 83 Ill. 602, that where the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation, and must reasonably have known that it was excessive, it is accepted as evidence of a fraud upon his part against the taxpayer, and the court will interpose. The decision of the question of fraud or no fraud would, no doubt, depend upon the circumstances under which, in each particular case, the excessive valuation was made. If it was manifest from these circumstances that the assessment could not have been honest, but was actuated by a malicious motive, then the conclusion of fraud would result. But the mere fact of overvaluation will not of itself establish fraud. *Trust Co. v. Weber*, 96 Ill. 346; *Keokuk & H. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482. And the rule is that if the assessor, through a mistake or error of judgment, has assessed the property higher than it should have been assessed, his action cannot be rectified or reversed in an application for judgment against the property. *Spencer v. People*, 68 Ill. 510; *People v. Big Muddy Iron Co.*, 89 Ill. 116; *English v. People*, 96 Ill. 566; *Keokuk & H. Bridge Co. v. People*, *supra*.

The legislature has committed the subject of the review of assessments in the matter of valuation in the first instance to the town board of review, and thereafter, in succession, to the board of supervisors of the county and the state board of equalization. Even if we should assume that the values as fixed by the assessor of the town of Hall were fraudulently made by him, the results claimed by appellant do not follow. It petitioned the town board of review, and secured reductions in some of the values. It then appealed to the county board, and had before it a full hearing as to its supposed grievances, and secured from it still further reductions of values. There is no intimation that the county board was governed or influenced by either fraud or intimidation. Appellant having availed it-

self of the remedies afforded by the statute; the decision made by the board of supervisors was final and conclusive; and it must be regarded that the fraud, if any, that was in the original assessment, was purged out of it; otherwise, it would be in the power of appellant, by securing the election of a prejudiced or dishonest assessor, to avoid the payment of any taxes whatever upon its large and valuable property.

It is claimed that the assessment of one tract of land was increased by the board of review from \$170 to \$2,500 without the notice that the law requires having been given to appellant. As we understand the evidence, the change was made by the assessor himself, he having discovered that he had made a mistake as to locality of the tract, and that there were, in fact, 21 houses on it, instead of no improvements whatever; and his corrected assessment was concurred in both by the town board of review and the county board.

It is objected that the city tax of the city of Spring Valley was levied in pursuance of a tax-levying ordinance that did not specify in detail the purposes for which the appropriations were made, and the amounts appropriated for each purpose; that the city levied 20 cents on the \$100 for library purposes, for which there was no authority whatever; and that it levied \$14,650 on a valuation of \$361,561, or \$4.10 on the \$100. The city council passed an annual appropriation ordinance, and, on the passage of that ordinance, the yeas and nays were taken. In it were specified the objects and purposes for which the appropriations were made, and the amount appropriated for each object or purpose. The yeas and nays were also taken on the passage of the tax-levying ordinance. Said ordinance, if properly and formally drawn, should, upon its face and in express words, have specified in detail the purposes for which the appropriations had been made, and the sum or amount appropriated for each purpose, respectively. 1 Starr & C. Ann. St. pp. 485, 486. It, however, in express terms, made reference to the annual appropriation ordinance that had been passed by the city council, and to the record thereof, and thereby made said appropriation ordinance a part and parcel of the tax-levying ordinances; and there can be no question but that said appropriation ordinance is sufficiently specific. It seems to us that the difference between stating in express words upon the face of the tax-levy ordinance the details of the appropriations, and incorporating such details into the tax-levy ordinance by reference to the general appropriation ordinance and the record of the same which do give such details, may be regarded as an error or informality in the proceedings of the city council in levying the city tax that does not affect the substantial justice of the tax itself, and is therefore cured by section 191 of the revenue law as amended in 1873, and that said city tax is

not vitiated or in any manner affected. *Laws* 1873, p. 48; 2 Starr & C. Ann. St. p. 2087. In *Mix v. People*, 106 Ill. 425, this court said: "We do not understand it to be necessary to publish the ordinance levying the taxes. Such ordinance presupposes antecedent appropriations, and merely makes a levy to raise money to pay appropriations already made. The total amount of appropriations legally made is required to be ascertained prior to its passage."

The additional levy of two mills on the dollar attempted to be levied by the tax-levy ordinance for the library fund stands upon a different footing. The record shows that a separate tax of 20 cents on the \$100 was assessed for the library fund; and that it was not included in the \$14,650 or in the rate per cent. of \$4.10 on the \$100 of valuation. This provision of the statute in regard to the library fund tax is that it shall be levied in like manner with the general taxes of the city. *Laws* 1891, p. 160; *Hurd's Rev. St.* 1893, p. 924, § 1. The corporate authorities are authorized to levy it, but are not required to levy it. In *City of Cairo v. Campbell*, 116 Ill. 305, 5 N. E. 114, and 8 N. E. 688, it was held that the statutory prohibition of further appropriations after the passage of the ordinance containing the annual appropriation bill is obligatory upon the council so far as the subject of appropriation belongs to the class which it is discretionary for that body to include in or omit from the annual appropriation bill. We think that the county court should have sustained the objections to the library fund tax, and that it was error to render judgment for the same.

There remains to be considered the claim that the ordinance levied \$7,418.78 in excess of the amount that the city was authorized by law to levy. A large deduction should be made from this supposed excess, for the appropriation bill made provision for \$4,000 to apply on bonded indebtedness. As we understand the record, the \$361,561 was the valuation of the property within the city as equalized by the state board of equalization; and only such a per cent. of the tax authorized by the ordinance was extended upon the tax books as was within the limits fixed by law; and the judgment of the court was not for an amount or for a rate per cent. in excess of that which the city was authorized to levy. We are unable to perceive how appellant is injured by the judgment in that regard.

Objection is made to the school tax for district No. 3, township 16, range 11. That district is controlled by a board of education, consisting of a president and six other members. It appears from the record of the proceedings of the board that, at a special meeting of the board held on July 19, 1893, there were present the president and five other members, and that a resolution was adopted that the sum of \$11,000 for school

purposes and \$1,000 for building purposes be appropriated for the year 1893, and that the said sum or amount should be duly certified and returned to the township treasurer as required by law. It appears that the certificate made was signed thus: "Thos. Linsley, Pres. Joseph Hecser, Clerk, Directors District No. 3, Township No. 16, Range No. 11, Bureau County, Illinois." It appears from the evidence that all of the members of the board present at the meeting, except the president, voted for the resolution, and that the use of the word "Directors" instead of the word "Board of Education" was through mere inadvertence. All of the members of the board who were present at the meeting appeared as witnesses at the hearing in the county court; and each testified that he was present at the meeting, and voted for the school-tax levy; that he did not sign the certificate of levy because he did not know it was necessary; and that he would have signed it if he had known that it was necessary. And thereupon the court permitted the certificate to be amended, and put in due form, and signed. We think there was no error in the action of the court. The power conferred by the statute upon the board of education was exercised at a lawful meeting of the board, and in substantial conformity with the decision of this court in *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. 197. This case is quite different from, and is not governed by, *People v. Smith*, 149 Ill. 549, 36 N. E. 971. In that case we said: "It is to be observed, however, that there is in the proceedings of the board no order or direction that the certificate contemplated by said section of the statute be filed, or any attempt to authorize any person or persons to file the same. * * * It does not appear that the board took any action in regard to the matter of making and filing a certificate authorizing the extension of said tax. The only act performed was the making of said certificate by less than a majority of the board, without any sanction or authority. The certificate filed was in no sense the act of the board of education, nor did it purport to be made by said board or under its authority." And further said: "To have permitted the amendment proposed would not be to correct a mistake or omission of the municipal body levying the tax or of its officers, but would have been to then make a valid levy. There is no showing or pretense that any other member of the board knew of or assented to the making of the certificate filed, or that the failure to sign the same was an omission or mistake on their part. Indeed, in the offer accompanying the proposed amendment, it is not shown or pretended or offered to be shown that any member of the board other than those signing it would originally have done so had it been brought to their knowledge." It is to be noted that almost or quite everything that was so conspicuously absent in the *Smith*

Case is to be found in the record in this case.

The trial court found that this school levy was in excess of the lawful amount, and by its judgment it reduced the rate from \$3.20 to \$2.28 on the \$100. Section 191 of the revenue law provides that the court shall hear and determine the matter of objections to applications for judgments for taxes in a summary manner, and shall pronounce judgment as the right of the case may be, and that it shall give judgment for such taxes as shall appear to be due. We think there was no error in the ruling of the court. *Buck v. People*, 78 Ill. 560, *Chiniquy v. People*, Id 570, and *Purinton v. People*, 79 Ill. 11, are authorities that seem to sustain the judgment in respect to these school taxes.

A few minor points are made by counsel, but they are sufficiently disposed of by what we have already said. The judgment for the library fund tax is reversed. In all other respects the judgment is affirmed. The costs of this appeal will be taxed against appellant. Affirmed in part, and reversed in part.

(158 Ill. 64)

CHICAGO, R. I. & P. R. CO. et al. v. CITY OF MOLINE.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT—SPECIAL TAXATION—RAILROAD IN STREET.

1. The right of way of a railroad in a public street is "contiguous property" so far as street improvements are concerned, within a statute subjecting contiguous property to special tax for local improvements. *Kuehner v. City of Freeport*, 32 N. E. 372, 145 Ill. 92, and *Freeport St. Ry. Co. v. City of Freeport*, 38 N. E. 137, 151 Ill. 451, followed.

2. An ordinance providing that the cost of improving so much of a street as is included in the right of way of any steam railroad, "being the space between the rails and one foot on the outside of such rails," shall be paid by special tax on such right of way, is not void for want of proper description of the property to be taxed.

3. Nor is such ordinance void for lack of uniformity in assessing the tax, since the proportion of the tax to be levied on railroads in the street itself cannot be determined in the manner applicable to abutting lots.

4. Nor is it erroneous for such ordinance to direct that the special tax be levied, assessed, and collected upon and from the said right of way, since the tax, if collected from the railroad company by proper proceedings, may be said to be collected from the property.

Appeal from county court, Rock Island county; Lucien Adams, Judge.

Petition by the city of Moline for confirmation of the assessment of a special tax. The Chicago, Rock Island & Pacific Railroad Company and others filed objections, which were overruled, and judgment of confirmation entered. Objectors appeal. Affirmed.

Henry Curtis and Sweeney & Walker, for appellants. J. B. Oakleaf (J. L. Haas, of counsel), for appellee.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

BAILEY, J. This is an appeal from a judgment of the county court of Rock Island county confirming a special tax levied by the city of Moline to pay the cost of excavating, draining, grading, curbing, and paving certain portions of Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Seventeenth streets, in the city. The portions of the streets thus sought to be improved are crossed by the tracks of the Chicago, Rock Island & Pacific Railway Company, and of the Chicago, Burlington & Quincy Railroad Company, and both companies have passenger stations upon the contiguous property. The freight yards and freight depot of the Chicago, Burlington & Quincy Railroad Company also abut upon the proposed improvement, and its side tracks connected therewith cross the streets to be improved, and the freight yards of the Chicago, Rock Island & Pacific Railway Company and the tracks connected therewith are also situated so as to be affected by the improvement. It thus appears that a large part of the property abutting upon and contiguous to the improvement is owned and occupied by these railroad companies.

The ordinance under which the special tax was levied was passed February 26, 1894, and its material provisions are as follows:

"Section 1. That Thirteenth street, from the south line of Third avenue to the south line of Fourth avenue; Fourteenth street, from the south line of Third avenue to the south line of Fourth avenue; Fifteenth street, from the north line of Second avenue to the north line of Third avenue, and from the south line of Third avenue to the south line of Fourth avenue; Sixteenth street, from the south line of Second avenue to the north line of Third avenue, and from the south line of Third avenue to the north curb line of Fifth avenue; and Seventeenth street, from the south line of Third avenue to the south line of Fourth avenue,—which said streets are eighty (80) feet in width, all in the city of Moline, Illinois, be, and the same are hereby, ordered to be excavated, drained, graded, curbed, and paved of the width of fifty-six (56) feet in the center of said streets, and full width at alley intersections, and full width between curb lines at street intersections, except such portions of said intersections as are embraced within the territory hereinafter described, in which no curbing is to be set, which portions of said intersections, as aforesaid, shall be paved fifty-six (56) feet in width.

"Sec. 2. The roadbed of said portions of said streets, between curb lines, except where no curbing is to be placed, as hereinafter described, shall be excavated for a brick pavement, to such a depth as will cause the top of the pavement, when laid as hereinafter set forth, to be as follows, viz.: The crown or center of the streets and the top of the curb to be at grade at each respective point as established by ordinances passed by said city council on the second day of March, A. D. 1891, the sixteenth day of November, A. D. 1891, and on the sixteenth day of January, A. D. 1893. On

either side of the crown or center of the streets the pavement to slope towards the curb line in an arc of a circle whose tangent is a right line touching the said crown or center and the curb at corresponding points, and with a radius of such a length as will cause said arc to fall six (6) inches below the top of the curb: provided, that at street intersections the form of both streets shall be the same as above, until they intersect in the diagonals of said streets: and provided, further, that on any street on which there is a street railway the crown or center shall be held to mean a right line on and from outside to outside of the rails of said street railway: provided, further, that except within street-car tracks the brick shall be placed flush with the tread of the rail on the outside, and on the inside flush with the tram, and the pavement between the rails shall be concave, with a depression of one inch in the center of the track below the tram of said rails. On that portion of said streets where no curbing is to be placed, as hereinafter described, the roadbed shall be excavated the same width as that portion of said streets where curbing is placed, to such a depth as will cause the top of the pavement, when laid as hereinafter described, to conform to the grade of said streets, as hereinafter stated, intending thereby that there shall be no depression for gutter."

Sections 3, 4, and 5 provide for storm drains, etc., for curbs on certain portions of the streets, and for catch basins and connections; and section 6 provides for the manner of constructing the roadbed, with a bottom or foundation layer of lime-stone macadam, and requires that this macadam on those parts of the streets occupied by the tracks of the railways shall have a depth of six inches greater than in other parts.

Sections 7, 8, and 9 are as follows:

"Sec. 7. The cost of making so much of said improvement on said streets which is included in the right of way of any steam railroad, being the space between the rails and one foot on the outside of such rails, shall be made, and the cost thereof paid, by special taxation of said rights of way; and for that purpose a special tax is hereby levied and ordered to be assessed and collected upon and from said rights of way. The cost of making so much of said improvement on said streets which is included in the right of way of any street railroad, being the space between the rails and fifteen (15) inches on the outside of such rails, shall be raised and paid by special taxation of said rights of way; and for that purpose a special tax is hereby levied and ordered to be assessed and collected upon and from said rights of way.

"Sec. 8. That fifteen (15) per cent. of the cost of making so much of said improvement on said streets which is not included within the right of way of any steam or street railroad, as aforesaid, shall be paid by general taxation, and shall be included in the next annual appropriation ordinance, and levied and

collected with and as a part of the general taxes of said city.

"Sec. 9. The remainder of the cost of making said improvement on said streets shall be raised and shall be paid by special taxation of the lots, blocks, tracts, and parcels of land touching upon the line of said improvement, in proportion to the frontage thereof; and for that purpose a special tax is hereby levied and ordered to be assessed and collected upon the several lots, blocks, tracts, and parcels of land touching upon the line of said improvement, as aforesaid, in proportion to their frontage upon the said line of improvement."

The subsequent sections are not material to any question raised upon this appeal.

Upon the passage of this ordinance, the city appointed the usual committee to estimate the cost of the improvement, and their estimate was returned and approved. A petition was thereupon filed by the city in the county court, setting forth the ordinance, and praying for the appointment of commissioners to assess the special tax; and, on such petition, commissioners were appointed, who subsequently returned their assessment roll. The two railroad companies above mentioned appeared, and severally filed objections to a confirmation of the special tax; and, on the hearing of their objections by the county court, certain of the objections were sustained, and the report of the commissioners was thereupon, by order of the court, returned to them to be recast. The commissioners having subsequently filed their amended or recast report or assessment roll, the railroad companies renewed their former objections, and also filed additional objections; and, upon a further hearing, these objections were all overruled, and judgment was entered confirming the special tax, and from that judgment this appeal is taken.

The first contention by the appellants is that the rights of way of the two railroad companies mentioned in the ordinance, being in the streets in question, are not "contiguous property," within the meaning of the constitution and statute, and that they are therefore not subject to special taxation. This precise question was discussed, if not expressly decided, in *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372, where, speaking of a street railway in a street where a special tax had been levied for a street improvement, we said: "The railway is contiguous to the proposed street improvement, and falls within the designation of property that may be specially taxed for the making of the local improvement." But it is claimed that the question whether the railway was "contiguous property" was not directly involved in that case, and, therefore, that the language thus employed cannot be quoted as authority. It is true that in that case the city had attempted to combine a special assessment with special taxation, a special assessment being levied upon the property of the street-railway to the

extent such property was deemed to be benefited by the improvement, and a special tax being levied upon all other contiguous property; and that judgment was reversed because of the impropriety of combining the two methods of taxation in the same improvement. But the language above quoted was properly used in the discussion of questions arising in the case, and, even if it was unnecessary to the decision of that case, this court became committed to its soundness in the case of *Freeport St. Ry. Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137. In that case the city, after its former proceeding had been declared invalid, passed an amended or supplemental ordinance, under which the special tax was reassessed, the property of the railway company being treated in that proceeding as "contiguous property," and a special tax being levied upon it to the extent of the benefits resulting to it from the street improvement. In the new assessment the language of this court in its former decision was strictly followed; and, on appeal by the street railway company from a judgment of the county court confirming the new tax imposed upon its property, we held that the tax was properly imposed, and affirmed the judgment. On the authority of the two cases above cited, then, the rights of way of the two railroad companies, the appellants in this case, must be held as "contiguous" to the streets proposed to be improved, and liable to be specially taxed as such.

It is insisted that the meaning of the phrase "right of way," as used in the ordinance, is not clear; and it seems to be argued that, because of the ambiguity, the tax should be held to be invalid. The seventh section of the ordinance provides that the cost of making so much of the improvement on the streets as is included in the right of way of any steam railroad, "being the space between the rails and one foot on the outside of such rails," shall be made, and the cost thereof paid, by special tax upon such right of way. It must be admitted that the phrase employed is not the most felicitous one that might have been employed as descriptive of the railroad property sought to be taxed; but, in view of the ordinary use of these words, we are of the opinion that no ambiguity is created which should defeat the tax. The manifest intention of the ordinance is to impose the tax upon the tangible property of the railroad companies in the street, within the limits above mentioned; in other words, upon that part of the tracks and roadbeds of the railroad companies lying in the streets or parts of streets proposed to be improved.

It is contended, in the next place, that the ordinance is invalid because it provides that the special tax be levied, and orders it to be assessed and collected upon and from the rights of way. We see nothing improper in this. If it be admitted that the tax creates no lien capable of being enforced by sale of the property taxed, the law furnishes oth-

er remedies by which its payment by the owners of the property may be compelled; and, when payment is enforced in that manner, we cannot see why, in a sense perfectly legitimate, the tax has not been collected from the property. The ordinance does not attempt to indicate the mode of collection, whether directly by sale of the property taxed, or indirectly by proper proceedings against the owner. As the latter would be the legitimate mode of collection, it, doubtless, was the mode contemplated by the ordinance.

The validity of the ordinance is questioned, in the next place, on the ground that the special taxation provided for lacks uniformity. It is insisted that the rule of apportionment of the tax applied to the property of the steam railroads, and also to the property of street railroads, is essentially different from that applied to the lots, blocks, etc., abutting on the improvement. We are of the opinion that this difference is rather apparent than real. It is doubtless the rule that special taxes should be apportioned upon property within the taxing district upon the principle of uniformity. *Davis v. City of Litchfield*, 145 Ill. 313, 33 N. E. 888; *Kuehner v. City of Freeport*, *supra*. In the apportionment of these taxes to the lots and blocks abutting upon the improvement, the application of this principle presents no considerable difficulty. But with railroad property consisting of tracks and roadbeds lying in and upon the street the case is different. Manifestly, the proportion of the tax to be imposed upon such property cannot be ascertained by any computation of its frontage. Some other criterion must be adopted. It becomes a matter of fair and reasonable estimate, to be made in view of all the facts in the case. Such estimate must be made and applied by the proper municipal authorities, and, when so made in the exercise of a reasonable discretion, the tax imposed will be presumed to represent the share of the tax to be borne by such railroad property upon the principle of uniformity. As we said in *Kuehner v. City of Freeport*, *supra*: "Whether the railway shall pay for paving between the tracks, as is sometimes done, or less or more, or whether the levy shall be a share or portion of the whole cost, and, if so, how much, rests in the discretion of the municipal authorities, to be reasonably exercised." In that case, the city, by its amended ordinance, levied upon the property of the street-railway company a gross sum as its proportion of the special tax, and such levy was sustained as a sufficient compliance with the principle of uniformity. So, here, the proportion of the tax imposed by the ordinance upon the property of the various railway companies, so long as there is nothing in the case tending to show that the discretion of the municipal authorities has been exercised unreasonably, will be deemed to be the fair proportion of the tax to be borne by

the property of those companies, upon the principle of uniformity.

What we have said also applies to the further objection that the tax upon the rights of way of the appellant railway companies is a mere arbitrary exaction. True, the information upon which the municipal authorities acted, and the precise mode in which they computed and apportioned the tax to be imposed upon these rights of way, are not specifically disclosed by the record; but they being the authorities to whom the law commits the apportionment, and they having made their estimate and assessment in apparent good faith, such assessment must be taken as the just and proper proportion of the special tax to be borne by the property upon which it is levied.

Other specific objections to the ordinance are raised, which seem to us to be no more than an elaboration, or a statement in a somewhat different form, of the objections already considered, and we do not deem it necessary, therefore, to discuss them further. After carefully considering the able briefs with which counsel have favored us, we are unable to see that any of the objections urged to the validity of the ordinance are tenable, and they must therefore be overruled.

A large number of points are raised, many of them exceedingly technical, in relation to the rulings of the court in the admission and exclusion of evidence, and in relation to the sufficiency of the oath taken by the commissioners, and of their recast of the assessment roll. We have given all the points thus made careful consideration, and fail to find that there was any material error committed by the court in those respects. To adequately discuss the propositions thus presented would extend this opinion to an unwarrantable length, and, so far as we can see, would be of very little service in settling the law applicable to cases of this character. All we need say is that we find the record substantially free from errors that could have materially prejudiced the rights of the property holders who are seeking to contest the confirmation of the assessment. It follows that the judgment of the county court confirming the assessment must be affirmed. Affirmed.

(158 Ill. 301)

CREAN v. HOURIGAN.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

EXAMINATION OF WITNESS—LEADING QUESTIONS.

It is not an abuse of judicial discretion to sustain objections to leading questions put to witnesses that are intelligent, and not hostile to the examining party.

Appeal from appellate court, Fourth district.

Petition by Maurice Crean for probate of the alleged will of Margaret Hourigan, deceased.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Michael Hourigan, husband of the deceased, objected. Probate was refused, and the proponent appealed to the court of appeals, where the decree was affirmed (58 Ill. App. 137), and proponent again appeals. Affirmed.

Green & Gilbert, for appellant. Lansden & Leek, for appellee.

BAKER, J. That which purported to be the nuncupative will of Margaret Hourigan, deceased, and to bequeath her property to her brother, Maurice Crean, was admitted to probate in the county court of Alexander county. Michael Hourigan, husband of the deceased, appealed to the circuit court from the order admitting said will to probate. In the latter court, a jury was waived, and the issue submitted to the court, and the court found that the said alleged nuncupative will was not a valid will, and adjudged that it should not be admitted to probate. From the judgment so rendered, Crean appealed to the appellate court, where the judgment of the circuit court was affirmed, and he thereupon prosecuted this further appeal.

The statute makes the judgment of the appellate court final and conclusive upon all questions of fact. In a cause tried before the court without the intervention of a jury the parties may obtain from the court rulings upon written propositions of law submitted to it, and thereby preserve in the record, for the purpose of review, any erroneous view of the law, or erroneous application of the law to the facts of the case, by the trial court. And unless questions of law or mixed questions of law and fact are thus preserved, the record will present no questions for the consideration of this court other than such as are raised by the admission or exclusion of evidence, or incidentally otherwise during the progress of the proceedings. *Tibbals v. Libby*, 97 Ill. 552; *Hardy v. Rapp*, 112 Ill. 359; *American Exch. Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547, 22 N. E. 523; *Kern v. Association*, 140 Ill. 371, 29 N. E. 1035; *Insurance Co. v. Bethel*, 142 Ill. 537, 32 N. E. 510; *Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937. Where, as in the present case, not only the facts are to be ascertained from the proofs, but the legal effect of those facts determined, the submission of written propositions is alike necessary, for all matters relating to the character, force, and effect of the testimony are settled in the courts below. *St. Louis Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Fitch v. Johnson*, 104 Ill. 111; *Edgerton v. Weaver*, 105 Ill. 43. In the case at bar no written propositions were submitted to the court by either party for the purpose of having them held as law in the decision of the case.

One of the assignments of error is that the circuit court refused to admit competent evidence offered by the proponent of the will. The specification of alleged error pointed out by counsel is that the court sustained objections to several questions asked the Rev. Fa-

ther Eschmann, priest in charge of St. Patrick's Church and parish, and Col. Patier, mayor of the city of Cairo, the two witnesses introduced to prove the alleged nuncupative will. The questions to which the objections went were leading, and admitted by counsel to be so. The objections interposed were placed upon the specific ground that said questions were leading and suggestive. The general rule is that in the direct examination of witnesses it is not permissible to put to them questions of that kind. 1 Greenl. Ev. § 434. Prima facie, the rulings of the court were right, and in conformity with the rule above stated. In some cases of apparent necessity or convenience it is admissible to ask leading questions. Here, however, the witnesses were not hostile to the party producing them, and were intelligent and educated men. It would seem this was no occasion for putting leading questions to them. Besides this, the matter of permitting or excluding such questions is largely and necessarily a matter resting in the sound discretion of the trial court. Greenleaf, in section 435, says it is "not a matter which can be assigned for error." We have not, in our decisions, gone to that extent; but we have frequently held that we would not interfere with the exercise of the discretion unless there had been a manifest abuse of it, to the detriment of the party complaining. Here there was no injury done, for both of the witnesses afterwards testified fully with reference to the very matters which were sought to be elicited by the questions to which the objections were sustained; and the record demonstrates that there was no abuse of discretion on the part of the court. The error is not well assigned.

Upon the record as made below, we find no other matter that is now open to review. The judgment of affirmance rendered by the appellate court is affirmed.

(158 Ill. 272)

HUNTINGTON v. METZGER.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

EXECUTION—RETURN—ARREST OF DEBTOR—APPEAL—DECISION.

1. Under Rev. St. 1893, c. 77, § 62, which provides for the arrest of a judgment debtor in certain cases "upon the return of an execution unsatisfied in whole or in part," a return stating that the sheriff made demand on the judgment debtor, and that, not being able to find any property on which to levy, he returns the writ no part satisfied, is a sufficient return on which to base such an arrest, even though the return was made before the return day, at the request of the plaintiff's attorney. *Schenbert v. Honel*, 38 N. E. 918, 152 Ill. 313, distinguished. 51 Ill. App. 222, reversed.

2. Under Rev. St. 1893, c. 110, § 88, which provides that if any final determination of any cause shall be made by the appellate court as the result wholly or in part of the finding of facts different from that of the trial court, the appellate court shall recite in its judgment its

findings of facts, the appellate court has no right, on affirming a judgment, to recite in its decision findings in regard to a question of law, and refuse to pass on the questions of fact.

Appeal from appellate court, First district.

Petition by William G. Metzger against W. W. Huntington, trustee, for discharge from custody as an insolvent debtor. Petitioner obtained an order of discharge, which was affirmed by the appellate court. 51 Ill. App. 222. Defendant appeals. Reversed.

This is an application by appellee to the county court of Cook county for a trial before a jury, under section 5 of the insolvent act, of the question whether he was guilty of fraud, or refusal to surrender his estate; he having been arrested upon a charge of such fraud and refusal under a writ of *capias ad satisfaciendum* issued upon affidavit and return of execution under a judgment in favor of appellant, in accordance with the provisions of sections 62 and 63 of the act in regard to judgments, decrees, and executions. A jury was waived by agreement, and the cause was submitted to the county court for trial without a jury. The county court found appellee not guilty, and ordered that he be discharged from arrest, and that he recover the costs from appellant.

The order or judgment of the county court was brought for review to the appellate court by writ of error. The appellate court rendered a judgment on November 27, 1893, affirming the judgment of the county court, but subsequently, on January 6, 1894, vacated said judgment of November 27, 1893, and entered the following judgment:

"This cause coming on to be heard upon the motion of plaintiff in error to vacate the judgment of this court entered in the above-entitled cause on the 27th day of November, 1893, and upon the motion of said plaintiff in error that the court make a finding of facts upon which its judgment to be entered in this cause is based, and the parties having been heard, and the court having fully considered the matter, it is thereupon adjudged and ordered that the judgment aforesaid entered by this court in the above-entitled cause on the 27th day of November ult., be, and is hereby, vacated and set aside. And thereupon the court finds the following facts as having been proved in this cause to the satisfaction of this court, viz.:

"(1) That heretofore, to wit, on the 12th day of June, A. D. 1893, there was issued out of the circuit court of Cook county a certain writ of *fieri facias* upon a judgment heretofore obtained by the plaintiff in error against the defendant in error in the said circuit court, which writ of *fieri facias* is in the words following, to wit: 'State of Illinois, County of Cook—ss.: The People of the State of Illinois to the Sheriff of Said County—Greeting: We command you that of the lands and tenements, goods and chattels of William G. Metzger, defendant, in your coun-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ty, you cause to be made the sum of twenty-six thousand one hundred and thirty-eight dollars and sixty cents, which William W. Huntington, trustee, plaintiff, lately, in the circuit court of Cook county, at a term thereof begun and held at Chicago, in said Cook county, on the third Monday of June, A. D. 1893, recovered against the said defendant, and which by the said court was adjudged to the said plaintiff for his debt, and also the further sum of three hundred and forty-four dollars and eighty-eight cents, which by the said court was adjudged to the said plaintiff for his damages, and also the further sum of six dollars and — cents, which was adjudged to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted as appears to us of record. And have you these moneys ready to render to the said plaintiff for his debt, damages, and costs aforesaid, and make a return of said writ, with an indorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof. [Seal.] Witness: Frank J. Gaultier, Clerk of our said Court, and the seal thereof, at the city of Chicago, in said county, the 12th day of June, A. D. 1893. Frank J. Gaultier, Clerk.'

"(2) That afterwards, to wit, on the 28th day of June, A. D. 1893, the sheriff of Cook county made return to said writ, in the words following, to wit: 'I did, on the 23d day of June, A. D. 1893, demand of the within-named defendant, William G. Metzger, that he pay this execution, or that he surrender sufficient of his estate, goods, chattels, lands and tenements for the satisfaction of this writ; and I also informed him that if he failed to comply with said demand he would be liable to arrest upon an execution against his body; and, he having failed to satisfy this writ, or any part thereof, and not being able to find any property in my county on which to levy this writ, I therefore return the same, "No property found, and no part satisfied," at this 28th day of June, 1893. James H. Gilbert, Sheriff. John Westerfield, Deputy.'

"(3) That on the 28th day of June, A. D. 1893, the attorneys for the plaintiff in error caused to be entered, in a book kept by the sheriff of Cook county for such purpose, an order in the words, following, to wit: 'Huntington vs. Metzger. Circuit Court. The sheriff will return the execution in the above-entitled cause. "No property found; no part satisfied." Aldrich, Payne & Defrees. June 28th 1893.' That in compliance with said order as given only the said sheriff made the said return upon said fi. fa. That said Aldrich, Payne & Defrees were attorneys of record for said Huntington in the said suit in which said writ of fieri facias was issued. That afterwards, to wit, on the 28th day of June, A. D. 1893, a writ of capias ad satisfaciendum was issued out of said circuit court, the same being in the words fol-

lowing, to wit: 'State of Illinois, Cook County—ss.: People of the State of Illinois to the Sheriff of Cook County—Greeting: We command that you take William G. Metzger, defendant, if he may be found in your county, and safely keep, as by law required and herein commanded, so that you have his body to satisfy William W. Huntington, trustee, plaintiff, in the sum of twenty-six thousand one hundred and thirty-eight dollars and sixty cents, which the said plaintiff lately, in the circuit court of Cook county, at a term thereof, begun and held at Chicago, in said Cook county, on the third Monday of June, 1893, recovered against the said defendant, and which by the said court was adjudged to the plaintiff for his debt, and also the further sum of three hundred and forty-four dollars and eighty-eight cents, which by the said court was adjudged to the plaintiff for his damages; and also the further sum of six dollars and seventy-five cents, which was adjudged to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record. You are so to take and keep William G. Metzger, defendant, as by law required, until said sums and all legal costs and expenses in said cause be paid and satisfied, or until he is discharged by due course or process of law. And do you have the moneys which may be paid on this writ ready to render said plaintiff, and make a return of said writ with an indorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof, as by law required. [Seal.] Witness: Frank J. Gaultier, Clerk of our Said Court in Said County, on the 29th day of June, A. D. 1893. Frank J. Gaultier, Clerk.'

"(4) That the defendant in error was arrested upon said writ, and thereupon filed in the county court of Cook county a petition in this cause for his release, and that afterwards, to wit, on the 4th day of August, 1893, he was found not guilty, and discharged from said arrest by the county court, as appears by the record of this cause.

"And thereupon, from said facts above recited, the court finds as a matter of law that the writ of capias ad satisfaciendum above mentioned was improvidently issued, and on account thereof the said defendant in error was entitled to be discharged therefrom by said county court. And having found as a matter of law that said writ was improvidently issued by reason of the order of the plaintiff's attorneys having been entered in the book kept by the sheriff as aforesaid, this court deems it unnecessary to find whether or not the plaintiff in error was guilty of refusing to surrender his estate, or of having fraudulently disposed of the same. And thereupon it is ordered and adjudged that the judgment of the county court be, and the same is hereby, affirmed."

The documents recited in this judgment were

not the only evidence introduced upon the trial in the county court, but a large amount of testimony was there introduced, both oral and in the form of depositions, bearing upon the question of fraud or refusal to surrender. All of this testimony is in the bill of exceptions, from which it appears that the finding of the trial court was not only upon the question of refusal to surrender, but also upon the question whether the debtor had fraudulently disposed of his estate with a design to secure the same to his own use, or defraud his creditors. The petition of the debtor to the county court is as follows: "The petition of William G. Metzger respectfully represents that the petitioner has been arrested under a writ of ca. sa. issued by Judge ———, of the circuit court of Cook county, in favor of W. W. Huntington, trustee, for the sum of \$26,493.23, and is now in the custody of the sheriff of said county of Cook under and by virtue of said writ * * * execution, and he hereby traverses the allegations in the affidavit upon which the execution against his body was issued, and demands a trial by jury. Wherefore he prays that such proceedings to that end may be had as are prescribed or required by the laws of the state relating to insolvent debtors."

From the judgment rendered by the appellate court on January 6, 1894, the present appeal is prosecuted by W. W. Huntington, trustee (appellant herein).

Defrees, Brace & Ritter, for appellant. F. A. Riddle, for appellee.

MAGRUDER, J. (after stating the facts). If the judgment entered by the appellate court was such a judgment as it was proper for that court to enter under the circumstances shown by this record, it presents the question whether the writ of capias ad satisfaciendum was improvidently issued by reason of the order of the attorneys of the judgment creditor, the appellant here, directing the sheriff to return the execution unsatisfied. Section 62 of chapter 77 of the Revised Statutes, in regard to judgments, etc., provides as follows: "If, upon the return of an execution unsatisfied in whole or in part, the judgment creditor, or his agent, or attorney shall make an affidavit stating that demand has been made upon the debtor for the surrender of his estate, goods, chattels, land and tenements for the satisfaction of such execution, and that he verily believes such debtor has estate, goods, chattels, lands or tenements not exempt from execution which he unjustly refuses to surrender or that since the debt was contracted or the cause of action accrued, the debtor has fraudulently conveyed, concealed or otherwise disposed of some part of his estate, with a design to secure the same to his own use or defraud his creditors; and also setting forth, upon his knowledge, information and belief in either case, the facts tending to show that such belief is well founded, and shall procure the order of the judge of the court from which the

execution issued, or of any judge or master in chancery in the same county certifying that probable cause is shown in such affidavit to authorize the issuing of an execution against the body of the debtor, and ordering that such writ be issued; upon the filing of such affidavit and order with the clerk he shall issue an execution against the body of such judgment debtor." 2 Starr & C. Ann. St. p. 1412. Section 63 of said chapter is as follows: "For the purpose of enabling the judgment creditor to make such affidavit the officer having an execution against the property of the defendant may demand any estate of the defendant not exempt from execution whether the same is of such a nature that it may be levied upon and sold on execution or not." 2 Starr & C. Ann. St. p. 1413. Whether the affidavit upon which the ca. sa. was issued in the present case was sufficient or not to justify the issuance of that writ cannot be determined, because the affidavit nowhere appears in the record. The petition of appellee to the county court for discharge concedes that there was an affidavit upon which the execution against his body was issued, and traverses the allegations thereof, and demands a jury trial, but fails to make the affidavit a part of the petition, as was done in *Re Ennor*, 105 Ill. 105. Such petition to the county court was presented thereto under and in pursuance of the first five sections of chapter 72 of the Revised Statutes, in relation to insolvent debtors, of which section 5 is as follows: "When any debtor is arrested or imprisoned for debt upon charge of fraud or upon execution on the charge of refusal to surrender his estate for the payment of any judgment he shall be entitled upon giving notice as provided in section 8 of this act, to have the question whether he is guilty of such fraud or has refused to surrender his estate, tried by a jury who may be summoned, tried and selected for that purpose. If the jury should find the debtor 'not guilty' of such fraud or refusal, as the case may be, the debtor shall be discharged from the arrest or imprisonment and the creditor at whose instance he was arrested or imprisoned shall be adjudged to pay the costs of the arrest or imprisonment of such proceeding. If the debtor shall be found 'guilty' of such fraud or refusal, he shall be remanded to the custody of the proper officers; but such finding shall not prevent his availing himself of the other provisions of this act." 1 Starr & C. Ann. St. p. 1296. Not only did appellee fail to attach the affidavit to his petition, but the judgment rendered in his favor by the county court fails to state what the charge was of which he was found guilty. That judgment, as set forth in the record, recites as follows: "The court * * * doth find said debtor not guilty, to which finding of the court said arresting creditor duly excepts; wherefore it is ordered, adjudged, and decreed by the court that said petition be allowed, and said debtor be, and is hereby, discharged from his said arrest." It would seem, however, from the recitals in the

bill of exceptions that appellee was charged by the affidavit not only with a refusal to surrender his estate, etc., but also with fraudulently disposing of his estate with a design to secure the same to his own use or defraud his creditors. Both of these grounds for arrest are within the contemplation of the constitution, which provides that "no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." Const. 1870, art. 2, § 12. In *Re Ennor*, supra, the petitioner was tried upon the two charges of fraudulently disposing of property and unjustly refusing to surrender property, and was not found guilty upon the former and guilty upon the latter.

The contention here is, not that the affidavit was insufficient to justify the issuance of the ca. sa., but that there was not such a return upon the original execution as justified the issuance of the ca. sa. We are unable to see why the return of the sheriff does not conform to the requirements of sections 62 and 63 as above quoted. The original execution was issued on June 12, 1893. On June 23, 1893, the sheriff made his return, and therein stated that on June 23, 1893, he demanded of the defendant, Metzger, that he pay the execution, or surrender sufficient of his estate, goods, chattels, lands, and tenements for the satisfaction of the writ; and the sheriff also states in his return that he informed the defendant that if he, the defendant, failed to comply with the demand made upon him, he would be liable to arrest upon an execution against his body; and the return then proceeds further to state that he, the defendant, having failed to satisfy the writ, or any part thereof, the sheriff, not being able to find any property in his county on which to levy the writ, therefore returned the same "No property found, and no part satisfied." In *Tuttle v. Wilson*, 24 Ill. 553,—a case which was decided before section 63 became the law,—it was held that a debtor could not be considered in such default as to justify seizing his body until a demand was made upon him to produce or show property. The return of the sheriff here shows that such a demand was made. In *Maher v. Huette*, 10 Ill. App. 56, it was said that such demand should be so specific, clear, and comprehensive as to fairly give the defendant to understand that, if he fails to comply therewith, he will render himself liable to be arrested. The return here shows that the demand was made specific in the respect thus indicated. In *Doty v. Colton*, 90 Ill. 453, it was held that an affidavit which "sets forth in detail such facts as show defendant had property liable to the execution in favor of plaintiff, and fraudulently concealed and withheld the same after demand," is sufficient to authorize the issuing of the writ. But it is said that the language of section 62, above quoted, is similar to that used in section 49 of the chancery act in regard to

creditors' bills. Said section 49 provides that "whenever an execution shall have been issued against the property of a defendant on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery," etc. 1 Starr & C. Ann. St. p. 414. In view of the similarity between the two sections 49 and 62, it is urged that the requirements, which have been held necessary in a return upon an execution to justify the filing of a creditors' bill are also necessary in such a return to justify the issuance of a ca. sa. This may be conceded to be true, but we see no reason why the return in this case would not be sufficient to justify the filing of a creditors' bill under said section 49.

It appears that on June 23, 1893, the day on which the execution was returned, the attorneys of appellant, the judgment creditor, entered the following order in an order book kept by the sheriff at his office: "*Huntington vs. Metzger*. Circuit Court. The sheriff will return the execution in the above-entitled cause 'No property found; no part satisfied.'" The contention is that the act of the sheriff in returning the execution after or upon receiving this order made his return insufficient, as showing a failure to exhaust the remedy at law under the judgment. In support of this position the case of *Scheubert v. Honel*, 152 Ill. 313, 38 N. E. 913, is referred to. In that case a judgment by confession was entered up, execution thereon was issued, and a return of the execution by the sheriff was made, all on the same day. The execution was so returned by direction of the plaintiff's attorney. The direction and return were both indorsed on the back of the execution. The direction was as follows: "The sheriff will return this writ, 'No property found, and no part satisfied forthwith,'" and the return was as follows: "This execution returned 'No property found, and no part satisfied.'" But the *Scheubert Case* is very different from the case at bar. In that case the execution was returned unsatisfied merely because the sheriff was instructed to make the return. The return was really, and in effect, the act of the plaintiff's attorney, and not the act of the sheriff. The sheriff made no effort to collect the judgment, and exercised no responsibility in making the return. He made no demand upon the debtor, and did not state or show that he was unable to find property to levy upon. In order to justify the filing of a creditors' bill, judgment must be obtained, execution must be sued out, the sheriff must make proper efforts to collect the judgment by means of the execution, and, such efforts being unavailing, the execution must be returned by the proper officer unsatisfied by reason of his inability to find property whereon to levy. Only by such proceedings will there be such an exhaustion of the legal remedies as will authorize the creditor to invoke the aid of

a court of equity. *Durand v. Gray*, 129 Ill. 9, 21 N. E. 610; *Russell v. Bank*, 139 Ill. 538, 29 N. E. 37. An examination of the return upon the execution in this case will show that the steps thus required to be taken as preliminary to the filing of a creditors' bill were taken by appellant. The sheriff states, as already indicated, that he made specific demand for payment or surrender of property, and that he was not able to find any property on which to levy, and that for this reason, and not because of any instructions from plaintiff's attorneys, he returned the execution unsatisfied. No direction to return the writ is indorsed thereon, and the writ does not show on its face that it was returned because of such direction. The return will be construed as being made for the reasons appearing on its face, and not because of any outside occurrence. The return that the execution is unsatisfied, and that the defendant has no property out of which it can be satisfied, is a matter of record, "and is conclusive as between the parties to the judgment and the officer, only to be questioned in an action for a false return. It shows, *prima facie*, that the creditor has exhausted his legal remedy, and chancery has jurisdiction." *Bowen v. Parkhurst*, 24 Ill. 257. Here the execution was in the sheriff's hands for about 11 days before he made demand upon the debtor, and informed him of his liability to arrest in case of failure to comply with the demand. It was five days after such demand made and information given before the sheriff made his return. The law requires the sheriff to make his return within 90 days, and he cannot be compelled to make it before the expiration of that time; but he may take the responsibility of making an earlier return to it of *nulla bona*, especially after he has made a personal demand upon the defendant to turn out property, and the latter has refused to do so. *Bowen v. Parkhurst*, *supra*; *Bank v. Gage*, 79 Ill. 207. Where—as appears from the return to have been the case here—the sheriff has taken all proper steps to collect the execution, and has made demand, which has not been complied with, and has been unable to find property to levy upon, then he is in a position where he may take the responsibility of returning the execution before the expiration of 90 days, and the fact that he is requested by the attorney of the creditor to make the return when such conditions exist is no evidence that his act is that of the attorneys, and not his own act. The facts exist which show an exhaustion of the legal remedies, and such facts are not changed or modified or affected by the direction of the creditor's attorney to return the execution unsatisfied. We are not prepared to say that the insufficiency of the affidavit and of the return of the execution may not be taken advantage of in the proceeding in the county court under section 5 of the Insolvent debtor act, when the affidavit and return are properly set out

in the petition for discharge, and when they so far fail to comply with the requirements of sections 62 and 63 as to show that the order for a *ca. sa.*, founded upon them, is void. In such case the court making the order for the execution against the body of the debtor would be without power to enter such order, and hence the validity of the order could be attacked collaterally. It is true that when the debtor calls for a jury to try the question whether or not he has been guilty of fraud or failure to surrender, the issue to be determined is purely one of fact, and in such case the traverse of the allegations of the affidavit will amount to a waiver of any irregularities therein. Where, however, there was no power to make the order for the writ of *ca. sa.*, such absence of jurisdiction in the court making the order may be taken advantage of in the proceeding for discharge. The better practice, however, is to move to quash the writ, as was done in *Doty v. Colton*, *supra*. Our conclusion is that the return upon the execution in this case was sufficient as a basis for the affidavit required to be made by section 62, above quoted. This being so, it will be presumed that the affidavit was sufficient to justify the issuance of the writ of *capias ad satisfaciendum*, nothing being shown against the validity or sufficiency of the affidavit, which is conceded to have been made. The order for the writ of *ca. sa.*, based upon such affidavit, was made by the circuit court of Cook county, which is a court of general jurisdiction. "A court of general jurisdiction, acting within the scope of its authority, is presumed to have jurisdiction to render the judgment or decree it pronounces, until the contrary appears." *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595.

But there is another question in the case. It is true that the judgment of the appellate court affirms the judgment of the county court. The issue submitted to the county court upon the traverse by the petitioner of the allegations in the affidavit was an issue of fact, and that issue of fact was whether or not the petitioner had been guilty of a fraudulent disposition of his property, and of an unjust refusal to surrender the same. The judgment creditor held the affirmative of this issue, and as a part of his original case introduced in evidence, in connection with other testimony, the original execution, and the sheriff's return thereon. The object of introducing the original execution and the sheriff's return thereon was to show, in connection with other testimony, that a demand had been made upon the debtor for the surrender of property, and that he had refused to comply with such demand. The petitioner introduced in evidence the direction of the attorneys to the sheriff to return the execution unsatisfied. It is manifest that the only thing found by the appellate court in its judgment is that, as matter of law, the return of the sheriff was insufficient to authorize the issuance of the *ca. sa.* because of

the direction so given by the attorneys of the appellant. But the judgment of the appellate court makes no finding upon the issue presented by the traverse of the affidavit. Counsel for appellee contends that, as the appellate court affirmed the judgment of the county court, it will be presumed that it found the facts upon the issue made by the traverse of the affidavit the same as the trial court found them, namely, that the petitioner was not guilty. Such undoubtedly is the presumption in the ordinary case of an affirmance by the appellate court of a judgment of the trial court. But here the appellate court in their judgment, which is based wholly upon their view of the law question, already referred to, make the following explicit statement: "This court deems it unnecessary to find whether or not the plaintiff in error was guilty of refusing to surrender his estate, or of having fraudulently disposed of the same." In the face of this statement, we cannot entertain the presumption ordinarily arising as above stated. The appellate court did not pass upon the question submitted to the trial court, as to whether appellee was or was not guilty of the charges made against him. We know of no authority in the statutes of this state for the entry of such a judgment as has been entered by the appellate court in the case at bar. Section 87 of the practice act provides that, "if any final determination of any cause as specified * * * shall be made by the appellate court as the result wholly or in part of the finding of the facts concerning the matter in controversy different from the finding of the court from which such cause was brought by appeal or writ of error it shall be the duty of such appellate court to recite in its final order, judgment or decree, the facts as found," etc. But it does not here appear that the appellate court finds the facts concerning the guilt or innocence of appellee different from the finding in reference thereto by the trial court. If it had made the same finding of the facts in regard to the matter in controversy as was made in the trial court, it was unnecessary to recite in its judgment the facts as found by it, because the statute only provides for such a recital in case of a different finding, and not where there is the same finding.

The question of the sufficiency of the affidavit for arrest, or of the return of the sheriff upon the execution, being a question of law, could not be submitted to a jury. The jury have "no right to pass upon the legality of the process." *Gorton v. Frizzell*, 20 Ill. 291. It cannot, therefore, be said that a finding upon this question of law is a "finding of the facts concerning the matter in controversy different from the finding" of the trial court. If either of the parties upon the trial in the county court had desired to raise a question of law as to the legality of the process, a proposition should have been submitted to that court to be held as law in the decision of the case. It is only by the submission of such propositions where the trial is before the court without a

jury that a question of law can be raised for the consideration of this court. If such a question can be raised by a special judgment of the appellate court, like the one entered in this case, then section 41 of the practice act (2 Starr & C. Ann. St. p. 1808), and all the decisions of this court construing that section, are rendered nugatory, and of no avail. The judgment of the appellate court is reversed and the cause is remanded to that court for the entry of such judgment, reversing or affirming the judgment of the county court, as in their judgment may be proper, and reciting in their judgment the facts found by them, if any such final determination of the cause is made by them, as is provided for in section 87 of the practice act as above quoted. Leave is given to withdraw the record of the county court filed in this court for the purpose of refiling it in the appellate court. *Neer v. Railroad Co.*, 188 Ill. 29, 27 N. E. 705. Reversed and remanded.

(158 Ill. 370.)

PORTER v. PEOPLE.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

RAPE—INDICTMENT—EVIDENCE—VENUE—INSTRUCTIONS.

1. Under Rev. St. 1893, c. 88, § 237, which defines rape as "the carnal knowledge of a female forcibly and against her will," but also declares that, in case of a female under the age of 14, carnal knowledge, "either with or without her consent," shall constitute rape, it is not necessary, in an indictment for assault with intent to commit rape on a female under said age, to charge that the act was forcibly done.

2. Where the prosecuting witness testifies that she lived in Murphysboro, Jackson county, Ill., and that the assault was committed in defendant's house, and the defendant testifies that the house in which he lived at the time was in Murphysboro, the venue is sufficiently proved.

3. An instruction that, if the testimony of any witness appears to be fair, and consistent, and the witness has not in any way been impeached, the jury have no right to disregard it from mere caprice or without cause, although erroneous, does not constitute reversible error where the jury are told in other instructions that, in order to convict, the defendant's guilt must be established beyond a reasonable doubt.

Error to circuit court, Jackson county; O. A. Harker, Judge.

Indictment of Walter A. Porter for assault with intent to commit rape. Defendant was convicted, and he brings error. Affirmed.

A. B. Garrett and W. A. Schwartz, for plaintiff in error. M. T. Moloney, Atty. Gen., and John M. Herbert, State's Atty. (T. J. Scofield and M. L. Newell, of counsel), for defendants in error.

BAILEY, J. Walter A. Porter was indicted in the circuit court of Jackson county for an assault upon Nora Blackwood with intent to commit rape, and at the trial the jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for the term of one year. Sentence having been pronounced

¹ Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

upon him in accordance with the verdict, he now brings the record to this court by writ of error.

The first proposition submitted by counsel for the defendant is that the indictment is insufficient, in that it omits the use of the word "forcibly" in its description of the offense which the defendant is charged with attempting to commit. The indictment alleges that the defendant, "on the 10th day of October, 1893, at and within the county of Jackson, state of Illinois, then and there being a male person of the age of sixteen years and upwards, unlawfully and feloniously did make an assault in and upon one Nora Blackwood, then and there being a female person under the age of fourteen years, to wit, of the age of eleven years, and her, the said Nora Blackwood, then and there wickedly, unlawfully, and feloniously, with intent then and there to ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois." Our statute defines rape to be "the carnal knowledge of a female forcibly and against her will," and ordinarily the offense can be described only by alleging that it was committed "forcibly, and against the will" of the female. But the same section of the statute in which the foregoing definition of the offense is given also provides that: "Every male person of the age of sixteen years and upwards who shall have carnal knowledge of any female person under the age of fourteen years either with or without her consent, shall be adjudged guilty of rape." 3 Starr & C. St. p. 368, § 293. This prosecution was brought under this latter clause of the statute, it being charged that the defendant was a male person of the age of 16 years and upwards, and that the female against whom the offense was attempted to be committed was a female person under the age of 14 years, to wit, of the age of 11 years. Under these circumstances it was immaterial whether the offense was forcibly and against the will of the female or not, as by the statute the consummated offense would have been rape whether committed with or without her consent. We are of the opinion, therefore, that the objection thus made to the indictment is not well taken.

The next point made is that there is no sufficient evidence that the offense charged was committed in Jackson county. It must be confessed that the testimony of the prosecuting witness, when taken alone, fails to show in what county the assault took place. She testifies that she lives in Murphysboro, Jackson county, Ill., and has lived there all her life, though on cross-examination she admits that she lived about 10 months at Champaign, and after that returned to Murphysboro. She further testified that some time prior to the commission of the assault she left her father's house, and went to live with the defendant, and that it was at his house that the assault was committed. She fails to state, however, where, or in what county, the defendant's

house is situated. An elder sister of the complaining witness testifies that she lived in Murphysboro, and that the defendant lived "not very far" from where she was living. In another place she says that the defendant lived "but a little piece," and in another that he lived "just a little ways over," from where she did. This testimony might, perhaps, be regarded as too uncertain to prove beyond a reasonable doubt that the offense was committed in Jackson county, but the matter is placed beyond doubt by the testimony of the defendant himself. When on the stand testifying in his own behalf he states positively that the house in which he was living at the time the assault is alleged to have been committed was in Murphysboro, and that the complaining witness was then living with him at that house, thus fixing the location of the defendant's house and the venue of the offense beyond all possible doubt.

It is next insisted that the evidence is insufficient to warrant a verdict of guilty. The testimony of the complaining witness, if believed by the jury, was, in our opinion, sufficient to warrant the jury in finding the defendant guilty. Her testimony is corroborated by that of other witnesses, who testify to declarations and admissions made by the defendant at various times since the time of the alleged assault, and it is disputed as to material matters by that of the defendant. A discussion of the evidence in detail would serve no useful purpose, and all we need to say is that it is sufficient to sustain the verdict. The case was one for the jury, and we are able to see no tenable ground upon which to call in question their finding. They saw and heard the witnesses, and, they having come to the conclusion that the witnesses for the prosecution have testified to the truth, their finding must be accepted as final.

Complaint is made of the following instruction given to the jury at the instance of the prosecution: "You are instructed that if the testimony of any witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not in any way been impeached, then you have no right to disregard the evidence of such witness from mere caprice, or without cause. It is the duty of the jury to consider the whole of the evidence, and to render a verdict in accordance with the weight of the evidence in the case." This instruction, standing alone, would doubtless be erroneous. In criminal cases the defendant cannot be found guilty upon a mere preponderance of the evidence, but his guilt must be established by evidence sufficiently strong to exclude from the minds of the jury all reasonable doubt on that subject. But it is clear that in this case the jury could not have been misled by the giving of the foregoing instruction. In several other instructions given at the instance of the prosecution, as well as in quite a large number of instructions given at the instance of the defendant, the rule that, in order to a conviction, the guilt of the defend-

ant must be established beyond a reasonable doubt, is plainly and emphatically expressed, and it is reiterated in various ways, so the jury could not have been left to suppose that his conviction would be warranted by a mere preponderance of the evidence. We think the error in the instruction above cited was fully cured by the numerous other instructions given at the request of both parties.

It is finally urged that the verdict is insufficient in that it fails to find whether or not the defendant was between the ages of 10 and 21 years, as required by section 10 of the act to establish the Illinois reformatory. 3 Starr & C. St. 1051. There was no evidence given at the trial as to the age of the defendant beyond what may be inferred from the fact that he was a married man, and father of one child. No objection was made to the verdict at the time it was returned by the jury on the ground that it failed to find the defendant's age. But the necessity for such finding in a case like the present is settled adversely to the contention of the defendant by the recent case of Sullivan v. People (Ill. Sup.) 40 N. E. 288. After carefully examining the entire record, we fail to find any error for which the judgment should be disturbed, and it will therefore be affirmed. Judgment affirmed.

(157 Ill. 554)

UNION STOCK-YARD & TRANSIT CO. v. MALLORY, SON & ZIMMERMAN CO.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

CONVERSION BY AGISTER—FRAUDULENT SALE—AGENCY—EVIDENCE—CUSTOM AND USAGE.

1. The owner of cattle sold them, and gave the purchaser's agent an order therefor, directed to the agister who had charge of the cattle. *Held*, that the agister was not liable to such owner, in trover, for a subsequent wrongful disposal of them, since at the time of such disposal the said owner no longer had title to, or right to possession of, the cattle.

2. The fact that such sale was fraudulent on the part of the purchaser does not affect the case, in the absence of any rescission, since a fraudulent sale is valid until rescinded.

3. In an action of trover by the seller of the cattle, against the agister, for their alleged conversion, evidence that the person to whom the agister delivered the cattle had been previously recognized by the purchaser as authorized to receive cattle for him is admissible, even though the seller did not know of it, since the issue is not as to the agent's authority to buy the cattle, but his authority to receive them after they are bought, with which latter question the seller has no concern.

4. A person dealing at a particular market will be taken to have dealt according to the custom and usage of that market; and, if he employs another to act for him in carrying on business dealings at such market, he will be held as intending that the business should be conducted according to the general usage and custom of such market, whether he in fact knows of the custom or not. *Samuels v. Oliver*, 22 N. E. 499, 130 Ill. 73, followed.

5. An agister of cattle is only required to act with reasonable care and diligence, and in ac-

cordance with the usages and customs of carrying on business at the place where he does business.

Appeal from appellate court, First district.

Action of trover by Mallory, Son & Zimmerman Company against the Union Stock-Yard & Transit Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 170. Defendant appeals. Reversed.

Samuel Fleischman, for a year or two prior to May 14, 1890, was a cattle buyer at the Union Stock Yards in Chicago. He did an extensive business, chiefly in acting as buyer or agent for butchers and cattle dealers who resided outside the city of Chicago. One of the persons for whom he so acted was a Walter Bussell, of Detroit. The business was conducted about as follows: Bussell would notify Fleischman by letter or wire when he desired cattle. Fleischman would go into the yards, pick out such cattle as, in his opinion, suited the requirements of his principal, negotiate with the commission man to whom the cattle desired by Fleischman had been consigned, and, if the price of the cattle was satisfactorily arranged, buy them. Thereupon the commission man and Fleischman would go to the weighmaster of the stock-yard company, by whom was made out a scale ticket, giving the number and weight of the cattle, from whom purchased, to whom weighed, and containing other memoranda respecting the sale, which was delivered to the seller. The scale ticket was then taken by the seller to his office, and the price of the cattle sold being paid by the buyer or agent, or a credit given for the price thereof, the seller gave to the buyer an order upon the stock-yard company to deliver the cattle so sold. Upon presentation of this order to the stock-yard company, or its employes in charge of deliveries of cattle, the cattle mentioned in the order were turned over to the buyer or agent, for shipment or other disposition, as will be mentioned later. Fleischman had acted as the agent of Bussell in the purchase of cattle in the way described for a period of something over one year, and less than two years; say 15 to 18 months prior to May 14, 1890. During this time he also purchased cattle for other non-resident butchers and cattle dealers,—notably, N. Phillips and L. Fleischman. On May 13, 1890, Bussell, at Detroit, telegraphed to Fleischman, at Chicago, to buy him (Bussell) "a load of cattle, if just right; if they are my kind, and come right." On the morning of May 14, 1890, Fleischman told Mr. Zimmerman, of the plaintiff company, that he had an order from Bussell for cattle; and between 9 and 10 o'clock on that day the plaintiff, acting through Mr. Zimmerman, sold to Fleischman 27 head of cattle, and delivered to Fleischman an order as follows:

"Chicago, May 14, 1890. Union Stock-Yard & Transit Co.: Please deliver to — Bussell 27 cattle, — hogs, — sheep.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Block —, pen —, division D, scale 5. Mallory, Son & Zimmerman Co., per Wm. Buhlman."

Fleischman took the order, and later in the day sold the cattle mentioned therein to Holmes & Pattison, a commission firm doing business at the stock yards, and going to the scales used in connection with the block and pen where the cattle were, with a representative of the firm of Holmes & Pattison, indorsed the order as follows:

"To Holmes & Pattison. Bussell. S. Fleischman."

Thereupon the 27 cattle mentioned in the order were delivered to Holmes & Pattison by the stock-yard company.

On the next day the officers of the plaintiff company heard rumors to the effect that Fleischman had run away, and thereupon Mr. Zimmerman and Mr. Mallory, officers of appellee company, went to the Transit House, where Fleischman lived, for the purpose of learning "whether he was going to pay for the cattle," but did not succeed in finding him there; nor, indeed, so far as appears, did they ever find him. Not finding Fleischman at the Transit House, the plaintiff company made out and forwarded the following bill and letter to Mr. Bussell, at Detroit:

"U. S. Yards, Ill., 5/14, 1890.

"Office of Mallory, Son & Zimmerman Co.

"Sold Wm. Bussell:

Date.	Cattle.	Hogs.	Sheep.	Weight.	Off. Price.	Amount.
5-14	6			6,150	2.10	\$1290 65
	3			3,170	2 1/4	103 02
	2			2,250	4c.	90 00
	9			7,590	2.65	276 67
	3			1,500	3c.	45 00
	3			3,200	2.40	108 80
	1			950	2.40	22 64
	27					\$246 78

"Dear Sir: We sold the above cattle to S. Fleischman, for your acct., on the date as above, but have not rec'd payment for same. Please remit at once, and oblige. Yours, resp'y, Mallory, Son & Zimmerman Co., per Bryant."

The first thing Bussell appears to have done, on receiving this communication, was to consult an attorney, who replied as follows:

"Detroit, May 27, 1890. Messrs. Mallory, Son & Zimmerman Company, Union Stock-Yards, Chicago—Gentlemen: In reply to your favor of the 14th inst. to Walter Bussell, he wishes me to say that he has neither ordered nor received from Mr. Fleischman the bill of cattle covered by your memorandum, nor anything like it, and he therefore will decline to pay the account. Fleischman must have bought that lot for some one else, or, at all events, turned them over to some one else. Yours, very truly, W. M. Lilliebridge."

The next step taken by the plaintiff company was to forward to the stock-yard company the following communication:

"Mallory, Son & Zimmerman Company. (Incorporated.) Established 1862. Live-Stock

Commission Merchants. Union Stock Yards, Ill., May 23, 1890. Union Stock-Yard & Transit Co. to Mallory, Son & Zimmerman Co., Dr.: To 27 cattle, as per bill attached, \$846.78. These cattle were sold to S. Fleischman, May 14th, for account of Wm. Bussell, Detroit, and we gave the order to Wm. Bussell direct. Your employes delivered the cattle to other parties, and, as Mr. Bussell did not get the cattle, he refuses to pay for them; and, as you delivered the cattle to others than Wm. Bussell, we look to you for the amount. Please adjust the same at once, and oblige. Mallory, Son & Zimmerman Co., per C. A. Mallory, Treas."

The bill mentioned in the letter was the same as that above set forth in the letter of May 14th to Bussell.

The following reply was thereupon made by the defendant company (appellant in this court):

"The Union Stock-Yard and Transit Company of Chicago. Jas. H. Ashby, General Superintendent. Union Stock Yards, Chicago, May 24th, 1890. Mallory, Son & Zimmerman Co., Union Stock Yards, City—Gentlemen: Referring to your claim of \$846.78, under date of the 23rd instant, account of alleged wrong delivery of cattle by the employes of this company, would say that I find, upon examination of your order, that these cattle were properly delivered on it, as directed, and consequently we can assume no responsibility in the matter. Very respectfully, James H. Ashby, General Superintendent."

Subsequently, and on June 13, 1890, formal demand for the possession of the 27 cattle was made by the plaintiff company upon the defendant company, and at a later period an action of trover for the conversion of the 27 cattle was commenced by the appellee against the appellant, and proceeded to judgment for \$1,004.25, being the sum for which the 27 cattle were sold, and interest thereon from the date of sale to the date of trial, and from that judgment the stock-yard company has appealed, first to the appellate court for the First district, and, on the affirmance there of the judgment of the court below, to this court.

Winston & Meagher, for appellant. Peck, Miller & Starr, for appellee.

MAGRUDER, J. (after stating the facts). This is an action of trover brought by the appellee, Mallory, Son & Zimmerman Company, an incorporated company of live-stock commission merchants doing business at the stock yards in the city of Chicago, against the appellant, the Union Stock-Yard & Transit Company, to recover the value of 27 head of cattle alleged to have been converted by the appellant. In an action of trover, which is a possessory action, the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's title; and he must show, not only a tortious conversion of the personal prop-

erty by the defendant, but also that at the time of the alleged conversion he had the right of property, general or special, in the chattels converted, and also the possession, or a right to the immediate possession, thereof. There must be a concurrence both of the right of property, general or special, and of the actual possession, or the right to immediate possession, and this concurrence must exist at the time of the conversion. *Davidson v. Waldron*, 81 Ill. 120; *Forth v. Pursley*, 82 Ill. 152; *Owens v. Weedman*, Id. 409; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819; 26 Am. & Eng. Enc. Law, p. 744. There is evidence in the record tending to show that the title to the cattle had passed out of appellee when the alleged conversion took place, and that both the right of property and the right of possession were in Bussell when the cattle were delivered by appellant to Fleischman, or to Holmes & Pattison at Fleischman's request. On May 13, 1890, which was Sunday, Bussell, in Detroit, telegraphed to Fleischman, at the stock yards in Chicago, to buy a load of cattle for him. Early on the next morning (Monday, May 14, 1890), Fleischman went to Zimmerman, a member of the appellee company, and told him of the telegram thus received from Bussell. Fleischman and Zimmerman together visited the cattle pens of appellant, between 9 and 10 o'clock on that morning, and there looked at several bunches of cattle held for appellee by appellant, and agreed on the price of 27 head of cattle. Zimmerman caused the cattle so selected to be taken by one of his employes to the scales in the yard, and weighed by appellant's weighmaster, who made out the scale tickets, showing the number and weight of the cattle, and the names of the seller and of the person to whom they were weighed. The scale tickets are in evidence, and show the names of appellee and of Bussell, and are signed by the weighmaster of appellant. Fleischman was present when the cattle were weighed, or when Zimmerman directed them to be carried to the scales to be weighed. The scale tickets were taken to appellee's office, and there appellee made out, and signed and delivered to Fleischman, an order on appellant to deliver to Bussell the 27 head of cattle. On the same day, Fleischman presented this order to appellant, and appellant delivered to him the cattle. It was not the business of appellant to buy and sell cattle, but the appellant operated the stock yards; and its business is to receive stock, and weigh it, and see that it is properly fed and watered. Appellee's business was to sell stock on commission, and sometimes buy it on order; and it had been engaged in that business at the stock-yards for some 22 years, having dealings with appellant every day in the year except Sunday. Fleischman also had been buying stock for more than a year at the stock yards for Bussell and other par-

ties, and had had dealings with appellee before May 14, 1890. The testimony of both Zimmerman and Mallory (the former being the salesman of appellee, and the latter its treasurer and manager) is that there was a sale of the cattle to Bussell when the delivery order was given to Fleischman, and that appellee then extended upon its books a credit of a few days, or perhaps a week, to Bussell. There was a symbolical delivery of the cattle by appellee to Fleischman, and therefore an execution of the contract of sale. When the vendor delivers to the purchaser, or to the purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, there is a constructive delivery of the property; and the delivery of the order vests the purchaser with the indicia of ownership, and has the same effect in transferring the title to the property as the delivery of the property. *McCormick v. Hadden*, 37 Ill. 370; *Burton v. Curry*, 40 Ill. 320; *Webster v. Granger*, 78 Ill. 230; *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1. It follows that the title to the cattle passed from appellee to Bussell; and, if the title remained in Bussell at the time of the alleged conversion of the property, then this action was improperly brought in the name of appellee, and cannot be maintained. If there was a conversion, it must be regarded as having taken place on May 14, 1890, when the cattle were delivered by appellant to Fleischman, and not on June 18, 1890, when appellee made a formal written demand upon appellant for the possession of the property. In trover, demand and refusal do not necessarily constitute the conversion, but are only evidence of it. A conversion is any unauthorized act which deprives a man of his property permanently, or for an indefinite time, and when such a conversion has taken place a demand is not necessary. A wrongful assumption of the ownership of property may be a conversion in itself, and render a demand and refusal unnecessary. Demand and refusal are evidence of conversion when the defendant is in such a condition that he can deliver the property if he will. *Johnson v. Howe*, 2 Gilman, 342; *Bruner v. Dyball*, 42 Ill. 34; *Hort v. Bott*, L. R. 9 Exch. 86; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767, and notes. It is not claimed by appellee that appellant delivered the cattle to Fleischman on May 14, 1890, with any evil intent, or from any improper motive, or that it thereby acted with a want of good faith. If appellant was then guilty of a conversion, it must be because it parted with the cattle through mistake or negligence. It was certainly justified at that time in regarding Bussell as the owner of the cattle, and entitled to the possession thereof, and in concluding that the right of property and of possession had both passed from appellee. The trial court refused to instruct the jury, at defendant's request, that to maintain this

action the plaintiff must recover on the strength of its own title to the cattle, and show in itself either a general or special property therein, and that at the time of the alleged conversion it had not only the right of property in the cattle, but also the right to the immediate possession of the same.

It is claimed, however, that the sale from appellee to Bussell, through Fleischman, was fraudulent. Fleischman is alleged to have been a special agent, and not a general agent, of Bussell. A general agent is one who is authorized to do all acts connected with a particular business, or in a particular place, while a special agent is one who is empowered to act only in a specific transaction. Mechem, Ag. § 6; 1 Am. & Eng. Enc. Law, p. 349. Fleischman is said to have had no authority to buy cattle for Bussell, except when he received an order to buy a particular lot of cattle, and that his authority to make purchases of cattle was limited to the particular order received by him. It is then contended that he received an order by telegraph, sent on May 13, 1890, to buy cattle; that on May 14, 1890, he bought a lot of cattle from another party than appellee, and shipped them to Bussell, and drew on Bussell for the purchase money, and that Bussell paid for the cattle so purchased and shipped to him. Appellee contends that Fleischman had exhausted his authority to buy for Bussell when he told Zimmerman that he had an order from Bussell, and that he obtained the cattle from appellee without having any authority from Bussell to do so, and without having any intention to pay for the same, and that his conduct in thus obtaining the cattle from appellee, and subsequently selling them to Holmes & Pattison, instead of shipping them to Bussell, was a fraud on appellee. Whether the purchase of the cattle from appellee was made by Fleischman before or after the other purchase was made by him may be considered doubtful, under the evidence, if it were proper to consider the evidence. If he bought of appellee under the order received by him, and before his authority was exhausted, then it cannot be said that there was any fraud in the original purchase of the cattle from appellee, but only in the subsequent disposition of them to Holmes & Pattison. It may be conceded, however, that the question whether the sale of the cattle by appellee to Bussell was fraudulent or not was a question of fact, to be determined by the jury under proper instructions, and that the judgment of the appellate court establishes the fraudulent character of the sale, as between appellee and Bussell, or Fleischman. Bussell denies that he gave Fleischman any authority to buy this particular lot of cattle from appellee. One who holds out another as his agent to act for him in a given capacity, and, by his habits and course of dealing, justifies the inference that such other is authorized to act as his agent, whether it be in a single trans-

action, or in a series of transactions, will not be heard to deny the agency, to the prejudice of an innocent party, who has been led to rely upon the appearance of authority in the agent. Mechem, Ag. §§ 83, 84. Whether or not Bussell's conduct towards Fleischman was such as to justify appellee in dealing with Fleischman as having authority to act for Bussell, is a question which seems to be immaterial, except so far as it concerns the validity of the sale, because this is not a suit by appellee against Bussell. Nor does the question here arise whether or not Holmes & Pattison were bona fide purchasers of the goods from Fleischman, as this is not a suit against Holmes & Pattison. This suit is brought by appellee against the appellant, its bailee or agister, charging the latter with having improperly delivered the goods to Fleischman when the delivery order directed them to be delivered to Bussell. Where a sale of goods is made through the fraudulent representations of the purchaser, or where the fraud in the sale arises from the intention of the purchaser not to pay for the goods, the sale is voidable only, and not absolutely void. 8 Am. & Eng. Enc. Law, pp. 791, 822, 823; Benj. Sales, bk. 3, c. 2, § 433. The sale being voidable, it results that the vendor may rescind it, if he so elects. But this rescission must be made before other rights acquired in good faith have intervened. If, before the vendor exercises his election, the vendee makes a transfer to an innocent third person, for a valuable consideration, such third person will hold the property, as against the original vendor. Brundage v. Camp, 21 Ill. 330; Fawcett v. Osborn, 32 Ill. 411; Butters v. Haughwout, 42 Ill. 18; Dock Co. v. Foster, 48 Ill. 507; Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; 2 Schouler, Pers. Prop. §§ 408, 409; Benj. Sales, § 433; 26 Am. & Eng. Enc. Law, p. 786, and notes. In the case at bar it is undisputably shown that the appellee exercised no election to rescind the sale before the cattle were delivered to Fleischman upon the order given to him by appellee. "The title of the fraudulent purchaser is subject to be divested, at the election of the seller, within any reasonable time after the fraud is discovered." Doane v. Lockwood, supra. Here the fraud was not discovered until after the alleged conversion took place. This being so, the title was still in Bussell at the time of the conversion, and had not become revested in appellee by rescission. We are therefore inclined to hold that the jury should have been instructed upon this subject in accordance with defendant's request, as above indicated.

It is said, however, that the point as to the existence of the title in Bussell at the time of the conversion is merely technical, and that it is immaterial whether appellant should be made to respond for the value of the cattle to appellee or to Bussell. With-

out conceding that there is any force in this suggestion, we will notice some of the other errors assigned.

By the fifth instruction given for the plaintiff the jury were told that "proof of the fact, if it be a fact, that Bussell had on former occasions recognized Fleischman as his agent in making purchases of cattle for him is not sufficient to charge him, or justify the Union Stock-Yard & Transit Company in delivering cattle to Fleischman, for Bussell, when they had an order from the plaintiff to deliver to Bussell himself, without proof that at the time of the transaction in question the plaintiff had knowledge of such former recognition." The court refused to give the fifth instruction asked for the defendant, which is as follows: "The jury are instructed that a person dealing at a particular market will be taken to have dealt according to the custom and usage of that market, and, if he employs another to act for him in carrying on business dealings at such market, he will be held as intending that the business should be conducted according to the general usage and custom of such market; and this is the rule whether he in fact knows of the custom or not." It is assigned as error that the court gave the fifth instruction asked by the plaintiff, and refused the fifth instruction asked by the defendant. In connection with these instructions, it may be noted that the defendant below offered in evidence six orders on appellant for the delivery of cattle to Bussell, signed by different commission merchants at the stock yards, and delivered to Fleischman, which orders were indorsed in the handwriting of Fleischman, in the same manner in which the order for the 27 cattle, signed by appellee, was indorsed, and upon the presentation of which orders to appellant the cattle therein named had been delivered to Fleischman, or to Holmes & Pattison. The court refused to admit the orders in evidence, and this refusal is assigned as error. The object of introducing these orders was to show that Fleischman had been in the habit of presenting to appellant orders directing cattle to be delivered to Bussell, and of indorsing the orders, and receiving the cattle, and shipping them or selling them, and that it was the usual custom at the stock yards to transfer the title to the cattle by indorsement of the delivery orders, and that cattle were delivered upon such orders to the party therein named, or to his known agent. The ground upon which the court refused to admit the orders was that the plaintiff was not shown to have had knowledge of them, and the necessity of such knowledge by the plaintiff is also set up in the given instruction No. 5. The instruction was correct in requiring knowledge of the orders by the plaintiff, so far as they bore upon the question whether or not Fleischman was Bussell's agent to purchase the cattle, and had authority to make the contract of sale with appellee. Upon this subject, counsel for appellee cite the

case of *Maxey v. Heckethorn*, 44 Ill. 437. There Heckethorn sued Maxey and Howard for cattle alleged to have been purchased by one Hewitt as Maxey's agent. It was sought to hold the defendants there liable on the ground that in previous transactions they had recognized Hewitt as their agent, or as Maxey's agent; and it was held that Maxey's recognition of previous acts of purchase for him by Hewitt was not sufficient to charge Maxey and Howard, in the absence of proof that the plaintiff, before he sold to Hewitt, was cognizant of the facts. Unless the previous transactions were brought home to the knowledge of Heckethorn, he could not claim that he sold the stock to Hewitt as Maxey's agent because of said transactions. So here it may be said that Bussell could not be held liable to appellee for the purchase of the cattle by Fleischman as his agent because Bussell had recognized previous purchases of cattle made for him by Fleischman, unless it was shown that plaintiff had knowledge of such previous purchases. Appellee could not be held, without such knowledge, to have relied upon such previous purchases as showing Fleischman's agency. But all this has reference to the right or authority of Fleischman to make a contract with appellee for the purchase of the cattle. It concerns only the validity of the contract of sale. But so far as appellant is concerned the question is, not whether Fleischman was Bussell's agent to buy the cattle of appellee, but whether, after the purchase of the cattle was made, Fleischman had authority to receive them as Bussell's agent. Appellant had nothing to do with the purchase of the cattle. When the delivery order was presented, appellant had a right to suppose that appellee had made a valid sale of the cattle to Bussell, and had determined that Fleischman had proper authority from Bussell to buy them. The only question for appellant to consider was this: The cattle having been sold to Bussell, and he being the rightful owner, has Fleischman authority to receive them for Bussell, and ought they to be delivered to Fleischman for Bussell? It is easy to see that the agency of Fleischman is to be looked at in two aspects: First. Was Fleischman Bussell's agent to buy the cattle? This was a question for appellee to settle. Second. After the cattle were bought, was Fleischman Bussell's agent to receive the cattle? This was a question to be determined by appellant. If, in previous transactions with appellant, Bussell had recognized Fleischman as his agent to receive cattle already bought by him, appellant might be justified in dealing with Fleischman as Bussell's agent for such purpose. In such case the knowledge of appellee as to transactions previously had with appellant showing Fleischman's agency to receive cattle already bought was not material. The knowledge of appellee was only material as to previous transactions tending to show Fleischman's authority as agent to make contracts

for the purchase of cattle. There is thus a plain distinction between the question of Fleischman's agency to buy cattle, as related to the validity of the sale thereof, and the question of Fleischman's agency as to the delivery to him of cattle which had already been bought. Whether Fleischman was a general or special agent, the evidence tends very conclusively to show that when he had an order from Bussell to buy cattle, and after he had bought them in pursuance of such order, he had full authority to receive them from the stock-yard company, upon the presentation to that company of a proper delivery order. We are therefore inclined to think that the fifth instruction given for the plaintiff was erroneous in so far as it makes the justification of appellant in delivering the cattle to Fleischman dependent upon appellee's knowledge of Fleischman's agency, and that the six orders in question should have been admitted in evidence, and that the fifth instruction asked by defendant below should have been given. The latter instruction conforms exactly to the ruling made by this court in *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499. The usages of a particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent. *Phillips v. Moir*, 69 Ill. 155; *National Furnace Co. v. Keystone Manuf'g Co.*, 110 Ill. 427.

The liability of the appellant was that of bailee or agister. Agisters of cattle are only bound for the exercise of ordinary care. *Umlauf v. Bassett*, 38 Ill. 96; *Story*, Ballm. 443. The degree of care exercised is a question of fact for the jury. *Mansfield v. Cole*, 61 Ill. 191. The ordinary rule is that if a bailee deliver goods to the wrong person, although innocently or by mistake, he is liable as for a conversion. *Schouler*, Ballm. p. 119; *Railroad Co. v. Kidd*, 35 Ala. 209. And if one man, who is intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, he is liable. *Parker v. Lomard*, 100 Mass. 405. But it is not a conversion if the bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it. *Parker v. Lomard*, supra. Nor will trover lie when the conversion is with the knowledge or consent of the plaintiff. *Tousley v. Board of Education*, 39 Minn. 419, 40 N. W. 509. Where the property is to be delivered by an ordinary bailee, and not by a carrier, the liability is only for proper diligence and care in the preservation and delivery of the property; and the question whether the defendant has been negligent in the delivery of the property is a question of fact, for the jury. *Price v. Railroad Co.*, 50 N. Y. 213; *Benj. Sales*, § 437; *Heugh v. Railway Co.*, L. R. 5 Exch. 51; *McKean v. McIvor*, L. R. 6 Exch. 36; *Clough v. Railway Co.*, L. R. 7 Exch. 26.

The trial court refused to give the seventh instruction asked by the defendant below,

which told the jury that, in the matter of the care and delivery of the cattle, the defendant was only required to act with reasonable care and diligence, and in accordance with the usages and customs of carrying on business at the Union Stock Yards. We think that this instruction should have been given. For the errors herein mentioned the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(157 Ill. 414)

WASHINGTONIAN HOME OF CHICAGO v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

PRIVATE INEBRIATE ASYLUM—DONATIONS TO BY
CITY—VALIDITY OF—REFRAL OF STATUTE
—ESTOPPEL.

1. A corporation organized for maintaining an inebriate asylum, with power to elect its own directors and adopt such by-laws as it may think proper for the management of its business, and subject to no control by the state, is a private corporation, within Const. 1870, forbidding donations by municipal corporations to such corporations, though its charter provides that it may receive persons sentenced to a house of correction for drunkenness.

2. Const. 1870, art. 14, which declares that no municipality shall become subscriber to the capital stock of any private corporation, make donation to, or loan its credit in aid of, such corporation, repeals, by implication, a previous statute requiring a city to pay annually a certain portion of its revenue to a private inebriate asylum.

3. The fact that a city, for 20 years after the adoption of a state constitution prohibiting municipal corporations from making donations to private corporations, continued to make annual payments to an inebriate asylum, does not estop it from resisting further payments as unconstitutional.

Appeal from circuit court, Cook county; E. W. Burke, Judge.

Petition for mandamus by the Washingtonian Home of Chicago against the city of Chicago. A demurrer to the petition was sustained, and the petitioner appeals. Affirmed.

M. B. & F. S. Loomis, for appellant. S. Zeisler, for appellee.

CRAIG, J. This was a petition for mandamus brought by the Washingtonian Home of Chicago against the city of Chicago to compel the city to pay to the petitioner \$25,000,—10 per cent. of moneys received for licenses granted by the city for the right or privilege to sell spirituous liquors from January 1, 1893, to June 29, 1894. To the petition the city of Chicago interposed a general demurrer, which the court sustained, and the petition was dismissed. To reverse the judgment of the circuit court, petitioner appealed.

The petitioner is a corporation organized under an act of the legislature approved Feb-

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

ruary 16, 1867. The act under which the petitioner was incorporated was set out in the petition, sections 1 and 2 of which are as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that the Washingtonian Home Association of Chicago is hereby created and declared to be a body corporate and politic, under the name of 'Washingtonian Home of Chicago,' with power to sue and be sued, plead and be impleaded, contract and be contracted with; to take, by gift, grant, devise or otherwise, property, real, personal and mixed, and the same to hold, use, lease, convey, mortgage and otherwise dispose of, for the purposes hereinafter mentioned; to adopt and use a corporate seal, and alter the same at pleasure; also to erect and maintain such buildings and other fixtures and conveniences as may be deemed requisite or necessary for the purposes of this corporation.

"Sec. 2. The object of this incorporation shall be the founding and maintenance of an institution for the care, cure and reclamation of inebriates."

Section 3 authorized the corporation to adopt such by-laws for the management of the institution as it thought proper.

Sections 4 and 5 of the act are as follows:

"Sec. 4. Fifteen of the directors of said Home, to be selected by lot, shall hold their office until the third Monday of January, A. D. 1869, and the remaining fifteen until the third Monday of January, A. D. 1871; and on the second Monday of January, A. D. 1869, and biennially thereafter, said corporation shall select successors in place of those whose term of office shall expire the Monday thereafter, who shall, respectively, hold their offices for two years, and until their successors shall have been elected; and in case of removal, death or resignation of any one or more of said directors or their successors before the expiration of their term of office, their place may be filled by said remaining directors; and such person or persons shall hold their office until the next biennial election. Seven of said directors shall constitute a quorum for the transaction of business.

"Sec. 5. Any person sentenced by the authorities of the city of Chicago to the Bridewell or House of Correction for intemperance, drunkenness or for any misdemeanor caused thereby, may, with the consent of the proper officers of said 'Home,' be received and retained as an inmate of said Home in lieu of the Bridewell or House of Correction, until the expiration of such sentence; and when any such person has been committed to the city Bridewell or House of Correction for any such misdemeanor caused by intoxication or for drunkenness, either justice of the police court may, with the consent aforesaid, cause him to be transferred to said Home for the unexpired term of sentence."

Section 7 provides:

"Sec. 7. It shall be the duty of the treasurer of the county of Cook and the treasurer of the

city of Chicago, or of the officers of either into whose hands the same may come or be paid, to pay over to said corporation in quarterly installments, for the support and maintenance of said institution, ten per cent. of all moneys received for all licenses granted by authority of said county or city for the right or privilege to vend or sell spirituous, vinous or fermented liquors within the said county of Cook and city of Chicago."

Section 7 was amended by an act in force July 1, 1883, providing that in no case shall the sum so paid for or during any one year exceed \$20,000.

It is alleged in the petition that, immediately after the act went into effect, petitioner perfected its organization, and at once proceeded to carry out the objects of its incorporation, and has continued its organization and continued to carry out the objects of its organization; that, since its organization up to the present time, petitioner has cared for and treated in its said institution not less than 18,000 inebriates, large numbers of whom have, by reason of such care and treatment, been cured and reclaimed from their unfortunate habits of drunkenness and inebriety. And petitioner avers that, of the above number of inebriates so cared for and treated by petitioner as aforesaid, a large number, to wit, about 3,865 thereof, were persons sentenced by the authorities of said city of Chicago to the Bridewell or House of Correction of said city, for intemperance, drunkenness, or for misdemeanors caused thereby, who, with the consent of the proper authorities of said Home, were received and maintained as inmates of the home in lieu of the Bridewell until the expiration of such sentence. It is also alleged in the petition: "That from the time of petitioner's organization until July 1, 1883, the treasurer of city of Chicago paid in quarterly installments to it, for its support and maintenance, 10 per cent. of all moneys received for licenses to sell spirituous liquors within the city. That after the said amendatory act went into force, to wit, after July 1, A. D. 1883, the treasurer of said city of Chicago continued to pay over to your petitioner, in the manner hereinbefore stated, in quarterly installments, for the support and maintenance of its aforesaid institution, ten per cent. of all moneys received by him as such treasurer as aforesaid for all licenses granted by authority of said city of Chicago, not exceeding \$20,000 in any one year, up to and including the quarterly installment due on the 1st day of January, 1893. That since January 1, 1893, the city treasurer has refused to make any payments."

It is claimed on behalf of the city of Chicago that section 7 of the act of 1867, which requires the city to pay to the Home 10 per cent. of all moneys received for licenses to sell spirituous liquors, and the amendatory act of 1883, whereby the amount was limited to \$20,000 per annum, are unconstitutional and void; that the section and amendment violate that clause of the constitution of 1870

which reads as follows: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, make donation to, or loan its credit in aid of such corporation: Provided however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same had been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." Article 14. It will be observed that this provision of the constitution prohibits cities and other municipal corporations from making donations or loaning their credit in aid of any private corporation; and the first question to be considered is whether the Washingtonian Home is a private corporation, within the meaning of the constitution. As has been seen, the second section of the act creating the Home declares the object of the corporation to be the founding and maintenance of an institution for the care, cure, and reclamation of inebriates. The charter contains nothing prohibiting the corporation from making such charges for the care or cure of patients as it may think best; but, on the other hand, section 3 confers the power to adopt such by-laws as it may think proper for the management of its business. The charter does not specify who the incorporators shall be, but the first section of the charter declares the Washingtonian Home Association of Chicago to be a body corporate and politic. Who constituted the association or what was the qualification of members when it was created a corporation is not disclosed by this record. Section 4 provides for the selection of 30 directors by lot, 15 to hold office until the third Monday of January, 1863, and the remainder until the third Monday of January, 1871; but the act is silent as to who shall elect the first board of directors. The act nowhere prescribes how any person can become a member of the corporation, nor is there any provision in regard to the salary of officers or directors. So far as appears, the persons who composed the Washingtonian Home Association of Chicago when this act was framed were clothed with corporate power, under which they might transact the business mentioned in the act for their own private benefit. At all events, no state control over the institution is provided for, nor has Chicago or Cook county any voice in its control or management. The corporation has the right to acquire and hold property, both real and personal; but the state has no voice in the management or control of the property thus acquired, or in the mode or manner in which the institution shall be managed or conducted. The act makes no provision for any report to be made by the institution to the state or any of its officials. Indeed, no provision whatever is made for an inspection or visitation of the institution by the state or any of its officers, but the entire supervision

and control seems, under the charter, to be intrusted to private individuals. No officer or manager of the corporation is elected by the people or approved by the state. They owe no duties to the public or the state.

Is such a corporation a public one, or is it a private corporation, within the meaning of the constitution? A brief reference to a few authorities will demonstrate, as we think, that the corporation is a private one. *Mor. Priv. Corp.* (2d Ed.) § 3, says: "By another classification, corporations have been divided into public corporations and private corporations. The difference between these two classes of corporations is radical, and hence they are in many instances governed by widely different principles of law. Private corporations are associations formed by the voluntary agreement of their members, such as banking, railroading, and manufacturing companies. Public corporations are not voluntary associations at all, and there is no contractual relation between the corporators who compose them. They are merely government institutions, created by law for the administration of the public affairs of the community. States, counties, and municipalities are examples of public corporations." In *Dartmouth College v. Woodward*, 4 Wheat. 888, Justice Story, in pointing out the distinction between private and public corporations, said: "Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation; so a hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is created by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may in a certain sense be called 'public,' but the corporations are private; as much so, indeed, as if the franchises were vested in a single person." This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity; so a college founded and endowed in the same manner, although, being for the

promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities, and cannot be shaken but by undermining the most solid foundations of the common law. When the corporation is said at the bar to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at their own good will and pleasure. Wat. Corp. § 17, says: "A corporation is private when the whole interest does not belong to the government, or the corporation is not created for the administration of political or municipal power. A chartered religious society is a private corporation. A corporation may be private, and yet the charter contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state." See, also, *City of Louisville v. University of Louisville*, 15 B. Mon. 642; *People v. McAdams*, 82 Ill. 356; *Cleveland v. Stewart*, 3 Kelly, 283. Under the rule declared on the authorities cited, it is plain that the Washingtonian Home is nothing more than a private corporation.

The constitution of 1848 contained no provision prohibiting cities from making donations to private corporations, and, if the legislature conferred the power upon cities, no reason is perceived why that power might not be exercised. But conceding that section 7 of the act of 1867, under which the Washingtonian Home was incorporated, was constitutional when executed, the question then arises how that act was affected by the constitutional provision of 1870, which prohibits cities from making donations to private corporations. It will be observed that the act does not authorize the city to make a contract with the Home under which persons sentenced to the Bridewell for intemperance, drunkenness, or for any misdemeanor caused thereby, may be taken into the Home, and retained for such time as they may have been committed for treatment or for any other purpose; but the act, by its terms, is mandatory on the city, and compels it to pay over \$20,000 per annum in quarterly installments to the Home for its support and maintenance. The petition for mandamus is not predicated on any contract existing between the city and the Home, but the right to require the payment of the fund is predicated on the provisions of the act of 1867, and upon these provisions alone. It is set out in the petition that during the years 1892 and 1893, and up to the time the petition was filed, in 1894, the amount secured by the city from licenses has not been less than \$2,000,000 per annum, so that 10 per cent. received for licenses each year is far in ex-

cess of \$20,000, so that the amount the Home seeks to compel the city to pay over has become a fixed and definite sum; and it is a matter of moment whether money demanded by the Home comes from liquor licenses received by the city into its treasury, or from funds in the treasury raised by taxation. Under the act of 1867, the city was required to pay over to the Home each year, from its revenues derived from liquor licenses, 10 per cent. of the amount received, not exceeding \$20,000, for the support and maintenance of that institution. This was required as a donation. By the terms of the section of the constitution in force, such donation was prohibited; and, whatever may have been the obligation imposed upon the city by the act of 1867 before the constitution of 1870 was adopted, after the adoption of the constitution the city had no power or authority to donate any of its revenues derived from liquor licenses or from any other source to a private corporation. It declares no county, city, town, etc., shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation. This provision of the constitution required no legislation to place it in full force and effect. It was, like some other provisions of the constitution, self-executing, and operated as a paramount law from the time the constitution was adopted by the people. *Phillips v. Quick*, 63 Ill. 445; *Hills v. City of Chicago*, 60 Ill. 86; *Chance v. Marion Co.*, 64 Ill. 66. In the case first cited, it is said: "But it may be said that constitutional provisions require legislation to carry them into effect. This is true in many cases, but not in all, as will occur to every person on a moment's reflection. In cases where its provisions are negative or prohibitory in their character, they execute themselves. Where that instrument limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, none would contend that the power might be exercised or the act performed until prohibited by the general assembly. The constitution undeniably has as much vigor in prohibiting the exercise of power or the performance of an act as the general assembly. That body could add to the prohibition penalties and forfeitures if the constitutional prohibition should be disregarded, but the prohibited act would, nevertheless, be void. Where the constitution requires the performance of an act, but provides neither officers, the means, nor the mode in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect than by appropriate legislation. In such cases the constitution does not execute such provisions. That instrument, all will concede, may repeal, and does repeal, laws which are repugnant to its provisions. The very first section of the schedule declares that all

laws in force at the adoption of the constitution, and not inconsistent with its provisions, shall continue to be as valid as if the constitution had not been adopted. This, by implication, says that all that conflict therewith shall be invalid and of no force. In fact, this provision preserves rights of the state and of individuals that would otherwise have been lost. The understanding with all persons is that a law passed either before or after the adoption of the constitution which is repugnant to its provisions must be held to be of no valid force, and precisely as if it had been repealed before the performance of the act." This question is discussed in *Cook Co. v. Chicago Industrial Schools*, 125 Ill. 540, 18 N. E. 183, and, among other things, it is there said: "If, on the one side, a statute directs the county board to pay money to a school, which appears, not on the face of the statute, but from outside proof, to be controlled by a church, and if, on the other side, the constitution, in a self-executing provision, directs the county board not to pay money to such a school, which direction is to be followed? We answer, unhesitatingly, the latter. When the constitution says, 'You must not pay,' it must be obeyed in preference to a statute which says, 'You must pay.' And this is true, not only where the statute on its face is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such provision. We are therefore of the opinion that, upon the facts of this case, the act of May 28, 1879, imposes no obligation upon the county of Cook which is superior to its obligation to obey section 3 of article 8 of the constitution." We do not think the constitution operated retrospectively. Under section 7 of the act of 1867, the city was authorized to make an annual donation to the Home; but, upon the adoption of the constitution in 1870, all cities are thereafter prohibited from making donations to a private corporation. The donations made prior to the adoption of the constitution remained unaffected, but donations after that time were prohibited.

But it is insisted in the argument that as the city paid over this fund quarterly for a period of over 20 years, as required by section 7 of the act, and as the payment was recognized each year in the annual appropriation ordinances of the city, and as the city has received a substantial benefit each year in return, the city is bound by its ratification of the act, and is now estopped from claiming its unconstitutionality. By the adoption of the constitution in 1870, the seventh section of the act of 1867 was repealed, and from that time it was nugatory; and the fact that the officers of the city for 22 years paid over to the Home annually a portion of the revenue of the city, in violation of law, could not work an estoppel on the city; nor did the fact that the city coun-

cil annually, in its appropriation ordinances, recognized and made provision for the payment of the fund to the Home, estop the city from refusing payment at any time it might elect to do so. The revenues of the city of Chicago arising from licenses, from taxation, and from all other sources are owned by the city, and held by it in trust to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city or by the city council to any person they may think entitled to the same; but, on the other hand, the revenues of a city can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law. Where the lawful power does not exist, the payment is unauthorized and void, and the city will lose no rights where the money has been unlawfully paid out by its officers. The city having no power to pay over its revenues to the Home, the fact of payment for a series of years will not estop it. In *Logan Co. v. City of Lincoln*, 81 Ill. 159, in speaking in regard to estoppel in pais, it is said: "Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done." An estoppel by matter in pais may be defined as an undisputable admission, arising from the circumstances that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary, intelligent action of the party against whom it is alleged, to change his position. *Bigelow, Estop.* (2d Ed.) p. 345. The other party must have been induced to act upon the representation or concealment. His action must have been of a character to result in substantial prejudice, were he not permitted to rely on the estoppel. 7 Am. & Eng. Enc. Law, pp. 17, 18. Here, so far as appears, the Home was not induced to change its position, nor was it induced to do or not do anything on account of the payments which were annually made by the city of Chicago different from what it would have done if the city had never made any payments. The judgment will be affirmed. Affirmed.

(157 Ill. 595)

NEW YORK, C. & ST. L. RY. CO. v.
LUEBECK.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS
— EVIDENCE — MISCONDUCT OF COUNSEL.

1. In an action for an accident at a crossing, evidence as to the frequency with which trains passed over the various tracks at such crossing is admissible under a declaration char-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ging negligence in the management of the train, since the other trains, even though run by other companies, rendered the crossing more dangerous, and made greater care necessary.

2. Nonexpert witnesses who have stated their observation and the facts attendant on the condition of a person before and after an alleged mental impairment may also state their conclusions and opinions based thereon.

3. Improper remarks of counsel made in reply to equally improper remarks of opposing counsel are not ground for reversal.

4. Where an accident occurs at a crossing in a populous city, where many trains pass daily, evidence that there were no gates and no flagman at the crossing is admissible for the purpose of showing the general condition of things at the crossing at the time of the alleged injury, so as to assist the jury to determine whether the railroad company was guilty of negligence. *Railroad Co. v. Lane*, 22 N. E. 513, 130 Ill. 116, followed.

5. Evidence that plaintiff was hurt at a street crossing; that cars on a side track obstructed his view towards the north, while a train from the south attracted his attention, and another train from the north came up, tender first, and struck him,—together with conflicting evidence as to the giving of signals by the latter train, is sufficient to justify submitting to the jury the questions of negligence and contributory negligence.

Appeal from appellate court, First district.

Action on the case by Frederick Luebeck, by his next friend, against the New York, Chicago & St. Louis Railway Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 551. Defendant appeals. Affirmed.

This was an action by appellee, by his next friend, begun in the circuit court of Cook county, against appellant, for injuries alleged to have been received from being struck by one of the freight trains of appellant at the Fifty-Third street crossing in the town of Lake. The declaration contains three counts. The first charges negligence and improper conduct of defendant and its servants in the management of its train; the second, a failure to ring a bell or blow a whistle, in compliance with the statute; and the third, the disregarding of an ordinance of the town of Lake limiting the speed of freight trains to six miles per hour. Fifty-Third street extends east and west, and crossing the road at right angles, north and south, are seven railroad tracks, none of which belong to appellant, but over one or more of which they had the right to and did operate their trains as far out as Grand crossing. The east track of the seven was a side track, on which at the time of the accident were standing a number of freight cars, projecting north, and extending south part of the way over Fifty-Third street. On the third track from the east, a train of another company was moving north, blocking the crossing; and on the fourth track a train belonging to appellant was running south. Appellee was struck on the second track from the east by one of the engines of appellant's freight trains running south, tender forward. The accident occurred in May, 1889, at which time appellee was about 16 years old; but the trial in the lower court was more than 4 years afterwards, when he was past 20.

The residence of appellee and place of business of his brother were located east of the railroad, and the theory of his counsel is that he was proceeding from here west, but some testimony of two trainmen was to the effect that he was going east, when struck. Appellee received no external physical injury. The evidence indicates that the shock or concussion occasioned by the engine striking him left him unconscious, and that he remained so for eight hours, and to some extent in a comatose condition for a week or more. It is alleged that the effect of these injuries, as shown, during the four years elapsing between the accident and the trial, has been to leave him mentally in a condition unfit for the transaction of ordinary business, and to impair his mind. The case was tried in the circuit court, before a jury, resulting in a verdict for plaintiff of \$10,000. A motion for a new trial was overruled, and judgment rendered on the verdict. An appeal was prosecuted from this judgment to the appellate court of the First district, where the judgment of the circuit court was affirmed. From this judgment of affirmance the appeal is prosecuted to this court. The errors assigned by appellant as reasons for a reversal are the admission of improper evidence for appellee by the trial court; improper remarks made by counsel for appellee in the argument of the case before the jury; in the giving by the trial court of the second instruction asked and given by the court on behalf of plaintiff; and in the refusal by the court to give the first instruction asked by the defendant below, in which the court was asked to instruct the jury that the evidence offered on behalf of the plaintiff was insufficient to support the plaintiff's case as charged in the declaration. A consideration of these questions necessarily involves in the opinion a more detailed statement of the case.

Walker & Eddy, for appellant. Moran, Kraus & Mayer, for appellee.

PHILLIPS, J. (after stating the facts). One of the errors assigned on the record is that the trial court admitted improper testimony on the part of appellee. Edward Luebeck, a brother of appellee, and whose place of business was east of the railroad tracks, was called as a witness, and asked if he knew where plaintiff was going at the time of the accident. His answer was: "Yes; I sent him to get some glass at Wentworth avenue." Motion was made by appellant to strike out the answer, but the court permitted it to stand, to which exception was taken by appellant. Three witnesses who observed the accident had testified that appellee was crossing the tracks from east to west, and the evident purpose of this evidence was in corroboration, as witness further stated that it was only about five minutes before the accident occurred that he had sent appellee on an errand. The record shows very clearly that the jury must have fully understood

from the testimony of the witness that he did not see the accident, for he so stated. All he knew was that, five minutes before, he had started appellee on an errand which would take him west across these tracks. This evidence was so nearly connected with the accident itself, and a mere fact in corroboration of other direct and positive evidence, that there was no error, under all the circumstances, in the trial court's overruling the motion, as made, to strike out the answer.

The court, over the objection of defendant below, permitted the plaintiff to show the frequency with which trains passed over these tracks, and that there was a train every 20 minutes, although most of them were trains of various other roads. Under the first count of the declaration, this evidence was admissible. It is to be presumed that defendant had knowledge of the running of these trains, and, if they passed in rapid succession, it thereby made this crossing much more dangerous to the public. Even though the numerous other trains were not those of appellant, if they made this crossing more dangerous appellant was bound to exercise a degree of care commensurate with this danger; and it is held to the same degree of care as though it owned the track, and controlled and operated every train run on these tracks. *Railroad Co. v. Kanouse*, 39 Ill. 272; *Railroad Co. v. Ross*, 142 Ill. 9, 31 N. E. 412. "Where the surrounding circumstances render the crossing especially dangerous to travelers on the highway, as when the line is curved or there are obstructions to the view, it is the duty of the railway to take precautions commensurate to the danger." *Patt. Ry. Acc. § 170*. To the same effect, also, is *Railway Co. v. Wallace*, 110 Ill. 114. This rule has been followed in this state by holding that it is proper to show that the view at the crossing of the railroad and highway was obstructed by a heavy growth of timber or foliage, even though not on the company's right of way (*Railroad Co. v. Siltman*, 88 Ill. 529); and also that, in a populous city where many people pass over a crossing, it is proper to show that no flagman was at the crossing, even though no statute or ordinance required one (*Railroad Co. v. Lane*, 130 Ill. 116, 22 N. E. 513). It was not error, therefore, to permit plaintiff to show as a circumstance that trains were in the habit of passing over this crossing in rapid succession.

Under the assignment of error as to the admission of improper evidence by the trial court, objection is also made to the testimony of certain nonexpert witnesses on the question of the mental impairment of appellee. A number of such witnesses were called, relatives, and persons with whom and for whom appellee had worked. The testimony of such witnesses—people of good common sense—is admissible, and is competent testimony. *Rutherford v. Morris*, 77 Ill. 397; *Morse v. Crawford*, 17 Vt. 499. Nonexpert witnesses, having stated their observations and the facts

attendant upon the condition of a person before any mental impairment, and such observations and facts after the alleged impairment, are permitted then to state their conclusions or opinions based on such facts or observations, and may make comparison of the mental condition of such person before and after an injury which is alleged to have resulted in affecting the mind. It is not necessary that the impression testified to must have been formed at the time the particular conduct or fact was observed. It may be the result of the observation of a continued condition or series of facts. While the record discloses that the answer to some questions on this branch of the case were in a manner not responsive to the questions, it does not appear that any specific objections were made at the time, and we perceive no harmful error in the ruling of the trial court in the matter.

Reversal of this case is also urged on the ground of improper remarks made by the counsel for appellee in the argument of the case before the jury. In his concluding remarks, counsel for appellee used the language complained of, as follows: "The plaintiff in this case is poor. He has not got the unlimited wealth of the defendant in this case. He cannot call these gentlemen and pay them \$150 for coming upon the stand. It was admitted, and it was stated in the presence of the jury by learned counsel that Mr. Fenger was a high-priced man; that the gentleman whom he called upon the stand was a high-priced man; and I say to you we cannot afford to call high-priced men to give opinions. Counsel on the other side put a high-priced man on the stand, but he did not ask his opinion. You will remember that, when I asked Dr. Church as to what really the mental condition of this boy was, he said he could not answer until I paid him; he wanted his pay. He had a right to demand it. You cannot compel a doctor to give his opinion any more than you can compel a shoemaker to deliver a pair of shoes free of charge. This is his privilege, but it does not seem to me that if I was already in court testifying for one side that had paid me, that I would not hesitate to tell the whole truth. If Dr. Church would have been satisfied or would have believed that this boy's mind was not affected, if he would have believed that the boy was not insane, I ask you, would not astute counsel have asked him that question?" Comment had been made in argument by counsel for appellant as to the failure of appellee to call Dr. Fisk, a specialist, as a witness. It appears that appellee had once visited this doctor's office, but the record does not disclose that this doctor had treated him. The argument of appellant's counsel was therefore not called for by anything in the record, and the remarks of counsel for appellee above quoted, while improper under ordinary circumstances, were called forth by the improper remarks of opposing counsel.

It is the duty of the trial court to control counsel in their remarks to the jury, and, by pointed rebuke or otherwise, remove any undue effects which improper remarks might have. We are not inclined in this case, under all the circumstances, to hold that the remarks complained of should cause a reversal.

Error is urged in the action of the trial court in giving to the jury the second instruction asked by appellee, which is as follows: "The court instructs the jury that there was no absolute duty imposed by law on the defendant to maintain either gates or flagmen at the crossing in question; and, if you believe from the evidence that there were no gates or flagmen there at the time of the alleged injury, that is not of itself evidence of negligence on the part of defendant. The plaintiff does not allege or claim any negligence on part of defendant in regard to this. Evidence as to whether there were gates or a flagman at the crossing in question at the time of the alleged injury was admitted by the court, and should be considered by the jury, not as tending of itself to establish negligence, but solely for the purpose of showing the general condition of things at the locality of such crossing, at the time of the alleged injury, so as to assist the jury to determine, from all the circumstances and evidence in the case, and under the instructions of the court, whether the defendant was guilty of negligence, as charged by the plaintiff in his declaration." The circuit court had admitted evidence on the trial showing that there were no gates or flagmen at the crossing in question. Under the rule announced in *Railroad Co. v. Lane*, 130 Ill. 116, 22 N. E. 513, this was competent in connection with proof of the condition of things in respect to travel and otherwise in that locality, and on the question of the care and caution on the part of appellant in running its trains in accord with public safety. We do not deem it necessary to discuss this instruction further than to say that it is fully in accord with the views we have expressed in the case of *Railroad Co. v. Lane*, supra, and that it states the law applicable to this case.

This court is asked to reverse the judgment in this case on the ground that the plaintiff himself was guilty of such contributory negligence that the court below should have instructed the jury to return a verdict for defendant. The weight of the evidence in the case shows that the plaintiff was proceeding west on Fifty-Third street; that he passed around the cars standing on the first track (a side track), which tended to prevent his view of any train approaching from the north. It appears that his attention was naturally engaged by the moving train on the third track which blocked the crossing, and that the short time he stopped on the second track was sufficient for him to be struck by appellant's train. The engine was running tender forward, and those in charge of it either could not see the track or were not on the lookout, as they

should have been in approaching a dangerous crossing, as they knew nothing of the accident until they had run by some distance. There is a conflict in the evidence as to whether a bell was rung or whistle sounded; employees of appellant testifying in the affirmative, and three disinterested witnesses, near enough to have heard, say that neither was done. The entire evidence, both of appellee and appellant, shows that the train was running at a speed in violation of the ordinances of the town of Lake. It cannot be said, therefore, there was not evidence tending to show negligence on the part of appellant, and tending to show appellee was in the exercise of ordinary care. Whether the evidence fully establishes questions of fact of this character is not determined as questions of law. The rule may be declared settled in this state that where there is evidence which, if true, tended to establish the facts necessary and sufficient to sustain a verdict, it is not error to refuse a peremptory instruction to find for defendant. *Syrup Co. v. Carlson*, 153 Ill. 210, 40 N. E. 492; *Fireproofing Co. v. Poczekal*, 130 Ill. 139, 22 N. E. 543; *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613; *Railroad Co. v. Dunleavy*, 129 Ill. 140, 22 N. E. 15; *Railroad Co. v. Snyder*, 128 Ill. 655, 21 N. E. 520; *Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662; *Railroad Co. v. O'Conner*, 115 Ill. 254, 3 N. E. 501.

The verdict and judgment in this case were for \$10,000, and it is urged it is excessive in comparison with the extent of the injuries received by appellee. We are precluded by the judgment of the appellate court from a consideration of that question. It is incumbent on the trial and appellate courts to guard carefully, and especially in actions of this character, the interests of both plaintiff and defendant in matters wherein their judgment is final. A careful and extended examination of this record develops no error that should cause a reversal of this judgment, and the judgment of the appellate court is therefore affirmed. Affirmed.

(157 Ill. 673)

CHICAGO, M. & ST. P. R. CO. v. WALSH.¹
(Supreme Court of Illinois. Oct. 11, 1895.)

RAILROAD COMPANIES—NEGLIGENCE—APPEAL—
PRACTICE—REMITTITUR.

1. Backing a train across a city street in the dark without having a conspicuous light on the rear car so as to show in what direction the train is moving, as required by an ordinance of the city, is negligence. 57 Ill. App. 448, affirmed.

2. Where the appellate court is of opinion that the verdict is excessive, it may, on the entry of a remittitur by plaintiff of part of his judgment, affirm the judgment for the residue, even though the action be for unliquidated damages for a tort. *Railroad Co. v. Wrixon*, 37 N. E. 895, 150 Ill. 532, followed.

Appeal from appellate court, First district.

Action on the case by Patrick Walsh against the Chicago, Milwaukee & St. Paul Railroad

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Company. Plaintiff obtained judgment, which was modified by the appellate court. 57 Ill. App. 448. Defendant appeals. Affirmed.

Edwin Walker, for appellant. Walker, Judd & Hawley, for appellee.

MAGRUDER, J. This is an action brought by the appellee against the appellant company to recover damages for a personal injury. Upon the trial in the circuit court the jury returned a verdict in favor of the plaintiff for the sum of \$29,583.33%. Motion for new trial was overruled, and judgment was rendered for the amount of the verdict. In the appellate court, upon motion of appellee, a remittitur was entered for the sum of \$13,583.33%, and judgment rendered for the remainder, to wit, \$16,000. From the judgment of the appellate court, as thus reduced by the remittitur, the present appeal is prosecuted.

It is not claimed that any error was committed by the trial court in the admission or exclusion of evidence. The plaintiff below asked for no instructions, and none were given for him. The defendant asked for two instructions only, both of which were refused. The instructions so refused are as follows: "(1) The court instructs the jury that upon the whole case the plaintiff is not entitled to recover, and your verdict should therefore be for the defendant. (2) The court instructs the jury that under all the testimony of the case the plaintiff is not entitled to recover, and your verdict should therefore be for the defendant." We have held that it is not proper to take a case away from the jury if there is evidence tending to establish the cause of action. *Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510. Here there was such evidence, and hence there was no error in refusing to give the foregoing instructions.

The tracks of appellant, running from the northwest to the southeast, cross Chicago avenue, a street in the city of Chicago, running east and west. Of the two main tracks crossing the street at that point the south track is used for incoming or east-bound trains, and the north track is used for outgoing or west-bound trains. There is a side track, north of the north main track, that connects with it about 650 feet west of the center of Chicago avenue. Appellant's railroad yards are a short distance southeast of Chicago avenue. Some time before 6 o'clock on the morning of December 20, 1890, a switching crew of the appellant had been ordered to take some cars from the yards, and place them on the north side of the yards, to be loaded. In order to accomplish this, the cars were run out of the yards towards the northwest, across Chicago avenue, upon the south main track, then on to the north main track, and then back southeasterly on the north main track to a switch, thus passing onto a side track. The train which was thus returning to the north side of the yards was backing across Chicago avenue, the engine being in the rear, and not in the

front, as it moved. About 6 o'clock, or a little before, on the same morning, it being then dark, and the weather being misty and foggy, appellee, who was a plumber's helper, and was then on his way from his house to his work, was crossing Chicago avenue at the point where it is intersected by said tracks. When he arrived at the crossing, he saw an incoming cattle train of 24 cars passing to the southeast on the southerly main track, and stopped until this train should cross the street. He also saw what appeared to him to be some stationary freight cars standing to the northwest of him on the side track. Not supposing that the latter cars were moving, he stood facing to the south or southeast, waiting for the cattle train to pass. While he was thus standing, the cars to the northwest, which proved to be the train that was backing across the street into the north side of the yards, struck him in the back, knocked him down, and inflicted the injuries, which resulted in the amputation of one arm, and the loss of three fingers of the remaining hand, and a part of the hand itself. The appellee testified that the cars, which appeared to him in the mist and dark to be standing on the side track on the northerly side of the main tracks, had no visible light on them. The declaration charges in different counts negligence in causing an engine with a train of freight cars to back across the public highway without ringing a bell, without having a flagman at the crossing to give notice of the approach of trains, and without having a proper light as a signal on the end of the train, or any person on the rear end thereof to give warning. The declaration sets out, and the plaintiff introduced in evidence, section 1833 of the Revised Ordinances of the city of Chicago, which is in the following words: "Every locomotive, engine, railroad car or train of cars running in the nighttime on any railroad track in said city shall have and keep while so running a brilliant and conspicuous light on the forward end of said locomotive, engine, car or train of cars. If such engine or train be backing, it shall have a conspicuous light on the rear car, or engine, so as to show in what direction said car is moving." There was evidence tending to show that the appellant failed to comply with this ordinance. Where a train is backing across a public street or highway in the dark, it should give warning of its approach to those traveling thereon; especially when another train is passing over the same crossing upon another track, at the same time, and in the same direction. An ordinary lantern in the hand of a brakeman on the top of a car does not seem to meet the requirement of the ordinance. A backing engine or train is required to have a "conspicuous" light on the engine or rear car; such a light as will show the direction in which the cars are moving. That there was no such light upon the rear car of the backing train which injured appellee appears to be established by the evidence, and is manifest from

the fact that appellee saw no such light, and that no one on the train saw him.

It is urged that the damages are excessive. The amount of damages sustained by the plaintiff in an action at law is a question of fact which is not open for consideration in this court, under the statute. *Railroad Co. v. Bode*, 150 Ill. 396, 37 N. E. 879, and cases there cited.

It is also claimed that the affirmance of a judgment by the appellate court for the amount of the judgment remaining after the entry of a remittitur by that court is error. We have recently held that the appellate court is authorized to allow a remittitur, and that in so doing and entering judgment for the remainder there is no error. *Railroad Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895. The judgment of the appellate court is affirmed. Affirmed.

(157 Ill. 579)

BARCHARD et al. v. KOHN.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

CHATTEL MORTGAGE—WAIVER OF LIEN—EXECUTION.

A mortgagee who obtains judgment for the mortgage debt, levies execution on the mortgaged chattels, and sells all of them under such execution except property exempt from execution, does not thereby release his claim under the chattel mortgage to the exempt property. 54 Ill. App. 629, reversed.

Appeal from appellate court, First district.

Action of trespass by Josephine Kohn against Ira Barchard and H. C. T. Borrmann. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 629. Defendants appeal. Reversed.

This is an action of trespass, begun on April 14, 1891, by appellee against appellant Borrmann, a dry-goods merchant, and appellant Barchard, a constable, for the alleged unlawful taking and carrying away of a stock of goods claimed to be the property of appellee, and entering for that purpose into the store No. 931 West Eighteenth street in Chicago, on April 13, 1891, where the goods were then located. Three pleas were filed: The first, not guilty. The second, averring that plaintiff, Josephine Kohn, was the wife of William Kohn; that William Kohn was the owner of the goods and chattels on June 16, 1890, and on that day executed a chattel mortgage upon the same to the defendant Borrmann to secure \$3,000, of which \$2,000 remained unpaid at the time of the alleged trespass; that Borrmann, by his agent, Barchard, took possession of the property under said mortgage, and, in pursuance of its terms, the property was sold at public auction on May 2, 1891, for \$421.40, an amount insufficient to pay what was due upon the mortgage. The third plea sets up that the entry into the premises was made in a quiet and peaceable manner, and without unneces-

sary damage, in order to take the goods under the mortgage. The trial in the circuit court was before the court and a jury, and resulted in verdict and judgment for \$800 in favor of plaintiff. The judgment has been affirmed by the appellate court, and an order has been made by that court certifying that the cause involves questions of law of such importance on account of collateral interests involved that it should be passed upon by the supreme court. The case is brought here by appeal from the judgment of the appellate court.

The material facts necessary to present the question involved are as follows: The chattel mortgage was given to secure 29 notes executed by William Kohn to Borrmann, dated June 16, 1890, 28 of which were each for \$100, payable weekly thereafter, and the twenty-ninth was for \$200, payable on March 1, 1891; so that all the notes had been due for some two weeks before the levy of the executions hereinafter named. The mortgage was not recorded until July 26, 1891, long after the present trespass suit was begun. On March 18, 1891, the mortgagor, William Kohn, executed two judgment notes, —one for \$98.52, to D. Liebman, and one for \$231.27, to A. Lewin & Sons. On the next day, March 19, 1891, judgments were entered up upon these notes, and executions issued and placed in the sheriff's hands, the sheriff receiving the Lewin execution at 10:55 a. m. and the Liebman execution at 11 a. m. of that day. On the same day the appellant Borrmann, learning of these judgments, caused judgment for \$2,000 to be entered up upon 18 of the notes secured by his chattel mortgage then remaining unpaid, and execution to be issued thereon, the sheriff receiving said execution at 4 o'clock in the afternoon of March 19, 1891. On the same day, and in the order in which they came to the hands of the sheriff, the three executions were levied upon the property included in the chattel mortgage. The next day, Kohn, the judgment debtor, presented a schedule, and asked to have his legal exemptions set off to him out of the property levied upon under the provisions of the exemption law of this state. 1 Starr & C. Ann. St. p. 1112, c. 52, § 14. Appraisers were appointed, and on March 26, 1891, Kohn selected, and there was set off to him as exempt property to the amount of \$400, being a part of the property covered by the chattel mortgage. Subsequently the balance of the property levied upon, after taking out the exemptions, was sold under the executions, and out of the proceeds of the sale the Lewin and Liebman executions were paid in full, and the remainder of the proceeds were, on March 30, 1891, applied upon the execution of the appellant Borrmann, leaving still due to him upon his judgment about \$950. It is claimed by appellee that her husband, William Kohn, owed her \$250 when the executions were levied; that he paid \$100 of this amount to her on March

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

19, 1891, and in payment of the remaining \$150 turned over the exempt property, amounting to about \$400, to her by first transferring it to one Adolph Cohen, who, on or about March 26, 1891, transferred it back to appellee. All instructions asked by the defendants submitting to the jury the question whether the property really belonged to the plaintiff were refused. It was this exempt property which the appellants took under the mortgage on April 13, 1891, for the purpose of satisfying pro tanto the \$950 remaining due thereon, and which was sold, after the giving and posting of notice as required by the mortgage, at public auction, on May 2, 1891, as alleged in the pleas.

Jesse Holdom, for appellants. Moran, Krause & Mayer, for appellee.

MAGRUDER, J. (after stating the facts). The question in the case is whether the appellant Borrmann, mortgagee in the chattel mortgage, had a right to take possession under his mortgage of the goods set off as exempt to William Kohn, the judgment debtor and mortgagor, or whether, by taking judgment upon the notes secured by the mortgage, and levying the execution issued thereon upon the mortgaged property, and allowing a part of the proceeds of the sale made under the executions to be applied upon the judgment, he thereby waived his right to proceed under his mortgage against the portion of the mortgaged property not sold under the executions, and set off as exempt to the judgment debtor. The question arises out of the ruling of the trial court excluding the chattel mortgage when offered by the defendants as a justification of the alleged trespass, and admitting it only in mitigation of damages, and also out of the action of the court in instructing the jury that as a matter of law the chattel mortgage did not justify the defendants in seizing the goods in question. As the mortgage was not recorded, and provided for the sale of the goods mortgaged in the ordinary course of business, it was void as to creditors, but it was good as between the parties to it. *Gregg v. Sanford*, 24 Ill. 17; *Forest v. Tinkham*, 29 Ill. 141; *McDowell v. Stewart*, 83 Ill. 538; *Jones, Mortg.* (4th Ed.) § 138; *Greenebaum v. Wheeler*, 90 Ill. 296; *William Deering & Co. v. Washburn*, 141 Ill. 153, 29 N. E. 558.

The main case which holds that an attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage is *Evans v. Warren*, 122 Mass. 303. The decision in that case was placed upon the ground substantially that the liens created by mortgage and by attachment upon the same property are essentially different, and cannot coexist, for the reason that under the Massachusetts statutes the equity of redemption of personal property is not subject to attachment, and hence, if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. The cases which hold that the at-

tachment operates as a waiver of the plaintiff's rights under the mortgage do so upon the general grounds that a person cannot avail himself of inconsistent remedies in relation to the same matter, and, having chosen and carried into effect one remedy, he cannot resort to a different one, involving a repudiation of the grounds upon which the first one was based; that the suit on the mortgage and the attachment suit were inconsistent, because the one proceeds upon the ground that the mortgagee is the owner of the property, and the other upon the ground that the mortgagor thereof is owner; that when the debt matured the mortgagee had the right to take the property under the mortgage, he having the legal title, subject only to a right of redemption; and that by bringing the attachment suit he elected to treat the property as the property of the debtor, and cannot, by seeking to enforce his mortgage, assert an ownership and right of possession in himself antedating the attachment. The reasoning in *Evans v. Warren*, supra, was held to be unsatisfactory, and its doctrine was repudiated in *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687. In the latter case the mortgagee in a chattel mortgage brought an action to foreclose it, and a junior mortgage set up as a defense that the complainant had previously brought suit upon the evidences of debt secured by his mortgage, and had therein issued a writ of attachment, and levied it upon the mortgaged property, and had thereby released his mortgage lien; but the court held that the attachment was not a waiver of the mortgage lien, and did not estop the mortgagee from claiming under his mortgage, basing its decision mainly upon the ground that in Indiana the mortgagee in a chattel mortgage is a mere lien holder. *Jones, Mortg.* § 565. In support of the conclusion that the mortgagee of personal property is a mere lien holder, Indiana decisions are there referred to, holding that personal property under mortgage may be levied upon and sold by execution subject to the mortgage lien. The case of *Howard v. Parks*, 1 Tex. Civ. App. 603, 21 S. W. 289, follows the case of *Byram v. Stout*, supra, holding that a mortgage lien upon personal property is not waived by suing out an attachment upon the debt secured by the mortgage, and that in Texas a chattel mortgage has the effect of a lien on the property.

There can be no doubt that the chattel mortgage act of Illinois recognizes a lien as existing under the mortgage upon the property mortgaged. Section 1 thereof speaks of a mortgage, trust deed, or other conveyance of personal property "having the effect of a mortgage or lien upon such property." 2 Starr & C. Ann. St. p. 1630. We have held that a court of equity has jurisdiction to foreclose a chattel mortgage. *McCauley v. Rogers*, 104 Ill. 578; *Dupuy v. Gibson*, 36 Ill. 197; *Gaar v. Hurd*, 92 Ill. 315. A bill in equity could not be filed to foreclose such a mortgage, unless a lien was thereby conferred which could be enforced against the property. If, there-

fore, an attachment of the mortgaged property in a suit upon the debt secured by the chattel mortgage is not a waiver of the right to proceed under the mortgage where the mortgage is a lien upon the property, such an attachment will not be a waiver in this state when the subsequent proceeding begun to enforce the mortgage is a bill in equity to foreclose. In such case there is no inconsistency between the two remedies, as both certainly recognize the mortgagor as owner. Where a chattel mortgage is properly acknowledged and recorded, a third person, who is a creditor of the mortgagor, may levy an attachment or an execution upon the property in the possession of the mortgagor subject to the mortgage. *Beach v. Derby*, 19 Ill. 617; *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371. We have also held that a chattel mortgage is a conditional sale; that when there is default in the performance of the condition the title of the mortgagor vests in the mortgagee; and that the mortgagee, upon default or condition broken, being invested with the legal title, may bring replevin or trover, or reduce the property to possession, and proceed to sell under the power in the mortgage. *Pike v. Colvin*, supra; *Durfee v. Grinnell*, supra; *Cleaves v. Herbert*, 61 Ill. 126; *Simmons v. Jenkins*, 76 Ill. 479; *Arnold v. Stock*, 81 Ill. 407; *Greenebaum v. Wheeler*, 90 Ill. 296; *Rhines v. Phelps*, 3 Gilman, 455. But even in this class of remedies the inconsistency relied upon as the basis of the theory of waiver is more seeming than real. In *Howard v. Parks*, supra, which was a statutory action for the trial of the right of property, in which it was sought to foreclose and enforce a contract lien upon personalty, the court say: "We are of opinion that * * * this lien was not waived by suing out an attachment upon the debt secured by such lien. We see no such inconsistency in the two suits as that the suing out of the attachment should have this effect." In the case at bar there was no attachment of the property covered by the chattel mortgage in the proceeding upon the note secured thereby. The property was levied upon under an execution issued upon a judgment entered upon the note so secured. There can be no substantial difference, however, between taking the property under execution after judgment and taking it under an attachment before judgment. If there is no inconsistency between the enforcement of the mortgage lien and an attachment of the property, there can be none between the enforcement of such lien and the levy of an execution upon the property. The chattel mortgage here provides that, in case of default in payment, or in any of the other conditions of the mortgage, the mortgagee shall have the right to take immediate possession of the property, and may sell the same, and out of the proceeds of sale, after paying the costs and debt secured, shall render the surplus, if any, to the mortgagor. Although the naked legal title, after condition broken, vests in the mortgagee for the

purpose of obtaining possession and applying the proceeds of the sale of the property to the payment of the debt, yet the requirement that the surplus proceeds be paid to the mortgagor shows that the absolute and exclusive ownership is not in the mortgagee. On the contrary, this requirement indicates that even the enforcement of the mortgage by seizure and sale under the power therein contained proceeds upon the idea that the rights of an owner still remain with the mortgagor to a certain extent.

It has long been the doctrine of this court in regard to real-estate mortgages that the mortgagee may sue upon the note secured by the mortgage, or bring ejectment on condition broken, or file a bill in chancery to foreclose, and that he may pursue these remedies either concurrently or successively. *Fish v. Glover*, 39 N. E. 1081, 154 Ill. 86, and cases there cited. In such cases, reducing the debt to judgment does not release the mortgage. It merely changes the form of the debt, so that the mortgage then becomes a security for the payment of the judgment. The judgment on the note without satisfaction is no bar to a proceeding in equity to foreclose, and the two suits may be pending at the same time. The lien of the debt secured by the mortgage attaches to the mortgaged property, and, as between the parties, can only be defeated by the payment or discharge of the debt, or by the release of the mortgage. *Id.* It has never been regarded as an objection to the prosecution of ejectment at law and of foreclosure in equity at the same time against the mortgagor of realty that the one proceeds upon the theory of title in the mortgagee and the other upon the theory of title in the mortgagor. Notwithstanding this apparent inconsistency, they may proceed concurrently until the debt secured is satisfied, it being always understood that there can be but one satisfaction. The rule that a mortgagee may proceed concurrently with an action on his note and with lawful proceedings to foreclose his mortgage applies to mortgages of personal property as well as to mortgages of real estate. *Burtis v. Bradford*, 122 Mass. 129. The holder of a chattel mortgage, after default, has three remedies, any one or two or all of which he may pursue concurrently,—an action at law to recover the debt, an appropriate action to recover the mortgaged property, and a foreclosure of the mortgage. *Herm. Chat. Mortg.* § 206; 2 *Cobbey, Chat. Mortg.* § 947. In the case of chattels, as well as of realty, a personal judgment on the note secured by the mortgage is no bar to a subsequent suit to foreclose the mortgage, and the mortgagee does not lose his right to the mortgaged property if he seizes it on execution under the judgment. 2 *Cobbey, Chat. Mortg.* §§ 944, 1018. The mortgage, being a specific lien, and the judgment a general lien, may be pursued consistently until the debt is satisfied. The doctrine of election does not apply in such cases. *Ping. Chat. Mortg.* § 1027; *Tyson v.*

Weber, 81 Ala. 470, 2 South. 901. The authorities which sustain the doctrine of waiver as above stated "depend upon a mere legal technicality, and not upon any principle in equity." *Byram v. Stout*, supra. In *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296, where the main point decided was that replevin and trespass for the wrongful taking of goods under a distress warrant were analogous, consistent, and concurrent remedies, the case of *Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73, was cited as illustrating the general doctrine that, where there are two inconsistent remedies, the selection of one will preclude the right to pursue the other; yet it was not intended to hold that the remedies here under discussion of attachment and foreclosure are inconsistent. Moreover, it is difficult to reconcile them with the decision of this court in *Atkins v. Byrnes*, 71 Ill. 326. In that case the action was replevin, brought by the holder of a junior chattel mortgage, who had suffered the mortgaged property to remain in the hands of the mortgagor long after the mortgage debt had matured, against the bailiff, who had taken possession of the property under a distress warrant issued by the holder of a prior chattel mortgage, after the debt thereby secured had been overdue an unreasonable length of time. It was held that, although both mortgagees had been guilty of laches, yet, as against each other, under the circumstances, the one first acquiring possession was entitled to the property; that, although the defendant took the property as bailiff under the distress warrant, yet his possession was legally that of the prior mortgagee, for whom he was acting; that the prior mortgagee did not thereby release any lien which he had upon the property by virtue of his chattel mortgage; that, consequently, he could subject the property, except as against third persons whose interests had attached before the property was taken, to the payment of either or both liens; and that the execution of a note for rent due and a chattel mortgage to secure its payment does not operate as a waiver of the right to enforce payment by distress. If the holder of a chattel mortgage, given to secure a note for rent due does not waive his mortgage lien by causing the property to be seized under a distress warrant issued for the rent, then it would seem to follow that the mortgage lien is not waived when the mortgagee causes the property to be taken under an execution upon the judgment obtained in a suit upon the note secured by the mortgage. The lien of the execution is no different from the lien of the distress warrant in its effect upon the right to enforce the mortgage lien.

In the case at bar the mortgaged goods were in custodia legis, when Borrmann's execution came into the sheriff's hands, because they had theretofore been levied upon under the executions issued upon the judgments in favor of Liebman and Lewin & Sons. Borrmann's execution lien was subject to the prior liens of the two other executions. The

property set off to Kohn as exempt was set off as exempt from the levy of the three executions. So far as the proceeds of the sale of the mortgaged property levied upon were applied upon Borrmann's execution, his chattel mortgage was to that extent satisfied. But the execution did not take effect against the property set off as exempt. That property was released from the lien of the execution. It was not sold and applied upon the execution, and did not operate as a satisfaction pro tanto of the judgment into which the mortgage note had been merged. In *Conway v. Wilson*, 44 N. J. Eq. 457, 11 Atl. 734, which was a bill to foreclose a chattel mortgage, the answer set up that the complainant had sued at law on the claim secured by his mortgage, recovered judgment, issued execution, levied on the mortgaged property and other property, and then had directed the sheriff to surrender the goods levied upon to the defendant, and the sheriff did so; and it was claimed from these facts that the complainant, having once had a levy on goods enough to satisfy his demand, his demand would be presumed to be satisfied; but it was held that, although such was the general rule, it could not apply when the defendant himself had received the goods, and retained them. Where property is not taken from the possession of the defendant, or is restored to him at his request, the levy does not operate as a satisfaction, so far as his rights are concerned. *Freem. Judgm. (4th Ed.)* § 475; *Hanness v. Bonnell*, 23 N. J. Law, 159. Hence, if the mortgaged property levied upon by Borrmann had been surrendered to and retained by Kohn, it would not have affected the right of Borrmann to proceed against it under his mortgage. We cannot see why that right was in any way affected by the fact that the property was, upon the application of the debtor, set off as exempt. In *Tuesley v. Robinson*, 103 Mass. 558, a chattel mortgage covering property exempt by law was held to be fraudulent as against creditors, but good as between the parties; and upon the bankruptcy of the mortgagor the property was set apart by the assignee as excepted from the operation of the bankruptcy act. It was held that the right of the mortgagee to hold the property as security under his mortgage was not waived or affected by the debtor's discharge in bankruptcy, and that he was entitled to replevy from the mortgagor the property so set off to him. In *Sumner v. McKee*, 89 Ill. 127, where the mortgagor in a chattel mortgage died before the note secured thereby had matured, and the mortgagee failed to take possession at its maturity, and the widow relinquished her claim to the articles mentioned in the appraisal of her specific allowance, and in lieu thereof elected to take all the articles of personalty inventoried and appraised, including the goods mortgaged, as a creditor of the estate, it was held that she took them subject to the lien of the mortgage.

In case of a chattel mortgage the owner waives the benefit of the exemption so far as the incumbrance is operative. *Thomp. Homest. & Ex. § 741*. It is questionable whether, as between *Borrmann and Kohn*, the latter was entitled to have the property set off as exempt from the levy of *Borrmann's* execution. *Borrmann* had the right, under his mortgage, to take possession of the property and sell it. There could be no material difference in selling it under the mortgage and directing the sheriff to sell it under the execution and apply the proceeds pro tanto towards the payment of the execution. "Where personal property otherwise exempt from execution has been pledged as collateral security for the payment of a debt, and judgment has been rendered on the debt, an execution may be issued, and the property seized and sold thereon as in other cases." *Jones v. Scott*, 10 Kan. 33. "Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to take possession of the property, he may, if he choose, reduce his debt to judgment, take out execution, and levy upon and sell the mortgaged property as in other cases; in which case the debtor sustains no such injury as will support an action of trespass, even though the chattels thus mortgaged be the articles enumerated by law as exempt from execution." *Frost v. Shaw*, 3 Ohio St. 270; *Thomp. Homest. & Ex. § 742*; *Herm. Chat. Mortg. § 207*. We are inclined to think that the lien of the mortgage upon the property not sold under the execution was not waived by the proceedings under the execution, and that the court below erred in refusing to admit the mortgage in evidence as a justification of the act of taking possession of the property, and in instructing the jury as follows: "The court instructs you as a matter of law that the defendant *Borrmann* lost the benefit of any lien which he may have had upon any of the property in question under the chattel mortgage in evidence by the entry of the judgment by him against *William Kohn*, and by the levy of the execution issued thereon, as shown by the evidence; and that, as a matter of law, the chattel mortgage did not justify the defendants in seizing the goods in question, and it is your duty to find the defendants guilty." The judgment of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(158 Ill. 259)

WATERLOO MILLING CO. v. KUENSTER
et al.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

BANKS AND BANKING—AGENCY—COLLECTIONS.

1. Where a draft upon a nonresident drawee is deposited for collection with a local bank, and

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

by it transmitted to another bank for collection, according to custom, the local bank is not responsible for loss occasioned by the default of the latter bank, since such latter bank is the agent of the depositor. 58 Ill. App. 61, affirmed.

2. Where a bank, on collecting drafts for another bank, transmits bank drafts to such bank, which credits the depositor with the amount of such drafts, and then collects only part of the drafts on account of the failure of the other bank, it has a right of action against the depositor for the deficit. 58 Ill. App. 61, affirmed.

Appeal from appellate court, Fourth district.

Assumpsit by the Waterloo Milling Company against the firm of H. Kuenster & Co. Defendants obtained judgment, which was affirmed by the appellate court. 58 Ill. App. 61. Plaintiff appeals. Affirmed.

This was an action of assumpsit brought by the Waterloo Milling Company against H. Kuenster and others, copartners doing a banking business at Waterloo, Ill., to recover certain moneys alleged to have been collected and received by the defendants from divers persons for the plaintiff, and as its agent. The defendants pleaded non assumpsit, and gave notice of set-off, and on trial before the court, a jury being waived, the issues were found for the defendants, and their damages under their notice of set-off were assessed at \$314.33. For that sum and costs the defendants had judgment. On appeal to the appellate court that judgment was affirmed, and this appeal is from the judgment of affirmance.

The facts appearing at the trial were all admitted by stipulation, and are as follows: "The plaintiff is a milling company, doing a general milling business in the city of Waterloo, Monroe county, Illinois, and has been so engaged for seven years last past. The defendants were engaged in the banking business as partners, and have been so engaged for eleven years, in said city of Waterloo. That on the 21st of August, 1891, the plaintiffs delivered to the defendants its 30-days date draft on one M. J. Heyer, of Wilmington, North Carolina, for \$613, with bill of lading attached for flour shipped that day to said Heyer, the said draft to be transmitted by defendants for collection. That on the same day the draft was received by the defendants, it, together with the bill of lading attached, was sent to the First National Bank of Wilmington, N. C., with instructions to collect same, and remit to the defendants. The draft contained the privilege to the drawee of obtaining 1 per cent. discount for cash. This draft was transmitted, as above stated, for collection, in the usual course of business, without any special instructions, or any especial arrangements as to compensation, except that the defendants were in the habit of charging plaintiff nothing except costs of such collections to them. The plaintiff had been doing business with defendants' bank since 1886, and kept its deposits with said bank. That on October 28, 1891, plaintiff delivered to defendants another draft for the sum of \$219.50, upon King & Montgomery, of Wilmington, N. C., with bill of lading attached. This draft

was payable on arrival of the goods, and was to be transmitted the same as the first-mentioned draft for collection in the usual course of business. That on the same day the plaintiff delivered to the defendants another draft, payable on arrival of goods, drawn on J. M. Forshee, of the same place, for the sum of \$219.50. This was also attached to bill of lading, and to be sent on for collection, the same as the other. On the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on West & Co., of the same place, for the sum of \$116; and also on the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on Fill-yaw & Skulker, of the same place, for the sum of \$69.60,—the two last-named drafts to be transmitted to Wilmington for collection the same as the others. On the 30th of October of the same year plaintiff delivered to the defendants another draft on West & Co., of Wilmington, N. C., with bill of lading attached, payable on arrival of goods, for the sum of \$108.50; and the same day plaintiff delivered to defendants another draft, with bill of lading attached, drawn on J. S. McEacher, all of the same place, for the sum of \$108.50,—both of these drafts to be collected in the usual course of business as the others. And on the 4th of November of the same year plaintiff delivered to the defendants another draft, drawn on West & Co., of Wilmington, for the sum of \$108.50, with bill of lading attached, payable on arrival of goods, same to be collected in usual course of business as the other drafts named. No instructions were given by the plaintiff to defendants as to what bank or agency these drafts should be sent to in Wilmington, N. C. Defendants sent all of them in due time and with due diligence to the First National Bank of Wilmington, N. C., with instructions to collect, as in the draft directed, and to transmit the proceeds to the defendants. The First National Bank of Wilmington, N. C., was a responsible bank in good standing, its solvency never having been called in question; and the defendants exercised due diligence in selecting that bank. It is further agreed that all the afore-said drafts were collected by the First National Bank of Wilmington, N. C., to which they were sent, but that said bank, on or about the 25th of November, 1891, failed, and the proceeds were never remitted to defendants. That on the 24th of November, 1891, defendants received from said First National Bank of Wilmington, N. C., two drafts upon the United States National Bank of the city of New York, one for the sum of \$327.25, and the other for the sum of \$613; that on receipt of said drafts, the intelligence of the First National Bank failure not having reached the defendants, the amount represented by them, being \$940.25, was placed to the credit of the plaintiff, paid to, and has been retained by, it, and the drafts themselves immediately for-

warded to New York for collection and credit there, the defendants keeping an account there. The drafts were protested from the New York bank on receipt, and nothing was realized from them. It is further agreed that on the 27th of May, 1893, plaintiff gave defendants a draft, with bill of lading attached, and drawn on B. F. King, of Wilmington, N. C., to be transmitted for collection in the usual course of business, without especial instructions, same as the other drafts above mentioned, for \$77.25, and on the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on McNair & Pearcell, of Wilmington, N. C., for collection same as draft last mentioned, for the sum of \$140.50; that these last two drafts were promptly forwarded to the Bank of New Hanover, of Wilmington, N. C., with instructions to collect as directed, and remit the proceeds to the defendants. That this bank was considered a suitable and safe agency, and the defendants are not charged with negligence in this selection; that the bank was in good standing, so far as known. That this bank afterwards, to wit, about the 18th or 21st (from 15th to 21st) day of June, 1893, likewise failed, after having collected the two drafts, but before remitting the amounts as directed. Plaintiff makes no claim on account of drafts mentioned herein, other than those mentioned in the copy of account sued on, attached to the declaration herein, and the sum of \$6.14, balance on the draft of August 21, 1891, and said other items and drafts as introduced by the defendants under the notice of set-off. It is further agreed that for some time previous, and terminating about 1890, it was the practice of the defendants, on receipt from the plaintiff of drafts for collection, to immediately credit the plaintiff with the amount of the draft, and then charge the plaintiff interest from date of giving it credit to the time defendant received the proceeds of the collection; that about 1890 this practice was changed, the defendants receiving items for collection to credit the plaintiff with the proceeds when received; and that continued and was the practice at the time of receiving the drafts above mentioned. It is further agreed that on the failure of the banks at Wilmington, N. C., respectively, as above stated, the defendants filed affidavits with the respective receivers for the amount of the several drafts that had been collected and not remitted; that affidavits and forms of claim furnished by the receivers were made out and presented by the defendants in their own name, the drafts having been indorsed by the plaintiff to the defendants at the time they were respectively delivered to them to be transmitted for collection as above stated. The defendants have received as dividends on the drafts above mentioned, from the First National Bank of Wilmington, N. C., the sum of \$625.92, and from the Bank of New Hanover nothing. The dividends as above stated have been retained.

by the defendants. It was not uncommon for delays to occur in payment of drafts sent on for collection in this way, caused by delay in the arrival of goods and from other causes, and there is no claim of negligence against the defendants on this account."

Wm. Hartzell and Josh Wilson, for appellant. Travous & Warnock, for appellees.

BAILEY, J. (after stating the facts). The controlling question in this case is whether the First National Bank and the Bank of Hanover of Wilmington, N. C., to which the defendants transmitted the drafts in question for collection, were, in making the collections and remitting the money, the agents of the defendants or of the plaintiff. It appeared from the stipulation of the parties that the drafts were delivered by the plaintiff to the defendants with bills of lading attached, to be transmitted by the defendants to Wilmington for collection. No instructions were given by the plaintiff to the defendants as to the bank or agency in Wilmington to which the drafts should be sent, and all were sent in due time and with due diligence to these banks; all but the last two being sent to the First National Bank, and those two to the Bank of Hanover. At the time the drafts were sent to these banks respectively, the banks were each responsible, and in good standing, their solvency then never having been called in question; and it is admitted that the defendants used due diligence in selecting these banks as the agencies for collecting the drafts and remitting the money. The drafts were all paid to the Wilmington banks in due course of business, but before the money collected was remitted to the defendants both banks failed, and the money, with the exception of certain sums paid over by the receiver of the First National Bank of Wilmington, was never received by either the defendants or the plaintiff.

Where a draft upon a nonresident drawee is deposited with a local bank for collection, and especially where, as in this case, it is deposited to be transmitted to the place of residence of the drawee for collection, the bank fully discharges its duty by transmitting the draft in due season to a suitable agent at the place of residence of the drawee, with necessary instructions; and it is not liable for loss occasioned by the negligence or default of the collection agent thus employed. Such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection. While some of the courts have been disposed to hold the bank in such cases to a higher degree of responsibility, the better reasoning, as well as the weight of authority, seems to support the rule as we have stated it, and that rule has long been recognized and adopted in this state. In *Allen v. Bank*, 22 Wend. 215, the stricter rule is held, but in a note to that case as it is reported in 34

Am. Dec. 315, by Mr. Freeman, it is said: "The preponderance is against the principal case and in favor of the rule that the liability of a bank taking a note or bill for collection which is payable at a distance extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent, with proper instructions; and that the corresponding bank is the agent, not of the transmitting bank, but of the holder; so that the transmitting bank is not liable for the default of the correspondent where due care has been used in selecting the correspondent." The foregoing statement of the rule by Mr. Freeman is quoted with approval in *Bank v. Sprague*, 34 Neb. 318, 51 N. W. 846, and the rule itself is adopted. In *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328, the reasons of the rule are stated as follows: "The course of business of defendant and all other banks is, in such cases, to make collections through their correspondents. They do not undertake themselves to collect the bills, but to indorse them to other banks, at the place where payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through another bank. The bank receiving the paper becomes the agent of the depositor, with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him. The party employed, with his assent to make the collection, must therefore be regarded as his agent." In *Daly v. Bank*, 56 Mo. 94, the plaintiff was a depositor in the defendant bank, and deposited therein certain drafts in controversy in that case. The drafts were sent by the defendant to the National Bank of Vicksburg, which the defendant believed trustworthy, with directions to collect and remit. The Vicksburg Bank collected the money, and kept it, and became insolvent, and it was held that the defendant was not liable for the loss. The foregoing cases are entirely in harmony with the decision of this court in *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 245, in which it was held that, where a bill or note is received by a bank for collection, which renders its transmission to another place necessary, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions for its collection. There the legal holder of the bill indorsed and delivered it to the defendant bank for collection in the usual and regular course of banking business, and the defendant bank on the same day indorsed and transmitted it for collection to certain bankers in St. Louis, Mo., the proceeds of the bill, when collected, to be placed

to the credit of the Alton Bank. By the negligence of the correspondent bankers in failing to have the bill protested for nonacceptance, and to give notice of nonacceptance, the amount of the bill was lost, and it was held that the defendant bank was not liable. In discussing the case the court said: "This presents the question whether the bank receiving such paper for collection is bound for the acts of their correspondents, and are responsible for their negligence, or whether their undertaking requires anything more than that they should use reasonable care and prudence in the selection of a responsible correspondent, to whom it shall be intrusted. That a bank receiving such paper for that purpose in the usual course of business is bound to use ordinary and reasonable care in selecting an agent competent and responsible, there is no doubt. And a want of such precaution would clearly render them liable for consequent loss. It does not appear that there was any agreement on the part of the bank to become liable, at all events, for any loss that might occur from the acts of their correspondents, and the law imposed no such liability." See, also, *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill. 100, 7 N. E. 601; *Fabens v. Bank*, 23 Pick. 332; *Stacy v. Bank*, 12 Wis. 629; *Bank v. Howell*, 8 Md. 530; *Lawrence v. Bank*, 6 Conn. 521; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101; *Bank v. Goodman*, 100 Pa. St. 422, 2 Atl. 687; *Hyde v. Bank*, 17 La. 560; *Bank v. Burns*, 12 Colo. 539, 21 Pac. 714; *Bank v. Ober*, 31 Kan. 599, 3 Pac. 324; *Mechem, Ag.* § 514. In the light of these authorities it must be held that the First National Bank and the Bank of Hanover, of Wilmington, N. C., were the agents of the plaintiff, and not of the defendants, and that the losses resulting from their default must be borne by the plaintiff, and not by the defendants.

It appears, however, that on the 24th day of November, 1891, the First National Bank of Wilmington, after collecting the drafts forwarded to it, remitted to the defendants two drafts on the United States National Bank of the city of New York, aggregating \$940.25, and failed, and became insolvent the day following; that the defendants, on receipt of the drafts, not having received intelligence of the failure of the drawer, placed the amount of the drafts to the credit of the plaintiff, and paid the same over to it, and that the money so paid has been retained by it; that the drafts themselves were immediately forwarded to New York for collection, and were there dishonored and protested, and that nothing was realized from them; that the defendant subsequently proved up their claim for the amount of the two drafts before the receiver of the First National Bank of Wilmington, and afterwards obtained from the receiver, by way of dividends on their

claim, the sum of \$625.92. They now claim, and have been permitted to recover by way of set-off, the difference between the amount of the dividends so received and the face of the drafts. This, we think, was proper. If the plaintiff had itself deposited these drafts with the defendants, and received payment of their amount, the drafts being at the time worthless by reason of the insolvency of the drawer, there can be no doubt that the defendants would have had the right to charge back and recover the amount of the loss from the plaintiff. They were in fact received by the defendants from the First National Bank of Wilmington, which, for all the purposes of the transactions under consideration, is to be regarded as the plaintiff's agent. The rights of the defendants would, therefore, seem to be the same as though the plaintiff had itself deposited the drafts with the defendants.

Nor are we able to see that the case is at all affected by the circumstance that the defendants retained the drafts, and proved up a claim for their amount before the receiver in their own name. They had paid the amount of the drafts to the plaintiff, and, until the money so paid was refunded to them, they were entitled to hold the drafts, and collect in their own name and for their own benefit whatever could be collected from the estate of the insolvent drawer; of course crediting whatever they might be able to collect upon their claim against the plaintiff. We are of the opinion that the judgment is fully warranted by the facts appearing by the stipulation of the parties, and the judgment of the appellate court will therefore be affirmed. Judgment affirmed.

(157 Ill. 406)

PITTSBURGH, FT. W. & C. RY. CO. v.
CALLAGHAN.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS
— EVIDENCE.

1. The fact that an engine is marked with defendant's name is evidence of defendant's ownership sufficient to warrant submitting that issue to the jury, even though the engine is also marked with the name of an unincorporated switching association composed of several railroad companies. 50 Ill. App. 676, affirmed.

2. Plaintiff, at the time of his injury, was crossing defendant's track, on business of his employer, at a curve in the track, where much switching was done, and where many people crossed daily. Two cars standing on the track obstructed his view, and these cars were pushed against him by an engine striking against them. By going half a block out of his way, and ascending some stairs, plaintiff might have crossed the track on a viaduct. *Held* proper to submit to the jury the question of contributory negligence. 50 Ill. App. 676, affirmed.

Error to appellate court, First district.

Action on the case by Michael Callaghan against the Pittsburgh, Ft. Wayne & Chicago

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Railway Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 50 Ill. App. 676. Defendant brings error. Affirmed.

This was an action on the case for personal injuries, brought by defendant in error against plaintiff in error in the circuit court of Cook county. The declaration contains two counts, the first charging negligence in the management and operation of a certain engine, under the control of defendant, whereby certain cars were propelled against certain other cars, and driven against plaintiff while, in the exercise of ordinary care, he was crossing the track of defendant, whereby he was injured. The second count is similar to the first, except that it charges that it was the duty of defendant to place a brakeman on the hindmost car. To this declaration the general issue was pleaded.

The plaintiff below was, at the time of the injury, a carpenter, in the employ of Nelson Morris & Co. The packing house of Morris & Co. stands on the northwest corner of the intersection of Forty-Third street, running east and west, and Loomis street, at right angles. The southeast corner of the packing house is curved to conform with railroad tracks turning from Loomis street west into Forty-Third street. West of Loomis street, and opposite the packing house, was a large carpenter shop, and various structures belonging to Morris & Co. and others. At the time of the injury certain railroad tracks ran north and south on Loomis street, used for the purpose of reaching these industries. Near Forty-Third street there branched west from Loomis street a track which, when fully curved into Forty-Third street, was divided by switches into several tracks, known as "Swift's Tracks," "Nels Morris' Track," and "Team Track." On both the north and south sides of Forty-Third street westward were located several manufacturing establishments, employing a large number of men, and this strip of ground occupied by tracks was used by them as a common passage in passing between these various buildings. As a means of passage, also, between the buildings of the Nelson Morris & Co. plant, one or more bridges or viaducts were constructed over these tracks, but were not exclusively used; most of the employes and other persons having occasion to pass back and forth being in the habit of crossing on a level with the tracks, and passing around or between cars when necessary. An average of about 1,500 employes and other persons, each day, crossed these tracks on their travel in the course of their business. The mode of conducting the switching of cars at these tracks was as follows: The railroad cars were taken to and from Morris & Co.'s plant by means of locomotive engines, and the switching necessary to be done for the plant was done by the same means, and on the tracks above described. Such switching was of daily occurrence, and was done in a manner usual and customary to that locality. For example, if there were cars on the platform track which

were to be taken off and away, and such cars were mixed with other cars on the same track, then the locomotive was attached to the easterly end of the line, and the track, in switchman's parlance, was "pulled," and the cars thrown, alternately, down upon one or the other of the tracks, as was necessary to select out those desired. The engine did not keep hold of the cars until brought to a standstill, nor did the switchman ride or follow them to point of stoppage; but they were given a reasonable momentum, and cut off, and allowed to run up themselves. In that way concussions between standing and moving cars took place, with varying degrees of force, and at points so far away from the engine as that its bell might or might not be heard. This mode of switching had been followed at the Nelson Morris & Co. plant, and on those tracks, during the year and a half that the plaintiff below had been employed there, next before the accident, and his testimony shows he understood it perfectly well. The supplies for the carpenter shop were kept in the packing house, and on October 28, 1889, defendant in error, being in need of nails, started to cross over to get them. He did not go over the bridge or viaduct, which necessitated the climbing of stairs, but attempted to cross the tracks. Two box cars were standing on the south track, with no engine attached. As defendant in error attempted to cross over near the west end of these, a flying switch was made, and two other cars were thrown in on this track, against the stationary cars, moving them about two car lengths. Defendant in error was about opposite the bumper of the west stationary car when they were struck, and was knocked down, and badly injured. A jury in the circuit court gave plaintiff a verdict for \$18,000. By order of that court a remittitur of \$3,000 was entered, whereupon the court rendered judgment on the verdict for \$10,000, after overruling motion for new trial. An appeal was taken to the appellate court of the First district, where the judgment was affirmed. From that judgment this writ of error is prosecuted.

W. E. Mason and George Willard, for plaintiff in error. Duncan & Gilbert, for defendant in error.

PHILLIPS, J. (after stating the facts). The principal error assigned on this record is in the refusal of the trial court to give to the jury certain instructions asked by plaintiff in error. At the close of the evidence of the plaintiff in the trial below, the defendant below moved the court to instruct the jury to find for defendant, which motion was renewed at the close of argument, and by the court denied. A consideration of the refusal of the trial court to give this instruction involves two questions raised: First. Was plaintiff in error responsible for injury received? Second. Did the negligence of defendant in error contribute to the injury to such an extent as to bar a recovery?

The question as to whether or not the engine which propelled the cars in such a manner as to injure defendant in error belonged to plaintiff in error was one of fact, and if there was evidence tending to show such fact, then it was not error for the court to refuse the general instruction to find for defendant. *Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773. The evidence shows that at the time of the injury these tracks were operated by the Railway Switching Association, which was not a corporation, but an association of several roads, jointly engaged in the operation of such tracks. The former manager of the association, on being asked whether the company of plaintiff in error was a member of the Railway Switching Association, stated that he believed, in their articles, it was termed the "Pennsylvania Company, operating the Ft. Wayne." While this evidence was not definite, other proof showed that the engine in question that propelled the cars was a Pittsburgh, Ft. Wayne & Chicago, No. 39, and that there was also a sign on the side of the cab, "Railway Switching Association." Other evidence, in corroboration, shows that engine No. 39 of the Pittsburgh, Ft. Wayne & Chicago was used there in switching on these tracks. No evidence was offered by plaintiff in error to contradict or disprove any of these facts. The Railway Switching Association was shown not to be a corporation, but simply an association of several roads for switching purposes. The lettering of the name of the company of plaintiff in error on the engine was prima facie evidence of possession by that company. In *Bergen v. Riggs*, 34 Ill. 173, this court has said: "As a general proposition, possession of chattels creates a presumption of ownership,—slight, it may be, but sufficient until overcome by proof. Yet the prima facie case may be rebutted by the circumstances attending the possession. It may be rebutted by evidence, either circumstantial or positive; but, until rebutted, it is evidence of ownership." In *Schulte v. Holliday*, 54 Minn. 73, 19 N. W. 752, being an action for damages caused by the servant of defendant permitting defendant's horse to run away, the controversy was upon the question of whether the negligent party was the servant of the defendant. The court, over the objection of defendant, permitted proof of the name of defendant's firm being on the vehicle, and this was the first point urged as ground of reversal before that court, and in disposing of such point the supreme court said: "The plaintiff shows, against the objection of defendant's counsel, of immateriality and irrelevancy, that the name of defendant's firm was upon the wagon which the servant used on the occasion of the injury. There was no error in this. It was proper to identify the horse and vehicle used by the defendant at the time." The undisputed evidence in this case that the engine was lettered with the name of the company of plaintiff in error, carrying with it, where unexplained, prima facie evidence of possession and ownership, was evidence tend-

ing to show the responsibility of plaintiff in error for the injury, and it was not error in the trial court to refuse to submit such evidence to the jury. The jury, by their special finding, and by their verdict, have found that the engineer or switchman in charge of the locomotive was the employé of plaintiff in error.

It is also urged that the court should have instructed the jury to find for the defendant below on the ground that the plaintiff, by his own negligence, contributed to his injury to such an extent as would bar his recovery against defendant below. This court has said, in the case of *Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. 273, that "negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on undisputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for a jury." At the time of the injury complained of in this case, defendant in error, in the ordinary course of his employment, was passing from one to the other of his employer's buildings. By going around half a block, and ascending two flights of stairs, he could have passed over the bridge or viaduct over the tracks. Instead, he adopted the route used by about 1,500 employées daily, and attempted to cross on a level with the tracks. The track curved at this point, and the two cars obstructed his view. Before stepping on the track, he stopped, and looked in both directions, because he knew switching was constantly going on, and that cars never stood on this track, except for a minute or two at a time. Without warning, the cars propelled from the engine struck the standing cars with such momentum as to force them two car lengths. This court has defined negligence to be "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do." *Manufacturing Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694; *Railroad Co. v. Johnson*, 103 Ill. 512. Whether the place of the occurrence of this accident was a street or not is not material to this case. It is not shown to have been private property of plaintiff in error. It appears that, for at least three years before the accident, it had been used as a pass-way and crossing by hundreds of people daily. It was on a curve, where the view of those operating the trains and those seeking to pass over was obstructed. Under such circumstances as this, it was the duty of those having control of trains to use care commensurate to the danger. *Railway Co. v. Wallace*, 110 Ill. 114; *Railroad Co. v. Siltman*, 88 Ill. 520; *Patt. Ry. Acc. § 170*. There was sufficient evidence in this record tending to show

that the plaintiff below was in the exercise of ordinary care and caution at the time of the injury. It was a question on which fair-minded men of ordinary intelligence might differ, and therefore a question of fact. It was not error, therefore, for the trial court to submit the question to the jury, and refuse the instruction directing them to find for defendant below. It is not for this court to pass upon the sufficiency of all the evidence, when considered together, to sustain the plaintiff's declaration, and entitle him to recover. A jury has so found, and we have frequently held, where such finding of fact has been approved by the trial and appellate courts, it is final. *Railway Co. v. Richards*, supra; *Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492.

The first and third instructions of plaintiff in error, refused by the court, which go to the extent of informing the jury that, if the engine was marked with the name of the company of plaintiff in error, and also "Chicago Switching Association," then there was no presumption of law or fact as to which corporation or association had its charge and management, were objectionable in that they invaded the province of the jury on a material fact, and for the reasons heretofore given in this opinion. There was also no evidence tending to show that the engine was marked "Chicago Switching Association," but it was lettered "Railway Switching Association." All the merit of the fourth instruction, refused, was fully embraced in the fifth and sixth instructions, which were given. There is no error in this record, and the judgment of the appellate court is affirmed. Affirmed.

(158 Ill. 314)

HILL et al. v. BAHRNS et al.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

OBJECTIONS TO EVIDENCE—WAIVER—WILL CONTEST—DECLARATIONS OF TESTATOR.

1. Where, in answer to a proper question, a witness gives an improper answer, error cannot be assigned thereon in the absence of a motion to strike out the answer.

2. In a suit to contest a will, declarations of the testator, made before and after its execution, may be proved so far as they tend to show his mental condition at the time of execution, but declarations as to the disposition he intended to make of his property are not admissible.

Error to circuit court, Effingham county; E. D. Youngblood, Judge.

Bill by Caroline Bahrns and others against Henry C. Hill and others to set aside the alleged will of George Hill, deceased. Complainants obtained a decree. Defendants bring error. Affirmed.

Horace Clark and Wm. B. Wright, for plaintiffs in error. S. F. Gilmore, E. N. Rinehart, and R. C. Harrah, for defendants in error.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

CARTER, J. Defendants in error Caroline Bahrns and others filed their bill in equity in the circuit court of Effingham county to set aside the will of George Hill, deceased, on the grounds that the testator was of unsound mind, and that the execution of the will was obtained by undue influence. Upon two different trials the contestants obtained verdicts in their favor. The court set the first verdict aside, but allowed the verdict rendered on the last trial, that the will in question was not the last will and testament of George Hill, deceased, to stand, and entered a decree accordingly.

Plaintiffs in error have assigned for error and insist here that the verdict rendered is contrary to the evidence, and that the trial court erred in not granting a new trial on that ground. A large number of witnesses were examined on each side, and, as not unusual in such cases, there was an irreconcilable conflict in their testimony. We have carefully read and considered the evidence, and have arrived at the conclusion that the trial court did not err in refusing to grant a new trial on this ground. The will in question was made on the 2d day of June, 1892, and the maker of it died on December 3d following, at the age of about 79 years. His wife had died about one year before, and after her death he lived with one of his married daughters until his death. Shortly after his wife's death, he made a will substantially the same as the last one, but, some question having been raised as to whether he was under the influence of intoxicating liquor or not when he executed it, he then made the will in controversy. These two wills were given in evidence. There was considerable evidence tending to show that his mind and memory had become so far impaired at the time of the execution of his last will as to render him incapable of making a valid will, and, on the other hand, many witnesses gave testimony tending to show his mental competency. It was the province of the jury to weigh the evidence, and, while we cannot say from the record that the verdict is supported by a clear preponderance of the evidence, neither does it appear to be manifestly against the weight of the evidence. The question was one of fact for the jury, and it is the well-established rule that this court will not set aside the verdict on the ground that the jury have reached a wrong conclusion as to the facts, unless the record shows the verdict is against the clear preponderance of the evidence. *Sinnett v. Bowman*, 151 Ill. 146, 37 N. E. 885; *McComman v. McComman*, 151 Ill. 428, 38 N. E. 145; *Society v. Price*, 115 Ill. 623, 5 N. E. 128; *Moyer v. Swygert*, 125 Ill. 262, 17 N. E. 450; *Calvert v. Carpenter*, 96 Ill. 63; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1036; *Hoobler v. Hoobler*, 128 Ill. 645, 21 N. E. 571; *Meeker v. Meeker*, 75 Ill. 260; *Long v. Long*, 107 Ill.

210; *Greene v. Greene*, 145 Ill. 264, 83 N. E. 941.

It is next insisted that the trial court erred in its rulings in the admission and exclusion of evidence. One of the principal witnesses for contestants who testified to the mental incompetency of said George Hill was his brother, Louis Hill. He testified: That he was a year or two younger than his brother. That his brother moved from his farm into the city of Effingham six or seven years before his death, and established his home about a square away from where witness lived. That he (witness) then saw his brother from one to three times each week until his brother's death. That his brother's wife died in December, 1891, and two or three months afterwards his brother went to live with his son-in-law, Frank Smith, in the country. That the last time his brother visited him at his house was in September before the death of his wife, and that "he wasn't exactly what he might be. He was sitting on the lounge there, and he said: 'I have made my will, Louis.' I said to him that was all right." Counsel for complainants then asked the witness this question: "Mr. Hill, you may state what he said to you, and how he acted." Counsel for defendants below objected on the ground that it was improper to show by the testator's statements that he had made or intended to make a will different from the one in controversy; that it might be proper if offered to prove weakness of mind, but was improper for any other purpose. Counsel for complainants then stated that it was offered for the purpose of showing the condition of the testator's mind; and the alleged influence by which he was induced to change it. It appeared that previous to the making of the two wills given in evidence he had made another will, and it turned out that the conversation was concerning this prior will. The court held the question was proper as bearing on the question of his capacity to make the will in controversy, and on the question of undue influence. The witness answered as follows: "He said he had made his will, and left them all alike. I said to him that was right; that they had all worked hard for it. That was all that was said about the will. I did not ask him how he made it." This answer was clearly improper, and prejudicial to the proponents of the will. It did not tend to prove either mental incapacity or undue influence. Its effect was to impress upon the minds of the jury that at that time the testator had declared his intention of treating all his children alike, and had so made his will; and that his brother, the witness, was of the opinion that that was the right thing to do; that all the children had worked hard for the property. It is obvious that the jury would not regard such evidence as tending to establish mental unsoundness, but only as proof of the double fact that both brothers

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thought it was right to treat all the children alike, and that the testator had so made his will. But the court could not know in advance what answer the witness would make. A perfectly proper answer might have been made in direct response to the question, so far as the court could see. The time of this conversation—only a few months before the making of the will in controversy—was sufficiently near to that event to make it proper to prove what the testator said and did in connection with other facts and circumstances as tending to prove the issue of mental unsoundness. The part of the question as to how he acted was not answered. The question, taken as a whole, called for an answer bearing upon the question of his mental condition, and so was a proper one. But the answer had no such bearing, and was improper, and ought to have been excluded, and its effect corrected by instructions. This the trial judge would doubtless have done had such action been requested by the proponents. No such request was made. No action by the court was requested and none taken upon which plaintiffs in error can now predicate error, and ask a reversal of the decree.

The declarations of the testator made before and after the execution of the will are proper to be proved so far as they tend to show his mental condition at the time the will was executed. And the question as asked was proper for the purpose of eliciting such testimony. *Reynolds v. Adams*, 90 Ill. 184. And it is held that a prior will, and statements and declarations of the testator made at a time when his mental capacity was undisputed, as to the manner in which he had disposed of his property by a prior will, which has been destroyed, are admissible in evidence where it appears that such disposition of his property by such prior will is approximately the same as that made by the contested will, as tending to rebut the idea of undue influence. *Roe v. Taylor*, 45 Ill. 485; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837. And in the case at bar the plaintiffs in error gave in evidence a canceled will of the testator, made a few months before the will in controversy was made; the provisions in both wills being in the main substantially the same.

But plaintiffs in error insist that the trial court applied a different rule when they were producing their evidence from that applied to the testimony of Louis Hill, and refused to permit them to prove by the witness Lacy what the testator said to him, in conversations had before the death of his wife, about the disposition of his property. We do not think the point is well taken. This witness testified to frequent conversations and business transactions with George Hill had up to the death of his wife; that they lived across the street from each other, and frequently visited back and forth, and that, in the opinion of the witness, he (Hill) was capable of transacting ordinary business; that, as far as he could see,

Hill was of sound mind, and that, if there was anything wrong with his mind, he could not discover it; that at different times he talked about the disposition of his property, but that witness paid but little attention to it; that he (Hill) and wife would talk about different things; "at times they would talk about their property; that it was theirs, and they intended to dispose of it as they saw fit"; and that he never made any inquiry about how they were to do it, or anything of the kind; that he never heard Mr. Hill say anything about the last will that was made after his wife died, but before that they talked as though he already had a will made. Had plaintiffs in error offered to prove by this witness statements and declarations of George Hill tending to show mental capacity at the time of the execution of the will sought to be set aside, or tending to rebut the idea that its execution was procured by undue influence, in addition to what was testified to by the witness, we think, under the rule above stated, the proof should have been admitted. But, as the record stands, we cannot see that plaintiffs in error were prejudiced by the ruling of the court in the respect complained of, as the question was substantially answered notwithstanding the objection; and we think it appears that the witness, in answer to other questions, stated the substance of the conversations inquired about.

It is next objected that the court erred in refusing to admit in evidence certain receipts drawn by the witness Warman, at the request of George Hill, to take the place of others purporting to have been given to him by some of his children, and which were not dated, or were otherwise defective, as stated by Mr. Hill. This witness stated all that was said by Mr. Hill, and described the transaction. The receipts were not offered as having any bearing on the question of mental capacity, but as evidence of what was contained in them, as showing the receipt of money from the testator by some of his children. These supposed receipts are not set out in the record, and we have no means of knowing what they were, and, so far as the record discloses, were mere unsigned copies or corrected receipts, intended by the testator to take the place of others already executed, which he thought were defective. What the contents of the receipts, or any of them, were, the record does not disclose. No error in this ruling is shown.

Counsel also insist that there was no evidence tending to show undue influence, and therefore it was improper for the trial court to give certain instructions which were given on behalf of the complainants on this issue in the case. We do not think it can be said there was no evidence bearing upon this issue. Besides, plaintiffs in error themselves asked and the court gave instructions on their behalf on the issue as to undue influence. Plaintiffs in error are therefore in no position to complain of the action of the court in this regard. *Greene v. Greene*, 145 Ill. 272, 33 N. E. 941.

Other criticisms are made upon the instructions given for complainants, but, after a careful examination of them, we find them to be substantially correct. The decree of the circuit court will be affirmed. Decree affirmed.

(158 Ill. 226)

TUCKER v. SHAW.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

WITNESS—MENTAL COMPETENCY—RECORD AS NOTICE.

1. The fact that a witness has been judicially declared to be of feeble mind, and not capable of transacting business, does not render his testimony inadmissible, where the nature and extent of his mental impairment are not shown, and the testimony of other witnesses shows that, at the time of his testifying, he had an intelligent appreciation of his responsibility as a witness, and a fair recollection and understanding of the matters about which he testified.

2. The effect of the record of a deed as constructive notice is not impaired by the destruction of the record by fire. *Franklin Sav. Bank v. Taylor*, 23 N. E. 397, 131 Ill. 376, followed.

Appeal from circuit court, Wayne county; S. Z. Landes, Judge.

Ejectment by Oliver Tucker against Thomas Shaw. Defendant obtained judgment. Plaintiff appeals. Affirmed.

H. Tompkins and Geo. M. Norris, for appellant. R. P. Hanna, for appellee.

CARTER, J. This was an action of ejectment, by Oliver Tucker against Thomas Shaw, for the recovery of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28, township 1 S., range 9 E. of the third P. M., in Wayne county. The land is what is generally denominated "swamp lands," and both parties claim title through Wayne county as a common source. The cause was tried by the court, without a jury, who found the defendant not guilty, and rendered judgment accordingly, from which judgment the plaintiff took this appeal.

It is admitted that the records of the county were destroyed by fire November 30, 1886. Appellant claims to have paramount title to the land in question by virtue of a deed from Wayne county to Illinois Southeastern Railroad Company, dated October 13, 1868, properly describing this tract, with other lands, and reciting that it conveyed about 45,000 acres of swamp land as a consideration for the building of the company's railroad through said county, and, by mesne conveyances, to the appellant. This deed to the railroad company was recorded June 15, 1871. Appellant claims that the railroad company took possession May 1, 1870, of the lands conveyed, and that the taxes on the land in dispute have been paid by appellant for 14 consecutive years prior to the commencement of the action. Appellee claims title by mesne conveyances through S. J. R. Wilson, who, it is claimed, obtained a deed as for swamp lands for the whole S. W. $\frac{1}{4}$ of section 28 from Wayne coun-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ty, by J. W. Barnhill, county clerk, in the spring of 1865, and by possession adverse to appellant for more than 20 years prior to the commencement of this suit. Appellant denies that Wilson ever obtained a deed from the county for the land, and denies also that the evidence sufficiently establishes such adverse possession in appellee and his grantor, and for the length of time as required by the statute to constitute a bar to the action.

The deposition of S. J. R. Wilson was taken by defendant, and the substance of his testimony was that one Vincent Shelton had made improvements on the land, by way of building a dwelling, and fencing and clearing about 15 acres, as early as 1859; that Shelton lived on the land until in February, 1865, when he (Wilson) bought from Shelton the improvements and his pre-emption claim, and thereupon took possession of the land,—that is, the said S. W. $\frac{1}{4}$ of section 28; that either during the same month, or in March following, he bought the land from the county as swamp land, and obtained a deed therefor from the county clerk, and filed it immediately for record with the recorder of deeds of Wayne county; that he never called for or obtained the deed thereafter, and did not know what became of it, but supposed it was destroyed by fire on November 30, 1866, when the records of the county were all burned up. It was admitted on the trial that the county records were so destroyed at that time, and it appeared from the evidence that no such deed or record thereof could be found. Wilson also testified that he was mustered out of the army December 29, 1864, and that he remembered that the purchase of the improvements and land was made in February or March following; that R. P. Hanna acted as his attorney in proving up the pre-emption and obtaining his deed for the land from the county clerk; that he continued in possession of the land, by cutting and selling timber from it, until 1877, when he sold to others, and had paid taxes four or five years, and afterwards heard that the railroad company was paying taxes on it; had paid before he could see the collector, but did not know that any one but himself claimed to own or be in possession; that he did not think the county would sell the land twice. Ritter Wilson, his wife, gave testimony corroborating him as to the purchase from Shelton, cutting and selling timber from the lands, and said they had some deeds in the recorder's office at the time of the fire. Other witnesses corroborated Wilson as to possession and improvements of Shelton, and as to cutting and selling timber from the land, and other acts indicating possession in Wilson soon after 1865; and that Wilson claimed to own the land by deed from the county. J. A. Paul testified that, shortly after the war, he went to Fairfield with Wilson, and that Wilson employed R. P. Hanna as his attorney to prove up his pre-emption on the Shelton land, and that Wilson and Hanna went together into the clerk's office; that Wilson took possession

of the land, and exercised acts of ownership over it. R. P. Hanna testified that in 1865, as late as April or May, he was employed as an attorney by Wilson, to prove up pre-emption and procure a deed to 160 acres of swamp land; that Shelton had made the improvement, and Wilson had bought it. He said: "We established the improvement and the pre-emption, and S. J. R. Wilson received a deed for the 160 acres of land. Jefferson Barnhill, county clerk, executed to Wilson a deed to the land Shelton claimed an improvement on. I do not know the numbers of the land, or what Wilson did with the deed. * * * I was of the opinion that, under the swamp-land laws of 1852 and 1854, the county could not sell and convey swamp land where there was an improvement on the same, except to the owner of the improvement. Hence, I advised Wilson to establish the improvement and take Shelton's pre-emption." While this witness testified that he did not recollect that he saw the deed executed and delivered, he was satisfied one was executed and delivered, as he was anxious to have it fixed up, so as to secure the title in Wilson, and defeat a certain swamp-land mortgage then in litigation. There was other evidence tending in part to show such a deed was made, and in part to the contrary; but from the whole evidence, which we have carefully examined, we are satisfied it was sufficient on this point to justify the finding of the trial court. Appellant proved by witnesses who had examined the swamp-land entry book before it was destroyed that the only entry in that book of any conveyance of the land in question was the one to the railroad company, but other witnesses, who were attorneys, and accustomed to examine this book, and were familiar with it, testified that it was not correctly kept and was unreliable; that they had found instances where lands had been conveyed, and the fact not noted on the book.

Appellant objected to the competency of Wilson as a witness, and gave in evidence the record of the county court of Wayne county, showing that at the September term, 1890, said Wilson was found to be of feeble mind, and not capable of transacting business, and that J. R. Creighton was appointed his conservator to manage his property. There was nothing in the record to show the nature or extent of the impairment of his mental faculties, nor was there any evidence tending to show that it was of a permanent or continuing character. Besides, the court heard evidence as to the condition of his mind at the time his deposition was given, which, with the deposition itself, tended to show that he was not insane, and that his mind was not so far enfeebled that he did not have an intelligent appreciation of his responsibility as a witness, and a fair recollection and understanding of the facts and circumstances about which he testified. He was cross-examined by appellant's counsel, and nothing was elicited tending to impair the force of his testi-

mony. Under this statement of facts, we know of no rule of law by which his testimony could be excluded. The court would give it such weight as it was entitled to, and no more. 11 Am. & Eng. Enc. Law, 444; Langdon v. People, 133 Ill. 382, 24 N. E. 874. We think the preponderance of the evidence shows the execution and delivery of a deed of conveyance from the county, by the county clerk, to Wilson, in 1865, and that he filed it for record with the recorder of deeds at that time. The deed and record thereof having been destroyed, it was competent for the court to receive all such evidence as would tend to establish its execution and contents. Rev. St. c. 116, § 28; 1 Devl. Deeds, § 691; Bush v. Stanley, 122 Ill. 406, 13 N. E. 249. The proof in this case indicated clearly that the deed executed to Wilson was that authorized by law in cases of sale of swamp lands by counties, which deed shall vest in the purchaser an absolute title in fee simple to the land therein described. Laws 1854, p. 19, § 12.

Under our recording laws, all deeds conveying lands, or any interest in them, take effect "from and after the time of filing the same for record," as to subsequent purchasers without notice. Brown v. Oil Co., 97 Ill. 214. So, the deed to Wilson took effect, as to the subsequent purchasers of this land, when he left it with the recorder for record (Merrick v. Wallace, 19 Ill. 486; Nottinger v. Ware, 41 Ill. 245); and the destruction of the records by fire had no effect upon the constructive notice existing by virtue of the recording of the deed (Bank v. Taylor, 131 Ill. 376, 23 N. E. 397). The county, then, having no title to the land in dispute when the deed to the railroad company was made, in 1868, could not convey it.

We shall not add to the length of this opinion by reciting the evidence bearing on the question of adverse possession under claim of ownership for 20 years. The evidence showed that Wilson was in possession in 1868, when the county made the deed to the railroad company under which appellant claims, and that Wilson and his grantees continued such possession to such extent as the character of the land would admit of, by cutting and hauling timber therefrom, and by selling timber to others in large quantities, which was converted into rails, posts, and sawed lumber, and in various ways exercised acts of ownership over it until the commencement of this suit. The testimony shows that the land was not susceptible of much farm improvement. Appellee and his grantors exercised all the acts of ownership over it that are ordinarily exercised by the proprietors of swamp timber land. He had all the possession of the land that could well be had of land of that character. Davis v. Easley, 13 Ill. 192, 200. There was such an appropriation as to apprise the community in its vicinity that the land was in his exclusive use and possession. Morrison v. Kelly, 22 Ill. 609, 624. What acts may or may not constitute a possession are necessarily varied, and depend to some extent

upon the nature, locality, and use to which the property may be applied. The situation of the parties and a variety of circumstances have to be taken into consideration in determining the question. Eddy v. Gage, 147 Ill. 162, 35 N. E. 847. As the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title, it is not material to consider whether the conveyance to appellee is defective or not. The judgment of the circuit court will be affirmed. Judgment affirmed.

(158 Ill. 390)

ST. LOUIS, A. & T. H. R. CO. et al. v.
BELLEVILLE CITY RY. CO.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

CORPORATION—EVIDENCE—EMINENT DOMAIN—
LAND OF RAILROAD COMPANY.

1. The introduction in evidence of a corporate charter, and proof of the exercise under it of the franchises and powers thereby granted, are sufficient to establish its existence as a corporation de facto without affirmative proof that it became organized within the time allowed by law.

2. Land belonging to a railroad company, but leased by it for 99 years to a private manufacturing company, may be condemned for the use of another railroad company, since it is not used for railroad purposes.

Appeal from St. Clair county court; Edward C. Rhoads, Judge.

Petition for condemnation by the Belleville City Railway Company against the St. Louis, Alton & Terre Haute Railroad Company and the Tudor Iron Works. There was judgment of condemnation. Defendants appeal. Affirmed.

Turner & Holder and Dill & Schaefer, for appellants. G. & G. A. Koerner, for appellee.

BAILEY, J. This was a petition by the Belleville City Railway Company against the St. Louis, Alton & Terre Haute Railroad Company and the Tudor Iron Works to condemn a strip of land embracing one-half acre in the city of East St. Louis for its right of way. The petitioner claims to be a corporation organized under a private act of the general assembly, entitled "An act incorporating the Belleville City Railway Company," approved February 25, 1867. By the second section of the act the petitioner was authorized to construct, maintain, and operate a single or double track railroad, with all necessary and convenient tracks, turnouts, side tracks, and appendages in the city of Belleville, and in, over, and along such street or streets, highway, or highways, as it might elect, within the then present or future limits of the city of Belleville. By section 5 it was authorized to extend its railway to any point or points in the county of St. Clair, and was vested with power to enter upon and condemn the lands necessary for its construc-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

tion and maintenance in the manner prescribed by an act entitled "An act to amend the law condemning right of way for the purpose of internal improvement," approved June 22, 1852, and the several acts amendatory thereof; and it was authorized to exercise all the powers conferred upon railroad corporations by an act entitled "An act to provide for a general system of railroad incorporations," approved November 5, 1849. Under the provisions of this charter the petitioner is now engaged in building a line of railroad, to be operated by steam power, from Belleville City to the city of East St. Louis; and the condemnation of the land in question, as is claimed (although that fact does not appear in the petition), is for the purpose of obtaining a connection with the track of the St. Louis, Alton & Terre Haute Railroad Company. The land sought to be condemned consists of a strip across a tract of nearly five acres held by the Tudor Iron Works under a lease for a term of years from the St. Louis, Alton & Terre Haute Railroad Company, and it lies across that tract in such a way as to cut off from the residue of the tract a small piece of land, containing about half an acre. The case was tried by a jury, and evidence was adduced by the respective parties as to the value of the land proposed to be taken, and as to damages to the land not taken; and the jury, after hearing the evidence, and after visiting and inspecting the premises, returned their verdict, by which they fixed the compensation to be paid to the St. Louis, Alton & Terre Haute Railroad Company at \$1,000, and to the Tudor Iron Works at \$900, for the land taken; and by which they assessed the damages to the land not taken, to be paid to the St. Louis, Alton & Terre Haute Railroad Company, at \$500, and found that no damages should be paid to the Tudor Iron Works. Upon this verdict judgment was duly entered, and from that judgment both defendants have appealed to this court.

The point is made by both appellants that the petitioner is not shown to have sufficient legal corporate existence to authorize it to exercise the power of eminent domain. The petitioner read in evidence its charter, and then gave evidence tending to show that it was acting as a corporation, and exercising the franchises thereby granted; but it is contended that, as there was no evidence showing affirmatively that it was organized and in operation within 10 days after the constitution of 1870 took effect, it will be presumed that its charter became void by the force of the provision of that instrument, and that there is, therefore, no charter in existence by virtue of which the petitioner can claim the position of a corporation de facto. In reference to this view we are unable to concur. The rule is a familiar one that the introduction of the charter of a corporation, coupled with proof of the exercise under it of the franchises and powers thereby granted, is

sufficient to establish the existence of the corporation de facto. If the petitioner failed to become organized and go into operation by the time prescribed by the constitution, it was for the appellants to show that fact; the evidence introduced by the petitioner being sufficient to establish prima facie the existence of the corporation de facto. *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 116; *Brown v. Railway Co.*, 125 Ill. 606, 18 N. E. 283; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 600; *Ward v. Railway Co.*, 119 Ill. 291, 10 N. E. 365.

It is next contended that the petitioner should not be allowed to take the property sought to be condemned for railroad purposes, for the reason that it is already devoted to the same use. The answer to this contention is that the evidence fails to show that it is now so devoted, but it is a vacant piece of land which the defendant railroad company has no present or prospective use for. In point of fact the railroad company, by lease for 99 years, of which term 76 were unexpired at the commencement of this proceeding, has parted with all dominion over it. True, it is claimed by the officers of the company that the building of a track over it connecting it with the tracks of the Tudor Iron Works was in contemplation; but the fact remains that it is not in actual use by the railroad company for railroad purposes, but is in the absolute control of a private manufacturing corporation. Under these circumstances we think the rule sought to be invoked is not applicable. It is true that where property is already devoted to railroad purposes it could not be condemned by another railroad company for the same purpose. To authorize a petitioner to condemn, there must be a change in the use of the property, and not the mere change of ownership; but, the property sought to be condemned in this case not being devoted to railroad purposes, we see no obstacle in the way of its condemnation by the petitioner for a purpose of that character.

It is also urged that the compensation and damages awarded by the jury are inadequate and insufficient, and that a reassessment should have been awarded for that reason. As is not unusual in cases of this character, there was a wide range of estimates by the witnesses as to the value of the property sought to be condemned. Some of the witnesses placed it considerably below the compensation awarded by the jury, while others, and notably the officers of the defendants, placed it very much higher; but, when the entire evidence is considered, and taken in connection with the fact that the jury not only saw and heard the witnesses, but also visited and inspected the premises, thus obtaining means of judging of the relative weight to be given to the conflicting testimony of the witnesses with which we are not furnished, we are unable to see that the compensation awarded by the jury for the

property taken was not sufficient and adequate. Substantially the same thing may be said of the award of damages to the property not taken. Several witnesses were produced who testified that in their opinion there would be no substantial damages, while others were disposed to place their estimate of the damages at a considerable sum. There being evidence to sustain the verdict, we ought not to interfere unless we are able to see from the entire record that the jury have misconstrued the evidence, or have been actuated by passion or prejudice. It is scarcely necessary to say that nothing of that character appears in this case.

Some other points were made, which we have considered attentively, but which we do not deem of sufficient importance to require separate discussion. We find no substantial error in the record, and the judgment of the county court must therefore be affirmed. Judgment affirmed.

(157 Ill. 576)

**HIBERNIAN BANKING ASS'N v. COMMERCIAL NAT. BANK
OF CHICAGO.¹**

(Supreme Court of Illinois. Oct. 11, 1895.)

**APPEAL—JURISDICTION—FREEHOLD—QUIETING
TITLE.**

Where, in a suit to remove a cloud on title, the bill alleges title in fee in the complainant, and this is denied in the answer, a freehold is involved, within the meaning of the statute regulating appeals, although the alleged cloud is merely a mortgage. 54 Ill. App. 277, affirmed.

Appeal from appellate court, First district. Bill by the Commercial National Bank of Chicago against the Hibernian Banking Association. Complainant obtained a decree. Defendant appealed to the appellate court, which dismissed the appeal for want of jurisdiction. 54 Ill. App. 277. Defendant again appeals. Affirmed.

Wilson, Moore & McIlvaine, for appellant.
J. A. Sleeper, for appellee.

CARTER, J. This is an appeal from the judgment of the appellate court for the First district dismissing an appeal from a decree rendered by the circuit court of Cook county on a bill to remove cloud from the title to real estate. The appeal was dismissed by the appellate court on the ground that a freehold was involved, and that the appeal should have been taken directly to this court. The appellant also sued out a writ of error from this court to the circuit court, and both proceedings are now pending here. The facts are fully stated in the case pending on the writ of error between the same parties, and will not be repeated. 41 N. E. 919.

¹ Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

This court has held that in a suit to remove a cloud from the title to real estate a freehold may or may not be involved. In such cases the real contention usually concerns that which is said to create the cloud, and not the title of the party complaining, unless it is put on issue by the pleadings. *Hutchinson v. Howe*, 100 Ill. 11; *Miller v. Pence*, 115 Ill. 576, 4 N. E. 496. Where the necessary result of the judgment or the decree is that one party gains and the other loses a freehold estate, and also in cases where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate, we have held that a freehold is involved. *Ryan v. Sanford*, 133 Ill. 296, 24 N. E. 428; *Railroad Co. v. Watson*, 105 Ill. 217. In the case at bar no freehold is involved in the controversy as to the nature of the title of appellant, for it is alleged in the bill and admitted in the answer that the warranty deed to Clarke, its president, and which is alleged to constitute the cloud sought to be removed, was a mere mortgage to secure the payment of a debt to appellant; and the only question respecting the lien was whether or not it was still in existence at the time of filing the bill. But the complainant alleged in its bill that it was the owner in fee simple of the property in question, and asked the court to so decree. The defendant denied that the complainant was the owner of the title, and thus complainant's title was put directly in issue, and this was one of the controverted questions in the trial of the cause. While this court has held that on a bill to remove cloud from a title the complainant is not bound to prove title as against all the world (*Rucker v. Dookey*, 49 Ill. 377), and that an equitable title may be sufficient to support the allegation of the ownership of the fee (*Hemstreet v. Burdick*, 90 Ill. 444), still, where the complainant alleges a freehold in himself, and this is denied in the answer, and the question becomes a controverted one on the trial, it is plain a freehold is involved in the case. In *Wing v. Sherrer*, 77 Ill. 200, on a bill to remove cloud from title, it was said that: "Preliminary to any relief in any view of the case, it must be proven complainant is the owner of the real estate in controversy. By the pleadings his title is put directly in issue, and the burden of proof rests upon him to maintain it." See, also, *Ritchie v. Pease*, 114 Ill. 363, 8 N. E. 897, and *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202, to the same effect, where the appeals were taken directly from the circuit court to this court. The appellate court did not err in its judgment dismissing the appeal for lack of jurisdiction, and the judgment is affirmed. Judgment affirmed.

(187 Ill. 524)

**HIBERNIAN BANKING ASS'N v. COMMERCIAL NAT. BANK
OF CHICAGO.¹**

(Supreme Court of Illinois. Oct. 11, 1895.)

MORTGAGE—LIMITATIONS—LACHES—EXECUTION.

1. After a sheriff's sale of land, but before the period for redemption had expired, the judgment debtor conveyed the land to the purchaser, and received from him an agreement reciting the sheriff's sale, and providing that the purchaser should procure a sheriff's deed, and that a settlement should be made by appraising the land, setting off to the purchaser enough of it to satisfy his claims, with interest thereon, and any advances he might make to protect his title, and transferring the residue of the land to the judgment debtor's wife. Afterwards the purchaser obtained a sheriff's deed, and also procured a tax deed of the property, but no appraisal or division of the land was made. *Held*, that the purchaser by these conveyances merely acquired a mortgage interest in the land.

2. Rev. St. 1893, c. 83, § 18, which declares that the time of a person's absence from the state is no part of the time limited for suit against him, applies even though he has executed a warrant of attorney under which personal judgment could be rendered against him without service of process.

3. Rev. St. 1893, c. 83, § 11, which bars, after 10 years, suit to foreclose a mortgage, does not prevent such suit, even after the lapse of 10 years, so long as the right of action on the mortgage debt is not barred.

4. The fact that the maker of a note leaves the state after making it, and dies out of the state, does not cause a new cause of action to arise against his administrator on his death, but the limitation which ceased to run when he left the state begins again on his death.

5. Laches cannot be relied on as a bar to a defense unless alleged in the bill.

6. A contract whereby a grantee in a master's deed gives the former owner the right to repurchase within a certain time, at a stated price, does not convert the master's deed into a mortgage, where there is no debt which such a mortgage could secure, and the contract expressly declares that the former owner has no interest in the land except the right to repurchase.

Error to circuit court, Cook county; Thomas G. Windes, Judge.

Bill by the Commercial National Bank of Chicago against the Hibernian Banking Association. Complainant obtained a decree. Defendant brings error. Reversed.

Bill in equity to remove cloud. The defendant in error, the Commercial National Bank of Chicago, filed its bill in equity against the plaintiff in error, the Hibernian Banking Association, in the circuit court of Cook county, to remove as a cloud upon the title to a tract of land in that county a certain warranty deed entered of record, made by one Caulfield to said association. The facts alleged and proved, or admitted by the answer, are substantially as follows:

On April 20, 1875, Bernard G. Caulfield was the owner of the undivided one-half of the land in question, his wife owning the other half, and one William H. Warder claiming to own an equitable interest in it also by virtue of a contract then of record. Ber-

nard G. Caulfield, then owing about \$8,000 to plaintiff in error for principal and interest upon a promissory note executed in 1872, jointly with one Walker, made and delivered to John V. Clarke, president of the banking association, his warranty deed for said land as security for the payment of said debt. The bill alleges and the answer admits that the deed was a mere mortgage. This deed was not recorded until November 15, 1875. A power of attorney from Caulfield to confess judgment on the note was executed and delivered with the note in 1872. Before this deed was recorded, and in September, 1875, the Central National Bank recovered judgment by confession against Caulfield for \$562.04, upon which execution was issued but no sale made. A short time before the expiration of the lien of the judgment in September, 1882, the Commercial National Bank bought and had assigned to it the judgment, and thereafter, on a writ of venditioni exponas, the land was sold, and bought by the latter bank, October 23, 1882, for \$800, the amount then due on the judgment. Before the purchase of this judgment, the Commercial Bank had become a creditor of Bernard G. Caulfield to about \$5,000, and had also purchased certain tax titles on the land in question. On March 1, 1883, Bernard G. Caulfield and Laura, his wife, conveyed all their and each of their interests in the land in question, with other tracts, to said Commercial Bank, for the expressed consideration of \$23,000, and as a part of the transaction the following contract was made between the parties:

"This agreement, made this first day of March, A. D. 1883, between the Commercial National Bank of Chicago, Illinois, party of the first part, and Bernard G. Caulfield and Laura Caulfield, parties of the second part, witnesseth, that whereas, the said parties of the second part are indebted to said bank in the aggregate sum of \$23,000, bearing interest from the 1st day of January, A. D. 1883, at 6 per cent, about one-half of which amount is for taxes advanced for said Laura Caulfield, together with the sum of \$500 in cash, paid to her by said bank at the date of the execution of this agreement, and the remainder of said sum of \$23,000 being a personal debt of the said Bernard G. Caulfield to the said bank; and whereas, for the purpose of securing the payment of said aggregate sum, the said parties of the second part conveyed to the said bank, by their deed of this day, all their right, title, and interest in and to blocks 1, 2, 3, and 4 in Warder's subdivision of outlot 32 of the School Trustee's subdivision in section 16, in township 38 north, range 14 east of the third principal meridian, in Cook county, Illinois, the undivided two-thirds of which lands are the separate property of the said Laura Caulfield; and whereas, on the 23d day of October, 1882, the said bank purchased the said lands on execution sale against said Bernard G. Caulfield, and holds the sheriff's certificate of said purchase, on

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

which, after the expiration of 15 months after the date of said sale, it will be entitled to a sheriff's deed in pursuance thereof, if no redemption shall be made; and which is only a sale and purchase of the interest of said Bernard G. Caulfield in said lands: Now, it is agreed that, as soon as the said period of redemption shall expire on said execution sale, the said bank shall, if no creditor of said Bernard G. Caulfield shall redeem, procure a sheriff's deed of the said interest of Bernard G. Caulfield upon its said certificate, and then a settlement shall be had upon the following basis: To the said sum of \$23,000, and interest thereon at six per cent. from January 1st, 1893, to date of settlement, shall be added any further advances the said bank may make hereafter to protect the title to said property by payment of taxes and assessments or otherwise, with interest at six per cent. from the date of advance to the date of settlement, and the aggregate shall be paid thus: The lots in said blocks shall be appraised at their fair cash value by two appraisers, one to be chosen by each of the parties hereto, and, if they cannot agree upon cash value, then they shall select a third party, and the appraisal of a majority of the three shall be binding upon the parties hereto. All such appraisers shall live either in the city of Chicago or in the towns of Hyde Park or Lake, and own unincumbered real estate in some portion of said territory; and before making such appraisal such appraisers shall each take an oath to make a true and fair appraisement of said lots according to their best judgment and ability, after going upon such lots, and personally examining the same. After the appraisal of said lots in the manner aforesaid, the two said appraisers, if they can agree,—if they cannot agree, then a majority of the three,—are hereby authorized to lay off or assign to the said bank so much of the said lands as may be equal in value to the whole amount due said bank as aforesaid; but in doing so they shall divide the land fairly, and in such manner as to protect the rights and interests of all concerned. If such appraised value of all of said lots shall not equal the amount so due said bank, then the said Bernard G. Caulfield will pay the residue on demand to said bank; but if, after the assignment of so many of said lots as shall, at their said appraised value, equal the whole amount due said bank as aforesaid, there shall remain any other lots, all such remaining lots said bank shall forthwith convey by quitclaim deed to the said Laura Caulfield, or to such persons as she may direct. Should the said execution sale be redeemed from, the rights of the parties hereto as respects each other shall remain unchanged, but it shall in such contingency become a matter of mutual agreement whether an immediate division of said lots shall be made, or further steps taken to perfect the title to said lots before a division: provided, however, an appraisal and division in the manner above set forth will not be delayed beyond the first day of January, 1895.

Should any of the said lots in the meantime, before any appraisal and division, be condemned for any public uses, the moneys that may be awarded shall be received by said bank to apply upon its said debt: provided, that said bank shall not accept any sum for damages occasioned by the taking of any of said property for public uses unless the amount thereof shall be satisfactory to the parties of the second part, or unless such damages are ascertained by a jury and competent court. Given under our hands and seals this 19th day of March, A. D. 1893." Signed in duplicate.

No appraisement was made under this contract as contemplated by it, and there was no setting apart to the bank, or conveyance to Laura Caulfield, of any of the lots, as mentioned in the contract. The land not having been redeemed, the Commercial Bank obtained a sheriff's deed for the undivided interest of Bernard G. Caulfield on January 24, 1884. Long prior, and in April, 1874, said Warder, who claimed an equitable interest in the land by virtue of his contract aforesaid, filed his bill in equity against the Caulfields and one Waller to enforce his interests, and afterwards, in January, 1887, the Commercial Bank intervened in Warder's suit, and filed its bill in the nature of a supplemental and cross bill against the Caulfields, Warder, and others, and afterwards, in January, 1890, obtained a decree that the title was vested in said bank, subject to the equitable rights of Warder, with the right of redemption in Laura Caulfield alone. The decree in that case further found, in pursuance of the allegations of the cross bill, that there was then due to said Commercial Bank from the Caulfields on the indebtedness mentioned in the agreement of March 1, 1883, and for moneys since advanced for taxes and otherwise to protect the title to the property, with interest thereon, \$27,000, and that Laura Caulfield, in redemption of the premises under the deed and agreement of March 1, 1883, should pay the bank that amount and interest in 90 days. Said Laura did not, however, pay the \$27,000, and under a subsequent order of the court the land was sold by the master and purchased by the Commercial Bank, June 12, 1890, for \$27,873.50. No one redeemed, and the master conveyed the land to the bank. Before this last sale, and on December 20, 1887, Bernard G. Caulfield died intestate in Deadwood, Dak., where he had resided from some time in 1878 until his death; the suit having been revived against his heirs before the final decree. Warder released to said Laura all of his interest in the lands in controversy before such decree. Neither the Hibernian Banking Association nor Clarke was made a party to that suit. June 10, 1891, the Commercial Bank and Laura Caulfield entered into a written agreement respecting said land, in which it was recited that whereas, in a bill lately pending in the circuit court, in which William H. Warder was complainant and said Laura Caulfield

and others were defendants, and a bill in the nature of a supplemental and cross bill of the Commercial National Bank, it was decreed that the lands in controversy in that suit (and hereinafter described) should be sold to pay the amount found due to the bank; also reciting the sale of said premises under said decree for the sum of \$27,873.50, and that the time for redemption is about to expire; and, in consideration of the premises the Commercial National Bank agreed with Laura Caulfield that, if she should fail to redeem said lands within the time allowed by law, and in case the bank shall become possessed of the title to said lands in fee simple by virtue of said decree and master's sale, the bank will, after it becomes the owner of the title, sell and convey such lands to said Laura Caulfield, subject to any adverse claim to or lien upon them, upon the payment to it, within one calendar month thereafter, of the following sums: \$35,000 and interest thereon at 8 per cent. from June 12, 1891, all moneys that the bank might pay out for taxes, assessments, and other charges, and also other items therein specifically set forth; and time was made the essence of said contract; and, on the failure of Laura Caulfield to make payments as therein provided, that said contract should no longer be binding, but should be null and void. In such case, however, the bank would manage, hold, and from time to time, as it might have opportunity, and be reasonably able, sell and dispose of the property at its own judgment and discretion, and upon such terms and conditions and for such prices as it might seem proper, and deduct and reserve to itself all of the proceeds of such sales necessary to pay the various sums before recited, with 8 per cent. interest; and, if any surplus remained in its hands after paying the said sums therein provided, that it would pay and deliver the remainder and surplus to said Laura Caulfield. In consideration thereof the said Laura Caulfield released and quitclaimed all right, title, and interest which she had in and to said lands, save as she had acquired them by said agreement, which it was agreed was a right to repurchase only, and that the agreement did not continue any interest in her whatever, but that her failure to redeem was to be an absolute abandonment and forfeiture of all her right, title, and interest in said land of every nature and kind.

The master reported the evidence and his conclusions to the court, recommending that a decree be entered dismissing the bill for want of equity. But the trial court entered a decree sustaining complainant's bill, and decreed the relief prayed. The Hibernian Banking Association sued out this writ of error to reverse that decree. It also appealed to the appellate court, where the appeal was dismissed for want of jurisdiction on the ground that a freehold was involved.

Wilson, Moore & McIlvaine, for plaintiff in error. J. A. Sleeper, for defendant in error.

CARTER, J. (after stating the facts). In *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 41 N. H. 918, on appeal from the appellate court, we held that a freehold was involved in this controversy, and affirmed the judgment of that court, dismissing the appeal thereto taken. It is unnecessary to repeat the reasons here for that decision, but the conclusion is that the writ of error was properly issued to bring the record of the circuit court directly to this court for review on the ground that, the complainant's claim of the title in fee being put in issue by the pleadings and controverted on the trial, a freehold is involved in the case.

If the Commercial National Bank became the owner in fee of the lands in question by the sheriff's deed of January 24, 1884, the lien of the Hibernian Banking Association, created by Caulfield's deed to Clarke, absolute in form, but in fact given as a mere security for a debt due the banking association, was cut off, and became a cloud on the title of the Commercial Bank. If, however, as insisted by plaintiff in error, the sheriff's deed, taken in connection with the agreement between the Caulfields and the Commercial Bank, and the deed of the Caulfields to said bank, of March 1, 1883, must be construed to be a mortgage, then it is plain that the lien of plaintiff in error created by the deed to Clarke was not lost, and the title of defendant in error was not clouded thereby. It appears to us very clear that the Commercial Bank did not obtain absolute title to the property by the sheriff's deed. On March 1, 1883,—about five months after the sheriff's sale, and about ten months before obtaining the sheriff's deed,—the Commercial Bank took from the Caulfields a deed for the property, and at the same time entered into an agreement reciting that the grantors owed the grantee \$23,000, with interest at 6 per cent., to be computed from January 1, 1883, and had by said deed conveyed the property, one-third of which belonged to Mr. Caulfield and two-thirds to Mrs. Caulfield, to the bank to secure said indebtedness. The agreement also recited the sheriff's sale of October 23, 1882, of Mr. Caulfield's interest in the property, and that, if no redemption should be made within 15 months, the bank would be entitled to a sheriff's deed. It then provided that the bank should procure the sheriff's deed, and a settlement should be made by allowing the bank the \$23,000 and interest, and all advances made to protect the title, with interest thereon, and the aggregate should be paid by having the lots into which the property was divided appraised, the appraisers to be appointed by the parties, and a sufficient number of such lots set off to the bank at their appraised value to pay its debt, and the remaining lots should be conveyed to Mrs. Caulfield, or to such person as she should direct. If the lots at their appraised value should not be sufficient to pay the debt, then Mr. Caulfield was to pay the deficiency. It was proved that the amount paid by the bank for the property at

the sheriff's sale entered into and formed a part of the indebtedness of \$23,000 mentioned in the agreement. No appraisal of the lots, or conveyance of any of them to Mrs. Caulfield, was ever made. While it appears that the Commercial Bank took possession, after obtaining the sheriff's deed, paid taxes, and purchased tax titles, the effect of the evidence is that it never treated its title as adverse to Caulfield. On the contrary, by its accounts, and by its intervention in the Warder suit, where by cross bill it sought to foreclose its lien on the property as against the Caulfields, and to have the amount of its debt as it then stood adjudicated, and the property sold to pay it, and by its purchase of the property at the master's sale under the decree in the Warder suit, which decree preserved the equity of redemption of Mrs. Caulfield in the whole property, the bank in effect treated its various titles as mere security for its demands, and in no wise as an absolute title in fee hostile to Caulfield. The fact that the equity of redemption was preserved to Mrs. Caulfield, and not to Mr. Caulfield, did not change the effect of the instruments from that of a mortgage to that of a title in fee simple. They still constituted a mere lien to secure the indebtedness specified. The bank could not treat the sheriff's deed as a complete divestiture of Mr. Caulfield's title, and still hold against him as an indebtedness the amount it had paid for his interests at the sheriff's sale, with interest thereon, and as being secured by its lien on the land acquired by the deed and agreement of March 1, 1883. We are inclined to agree with the conclusions of the master in his report to the court below that the legal effect of these transactions was that the Commercial Bank redeemed the interest of Mr. Caulfield in said lands from the sheriff's sale for him, and charged against him the moneys paid in making such redemption, and that the certificate and sheriff's deed became merged in the general claim of the bank, and, together with the agreement and deed of March 1, 1883, constituted its lien on the property to secure the repayment of its debt. We cannot see how the moneys paid by the Commercial Bank for Caulfield's interest at the sheriff's sale could be treated, as the same was treated, as an indebtedness of his to the bank, without treating it as money advanced by the bank for him to redeem from the judgment sale. Had the Caulfields paid the whole demand of the bank after the bank received the sheriff's deed, without carrying out the provisions respecting the appraisal and division of the property (and that provision was never carried out), such payment would have amounted to a redemption of the whole property, and equity would have compelled a restoration of the title as it stood before the sale. It may be that, for laches of the banking association, or other equitable causes, the lien of the plaintiff in error under its deed to Clarke became postponed to that of the Commercial National Bank, but we are of the opinion that it was not cut off by

the sheriff's deed operating as vesting title in fee simple absolute in said bank.

It is also contended by defendant in error that plaintiff in error has lost its mortgage lien by reason of its failure to foreclose the same within 10 years after the right of action accrued, under the eleventh section of the limitation act, which provides that: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action, or right to make such a sale accrues." Rev. St. 1893, c. 83. And it is said that, inasmuch as Caulfield's interest in the land had passed to defendant in error, if not by the sheriff's deed, then by the master's sale and deed under the decree in the Warder suit, and inasmuch as plaintiff in error had from Caulfield a power of attorney to confess judgment, and inasmuch as the court retained jurisdiction to foreclose the mortgage of plaintiff in error, notwithstanding Caulfield's departure from the state, no reason remains why the exception contained in section 18 should apply, or the time of his absence from the state be deducted; and that, plaintiff in error having commenced no action to foreclose or enforce its lien within 10 years after the right to do so accrued, when it might have done so at any time, it is now barred from such right by said eleventh section; and that it has become immaterial to inquire whether the indebtedness was barred or not. We have seen that by the agreement and deed of March 1, 1883, those instruments and the sheriff's deed became in the hands of defendant in error a mere mortgage; and while it was adjudged in the Warder suit, when the decree was rendered in 1890, that Caulfield's title had vested in defendant in error under the sheriff's deed, such decree could not affect the lien of plaintiff in error, it not being a party to the suit. But, aside from this line of argument, it has been repeatedly decided by this court that the mortgage is a mere incident of the debt, and is barred when the debt is barred, and not before; and that the rule remains the same since the enactment of section 11. *Schifferstein v. Allison*, 123 Ill. 602, 15 N. E. 275; *Von Campe v. City of Chicago*, 140 Ill. 361, 29 N. E. 892, and cases there cited. It follows, therefore, that if Caulfield's indebtedness to plaintiff in error, secured by the mortgage, was not barred, the mortgage was not barred. While it may be true that the reason for the exception created by section 18 of the statute does not exist in full force when applied to this case, inasmuch as the absence of Caulfield from the state did not prevent foreclosure of the mortgage, or the obtaining of a personal judgment against him by confession prior to his death, still, as the case comes within the express language of the exception, we cannot assume the province of the legislature, and say that the exception ought not to apply,

and that, although having departed from the state after the cause of action accrued, and residing in another state, he, having substituted certain supposed equivalents for his presence in this state, should be treated as present, within the meaning of the statute. *Bedell v. Janney*, 4 Gilman, 193; *Hazell v. Shelby*, 11 Ill. 9; *Stevenson v. Westfall*, 18 Ill. 209; *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117; *Bassett v. Bassett*, 55 Barb. 505; *Rockwood v. Whiting*, 118 Mass. 337; *Ang. Lim.* (6th Ed.) §§ 194, 485-487; *Wood, Lim. Act.* § 252; *Sacla v. De Graaf*, 1 Cow. 356; *McIver v. Ragan*, 2 Wheat. 25; *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537; *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539; *Pryor v. Ryburn*, 16 Ark. 671; *Rowell v. Patterson*, 76 Me. 196; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499; *Dozier v. Ellis*, 28 Miss. 730. The principle contended for by defendant in error does not come within the doctrine that an exception may be ingrafted upon the statute by what is called "invincible necessity"; such, for instance, as civil war.

It is, however, contended that the debt was barred by the statutes of Dakota, which provided: First, that actions in such cases must be brought before the expiration of the time limited; second, actions might be brought against the administrator within one year after his appointment, and not thereafter; and, third, that administration was had and closed in Dakota on the estate of Caulfield, and the claim of plaintiff in error was not presented or allowed within the time limited, and that by the statutes of that then territory all claims not so represented and allowed within the time so limited were forever barred; and it is said that the debt, being so barred in Dakota, is, by virtue of the twentieth section of our limitation act, barred here. We cannot regard either position relied upon as tenable. This suit was begun in March, 1892, and it is undisputed that Caulfield removed to and became a permanent resident of Dakota in October, 1878, and died there in December, 1887. Interest was paid on the note which the mortgage was given to secure to July 30, 1874, and neither the debt nor the right to foreclose would, under the eleventh and sixteenth sections of our statute, be barred until 10 years after such payment of interest. But, after the cause of action accrued in this state, Caulfield departed from this state, and took up his residence in Dakota, and by section 18, and the construction given to it in *Wooley v. Yarnell*, 142 Ill. 442, 32 N. E. 891, the time of his absence cannot be counted as any part of the time limited for the commencement of the action; and section 20 does not apply, for the reason that the cause of action accrued in this state before his departure, and it could not be said to have arisen in Dakota. The six-year statute of Dakota therefore had no application. Deducting the period of his absence,

10 years had not elapsed when the suit was begun, and the bar of the statute of this state had not become complete.

It is said, however, that when Caulfield died his absence terminated, and that a cause of action then arose in Dakota against his administrator, and, no action having been there commenced, or claim filed against his estate, that, by virtue of the statute of Dakota, the debt was barred there, and under said twentieth section is barred here. It is true that only his absence up to the time of his death can be deducted, for when he died the section of the statute providing for deducting such absence ceased to apply, except as to the time of such absence preceding his death, and the time began to run again under the 10-year section as before his departure from the state, unless prevented by the nineteenth section of our statute, as contended by plaintiff in error. His death did not prevent the running of the statute, unless the statute itself so provided. *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833. The nineteenth section is as follows: "If the person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration." And it is urged by counsel for plaintiff in error that the statute did not commence to run again at all after the death of Caulfield. They say: "As no administration has been taken out in this state, the running of the statute never began after the death of Caulfield. The foreign administration is immaterial on this point. Our statute relates to administration in this state, and this only would be equivalent to the return of the non-resident or his representative. See *Gallup v. Gallup*, 11 Metc. (Mass.) 445. Whether counsel are correct in this contention, or whether it is a sufficient answer to invoke the familiar rule that one disability cannot be tacked to another to prevent the running of the statute, it is not necessary here to decide, for, as before said, if it be conceded that the statute began to run again at Caulfield's death, the 10-year bar did not become complete. Nor can it be said that because of his death any cause of action arose against his administrators which did not before exist against him. One provision of the Dakota statute was that, in case of death before the bar had become complete, a year should be allowed in which to bring suit after the administrator was appointed. This was a mere enlargement of the time limited by other provisions because of the death of the debtor. But in this case the six years allowed by the Dakota statute in which to bring suit had expired before his death, and it could not be said that a cause of action arose on his death against his administrator, when the same cause of action was barred against him before his death.

The question is not simply whether or not the debt was barred by the laws of Dakota, but also whether or not the cause of action arose in Dakota. Under the construction given to the statute in *Wooley v. Yarnell*, supra, it is plain that the cause of action did not arise in Dakota, but in Illinois. In that case it was said that the doctrine was the same as announced in *Hyman v. Bayne*, 83 Ill. 256, and *Hyman v. McVeigh*, unreported, but mentioned in 87 Ill. 708, and that what was said in the latter case "must be limited and confined to the facts presented by the record then before the court, that neither the maker nor the payee of the note at the time the cause of action arose resided in Illinois."

No sufficient showing is made by the bill or proof to establish title in defendant in error by virtue of the certain tax sales and deeds mentioned in the record, and we do not understand counsel to contend very seriously that complainant's title is so derived, or that it held possession or paid taxes under such title as color of title made in good faith for seven successive years. As we understand the record, the disbursements for the purchase of these tax titles were charged up against the Caulfields as a part of their indebtedness to defendant in error; one of its witnesses testifying that these disbursements were included in the \$23,000 mentioned in the agreement of March 1, 1883. And it will also be noticed that under the agreement all disbursements for taxes, with interest thereon, were to be added to the \$23,000. None of these moneys having been repaid as contemplated by the agreement, they were carried forward, and set up as a charge against the Caulfields and the property in the *Warder* suit, and the property was under the decree in that case sold to reimburse defendant in error for all its outlays. No argument is needed to show that such payment of taxes for seven successive years could not, under the statute, coupled with the possession and title held by defendant in error, ripen into an independent title.

Counsel have at some length discussed the question of laches, and it is insisted on the part of defendant in error that, even if the mortgage lien is not barred by the statute of limitations, it is barred by the laches of plaintiff in error. Whether or not, under proper allegations of the bill, the doctrine of laches could be invoked as applicable to such a state of facts shown by the proof, we shall not consider, for there is no allegation in the bill under which any such relief could be granted, even if otherwise proper. *Zeigler v. Hughes*, 53 Ill. 288. When the defendant in error received the master's deed to the land in controversy under the decree and sale in the *Warder* suit, it became the owner of the title to the property, and the contract of June 10, 1891, whereby Mrs. Caulfield was given the right to repurchase within a certain time at a certain price, did not convert the master's deed into a mortgage. There was no indebtedness of Mrs. Caulfield to be secured by any

such mortgage, and by the contract she expressly released and quitclaimed to the bank, in case of her failure to redeem under the decree, any and all interest which she might have in the property, and it was expressly provided that the contract should not continue any such interest in her, but all such interest should be forever forfeited and abandoned, and that she did not take or acquire any interest in the land by the contract except the right to repurchase. We cannot, upon the face of these papers, hold that by this contract and deed the bank became the mere mortgagee of this land. We are of the opinion that defendant in error showed sufficient title in itself to sustain the bill had it been able to support its allegations respecting the mortgage lien of plaintiff in error. Failing, however, in the latter respect, it was not entitled to the decree which it secured. The decree of the circuit court will be reversed, and the cause remanded. Reversed and remanded.

(158 Ill. 243)

RICH et al. v. TRUSTEES OF SCHOOLS OF TOWNSHIP 11.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

SCHOOLS AND SCHOOL DISTRICTS—ELECTION—EVIDENCE—REFORMATION OF DEED.

1. The holding of a school election for the purpose of selecting a schoolhouse site, and its result, may be proved by parol evidence, in the absence of any specific objection thereto.

2. The fact that land was conveyed to a school district by one of its directors cannot, after the sale has been consummated and possession taken, constitute any defense to a suit by the school trustees to correct a mistake in the deed.

Appeal from circuit court, Union county; J. P. Roberts, Judge.

Bill by the trustees of schools of township 11 S., range 2 W., against William C. Rich, Sr., Ed. Samson, William R. Abernathie, and others. Complainants obtained a decree. Defendants Rich and Samson appeal. Affirmed.

Taylor Dodd and W. C. Moreland, for appellants. Karraker & Lingle, for appellees.

BAKER, J. This is a bill in equity that was exhibited in the Union circuit court by the trustees of schools of township 11 S., range 2 W., against William C. Rich, Sr., and Ed. Samson, the two appellants, and William R. Abernathie and others, for the purpose of correcting mistakes in two deeds, and also removing clouds from their title. It appears, from the allegations of the bill, the evidence at the hearing, and the findings in the decree, that on February 21, 1879, said Abernathie and wife and one Harreld and wife made a deed to H. R. Buckingham for two acres of land. It also appears that on February 24, 1870, said Buckingham and wife made a deed for the same premises to the said trustees of schools, who were complainants below and

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

are appellees here. It is also a part of the case that in each of said deeds a like mistake was made by the scrivener, the description of the land in one being copied from that found in the other. The description of the land conveyed, as it was written in the deeds by the draftsman, was as follows: "The following described real estate, situated and being between Jonesboro and Murphysboro road and the right of way of the Cairo & St. Louis Railroad, bounded as follows, to wit: Commencing at a point on said Jonesboro and Murphysboro road on the north line of the town plat of the town of Alto Pass, thence north along said Jonesboro and Murphysboro road (420) four hundred and twenty feet, thence west to the right of way of said Cairo & St. Louis Railroad, thence south along the said right of way to the north line of said town plat, and thence east on said line to the place of beginning, containing two (2) acres, it being a part of the northwest quarter of the southeast quarter of section (10) ten, township 11 south, of range (2) two west, situated in the county of Union, in the state of Illinois." The mistake, as is shown by the pleadings and proofs, was in inserting in the deeds the words "southeast quarter," instead of the words "southwest quarter."

The court, in its decree, corrected the mistake as prayed for, and it is claimed by appellants that the court in so doing committed error. The claim is that the deeds were illegal and void, and did not pass title to appellees. The claim of invalidity, as we understand counsel, is based on two grounds: First that the board of directors of school district No. 5, in said township 11, located the schoolhouse site on the land in question without complying with the requirements of the first clause of the last paragraph of section 48 of chapter 122 of the Revised Statutes of 1874; and, second, that Abernathie was a school director of the district, and sold the land for a school site to the other directors, and, such site being illegal and void, he attempted to convey indirectly, by means of a deed from himself to Buckingham, and a deed from Buckingham to the trustees of schools. Said clause of section 48, which is retained as a part of section 31 of article 5 of the present school law, provides that it shall not be lawful for a board of directors to purchase or locate a schoolhouse site, or to purchase, build, or move a schoolhouse, or to levy a tax to extend schools beyond nine months, without a vote of the people, at an election called and conducted as required in section 42 of the act. We find, upon looking into the evidence in the record, that H. R. Buckingham testifies that before the making of these deeds there had been an election in school district No. 5, for the purpose of selecting a school site for a school building, and there were two sites to be chosen from,—one at or near where W. E. Harreld's dwelling now stands, and the other where the schoolhouse stands,—and that the plat of ground where the schoolhouse now stands was

chosen. It is true that objection was made to this testimony, but it was only a general objection. If a specific objection had been made that there was record or better evidence of the election and its result, and no evidence that notice was given as required by law, it is probable that the record and better and additional evidence would have been produced. As it was, it was not error to overrule the objection, and consider the evidence in the decision of the case. We have, in numerous cases, announced the rule that a general objection will not avail in cases where, if the objections were made specific, they were removable, or might be obviated. And the presumption in this collateral proceeding must be that the school officers performed their duty, and gave the required notice of the election. Our conclusion from this record is that a lawful election was held, and that the provisions of the statute were complied with in locating the schoolhouse site.

In regard to the fact that Abernathie was a school director of the district at the time he sold the land to the district for a school site, we may say that the evidence seems to preclude any conclusion that there was any fraud in fact in the transaction, and our attention has been called to no provision of the statute in force in 1879, and we know of none, that made it unlawful for a director to sell a site for a schoolhouse to the district in which he was such director. There was a provision in force (section 77) that no district school officer should be interested in the sale, proceeds, or profits of any book, apparatus, or furniture used or to be used in any schoolhouse with which he was connected, but that provision did not apply to the case of the sale of this site for a schoolhouse. But even if the statute in terms declared that such a sale was unlawful, yet the results insisted upon by appellants would not follow, at least in the absence of an express provision of the statute that the deed made to or for the benefit of the district should be null and void. Such a provision would be, and somewhat similar provisions are, intended for the benefit and protection of the school district, and its inhabitants and taxpayers. It might well be, in such a case, that, while the contract was still executory, it could not be enforced. But where, as in this case, it has been fully executed, and the purchase money has been paid to the director, and he has made and delivered a deed, and given possession, and the school district has expended several thousand dollars in building a schoolhouse and improving the property, no court of equity would permit the school director or his grantees or creditors to wrest the schoolhouse site and the schoolhouse from the school district, or from the township trustees who hold the property in trust for the district, upon any such plea as that the original contract for the purchase of the schoolhouse site was unlawful. When, on May 13, 1879, Abernathie made a deed to John Crisp of land which included within its bounds

the school site in question, the school directors were already in the actual possession of the premises, and had commenced the construction of a brick schoolhouse thereon; and the deed from Abernathie to Buckingham had been duly filed for record nearly three months before. Of course, either of these facts was sufficient to prevent the deed of May 13th from becoming effective to pass the title to said land; and so the deed that appellant Rich afterwards got from Crisp is a mere cloud on the title of appellees. It needs no argument to show that the judgment that Rich recovered in 1882 against Abernathie never became a lien on the land. Even the deed from Buckingham to the trustees of schools had been recorded for over two years prior to the date of that judgment. There is no ground for claiming that said judgment, and the execution issued thereon, and the levy on this land as the property of Abernathie, and the subsequent sale and sheriff's deed to the two appellants now before this court, passed the title to said land. That alleged title is also a mere cloud upon the title held by appellees. As we understand the record, the north line of the corporate limits of the village of Alto Pass is a wholly different line from the north line of the town plat of the town of Alto Pass, and there is no sufficient ground for claiming that the two deeds by which the title to the school site was conveyed from Abernathie to the trustees of schools covered lots 6 and 7 of block "B" of Abernathie's addition; and it follows that the Abernathie trust deed, and the deed made by the trustee to appellants, are here entirely immaterial.

We find no error in the decree correcting the mistakes in appellees' chain of title, and removing clouds therefrom. It may be doubted that it was really necessary to correct the mistakes in the deeds. The false description could be rejected as mere surplusage, and still leave a good, sufficient, and certain description of the land conveyed. *Stevens v. Walt*, 112 Ill. 544; *Bowen v. Allen*, 113 Ill. 53; *Holston v. Needles*, 115 Ill. 461, 5 N. E. 530. The decree is affirmed. Affirmed.

(158 Ill. 442)

CITY OF ALTON v. MIDDLETON'S HEIRS
et al.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS
—SEWER ORDINANCE.

1. Under Rev. St. c. 24, art. 9, § 19, as amended in 1887, which provided that a local improvement, to be paid for by special assessment, might be described in the ordinance ordering it "either by setting forth the same in the ordinance itself, or by reference to maps, plats, plans, profiles, or specifications thereof on file in the office of the proper clerk," a description in an ordinance cannot be made good by reference to plans in the office of the village engineer.

2. An ordinance providing for a sewer to

connect two other sewers, one of which is 9 or 10 feet high, without specifying the depth of the proposed sewer, does not sufficiently describe the proposed improvement, since the connection with the other sewer might be made at any part of its height.

Appeal from Madison county court; William H. Krome, Judge.

Petition by the city of Alton for confirmation of a special assessment. Objections were filed by the heirs of Thomas Middleton and others. The objections were sustained, and the city appeals. Affirmed.

John F. McGinnis and Levi Davis, Jr., for appellant. Alex. W. Hope, for appellees.

BAKER, J. This is a proceeding commenced by the city of Alton for the construction of a pipe sewer in a portion of Second street, in said city, by special assessment. The appellees herein, who are objecting property owners, filed in the county court various objections to the confirmation of the assessment roll; and some of these objections were sustained by the court, and the petition for judgment of confirmation was dismissed as to the property of appellees. From the order and judgment of the court in that behalf made and rendered, this appeal is prosecuted by the city.

Among the objections made to the assessment are the following: (1) "The ordinance does not specify the nature, character, locality, and description of the improvement, as required by the statute, and for that reason is illegal and contrary to law." (2) "The ordinance does not designate a certain point of beginning or ending, nor a certain course for said sewer on said Second street from beginning to end, and for that reason is illegal and void."

Sections 1 and 2 of the ordinance providing for said improvement are substantially as follows:

"Section 1. That the following local improvement be, and the same is hereby, ordered to be made in the manner hereinafter specified, to wit: That there be constructed in Second street, from the connection with the Plaza street sewer, in Plaza street, to a connection with the Ridge street sewer, in Ridge street, an underground pipe sewer, commencing at a connection with the Plaza street sewer, on Plaza street, running thence east in the center line of Second street (or as near the center as practical, taking into consideration where the water mains are now laid so as not to interfere in any way with them), to a connection with the sewer on Alton street, thence east in the said center line of Second street, or as near the center as practical, to a connection with the Ridge street sewer. Said main sewer laid in the center of said Second street shall be of the best stone glazed pipe (and known as vitrified stone pipe), the size of which shall be eighteen inches (18 in.) in diameter. All joints shall be uniform and cemented and

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

filled with the best Louisville cement mortar. All connections with cross sewers now laid shall be carefully cemented. There shall be inlets to said sewer at the following places, to wit," etc.

"Sec. 2. That said sewer and inlets shall be laid at a proper depth and grade to give proper fall and drainage, and in addition to the foregoing all of said improvement shall be done under the supervision of the city engineer and the committee on sewers of the city of Alton, in accordance with the plans, maps, profiles, and specifications to be furnished by the city engineer, and now on file in his office."

Section 19 of article 9 of the city and village act, as amended June 17, 1887 (Laws 1887, pp. 107, 108), provides: "Whenever such local improvements are to be made wholly or in part by special assessment, the said council, in cities, or board of trustees in villages, shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement, either by setting forth the same in the ordinance itself or by reference to maps, plats, plans, profiles, or specifications thereof on file in the office of the proper clerk, or both."

The first question that arises is whether or not an ordinance which describes the proposed improvement by a reference to plans, maps, profiles, and specifications on file in the office of the city engineer is in compliance with the requirement of the statute that permits the description to be made by reference to maps, plats, plans, profiles, or specifications on file in the office of "the proper clerk." It has been said that a substantial compliance with the statute is all that is required in an ordinance of this kind. *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212. But a legal and sufficient ordinance is the foundation of a valid special assessment; and hence, if the ordinance does not contain a specification or description of the nature, character, and locality of the improvement, either within its own four corners, or by reference to maps, plats, plans, profiles, or specifications on file in the office designated by the statute, the court will have no authority to confirm the assessment. *Levy v. City of Chicago*, 113 Ill. 650; *Ogden v. Town of Lake View*, 121 Ill. 422, 13 N. E. 159. In *City of Kankakee v. Potter*, supra, this court said: "As the ordinance affords the only authority for what is proposed to be done by the municipality, there necessarily can be no authoritative way of making that known except through the ordinance, as required by the statute. It is the basis of all contracts for the construction of the improvement," etc. And in *Lake Shore & M. S. R. Co. v. City of Chicago*, 56 Ill. 454, in speaking of an ordinance providing for a public improvement by special assessment, it was said: "If the exercise of this great power over the rights

of private property can be upheld at all, it can only be done by showing a close, straightforward, honest compliance with every substantial requirement of the law prescribed for its government." Prior to the amendment of 1887, permitting the nature, character, locality, and description of the improvement to be set forth in the ordinances by reference to the maps, plats, plans, profiles, or specifications thereof on file in the office of the proper clerk, the original section 19 required the improvement to be described in the ordinance itself; and a case then arose where the ordinance, instead of itself describing the nature, character, and locality of the improvement, referred for the details thereof to the maps, plans, profiles, and specifications of the same made by a "civil engineer, and now on file in the office of the city clerk of said city"; and this court held that the provision of the statute as it then stood was mandatory; that the fact of a reference to the specifications as being in the city clerk's office could not alter the case; that that was not a source of information which the law recognized in these matters; that the statute, whether for wise or unwise purposes, had required this information to be inserted in the ordinance itself; that that had not been done or attempted to be done; and that, therefore, the ordinance was fatally defective. *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471. And so, by parity of reasoning, the provision in section 19, as amended in 1887, requiring the specifications of the improvement, if not given in the ordinance itself, to be set forth by reference to maps, plats, plans, profiles, or specifications on file "in the office of the proper clerk," must be regarded as mandatory. If the legislature had intended that a reference to plans, etc., on file in the office of the city engineer should be a sufficient specification of the nature, character, locality, and description of the improvement, then the statute would have mentioned such official, instead of designating the clerk only. The statute does not recognize plans, etc., on file in the office of the city engineer as a source of information in these matters, but, whether for wise or unwise purposes, requires such information to be obtained either from the ordinance itself or from maps, plats, plans, profiles, or specifications on file in the office of "the proper clerk." In *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824, and *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034, where the amendment of 1887 came under consideration, the references in the ordinances were to the plans, profiles, and specifications on file in the office of the clerk of the village, and not to those on file in the office of the engineer.

Counsel for appellant concede that "if, in section 19, the word 'proper' had not been used in connection with 'clerk,' it would have been understood that the city or village

clerk was meant"; but they claim that the use of the word "proper" gives to the word "clerk" a wider meaning than "city or village clerk," and that the city engineer must be regarded as a "proper" clerk, because the making of plans, etc., is his appropriate work, and therefore his office is the appropriate place for filing them. We cannot agree with this construction. It gives to the common council the power to designate the appropriate place for the filing of the plans, etc., regardless of the requirements of the statute upon the subject. Said amended section 19 starts out by providing that, "whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities, or board of trustees in villages, shall pass an ordinance to that effect, specifying therein the nature," etc., "of such improvement," etc. The subsequent word "proper," which qualifies the word "clerk," refers back to the words "council in cities, or board of trustees in villages," and was intended to designate the clerk proper for, or appropriate to, the character of the municipality passing the ordinance. If the ordinance is passed by a city, the proper clerk is the city clerk; and, if the ordinance is passed by a village, the proper clerk is the village clerk. It is appropriate, and operates as a reasonable safeguard against mistakes and frauds, that the plans, etc., should be filed in the office of the clerk of the city or village. The nature, character, locality, and description of the improvement must be specified in the ordinance, even though it is done by reference made therein to the plans, specifications, etc.; and therefore the plans, specifications, etc., being made by reference virtually a part of the ordinance, are very properly placed on file in the office where the ordinance is required to be kept. Section 18 of article 3 of the city and village act provides that "all ordinances passed by the city council shall, before they take effect, be deposited in the office of the city clerk"; section 4 of article 5 provides that "all ordinances and the date of publication thereof may be proven by the certificate of the clerk, under the seal of the corporation"; and sections 10 and 11 of article 6 direct that "the clerk shall keep the corporate seal, * * * and all papers belonging to the city or village, * * * [and] shall record, in a book to be kept for that purpose, all ordinances passed by the city council or board of trustees," etc. From the statute, and for the reasons herein stated, we think that an ordinance for a local improvement to be made wholly or in part by special assessment cannot, by reference to maps, plats, plans, profiles, or specifications on file in the office of the city engineer, set forth or show the nature, character, locality, or description of such improvement; and it follows that, in deciding this case, the specifications, plans, and profiles which were on file in the office of the city engineer

of the city of Alton must be excluded from consideration.

It is urged that, without reference to the plans and specifications, the ordinance in itself sufficiently specifies the nature, character, locality, and description of the improvement. Section 1 of said ordinance provides "that there be constructed in Second street, from the connection with the Plasa street sewer, in Plasa street, to a connection with the Ridge street sewer in Ridge street, an underground pipe sewer, commencing at a connection with the Plasa street sewer, on Plasa street, running thence east in the center line of Second street, * * * to a connection with the sewer on Alton street, thence east in the said center line of Second street, * * * to a connection with the Ridge street sewer. Said main sewer laid in the center of said Second street shall be of * * * pipe, * * * the size of which shall be eighteen inches (18 in.) in diameter." And section 2 provides that "said sewer * * * shall be laid at a proper depth and grade to give proper fall and drainage." The location of the proposed sewer on the horizontal plane of the city of Alton is sufficiently indicated by the references to the center of Second street, Plasa street, Alton street, and Ridge street, found in section 1, but we are unable to find in that, or in the subsequent section, or elsewhere in the ordinance, any data from which to determine the location of said sewer on the vertical plane of the city. If the claim be conceded that the Plasa street sewer (the place of beginning) and the Ridge street sewer (the place of ending) are well-known monuments, and that the depths of said two sewers are readily ascertainable, by making the proper measurements, yet this does not seem to help the matter of the location of the Second street sewer on the vertical plane. The proposed new sewer is to be "an underground pipe sewer, commencing at a connection with the Plasa street sewer"; but no information is anywhere given as to whether this connection is to be with the side, the top, or the bottom of the Plasa street sewer, nor is it anywhere designated how deep under ground the new pipe sewer is to be laid. It appears from the evidence in the record that the so-called "Plasa Street Sewer" is an underground stone culvert or arched drain, that was originally constructed for the passage of a natural stream of water, and that it is used as a drain and sewer for the accumulated waters of quite an extensive valley. Its dimensions do not definitely appear in the record, but the evidence indicates that it is at least 9 or 10 feet high, from top to bottom. We are not aware that there is anything in the nature of things that would prevent an underground pipe drain from being connected with this Plasa street culvert, either at its bottom, or within a foot of its top, or at any intermediate distance between top and bottom; and so it necessarily follows that the starting point of the Second street sewer on the vertical plane of the city is not located by the ordinance;

and it not being indicated, and it being nowhere stated in the ordinance how deep below the surface of Second street the new pipe sewer is to be placed, either at Plaza street, or at Ridge street, or at any other point along the line of the improvement, it follows that it is wholly uncertain and incapable of ascertainment whether one foot of excavation, or ten feet of excavation, or some other depth of excavation, is required to be made in constructing the contemplated underground pipe sewer. There is nothing in the ordinance to fix the vertical plane of the improvement at the connection with the Ridge street sewer. It is true that section 2 of the ordinance provides "that said sewer shall be laid at a proper depth and grade to give proper fall and drainage." But what is "a proper depth" or "proper grade" or "proper fall and drainage" are matters about which different engineers and different contractors might well have differing opinions. As we understand the record, the proposed sewer is to extend from the Plaza street sewer to the Ridge street sewer, a distance of nine blocks; but whether the grade is to be such as to conduct all the waters for that whole distance to the Plaza street sewer, or all to the Ridge street sewer, or some portion or for given distances to each, does not appear. In other words, not only is no grade fixed by the ordinance for all or any portion of the sewer, but it is not even indicated therein in which direction, east or west, the drainage is to be.

One object of the requirement of the statute that the ordinance shall specify the nature, character, locality, and description of the improvement is that those charged with the duty of making an estimate of the cost of such improvement may make an intelligent, just, and fair estimate thereof; and another object is that, since such ordinance is the basis for all contracts for the construction of the improvement, it should contain, either upon its face or by reference to the specifications, etc., on file in the office designated by the statute, the data necessary for estimating its cost, so as to enable bidders to make intelligent bids for the work, and thereby invite a healthy competition among contractors. *Levy v. City of Chicago*, 113 Ill. 650; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *City of Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Barber v. City of Chicago*, 152 Ill. 37, 33 N. E. 253; *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034. It seems to be supposed by appellant that the case last cited (*Steele v. Village of River Forest*) is an authority in point to sustain the sufficiency of the ordinance here in question. The ordinance there involved was quite different from the one now before us. It provided that the drain should be constructed in the center of Thatcher avenue, "from the manhole now constructed on the line of the Madison street pipe drain," and that "the bottom of said drain, at its junction

with the pipe drain on Madison street, shall be eight and $\frac{9}{10}$ feet above the village datum, and the grade of such drain shall rise uniformly from that point two-tenths of one foot in every hundred feet of its length." The point there decided was that where, from the entire ordinance, the starting point of a drain can be fixed, and its depth at that place ascertained, the ordinance will not be void for uncertainty, and we there used this language, which seems quite appropriate here: "It is contended that the ordinance is defective because there is no starting point for the sewer, and hence nothing to show how deep or shallow it should be. There is much force in the position of counsel on this point. It is plain, if the starting point of the drain is not given, its depth could not be determined, and no intelligent bid could be made for the work."

To get back to our case: It needs no expert testimony to show that, with simply this ordinance for the construction of a sewer in Second street before them, neither the committee of three aldermen appointed to make an estimate of the cost of that sewer, nor persons desirous of bidding for the performance of the work, could make an intelligent estimate of such cost. The ordinance leaves it a mere matter for surmise and conjecture whether the excavation required for laying the pipe sewer is of the depth of one foot or ten feet or fifteen feet from the surface of the street, at each and all of the different points along the entire line of the proposed improvement; and the expert testimony corroborates the conclusion plainly deducible by any one from the ordinance itself. Thomas Long, who has been a civil engineer for 25 years, testifies that nobody could make an intelligent bid, and tell what the depth of the sewer was at the point of beginning or ending, or at any place along its line. E. E. Rutledge, a civil engineer, introduced as a witness by appellant, testifies that the depth would have to be gotten outside of the ordinance, in some way, in order to enable one to make an intelligent estimate of how much work it would take to put in the pipe. R. D. Nixon, who is a plumber, and is also engaged in the business of building sewers, testifies that, from the ordinance, profile, and specifications, he could not have made an intelligent bid on the work. And A. F. Foster, the contractor who did the work under a contract with the city, testifies that he could not tell from the ordinance how much he had to dig, and that he could not make a proper bid on that ordinance alone, without the depth being given to him.

For the reasons stated herein, we are unable to arrive at the conclusion that the county court committed error when it rendered the judgment and entered the order from which this appeal is taken. There is no occasion for considering the other objections made to the rendition of judgment of confirmation. The judgment and order below are affirmed. Affirmed.

(142 Ind. 528)

STEPHENS et al. v. KAGA.

(Supreme Court of Indiana. Nov. 8, 1895.)

PETITION FOR RECEIVER—JURISDICTION—EJECTMENT—RECEIVER FOR GROWING CROPS—REMEDY AT LAW.

1. Where the judge was absent on the day set for the hearing of a petition for the appointment of a receiver, he has jurisdiction to hear it on the following day, without further notice to defendants.

2. Rev. St. 1894, § 1076 (Rev. St. 1881, § 1064), provides for a new trial in ejectment on the applicant giving an undertaking that he will pay all costs and damages which shall be recovered against him in the action. *Held*, that if plaintiff in ejectment is entitled to the crops sown by defendant after the first trial, which terminated in plaintiff's favor, plaintiff has his remedy on the bond for defendant's conversion thereof, and therefore a receiver to take charge of said crops should not be appointed.

Appeal from circuit court, Harrison county; W. T. Zenor, Judge.

Ejectment by John Kaga against John Stephens and others. From an order appointing a receiver to take charge of the crops, defendants appeal. Reversed.

Cook & Ridley, for appellants. N. R. & H. M. Peckinpaugh and H. C. Hays, for appellee.

HACKNEY, J. This appeal is from an order by the judge of the circuit court, entered in vacation, appointing a receiver to take charge of, harvest, and sell the crops growing upon certain lands in the possession of the appellants. The petition upon which such appointment was made alleged that the appellee, the petitioner, had theretofore become the purchaser of, and had received a deed for, said lands, upon a sale under a decree of foreclosure of mortgage; that he had instituted and prosecuted to judgment an action against the appellants in ejectment; that the appellants had, in said ejectment action, obtained a new trial, as a matter of right; that said crops had been sown and had matured after the appellee had become the purchaser of said lands; that the appellants were insolvent, and had no defense to said ejectment action, but were delaying a trial thereof to enable them to gather and convert to their own use said crops, which they were then about to do, to the appellee's damage in the sum of \$300. On the 13th day of June, 1895, the appellants were personally served with notice that the appellee would, "on the 20th day of June, 1895, at 10 o'clock a. m., or as soon thereafter as counsel "could be heard," apply to the judges of said court, in chambers, for the appointment of a receiver, the notice being accompanied by a copy of the petition. On the 21st day of June, 1895, the application not having been heard on the 20th, because of the absence of the judge, the said petition was presented to and heard by said judge, over the written objection of the appellants that no jurisdiction existed to entertain such petition on that day without further notice to the appellants. On such hear-

ing the facts alleged in the petition were established by affidavits and by the proceedings and papers in said ejectment action, which included a bond executed by appellants, with surety, for the payment of all costs and damages to be recovered against them in said action.

The appellants claim error in the rulings of the lower court in two respects: (1) In assuming jurisdiction to appoint a receiver, upon a day subsequent to the day of which notice was given of the application, in vacation, for such appointment; and (2) that it appeared inferentially from the petition, and directly from the evidence, that the appellee had an adequate remedy at law for any losses to be sustained in the conversion of crops, upon the bond of appellants so executed in the ejectment suit.

1. Notice in proceedings of the character here involved cannot be given, with reference to the time of the proposed hearing, with that certainty that is possible with reference to stated terms of court, prescribed by law, and continuing through definite periods, and which litigants are presumed to attend, and to observe the course of proceeding throughout such periods. Here the return time of the notice must involve uncertainty, and admit of reasonable variation, to meet the varying demands upon the time of the judge who is to hear the application. Of course, there should be no rule enabling a litigant to give notice to his adversary of a hearing at a particular time, and then to so delay his application and to so present it as to require the adversary to stand guard constantly at the place of hearing, to avoid an advantage being taken of his interests. The correct rule, we think, is that which requires the moving party to proceed within such reasonable time after the time fixed in the notice, and within the convenience of the judge, as will enable his adversary to be present and be heard without the unreasonable burden of attending through protracted periods of delays and uncertainty. If he so delays in presenting his application as to cast such burden upon his adversary, he should be deemed to have waived his right to proceed under the notice given, and to have assumed the duty of giving another notice. Here the delay was but for a day, and that from no fault of the moving party, but because of the engagements of the judge which prevented him from being present at the time specified in the notice. This delay was not unreasonable, and did not deprive the appellants of an opportunity to be present, nor require of them a burdensome attention to the movements of the appellee in seeking the judge and presenting the application. In this conclusion we have left out of view the fact that, on the 20th day of June, telegrams passed between appellee's counsel and the judge, from which it was learned that the proceeding would be heard the next day, and that counsel who represented the appellants in the ejectment action, to which said application was auxiliary, were

shows the telegrams, and thereby received a knowledge of the course of the proceeding, which enabled them, on the next day, to be present, as they were, and to have been heard with every preparation made for a hearing on the day previous. We conclude, therefore, that the appellee acted upon his notice with reasonable promptness, and with the utmost fairness to the appellants and their legitimate interests.

2. The appointment of a receiver to gather and sell the crops if appellants succeed in the ejectment action will deprive them of their property rights in such crops, and will substitute therefor a claim against the receivership for such balance of the proceeds of sale as may remain after the payment of the expenses of harvesting and marketing, and the costs of receivership, including receiver's fees, attorney's fees, court costs, etc. Such right should not be so embarrassed, and its value diminished, unless it may be made to appear clearly that, if the appellee shall ultimately succeed in the principal action, he will, should a receiver be denied, suffer the loss of a like property right in such crops, with no prompt, efficient, and adequate remedy for the recovery of the value to him of such crops. On the one hand, it is claimed that though appellants may be insolvent, and may intend to convert the crops, the bond which they gave in the principal case takes the place of their solvency, and makes good any claim which the appellee may be entitled to enforce against them for the conversion of such crops. On the other side, it is urged that the bond cannot be held to cover liabilities arising subsequent to its execution, and not involved in the issue at the time of its execution, and that the appellee is not required to suffer the conversion, but is entitled to the specific property rather than to a recovery of damages. In the absence of the bond, if appellants were insolvent, we think there could be no reasonable doubt but that a receiver should have been appointed if the pleadings were so framed as to present the question of damages. Rev. St. 1894, § 1236 (Rev. St. 1881, § 1222); *Bitting v. Ten Eyck*, 85 Ind. 357; *Galloway v. Campbell* (this term) 41 N. E. 597. It is asserted in behalf of the appellants, and is conceded for the appellee, that equity will not permit the appointment of a receiver in any case where the party applying has a clear and effective legal remedy for such damages as he alleges he will sustain by the failure to appoint such receiver. Of this proposition there can be no doubt. It then remains to determine whether such remedy existed in favor of the appellee. Under the former rule (2 *Gavin & H.* p. 252, § 601), a new trial, as a matter of right, was allowed to the unsuccessful party in an ejectment suit, "upon the payment of all costs, and of the damages, if the court so" directed. By the present rule (Rev. St. 1894, § 1076; Rev. St. 1881, § 1064), the new trial is given "on the applicant's giving an undertaking, with surety to be approved by the court as clerk,

that he will pay all costs and damages which shall be recovered against him in the action." It is manifest that under the old rule, where the damages to the successful party have materially increased upon the second trial, injustice would result from the payment only of the costs of the first trial, and, if the court so held, the damages first assessed. By the present rule, no such injustice is possible. The increased costs and damages are secured by the bond, and cannot be affected by the insolvency of the party. We may properly presume that the rule was changed for the purpose of attaining this end. If, therefore, the conversion of the crops by the appellants between the first and the second trials had the effect to increase the appellee's recoverable damages, if successful on the second trial, such damages were secured by the bond, without regard to the solvency of the appellants. If, however, such conversion could not admit of a recovery by the appellee in case of the successful termination of his action, it would seem to follow, as a necessary conclusion, that a receiver should not be allowed. The appointment was sought, as we have shown, as a remedy auxiliary to the main action, and upon the theory of a right of recovery in such action for the conversion of the crops. If no such recovery were possible, the remedy would be improper, and, if possible, the bond would give security against the insolvency of the appellants. Counsel for appellee suggest that their client would not be required to stand by and suffer the sale of his crops, but is entitled to such remedy as will secure to him the identical property rather than a recovery in damages. The theory of his application for the appointment was, not to secure to him or to his adversaries the identical property, but to cause the conversion of the property into cash, to be held to await the final disposition of the principal cause. A court of equity, regarding sacredly the rights of both parties, would have the same duty to protect the party in possession of the crops in his right to the identical property as to protect the party out of possession in such rights.

We conclude, therefore, that even if, in the absence of a bond, a receiver could properly have been appointed, no such right existed in this case. The order of the judge appointing such receiver is reversed, with instructions to deny the appellee's petition.

(143 Ind. 467)

STEVENS et al. v. REYNOLDS.¹

(Supreme Court of Indiana. Nov. 8, 1895.)

COTENANCY—PURCHASE OF OUTSTANDING TITLE—JUDGMENT—COLLATERAL ATTACK.

1. On petition of B.'s administrator, an undivided two-thirds of land belonging to the estate was conveyed to complainant and S., to procure funds with which to pay debts of the estate, and on the same day P.'s widow conveyed the other undivided one-third to the same grantees. Thereafter S. and his wife conveyed an undivided one-half of the tract to E., who subse-

¹ Rehearing denied.

quently reconveyed such portion to S.'s wife. *Held*, that by the latter conveyance the wife of S. became a tenant in common with complainant.

2. The general rule that a tenant in common may not acquire an outstanding title as against his cotenant rests upon considerations of mutual trust, and does not, therefore, apply where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times.

3. Though tenants in common acquired their interests in such a manner as to create a fiduciary relation between them, the purchase of an outstanding claim by one is not void as to his cotenant, nor does such interest vest, by operation of law, in the latter; his right to share in the benefits of the purchase being dependent on his having elected, within a reasonable time, to bear his portion of the expense necessarily incurred in the acquisition of the claim.

4. The fact that a judgment rendered without other notice than by publication in a newspaper may, under Rev. St. 1894, § 609 (Rev. St. 1881, § 600), be opened at any time within five years, does not impair its conclusive force so long as it remains unopened.

5. Where a notice of publication is procured on affidavit that, after diligent inquiry, defendant's residence could not be found,—as provided by Rev. St. 1894, § 320 (Rev. St. 1881, § 318),—a judgment rendered on such notice cannot be collaterally attacked, though the affidavit was defective or false.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Action by James M. Reynolds against Margaret A. Stevens and others for partition and to quiet title. From a judgment for plaintiff, defendants appeal. Reversed.

G. C. Moore, for appellants. Stimson, Stimson & Higgins, for appellee.

MCCABE, J. The appellee sued the appellants in the superior court of Vigo county for partition of and to quiet title to certain real estate in the complaint described as situate in said county, consisting of an 80-acre tract of land. The venue was changed to the Clay circuit court. The superior court sustained a demurrer to the first and overruled a demurrer to the second paragraph of the complaint, and the circuit court sustained a demurrer to the second paragraph of the separate answer of appellant Margaret A. Stevens. A special finding of the facts having been made, on proper request the court stated its conclusions of law thereon, overruled appellants' motion for a new trial, and rendered judgment quieting appellee's title in and to one undivided half of said real estate, after the court had defaulted the defendant Crawford, and ordered partition. There was no error in sustaining the demurrer to the second paragraph of the separate answer of appellant Margaret A. Stevens, because it was nothing more than a special denial of certain specific facts stated in the complaint, without which the plaintiff could not recover; her first paragraph of answer being a general denial of all the facts stated in the complaint. There was no need of two denials of the same facts. The same question arises on the exception to the conclusions of law as arose on the demurrer to the complaint. Therefore we will consider only the conclusions of law upon the facts found.

The special findings on conclusions of law are as follows: "On August 26, 1876, Sarah McGrew acquired title to the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, sec. 17, 18 N., R. 7 W., in Vigo county, Indiana. On February 25, 1880, said lands were sold as the property of Sarah McGrew to Josiah Locke by the auditor and treasurer of said county, at private sale, for \$70.27, as the taxes, penalty, and costs of the years 1876, 1877, 1878, and 1879, all previous taxes on said lands having been paid. On January 29, 1881, in pursuance of a decree of the circuit court of said county of Vigo against said Sarah McGrew, the sheriff of said county executed a deed conveying said lands to James M. Parkes, who died intestate, seised of the same, leaving his wife, Mary J. Parkes, surviving as his widow. On July 11, 1882, tax deeds for said lands were executed by the auditor of said county to Josiah Locke in pursuance of said tax sale. On September 18, 1882, the circuit court of Putnam county, Indiana, in which the settlement of the estate of said James M. Parkes was pending, caused its commissioner, on the petition of the administrator of said estate, to execute a deed for the undivided two-thirds of said lands to the plaintiff, James M. Reynolds, and the defendant John L. Stevens, to procure funds to pay the debts of the said estate, which was insolvent; and on the same day said widow, Mary J. Parkes, executed a deed conveying to said James M. Reynolds and John L. Stevens the other undivided one-third of said lands; which deeds were duly acknowledged and recorded in the office of the recorder of said county of Vigo, April 9, 1884, by which conveyances said James M. Reynolds and John L. Stevens became each the owner of an undivided half of said lands as tenants in common. On March 29, 1884, said John L. Stevens and the defendant Margaret A. Stevens, his wife, conveyed their undivided half of said lands to their son-in-law, Frank H. Eaton, by warranty deed, which was acknowledged and recorded in the office of said recorder April 9, 1884. On April 21, 1884, said Eaton and his wife, by their warranty deed, conveyed said undivided half of said lands to said Margaret A. Stevens, which deed was acknowledged and recorded in the office of said recorder December 10, 1885, by which deed the said Margaret A. Stevens became the owner of an undivided half interest in said lands as a tenant in common with said James M. Reynolds. On July 3, 1884, said Josiah Locke filed his complaint in the superior court of said county of Vigo to quiet his title by virtue of said tax deed, making parties defendant thereto said James M. Reynolds, John L. Stevens, Frank H. Eaton, and others, not including said Margaret A. Stevens. On March 2, 1885, said Locke and his wife conveyed said lands by quitclaim deed to Stoughton J. Fletcher and Francis M. Churchman, which deed was acknowledged and recorded in the office of said recorder April 11, 1885. On June 4, 1885, on suggestion of the death of said Josiah Locke, said Fletcher and Churchman were substituted

as plaintiffs in said action; and the defendants, not having appeared, were defaulted, and thereupon a judgment was rendered against them quieting the title of said Fletcher and Churchman. The said James M. Reynolds, John L. Stevens, and Frank H. Eaton were notified of the pendency of said action to quiet title as nonresident defendants, by publication, and not otherwise; and said James M. Reynolds had no actual knowledge or notice of such proceedings until after the rendition of said judgment, nor until in the spring of 1891. Notice by publication was ordered on motion and affidavit that after diligent inquiry the residence of said defendants was unknown, but without any proof of nonresidence. At the time of said proceedings said James M. Reynolds resided in Tippecanoe county, Indiana, John L. Stevens resided in Putnam county, Indiana, and Frank H. Eaton resided in Clay county, Indiana, and their respective places of residence were shown in their title deeds, then on record, as aforesaid. Said Reynolds has ever since continued to reside in said Tippecanoe county, in the city of Lafayette. Said John L. Stevens and Margaret A. Stevens removed to Terre Haute, in Vigo county, in December, 1884, and resided there three years. At the time James M. Reynolds and John L. Stevens acquired title to said lands as aforesaid, September 18, 1882, John R. Brown was in possession of the same as the tenant of said James M. Parkes for a cash rental of \$75 a year, which had been paid for the year 1882. Said Brown attorned to said Reynolds and Stevens, and agreed to pay \$75 rent for the year 1883, and \$100 a year thereafter. Said Reynolds thereupon left the management of said common property to said cotenant, John L. Stevens, who was also in custody of their title deeds; and said Reynolds, knowing nothing of said tax incumbrance, and relying upon his cotenant to collect and apply the rents for their mutual interest, learned nothing of said proceedings to quiet title, nor of said conveyance to Frank H. Eaton and Margaret A. Stevens, nor of the facts hereinafter stated, until 1891. In November, 1886, said Margaret A. Stevens, without the knowledge of said James M. Reynolds, for the purpose of securing to herself the title to the entire interest in said lands, and designing thereby to oust her said cotenant, by John E. Stevens, her son and agent, entered into negotiations with said Fletcher and Churchman for the redemption of said lands from the incumbrance of said tax sales, tax deeds, and decree quieting title. Said agent falsely represented himself as the agent of said James M. Reynolds and other defendants in said proceeding to quiet title, and induced said Fletcher and Churchman to consent to such redemption in consideration of the payment of \$304, the estimated sum of the taxes, interest, penalty, and costs then accrued upon said tax sales, and including nothing additional thereto except taxes paid on said land by said Fletcher and Churchman subsequent to

said decree. Said lands were at the time worth \$5,000, and were held by said Fletcher and Churchman at \$8,000; but they were induced to permit such redemption upon the representation that the notice to said defendants was insufficient; that the affidavit upon which the court ordered publication was false, in that diligent inquiry was not made to learn their place of residence. Upon said consideration and inducement said Fletcher and Churchman, on March 3, 1887, by the direction of said John E. Stevens, executed their release and quitclaim for the whole of said lands to said Margaret A. Stevens, which deed was recorded in the office of said recorder March 8, 1887, since which date the said Margaret A. Stevens has claimed the exclusive ownership of said lands. On July 14, 1890, said Margaret A. Stevens and said John L. Stevens, her husband, executed their mortgage upon the entirety of said lands to the defendant Charles M. Crawford, to secure the payment of three promissory notes for \$933.33 each, executed by said Margaret A. Stevens, December 16, 1887, to Benjamin B. Briggs, payable in one, two, and three years after date, in consideration of which mortgage the payment of said notes was extended to one, two, and three years from June 16, 1890. Said John L. Stevens collected all the rents of said lands up to May 21, 1884, and appropriated the same to his own use. On May 21, 1884, when his undivided half interest was conveyed to said Margaret, John L. Stevens collected rents of said John R. Brown, previous to the commencement of this action, the sum of \$265 in cash and the sum of \$—— in labor in mining coal, as hereinafter stated, and \$—— in labor in improving said land; and Margaret A. Stevens collected rents of said Brown to amount of \$25. In March, 1889, said John R. Brown ceased to occupy said lands, and during the remainder of said year the land was not rented. During the year 1890 a portion of said lands was rented by said John L. Stevens to Robert Munkhouse for \$60, of which \$10.35 was paid to said John L. in cash, and the remainder in labor in betterment of the land. During the years 1891 and 1892 the land was not rented. The land was rented by said John L. Stevens for the year 1893 to James Downs, who is still in possession, and has paid the full rent in advance to said John L. Stevens,—\$10 in cash, and some cows for the remainder. The rental value of the land up to March, 1889, was \$100 a year, since which time, by reason of deterioration of the premises, it has only been worth a rental of \$75 a year. In addition to the sums paid to John L. Stevens as aforesaid, said John R. Brown, in 1888, paid to Margaret A. Stevens in person, \$25 cash on rent of said land. In September, 1888, said John L. Stevens entered upon said lands, opened a coal mine, and operated the same until the latter part of February, 1889, during which time he mined and marketed 6,000 tons of coal, which was at that time worth a royalty of five cents per ton, in the mining of which coal John R. Brown

worked out a part of his said rents as aforesaid. On February 5, 1891, said James M. Reynolds paid \$39 taxes on said lands, and in the spring of 1891 first learned by a stranger of the said tax sales, and of said conveyances to said Margaret A. Stevens, and wrote for information to said John L. Stevens, which letter was intercepted by said Margaret A. Stevens with the intent to keep concealed from said Reynolds the facts in the case, and thereby to prevent him from taking any steps towards securing a share in the possession, rents, and profits of said lands. Said Margaret A. Stevens has paid taxes on said lands as follows: April 18, 1887, \$7.22; November 7, 1887, \$6.23; April 18, 1892, \$22.40; November 7, 1892, \$18.89. Said James M. Reynolds has received no part of the rents and profits of said lands.

"Upon the foregoing facts the court states the following conclusions of law: (1) That the plaintiff, James M. Reynolds, and the defendant Margaret A. Stevens are equal tenants in common of said lands, and the plaintiff is entitled to partition of said land, and an accounting. (2) That in such accounting the defendant should be allowed, on account of redemption of said lands, \$152, and \$10 attorney fee, with 6 per cent. interest on said sums from March 3, 1887. She should also be allowed one-half of the taxes paid by her on said land, with 6 per cent. interest on each item from time of payment. (3) That defendant should be charged with one-half of rent collected by her, or one-half of \$25, and interest on same at 6 per cent. from 1888, and with one-half of \$39, taxes paid by plaintiff in 1891, and interest on same at 6 per cent. from February 5, 1891. That the balance due on said accounting in favor of defendant is \$215.24, and that said defendant should have judgment for the same against plaintiff, and that the same be a charge upon the interest of plaintiff in said land."

These conclusions are not as definite and specific as could be desired. There are several propositions sought to be maintained by the appellee as law, either of which, if sound, and applicable to the facts found, would support and justify the conclusions of law stated. It is first contended that the purchase by Margaret A. Stevens from Fletcher and Churchman inured to the equal benefit of the appellee, Reynolds, subject only to his liability to contribute his pro rata share of the expense of making the purchase or redemption as it is called; because it is claimed appellant Margaret A. Stevens and appellee, James M. Reynolds, were tenants in common in their ownership of the land. And, in the second place, it is contended that the decree quieting the title in Fletcher and Churchman is not binding and conclusive on the defendants therein, among whom was the appellee, Reynolds, because the decree was rendered without other notice than publication, and five years had not elapsed from the rendition of the decree until the deed was made by Fletcher and Churchman to Mrs. Stevens, the decree having been rendered June 4, 1885, and the deed made March 3, 1887.

Consequently, it is contended that the defendants in that decree had yet legal standing in court, and where not concluded by reason of the fact that they could have had the decree set aside, and a new trial granted as of right, and have made as full a defense as if they had appeared and answered before default, under sections 600, 610, Burns' Rev. St. 1894 (sections 600, 601, Rev. St. 1881), providing for opening a default taken without other notice than by publication in a newspaper. And it is thirdly contended that the purchase by appellant Mrs. Stevens from Fletcher and Churchman was, in legal effect, a redemption from them and their tax title. We have no means of knowing which one of these propositions it was that the trial court adopted as the basis for its conclusions of law, or that it did not adopt them all. There can be no question that the conveyance by the commissioner of the Putnam circuit court to appellee, James M. Reynolds, and John L. Stevens, to make assets to pay the debts of the estate of James M. Parkes, deceased, and his widow at the same time conveying her undivided third of said real estate to the same grantees, made said Reynolds and John L. Stevens tenants in common in the land. The conveyance afterwards by said Stevens and his wife to their son-in-law, Eaton, and the conveyance by said Eaton and his wife to appellant Margaret A. Stevens, made her a tenant in common with appellee, James M. Reynolds, in the land. Rev. St. 1894, §§ 3341, 3342 (Rev. St. 1881, §§ 2922, 2923); *Mining Co. v. Beckleheimer*, 102 Ind. 85, 1 N. E. 202; *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996.

The principal contention of appellee's counsel in support of the conclusions of law is best expressed in the language borrowed by this court and cited by appellee's counsel in *McPheeters v. Wright*, 124 Ind., at page 572, 24 N. E. 734, from 11 Am. & Eng. Enc. Law, p. 1062: "The general rule is that a cotenant's purchase of an outstanding title inures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments, or by acts of law; and in some states this rule seems to apply however the tenancy may have been formed, whatever the relation the cotenants with each other may have been, and from whatever source the outstanding title may have been acquired. * * * But in other states this rule applies only when tenants stand in some confidential relation in regard to one another's interest, so that it would be inequitable to permit one to acquire a title solely for his own benefit, in which case he will be treated as a trustee for the share of his cotenants, but persons acquiring unconnected interests in the same subject are not, it appears, bound to any greater protection of another's interests than would be required of strangers." The general rule seems to be that one tenant in common cannot deny the validity of the common source of title while he himself claims or remains in possession thereunder; nor will he

be permitted, while remaining in such possession, to defend by proving a paramount title or interest in some third person. Where the title or interest of such tenants accrues under the same instrument or act of the parties or of the law, neither can deny the validity of the instrument or act, and each is bound to preserve the estate in good faith for the equal benefit of all. *Millis v. Roof*, 121 Ind. 360, 23 N. E. 255; *Elston v. Piggott*, 94 Ind. 14. Neither of such tenants can acquire an outstanding lien or title, and thereby oust his cotenants, or do any other act to prejudice or injuriously affect their interest in the common property, because the relation between them is one of trust and confidence. The only right such a purchase or acquirement confers on the cotenant securing it is to compel contribution to the expense thereof. *Elston v. Piggott*, supra; *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. 287; *Carpenter v. Carpenter*, 131 N. Y. 101, 29 N. E. 1013; *Ramberg v. Wahlstrom*, 140 Ill. 182, 29 N. E. 727; *McPheeters v. Wright*, supra. But it may be doubted whether the case now before us falls within the rule above stated. The appellant Margaret A. Stevens did not acquire the interest that made her a tenant in common with Reynolds either by the same deed by, and at the same time at, which Reynolds acquired his interest. An eminent author (*Freem. Coten.* § 155) says: "As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold by and under the same title. Their union of interest and of title is so complete that beyond all doubt such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire

and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises,"—citing *Roberts v. Thorn*, 25 Tex. 736; *Frentz v. Klotzsch*, 28 Wis. 317; *Wright v. Sperry*, 21 Wis. 331; *Brittin v. Handy*, 20 Ark. 381; *Matthews v. Bliss*, 22 Pick. 48; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Helsk. 682. And this court asserted the same doctrine in *Elston v. Piggott*, supra. In that case Elston had purchased Piggott's farm at the sale of Piggott's assignee in bankruptcy, the bankrupt having a wife at the time. That sale made Elston the owner of the undivided two-thirds of the land and Piggott's wife the owner of the other third as tenants in common. A mortgage was executed by Piggott and wife on the same land which had been sold on foreclosure sale on said mortgage, and Elston, after his purchase at the assignee's sale, purchased the certificate of the foreclosure sale, and at the expiration of the year got a sheriff's deed thereon, and then sued Piggott and wife for possession. It was contended on behalf of Mrs. Piggott that, as the relation of tenants in common in the land existed between her and Elston when he bought the certificate of the foreclosure sale, it gave Elston no title as against her, but inured to her benefit, and that Elston acquired nothing only a right to enforce contribution against her. It was there said by Elliott, J., speaking for the court, that: "The question which is next encountered may be thus stated: Does the fact that the appellant, at the time he acquired the certificate of sale issued on the decree of foreclosure rendered on the mortgage executed by Albert Piggott, the husband, and Martha J. Piggott, the wife, held a conveyance for two-thirds of the land from the assignee in bankruptcy of Albert, the husband, executed after the sale on the decree, preclude him, the appellant, from asserting against Martha J., the wife, the title founded on the deed executed upon the foreclosure sale? Appellee's counsel contend that the appellant is precluded from asserting title under the foreclosure sale because he was, as they affirm, a tenant in common with Martha J. Piggott, and could not, therefore, buy in an outstanding lien, and build a title on it. The general rule is that one tenant in common cannot, by purchasing an outstanding lien, acquire a title which will evict his cotenant. This rule, however, is subject to many exceptions, and obtains only where the relation of tenants in common exists in strictness, and where the relation is such as to require a mutual trust and confidence. It is impossible to perceive how one who buys at a sale made by an assignee in bankruptcy of the husband's interest becomes charged, in such a case as that embraced in our general question, with the duties of trust and confidence to the wife of the bankrupt. The title is not a common one, the interests are not reciprocal, and there is no fiduciary relationship created. The title is secured by virtue of a judicial sale, and not by the same instrument, nor from the

same source, as that from which the wife's claim is derived. There is, we repeat, nothing in such a case to create relations of trust and confidence, and therefore the reason of the rule applicable to ordinary cases fails; and the time-honored doctrine is that, where the reason of the rule ceases, so does the rule itself. An examination of the cases will show that we are right in stating that the reason of the rule is that the relationship is one imposing trust and confidence, and requiring the tenants not to assume positions of hostility. Mr. Freeman says," and then is quoted the section of Freeman on Cotenancy and Partition we have already quoted above, citing the authorities there cited. And the conclusion of this court in that case was that the title of Elston, founded on his purchase of the outstanding lien against the land held by him and Mrs. Piggott as tenants in common, was good against her, and sufficient to oust her from possession. Here the interest of Margaret A. Stevens accrued at a different time, and under a different instrument, from that at and under which the title of James M. Reynolds accrued. See *Vasques v. Ewing*, 24 Mo. 31; *Coleman v. Coleman*, 3 Dana, 398.

But assuming, without deciding, that the tenancy here was of such a character as to create the relation of trust and confidence between Mrs. Stevens and Reynolds, precluding either from doing any act in hostility to the interests of the other, yet there are some other questions which must be determined favorably to the appellee before that principle can avail him in this case. The evident theory upon which the complaint proceeds is that Mrs. Stevens' purchase from Fletcher and Churchman was voidable as against appellee on account of the relation of cotenancy between them, and on account of the alleged defect in the notice to the defendants in the decree quieting the title in Fletcher and Churchman, and not on account of any fraud practiced by Mrs. Stevens in inducing them to convey to her. There is no allegation in the complaint that the plaintiff desired to share in the benefits of that purchase, or that he had ever offered to share in the burdens thereof; nor is there any offer in the complaint to pay his share of the purchase money, or that it may be charged to him in the accounting for rents. The first time that anything appears in the record recognizing the plaintiff's liability to contribute to the payment of the purchase money for the conveyance by Fletcher and Churchman to the defendant Mrs. Stevens is found in the conclusions of law. But the plaintiff excepted to them as well as the defendant. The plaintiff's exceptions, however, do not disclose that he excepted because Mrs. Stevens' purchase was not declared void as against the plaintiff. But the theory of the complaint to that effect was further evidenced by the plaintiff seeking in the complaint to quiet his title as against a mortgage executed by

Mrs. Stevens with her husband on the land after her purchase from Fletcher and Churchman to secure a debt of \$2,800 to the defendant Crawford. Though the complaint did not charge Crawford with any knowledge of any of the facts whatever, yet the decree, following the theory of the complaint that Mrs. Stevens' purchase was void, quieted the plaintiff's title against the defendant Crawford's mortgage. Mr. Freeman, from whom we have quoted above on the point now in hand, in section 156 says: "The purchase made by a cotenant is not void, nor does the interest so acquired by him, or any part of it, by operation of law, vest in his cotenants. They may not wish to share in the benefits of his purchase; for, in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives them a privilege which they may assert. This privilege consists in the right to obtain a conveyance of the title bought in upon their paying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the cotenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having within a reasonable time elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. A most natural and material inquiry, then, is, what is a reasonable time? To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The cotenant asking a court of equity to award him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition." An additional reason why the complaint in this case proceeded upon the theory that Mrs. Stevens' purchase was void because of the relation of cotenancy and defective notice to Reynolds is found in the fact that the complaint did not ask to have a conveyance made to him upon the plaintiff paying his share of the price; and the further fact that it is not alleged that the plaintiff elected within a reasonable time, or that he ever elected, to bear his portion of the expense and share in the benefits of the purchase. Nor was there any finding of these facts, and, if there had been, they would have been outside of the issues, and without force, for that reason. Neither is there any conclusion of law that the appellee was entitled to such a conveyance, and, if there had been, it would have been erroneous for

want of the fact found to rest on. Therefore the conclusions of law stated can only rest on the assumption that Mrs. Stevens' purchase was void in law on account of the relation of cotenancy, or want of notice to the defendants in the decree quieting Fletcher and Churchman's titles. That is erroneous, even though the facts found should be held to establish that character of cotenancy between the parties that carries with it the relation of trust and confidence, which precludes either from acting in hostility to the interests of the other, unless Fletcher and Churchman's decree was void for want of notice to the defendants therein. There is no claim in appellee's brief that it was void or invalid for that reason, or for the reason that the publication notice of that proceeding was procured on an affidavit that, after diligent inquiry, the residence of the defendants was unknown, though they all resided in this state. The statute authorized such a notice on such an affidavit. Rev. St. 1894, § 320 (Rev. St. 1881, § 318). Defects in the affidavit, or its falsity, will not subject the judgment to collateral attack. *Dowell v. Lahr*, 97 Ind. 146; *Quarl v. Abbott*, 102 Ind. 233, 1 N. E. 476; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090; *Goodell v. Starr*, 127 Ind. 198, 28 N. E. 793. Nor did the fact that the judgment was liable to be opened up on application to let in a defense impair its conclusive force so long as it stood unopened. Rev. St. 1894, § 609 (Rev. St. 1881, § 600). We need not and do not decide what effect the fraud of Mrs. Stevens, as stated in the special finding, had on her deed from Fletcher and Churchman, because the facts concerning such fraud stated in the special finding are outside of the issues, and for that reason must be disregarded. *Neutz v. Coke Co.*, 139 Ind. 411, 39 N. E. 147, and authorities there cited; *Brown v. Will*, 103 Ind. 71, 2 N. E. 283; *Thomas v. Dale*, 86 Ind. 435; *Town of Cicero v. Clifford*, 53 Ind. 191; *Boardman v. Griffin*, 52 Ind. 101. The circuit court erred in its conclusions of law. The judgment is reversed, and the cause remanded, with instructions to grant leave to reform the issues, if the appellee shall desire to amend his complaint.

(142 Ind. 428)

PENNSYLVANIA CO. v. STATE.

(Supreme Court of Indiana. Nov. 1, 1895.)

RAILROAD COMPANIES—STATUTE REQUIRING BLACK-BOARDS IN STATIONS WITH NOTICE OF DELAYED TRAINS—VALIDITY—ACTION FOR PENALTIES—LIMITATION.

1. Act March 9, 1889 (Rev. St. 1894, §§ 5186, 5187; Elliott's Supp. §§ 1088, 1089), requiring railroad companies to place in each passenger depot where there is a telegraph office a blackboard, and note thereon whether trains are late, and, if so, how much, is not void for ambiguity. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 133 Ind. 69, followed.

2. Such act is not a regulation of interstate commerce, within the prohibition of the federal constitution. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 133 Ind. 69, followed.

3. Act March 9, 1889 (Rev. St. 1894, §§ 5186, 5187; Elliott's Supp. §§ 1088, 1089), requiring railroad companies to place in each passenger depot where there is a telegraph office a blackboard, and note thereon, at least 20 minutes before the time for the arrival of each passenger train, the fact as to whether such train is on time, and, if late, how much, contains no emergency clause, and provides that compliance with it shall begin "immediately" after the taking effect of the act. It went into effect May 10, 1889, on distribution and proclamation of the governor. *Held*, that the companies had a reasonable time after the passage of the act, and before it took effect, in which to prepare for compliance therewith.

4. Act March 9, 1889 (Rev. St. 1894, §§ 5186, 5187; Elliott's Supp. §§ 1088, 1089), requires railroad companies to place in each passenger depot where there is a telegraph office, a blackboard on which they shall note, at least 20 minutes before the schedule time for the arrival of each passenger train, the fact as to whether such train is on schedule time, and, if late, how much, and provides penalties for each violation, to be recovered by action in the name of the state by the prosecuting attorney, and that one-half the amount recovered shall go to such attorney. *Held* that, in an action to recover such penalties, a railroad company cannot question the validity of the law, on the ground that the provision respecting the prosecuting attorney is in conflict with Const. art. 8, §§ 2, 3, which provide that the fines assessed for breaches of the penal laws of the state, and all forfeitures which may accrue, shall constitute parts of the common school fund, and the principal of such fund "shall remain a perpetual fund," and "shall never be diminished."

5. Such act is not open to the objections that it provides for special judgments in favor of particular persons and against particular persons; that it provides a special statutory action, and authorizes a particular judgment in favor of a particular officer against particular persons; and that it gives a particular officer a part of the penalty, and so requires judgment in favor of such officer,—and thereby conflicts with Const. art. 4, § 22, subd. 8, forbidding special acts regulating practice in courts of justice.

6. In an action to recover penalties for violation of such act, the railroad company cannot claim that it does not comply with Const. art. 4, § 22, providing that the general assembly shall not pass local or special laws "in relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary service required," on the ground that the prosecuting attorney participates in the recovery, and that defendant, aside from its interest in common with that of the people of the state, has an interest in the distribution of the fund recovered as penalties for its violation.

7. Such act does not violate Const. art. 1, § 23, forbidding the granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens; nor U. S. Const. art. 14, § 1, providing that no state shall deny to any person equal protection of the law.

8. The fact that there is a railway in the state which has no stations or telegraph facilities, but is operated by a system of telephones, to which railway such act does not apply, does not make it subject to the objection that it lacks uniformity, as required by Const. art. 4, §§ 22, 23. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 133 Ind. 69, and *State v. Pennsylvania Co.*, 32 N. E. 822, 133 Ind. 700, followed.

9. Rev. St. 1894, § 294 (Rev. St. 1881, § 293), providing that, "for forfeitures or penalties given by statute," actions shall be commenced within two years after the cause of action has accrued,

does not apply to actions in the name of the state to recover penalties, since Rev. St. 1894, § 305 (Rev. St. 1881, § 304), provides that "limitations of actions shall not bar the state except as to sureties."

Appeal from circuit court, Scott county; Thomas C. Batchelor, Judge.

Action by the state of Indiana against the Pennsylvania Company to recover penalties for the violation of Act March 9, 1889, requiring railroad companies to place in each passenger depot located at any station in the state at which there is a telegraph office a blackboard, and note thereon, at least 20 minutes before the schedule time for the arrival of each passenger train stopping at such station, the fact whether such train is on schedule time or not, and, if late, how much; and that, for each violation of the provisions of such act, the company shall forfeit and pay the sum of \$25, to be recovered in a civil action to be prosecuted by the prosecuting attorney of the county in which the neglect or refusal occurs, in the name of the state, one-half of which shall go to the prosecuting attorney, and the remainder shall be paid to the county in which the proceedings are had, and be part of the school fund. From a judgment for plaintiff, defendant appeals. Affirmed.

S. Stansifer and Elliott & Elliott, for appellant. A. G. Smith, Ex-Atty. Gen., and W. A. Ketcham, Atty. Gen., for the State.

HACKNEY, J. This was an action by the appellee for the recovery of penalties for the violation of the act of March 9, 1889 (Rev. St. 1894, §§ 5186, 5187; Elliott's Supp. §§ 1088, 1089). The complaint was in 73 paragraphs, and each charged a distinct violation of said act in the failure of the appellant to note, upon a blackboard, at least 20 minutes before the schedule time of the arrival of passenger trains, the fact as to whether such trains were on schedule time, and, if late, how much. The paragraphs apply to different trains and different days, including trains stopping at Scottsburg from May 10, 1889, to May 19, 1889. The complaint was filed on the 9th day of May, 1891, and summons was issued thereon June 4, 1891. Demurrers were overruled to the several paragraphs of complaint, and the appellant answered in five paragraphs, to the four affirmative paragraphs of which the demurrers were sustained. Upon a trial there was a finding and judgment in favor of the appellee for \$1,400. Questions of the constitutionality of said act bring the appeal within the jurisdiction of this court.

The second paragraph of answer alleged that on May 10, 1889, when the act took effect, the appellant was operating 220 miles of railway, having 50 passenger stations, with depots and telegraph offices; and that, when the statute took effect, the appellant, "exercising due care and reasonable expedition, proceeded to and did prepare black-

boards three feet long and two feet wide, and placed one in a conspicuous place in each of said passenger stations, including the one mentioned in the complaint, all of which was done by May 18, 1889, and it is averred that the work could not have been done within a shorter period of time." The third paragraph pleaded substantially the same facts, with the conclusion "that it reasonably and conveniently required, to wit, seven days, within which to prepare and place said blackboards as aforesaid." The fourth paragraph alleged the placing of blackboards in the depots mentioned in the complaint by May 18, 1889; that summons did not issue until June 11, 1891; and that the action was commenced more than two years after each of the causes of action sued on had accrued. The fifth paragraph was substantially the same as the fourth.

As will be observed, the second and third paragraphs proceeded upon the theory that after the law was distributed, and had, by the proclamation of the governor, gone into effect, the companies affected by it would have a reasonable time in which to prepare and place blackboards upon which to note the time of arrival of trains, and that such reasonable time, as alleged in the third paragraph, was seven days. In discussing the sufficiency of the complaint, the proposition is also pressed that companies were entitled to a reasonable time, after the law was declared in force, within which to prepare for compliance with its requirements. The language of the act as to the time when compliance shall begin is: "Immediately after [the] taking effect of this act." If there had been an emergency clause, under which penalties would, by the letter of the law, have attached at once upon its passage, manifestly it would have worked great hardship to hold that the legislature meant to inflict heavy penalties for failing to do that which necessarily required time for preparation to do. Probably the situation thus stated would have required the holding that the word "Immediately" was not employed to exclude the intervention of a reasonable time within which to prepare and place the boards required. So we may say with reference to the time when the law went into force (May 10, 1889), if that were the first notice that railway companies were required to take of the law. As we find it, the law was approved March 9, 1889, and was proclaimed in force May 10, 1889,—more than 60 days, and, upon the allegations of the answer, an abundant time within which to prepare for compliance with the law and for the avoidance of the prescribed penalties. The law, having passed without an emergency clause, was not in force until May 10, 1889. However, that its passage by the legislature, and the declaration of the constitution that it should be in force from its distribution and the proclamation of the governor, were notice to railway companies sufficient to ena-

ble them to prepare for its requirements, we have no doubt. It is one of the frequently declared objects of section 19, art. 4, of the state constitution, requiring that the subject of an act "shall be expressed in the title," "to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire." *Cooley, Const. Lim. (6th Ed.)* p. 171; *Henderson v. Insurance Co.*, 135 Ind. 23, 34 N. E. 565. There was the same emergency for the existence of the law between March 9 and May 10, 1889, as that following those periods, and the omission of an emergency clause was, probably, to enable companies to prepare to comply with the law when it should be declared that penalties were enforceable. It is not claimed that the legislature possessed no power to enact that penalties should attach at once upon the passage of the law or the declaration that it had been published. The contention, as we understand it, is that the legislature will not be deemed to have intended so harsh a measure. The question being one of intention, and not of power, and the word "immediately" ordinarily signifying "without interval of time," we must conclude that the legislature omitted the emergency clause, and provided that compliance should follow "immediately after [the] taking effect of" the act, thereby intending to give to railway companies the period extending from the passage of the act to the proclamation of the governor in which to prepare for compliance without penalties. Aside from the question of legislative intent to give such opportunity, and also of the constructive or implied notice of the passage of the act, and presuming that power existed to enforce penalties "without interval of time" for preparation, it then becomes a question of legislative judgment, not reviewable by the courts, and a question of the good faith of railway companies in possibly possessing actual knowledge of the law, but delaying beyond the period for its enforcement, without steps to meet its requirements, — a question not made by the answers, and not subject to review.

The sufficiency of the fourth and fifth answers depends upon sections 294 and 305, Rev. St. 1894 (sections 293 and 304, Rev. St. 1881). The first provides that, "for * * * a forfeiture or penalty given by statute," actions shall be commenced within two years after the cause of action has accrued. The appellant, standing upon this provision, insists that the penalties sued for accrued before May 10, 1889; that while the complaint was filed on the 9th day of May, 1891, summons was not issued and the suit not commenced, in contemplation of law, until, as the answer alleges, the 11th day of June, 1891. To this proposition is cited section 310, Rev. St. 1894

(section 314, Rev. St. 1881), which provides that "a civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons." In view of section 305 (304), *supra*, we need make no decision of the force of the appellant's position thus stated, since that section provides that "limitations of actions shall not bar the state of Indiana, except as to sureties." Very plainly, we think, the limitation insisted upon by the appellant does not apply where the cause of action, as in this case, is in favor of the state of Indiana.

Invoking the rule of strict construction for penal statutes, appellant's learned counsel, with much ability, attack the act in question as void for ambiguity. The first duty of the courts, in the construction of statutes, is to ascertain the intention of the legislature in the enactments, whether such statutes fall within the rule calling for a strict or that calling for a liberal interpretation. All of the alleged ambiguities of the act in question must be tested in the light of the legislative intention, ascertained from within the lines of the act. There is no guide to the ascertainment of legislative intention by which in every case the interpreters may be led, with unerring certainty, to the one conclusion; yet it is the manifest policy of the law that interpretation of a given act shall not be so varying and unstable as to yield, like the kaleidoscope, a new view as each new hand turns the instrument. While the act is not drawn with the care and skill that its importance to the public and to railway management should have required, we feel that, its meaning having been considered and determined by our predecessors, — a bench justly distinguished for its learning and ability, — we cannot review that decision, upon the very questions then made, though, if a question of first impression, some of us might incline to a different view. See *State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N. E. 817; *State v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. 822.

All that we have said with relation to the interpretation of the act, against the objection that it is ambiguous, may be said concerning the renewed objection that cumulative penalties are not permitted, but that the recovery is limited to one "for each violation of the provisions of the act in failing to report, or in making a false report," and that only when a blackboard shall have been "placed in the depot 'upon which' to write the fact," etc. It is here insisted, as it was in the cases above cited, that the act in question violates sections 2 and 3 of article 8 of the constitution, which sections provide that "the fines assessed for breaches of the penal laws of the state and all forfeitures which may accrue" shall constitute parts of the common school fund, and provide, further, that the principal of such fund "shall remain a perpetual fund," and "shall never be diminished." This proposition is directed to the penal provision of section 2

of the act, which provides "that for each violation of * * * this act * * * shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action, to be prosecuted by the prosecuting attorney, * * * in the name of the state of Indiana, one-half of which shall go to said prosecuting attorney, and the remainder to be paid over to the county in which such proceedings are had, and shall be part of the common school fund." The objection urged against the act in this respect is that the recovery, treated as a fine or as a forfeiture, was made, by the constitution, a part of the common school fund, and could not be diverted therefrom or diminished by appropriating it to the payment or benefit of public officers. In addition to what was said of this proposition in the former cases, we express our conclusion that the appellant may not avail itself of the objection. The recovery, as far as offenders are concerned, is fixed, not to be recovered by the prosecuting attorney, but by the state of Indiana. If, as insisted, the provision that "one-half * * * shall go to prosecuting attorney" should violate the constitution, that conclusion would not excuse the appellant from paying the penalty, and would certainly not render invalid that provision which creates the penalty, and subjects the appellant to its payment. If the provision that one-half of the penalty shall go to the prosecuting attorney were unconstitutional, that would be a question properly arising between the state, for the benefit of the common school fund, and such prosecuting attorney.

It is here further urged that the act infringes that provision of the federal constitution which reserves to congress the power to regulate interstate commerce. This question was, in our opinion, fully and correctly settled against the appellant's position in the cases of *State v. Indiana & I. S. R. Co.*, supra, and *State v. Pennsylvania Co.*, supra.

It is insisted that the act violates the second subdivision of section 22, art. 4, of the state constitution, which forbids the enactment of local or special laws "for the punishment of crimes and misdemeanors." The argument of counsel proceeds upon such a broad construction of the word "misdemeanors" as would include all violations of duty for which penalties may be provided, though such penalties may be recoverable in civil actions, and as not limited to offenses punishable by criminal procedure, and whose penalties are imposed as fines or by imprisonment in the county jail. While there may be instances in which this word should be given the meaning here insisted upon, we doubt that such was the meaning in which it was employed in the constitution. However this may be, the question yet remains to be determined, is the act local or special? Counsel claim that it is special, in "regulating the practice in courts of justice," as forbidden by subdivision 3, § 22, art. 4, of the constitution. They say: "Considered as affecting the form and substance of the judgment, the act is special: (1) Because it pro-

vides for special judgments in favor of particular persons and against particular persons; (2) because it provides a special statutory action, and authorizes a particular judgment in favor of a particular officer against particular persons; (3) because it gives a particular officer a part of a penalty, and thereby requires judgment in favor of such officer." These propositions grow out of a strained construction of the act, and, in our opinion, cannot be maintained. The act does not require a special form of judgment. There is nothing in the act directing or suggesting that the form of judgment shall be other than that governed by the general practice act. The proceeding and judgment are, so far as the provisions of the act are concerned, subject to the direction of the Code. It is true that the action is by and in the name of the state. This provision cannot be condemned as special; indeed, we do not understand counsel to so claim. Nor can it be true that the judgment is required to be entered in favor of the state of Indiana and of the prosecuting attorney jointly or in severalty. The provision that one-half of the recovery shall go to the prosecuting attorney was intended as a method of compensating that officer, and to encourage the active enforcement of the law against its violators, and was not intended to require the prosecutor to become a party litigant, either as affecting the pleadings or the judgment. That the prosecutor is given a share in the results of the litigation no more requires that the judgment shall be entered in his favor than that an attorney's privilege to maintain a lien for his services requires that the judgment in his client's favor shall be so entered as to include his claim for fees.

The constitutional validity of the act is further questioned as not in compliance with the fourteenth subdivision of section 22, art. 4, of the state constitution, which, together with the context, provides that the general assembly shall not pass local or special laws "in relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required." As may be observed, this proposition involves the theory that the prosecuting attorney participates in the recovery, and that the appellant, aside from its interest in common with that of the people of the state, has an interest in the distribution of the fund recovered as penalties for violations of the act. This theory, as we have already shown, is not tenable so far as this case is concerned, and can have place only in a case involving the right of the prosecuting attorney to enforce his claim to one-half of the judgment.

It is suggested by counsel that the act violates section 23, art. 1, of the constitution, which forbids the granting "to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." This suggestion has its force in the idea that persons traveling from

railway stations at which there are no telegraph offices are entitled to the same information as to the arrival of trains as those traveling from stations having telegraph facilities. So manifestly does the act in question permit all classes to avail themselves of the benefits intended by it that we can hardly believe this suggestion to have been seriously made. Within the borders of the state there is no citizen or class of citizens given a privilege or an immunity by this act which, "upon the same terms, shall not equally belong to all citizens." This provision of the constitution, if applied as appellant suggests, would forbid the enactment of a law permitting the construction of a railway passing through cities and avoiding towns, or passing through some cities and avoiding others. This law does not grant a privilege, nor extend immunity. It simply requires that railway management shall observe a given rule, intended for the benefit of every one who may avail himself of it.

What we have said of this suggestion applies with like force to the appellant's further suggestion that under section 1, art. 14, of the federal constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The only remaining question presented by counsel is that this act is local and special, and therefore lacks uniformity of operation, as forbidden by sections 22, 23, art. 4, of the state constitution. This question proceeds upon the two propositions that there is a railway operated within this state which has no station telegraph facilities, but which employs, instead, a system of telephones, and that the act does not purport to apply to all common carriers, but omits the company referred to, and omits all carriers by water. It is said that this question was not passed upon in the cases of *State v. Indiana & I. S. R. Co.*, supra, and *State v. Pennsylvania Co.*, supra, but in this we think counsel are in error, as will be seen from pages 77 and 78, 133 Ind., and page 817, 32 N. E. It is urged, however, that, if there decided, it was not correctly decided, and we are again asked to consider the question. Section 22, supra, enumerates particular instances in which local or special laws shall not be enacted, and we have seen that the present law does not fall within any of those particular inhibitions. Section 23, supra, provides that, "in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision, it was the duty of the general assembly to have enacted a law of "general and uniform operation throughout the state," if a general law could be made applicable. Whether a general law could be made applicable in any instance not so specially enumerated is not a judicial question, but has many times been held to be a legislative question. *Young v. Board*, 137 Ind. 323, 36 N. E. 1118; *Bell v. Malish*, 137 Ind. 226, 36 N. E. 353, 1118; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595; *Wiley v. Corporation of Bluffton*, 111 Ind. 152, 12 N.

E. 165; *Gentile v. State*, 29 Ind. 409. If, in our opinion, there were strong reasons for pronouncing this act special or local in its application to the classes of railways, it will be seen that, under the rule of the cases cited, we could not pass upon the question. It is our opinion that the law in question operates in all parts of the state in a similar manner where the same circumstances and conditions exist. This, it has frequently been held, answers the requirement that laws shall be of uniform operation. *Young v. Board*, supra; *Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062; *Groesch v. State*, 42 Ind. 547; *State v. Indiana & I. S. R. Co.*, supra; *State v. Pennsylvania Co.*, supra. We conclude, therefore, that the record presents no available error, and the judgment of the circuit court is affirmed.

(143 Ind. 471)

RUSS v. RUSS et al.

(Supreme Court of Indiana. Nov. 6, 1895.)

RECORD ON APPEAL.

Under Rev. St. 1894, § 662 (Rev. St. 1881, § 650), requiring collateral motions, together with rulings of the court thereon and exceptions thereto, to be made a part of the record by bill of exceptions or special order, an order reciting that the court, "having heard said motion, overrules the same, to which ruling of the court the defendant at the time excepts, and the same is now ordered to be made a part of the record," is, on account of its indefiniteness, insufficient to make the motion, the ruling, or exception a part of the record.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Action by Charles E. Russ and others against Simon A. Russ to enjoin the use of a trade-mark, and for damages for its wrongful use. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. L. Brick and John Talbot, for appellant. Andrew Anderson, for appellees.

MCCABE, J. The appellees sued the appellant in the St. Joseph circuit court to enjoin him from wrongfully using a trade-mark and trade-names belonging to the appellees by purchase from the former firm of S. A. Russ Co., known as "S. A. Russ' Bleaching Blue," and to recover damages for such wrongful use. The issues joined were tried by the court, resulting in a general finding, judgment for \$300, and a perpetual injunction, pursuant to the prayer of the complaint, over appellant's motion for a new trial and to modify the decree of injunction. Error is assigned on the action of the court in overruling the motion for a new trial, in overruling the motion to modify, and in rendering judgment against the appellant. The only one of these alleged errors discussed in the brief of appellant's counsel is that overruling the appellant's motion to modify the decree. The other assignments are therefore deemed waived.

The motion to modify was not made a part

of the record by a bill of exceptions, but an attempt was made to make it a part of the record by an order of court. Collateral motions, together with the action of the court thereon and exception thereto, must be made a part of the record by bill of exceptions or special order of court. *Turnpike Co. v. Siderer*, 40 Ind. 424; *Scotten v. Devilbiss*, 60 Ind. 37; *Boll v. Slims*, 60 Ind. 162; *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Myers v. Conway*, 62 Ind. 474; *Merritt v. Cobb*, 17 Ind. 314; *Board v. Montgomery*, 109 Ind. 69, 9 N. E. 500. Where the record does not otherwise show the decision or the grounds of objection thereto, the matter should be brought into the record by bill of exceptions or order of court. *Redinbo v. Fretz*, 99 Ind. 458; *State v. Cooper*, 103 Ind. 75, 2 N. E. 238. Unless a motion to dismiss an appeal from a board of county commissioners is incorporated in a bill of exceptions, no question of the trial court's ruling thereon is presented on appeal to this court. *McCoy v. Able*, 131 Ind. 417, 30 N. E. 523, and 31 N. E. 453. A motion to make a complaint more specific, it has been held, is not a part of the record, unless brought into such record by a bill of exceptions. *Line v. State*, 131 Ind. 468, 30 N. E. 703. To like effect are *Thieband v. Tait*, 138 Ind. 238, 36 N. E. 525, and *Elliot*, App. Proc. §§ 190-192. Objections to the form of the decree or judgment, such as that urged here, must be taken in the trial court by motion to modify, or they are unavailable. *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731; *Ludlow v. Walker*, 67 Ind. 353; *Merritt v. Pearson*, 76 Ind. 44; *Scotten v. Mann*, 89 Ind. 404; *Stout v. Curry*, 110 Ind. 514, 11 N. E. 487; *Benefield v. Aughe*, 83 Ind. 401; *City of Greenfield v. State*, 113 Ind. 597, 15 N. E. 241; *Buchanan v. Insurance Co.*, 96 Ind. 510; *Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. 427; *Tewksberry v. Howard* (Ind. Sup.) 87 N. E. 355.

An objection to the form of the judgment by means of a motion to modify the same must point out the particulars in which the judgment is supposed to be wrong in form, and specify the particular change or modification that is desired by the mover. These matters, and the action of the court on the motion, especially if the motion is overruled, as was the case here, and the exceptions thereto, are not a part of the record, unless made so by bill of exceptions or order of the court. *Benefield v. Aughe*, supra. The Civil Code provides that "all proper entries made by the clerk, and all papers pertaining to a cause, and filed therein (except a summons for the defendant, where all the persons named in it have appeared to the action, and summons for witnesses, depositions, and other papers which are used as mere evidence), are to be deemed parts of the record; but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions and papers filed as mere evidence shall not be certified, unless made a part of the

record by exception or order of court, and directed to be certified by the appellant. * * * Every paper and pleading above excepted may be made part of the record by exceptions or order of the court, on motion." Rev. St. 1894, § 662 (Rev. St. 1881, § 650). What purports to be the motion to modify in this case is copied into the transcript immediately following the judgment and decree, and immediately following the motion is the following entry: "And the court, having heard said motion, overrules the same, to which ruling of the court the defendant at the time excepts, and the same is now ordered to be made a part of the record." The provision in the section quoted authorizing extrinsic matter to be made a part of the record by order of court is confined exclusively to papers and documents. The order is too indefinite. The motion, the ruling thereon, and exception thereto had all preceded the order, and it says the same is ordered to be made a part of the record. Such an order ought to designate and point out with reasonable certainty the extrinsic matters it seeks to make a part of the record. It ought not to be left to inference, speculation, or surmise what matters are thus made a part of the record. Whether it was the motion, the ruling thereon, or the exception, or all of them, that were made a part of the record, is left to conjecture or surmise. The motion, ruling thereon, and exception thereto not being a part of the record, the judgment is affirmed.

HOWARD, J., took no part in this decision.

(142 Ind. 435)

COLE v. TEMPLE.

(Supreme Court of Indiana. Nov. 7, 1895.)

LIABILITY OF WIFE—MORTGAGE TO SECURE HUSBAND'S DEBT.

A mortgage of the separate property of the wife, executed by her jointly with her husband, to secure the purchase price of goods, reciting that the grantors convey the land, and also the goods "which we have purchased," to secure notes given for the goods, and acknowledging that the grantors own the land equally as tenants in common, and not by entirety, will not bind the wife where the mortgage was procured from the wife after sale and delivery of the goods to the husband alone, who had no authority to act for his wife.

Appeal from circuit court, Crawford county; W. T. Zenor, Judge.

Action by James L. Temple, assignee, against Alice J. Cole, on promissory notes, and to foreclose the mortgage securing them. From a judgment for plaintiff, defendant appeals. Reversed.

R. J. Tracewell and A. W. Funkhouser, for appellant. C. W. Cook, John H. Weathers, and J. L. Suddarth, for appellee.

HOWARD, C. J. The appellee, as assignee of one Stephen C. Patton, is the holder of the notes and mortgage in suit. These notes

and the mortgage were executed to the said Patton by the appellant and her then husband, Dr. William A. Cole, since deceased. Appellant and her said husband were the owners of the real estate in controversy, being part of a lot situated in the town of English. She had inherited property from her father, and had exchanged the same for other property. The real estate here in controversy was part of the property so received in exchange by her, and the deed for the same was made to her and her said husband. Prior to August 18, 1891, the said Patton, appellee's assignor, was the owner and in the possession of a stock of drugs kept in a storeroom situated on the said town lot of appellant and her husband, Patton being their tenant. On the trial, Patton testified that for ten days or two weeks prior to said date negotiations were pending between him and appellant's husband, the said Dr. William A. Cole, for the sale of the drugs to the latter. They finally agreed on the terms of sale. Dr. Cole was to pay \$1,300 for the stock,—\$300 cash, and the balance in notes on personal security. The persons proposed and accepted as sureties, however, refused to sign the notes with the doctor. Cole then proposed, as Patton testifies, that he and his wife, the appellant, should purchase the stock jointly, and that he and his wife should execute their notes for the unpaid balance, and to secure said notes would give him a mortgage upon the lot and storeroom in question. To this Patton agreed. The \$300 was paid, the invoice made, and the drug stock turned over to Dr. Cole on the 18th of August, 1891. The appellant was not present during any of these transactions, and took no part in the negotiations. She was then, and had been for some time, on a visit at Paoli, 18 miles distant from English. Dr. Cole, however, represented that he was acting for his wife. Patton at the time of the sale did not think that Dr. Cole had any property, and believed that the storeroom and lot came to the appellant, Mrs. Cole, through her father's estate. He never spoke to Mrs. Cole about her title to the lot, and did not go to Paoli to see her about the sale of the drugs. After the sale, Dr. Cole went to Paoli, and procured the execution of the notes and mortgage by his wife. Over the objection of the appellant, the foregoing testimony, by Patton was admitted by the court, not for the purpose of showing that Dr. Cole was agent for his wife, but only as to the nature of the trade between the parties. No other evidence was offered to prove that Dr. Cole was agent for his wife. The appellant testified: "When I signed the mortgage, it was the first I knew of the purchase of the drug store. I had no interest in the purchase of the drug store, and did not have any interest in the store. All I know about it was, Dr. Cole and Mr. Throop, an attorney, brought the mortgage to me at Paoli, and my husband wanted me to sign it. I signed it."

On cross-examination she said: "I had no conversation with Patton about buying the drug store, at or before the sale. I do not remember that Dr. Cole, my husband, had talked about buying the drug store before I went to Paoli. I had nothing to do with the drug store. It was not understood that I was to help the doctor in buying it. I first heard about it on the Wednesday after the trade was made. * * * I did not examine the mortgage. My husband came into the room where I was, and then we went into the room where Mr. Throop was, and I signed the mortgage. The mortgage was not read to me. The doctor called me into the room where Mr. Throop was, and told me to put my name to it. I knew it was a mortgage to secure the notes for the drug store. My husband did not tell me that he and I were to buy the drug store together." No other evidence was given inconsistent with the foregoing, and bearing upon the question at issue, namely, the alleged obligation of appellant as joint purchaser of the stock of drugs, unless it be the recitals in the mortgage. The mortgage, which was executed by appellant and her husband, recites that the parties convey the real estate, "and also the stock of goods that we have purchased from Stephen C. Patton, consisting of drugs, etc., to secure the payment of two promissory notes dated August 18, 1891, and made by said William A. Cole and Alice J. Cole, payable to said Stephen C. Patton, each for five hundred dollars." Other like recitals follow, including the statement: "We hereby acknowledge that we own the above-described real estate in equal shares, as tenants in common, and not as joint tenants by entirety."

It was said in *Thacker v. Thacker*, 125 Ind. 489, 25 N. E. 595: "As has often been said, suretyship is a fact collateral to the contract, and arises out of the equities existing between the parties. The test by which to determine the true relation of a married woman to a contract in which she has become a joint promisor with others is not what relation she agreed to occupy, but what she received, or what she was to receive, in consideration of her promise. If, in fact, she neither received nor contracted for any benefit, but signed upon a consideration the benefit of which was received by one of the joint promisors, then, no matter that she may have agreed to be bound as principal, the law assigns to her the status of a surety, and she will not be bound unless she has in some way estopped herself from setting up the facts. *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565." See, also, *Orr v. White*, 106 Ind. 341, 6 N. E. 909; *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70. If a married woman who receives no benefit from a contract cannot, except by estoppel, bind herself as principal, it seems clear enough that she cannot, as here, bind herself as joint principal. There is no doubt, of course, that by representing that the contract is for her own benefit, or that the

money or other advantage secured thereby is to be for herself or for her estate, a married woman may, as any other person, in case reliance is placed upon her statements, be estopped from denying the truth of such representations. Representations held to create such estoppel are set out in the case of Tomblin v. Reitz, 134 Ind. 9, 33 N. E. 789.

Other cases are referred to in the brief of appellee. In Ward v. Insurance Co., 108 Ind. 301, 9 N. E. 361, it was said that where a married woman "represents by sworn statement that a contract is for her own benefit, and induces another to act in good faith on such statement, she is estopped, under the act of 1881 (section 6962, Rev. St. 1894; section 5117, Rev. St. 1881), to aver that the contract was one of suretyship." In Rogers v. Insurance Co., 111 Ind. 343, 12 N. E. 495, the court said: "The facts pleaded show that the appellee was informed by Mrs. Rogers that the money she sought to obtain was for her own benefit; that she was not undertaking as the surety of her husband; that the appellee believed her statements, and, relying on their truth, loaned her the money she desired. And they show also that the appellee rightfully relied on her representations." And, referring to Ward v. Insurance Co., supra, the court added: "We did not hold in that case that the form or recitals of the contract will work an estoppel, nor do we so hold in this. What we hold is that, by her conduct and representations, relied upon by one who contracted with her in good faith, she is estopped to deny the character of her contract." So, in Lane v. Schlemmer, 114 Ind. 296, 15 N. E. 454, also relied upon by appellee, the facts, as detailed in the opinion, were: "The note and mortgage were executed for personal property sold to the appellant. She made, and delivered to the appellee's indorser, an affidavit stating that she executed the note and mortgage to pay for the property she proposed to buy of him. He relied on this affidavit and her representations that she was the purchaser of the property, and that the note and mortgage were executed for her sole use and benefit, and not as the surety of her husband. The indorsee of the appellee believed the facts to be true, and had no knowledge to the contrary, and relied entirely on the appellant's representations." These cases, so far from showing that the appellant in the case at bar is estopped from denying that she signed the notes and mortgage as surety for her husband, plainly indicate, when applied to the facts in the record, that she made no representations such as the law deems sufficient to work an estoppel. Patton's contract was solely with the husband. Personal security was at first agreed upon. That failing, the joint-purchase plan, with notes and mortgage to be executed by the wife, was substituted. The wife was not consulted in either case. After the bargain was made, and possession surrendered by Patton, the husband went to Paoli, and procured his wife's signature to the notes and mortgage. Patton never

saw her or spoke to her about the matter. It is not pretended that Patton's testimony as to his conversation with Dr. Cole was competent to prove that Cole was agent for his wife in the transaction, or that the husband's representations could thus be imputed to the wife. Agency cannot be established by the statements of the alleged agent, but must be shown by some act, word, or conduct of the principal. Coburn v. Stephens, 137 Ind. 683, 36 N. E. 132; Metzger v. Huntington, 139 Ind. 501, 37 N. E. 1084, and 39 N. E. 235. Apart from this testimony of Patton's, however, there is no evidence of any representations made by appellant as to any interest accruing to her from the contract made by her husband. The recitals in the mortgage are plainly insufficient for such purpose. Indeed, all the facts clearly show that she had nothing to do with the sale, except to sign the notes and mortgage at the request of her husband. She made no representations whatever; and Patton, so far from relying on any representations of hers, completed the bargain, received the cash payment, and placed Dr. Cole in possession of the drug store, before the appellant had any knowledge of the trade, or had signed the notes or mortgage. The judgment is reversed, with instructions to sustain the motion for a new trial.

(144 Ind. 157.)

BEVER v. BEVER.¹

(Supreme Court of Indiana. Nov. 8, 1895.)

PAROL EVIDENCE—ADMISSIBILITY TO EXPLAIN A RESERVATION IN A DEED.

Parol evidence is admissible to show that the reservation in a deed of a life estate to the grantors was made to secure payment of the unpaid purchase price payable in support, and by allowing the grantors to reside on the premises.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by Mary Bever against Henry L. Bever. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Livengood & Livengood and Clodfelter & Thompson, for appellant. Nebeker & Simms, for appellee.

MONKS, J. This action was brought by appellant against appellee. The complaint is in two paragraphs, the first of which was to recover possession of real estate, with damage for its detention, and the second to quiet title thereto in appellant during her life. Appellee filed a general denial, and the cause was tried by a jury, and a special verdict returned, upon which, over a motion by appellant for a judgment in her favor, and over a motion for a new trial, judgment was rendered in favor of appellee, to which appellant excepted.

The special verdict, so far as necessary to determine the questions presented on this appeal, was as follows: "On the 6th day of August, 1890, Henry Bever, Sr., was the sole owner in fee simple of the real estate in controversy. Appellant was his wife and appellee

¹ Rehearing denied.

his son, Henry Bever, Sr., was old and feeble, about 78 years old, and was desirous of making a division and distribution of his estate. He had six children, including appellee. He had made no advancement to appellee or his daughter Mary, but had advanced to each of his other children large sums of money. Said Bever, Sr., was indebted to appellee in the sum of \$2,400 for work and labor. On August 6, 1894, Henry Bever, Sr., sold said real estate to appellee for \$11,200; that, as a payment on the purchase money, \$2,200 as an advancement and \$2,400 for said indebtedness was allowed. Bever, Sr., to equalize all his children with the \$2,200 advanced in said land to appellee, executed his notes secured by mortgage on said real estate, payable to his said children, amounting in all to \$3,439.50, which appellee assumed and agreed to pay as a part of the purchase money for said real estate, and also agreed to pay \$1,200 cash to said Mary Bever, thereby making her advancement, with the note executed to her, \$2,200. It was further agreed, as a part of said purchase price of said real estate, that appellee should support said Henry Bever, Sr., and his wife, the appellant, so long as either of them should live, and it was further agreed, as a part of said sale and purchase, that said Bever, Sr., and his wife should occupy and have the use of the residence on said premises. On August 6th said Henry Bever, Sr., and his wife executed to appellee a warranty deed conveying said real estate to him in fee simple, except that after the granting clause in said deed, and after a description of the premises, there was inserted the following, to wit: 'The grantors herein except and expressly reserve from this grant a life estate into and upon all said real estate in favor of said Henry Bever and Mary Bever, and the said Henry Bever and Mary Bever hold, retain, and reserve a life estate during their natural lives in their favor upon all said real estate and out of the same.' The provision contained in said deed excepting and reserving a life estate was inserted, and such life estate was reserved by said grantors solely for the purpose, and with the understanding and agreement, that the same was to secure the grantors in the possession of said residence, and to secure the performance by appellee of his agreement to support the said grantors; and it was further agreed at the said time, by and between said grantors and said grantee, that the whole estate in fee simple, including said life estate, should pass and be transferred to said grantee, except that the legal title to the real estate mentioned in said deed should remain in said grantors as security, as aforesaid; and it was further agreed by and between said grantors and grantee that the possession of said premises, except the residence, should be turned over and surrendered to said appellee, the grantee, and should continue in his possession unless he should fail to perform said agreement, and that he should have the use, proceeds, rents, and profits of said real estate during the life-

time of said grantors, so long as he should perform his contract, without the payment of any rent. On the 6th of August the grantors placed appellee in full possession of said real estate, except said residence, and appellee immediately took possession, and has ever since said time remained in, and now is in, exclusive possession of said premises, and is using the same for farming purposes. In the fall of 1890 appellee placed upon said premises a house of the cost and value of one thousand dollars, and made other lasting and valuable improvements, all with the consent and knowledge of the grantors, and at his own expense. Appellee has from the date of said deed paid all the taxes on said real estate, including the taxes due in the spring of 1894. The grantors have never paid, or offered to pay, the same to him. Henry Bever, Sr., died May 18, 1893. From the date of said deed appellee furnished reasonable support to grantors, and gave them all the support that they or either of them required of him, and, ever since the death of his father, appellee has furnished appellant reasonable support, and has furnished to her all the support she required or requested. Since November, 1893, and ever since the commencement of this action, appellee has furnished to the appellant, and she has received from him, her support, including groceries, provisions, money, and clothing, firewood, and such other articles as she needed, and ever since the death of her husband, and up to the time of this trial, the plaintiff has called upon the appellee for her support, and the same has been furnished by appellee to appellant, and has been received by her, under and in pursuance of said agreement by appellee to support said grantors during their lives. Appellee has at all times been ready and willing to perform his said contract, so made with Henry Bever, Sr., and has kept and performed the same. The house which was on said real estate at the date of said deed has ever since been occupied by the grantors. In November, 1893, appellant, by one Pursely, her son-in-law and agent, ordered appellee to quit the possession of said premises, which he refused to do, upon the ground that he was the owner thereof. Afterwards appellant consented that appellee remain in possession of said real estate, and directed him to put in a crop, which he did."

Appellant insists that the court erred in rendering judgment on the special verdict in favor of appellee; "that the deed reserved her a life estate, and the parol agreement set out in the special verdict, and made before or contemporaneous with the execution of the deed, cannot enlarge, diminish, or vary the terms of the deed, or render inoperative and defeat the terms of this life estate; that such findings, contradicting the terms of the reservation in the deed, should have been disregarded, and judgment rendered for appellant."

It is the general rule that, in the absence of fraud or mistake, parol agreements made before or contemporaneously with a written

contract cannot be given in evidence to contradict, vary, or modify the writing. *Coy v. Stucker*, 31 Ind. 161; *Hosteter v. Auman*, 119 Ind. 71, 20 N. E. 506. In *Philbrook v. Enswiler*, 92 Ind. 590, this court approved the rule in this language: "Nothing is better settled than that, where two parties have entered into a written contract, all provisions, negotiations, and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. *King v. Insurance Co.*, 45 Ind. 43." It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its original terms and those in the deed are to be explained and settled by the deed alone. *Philbrook v. Enswiler*, supra; *Cole v. Gray*, 139 Ind. 396, 38 N. E. 856. A deed, however, as a general rule, does not state the entire contract, and such is not the purpose of its execution. It is the evidence of the consummation of a part of some contract previously made. It is not the purpose of a deed to state how, when, or in what manner the consideration shall be paid. *Davis v. Hopkins* (Colo. Sup.) 32 Pac. 70; *Trayer v. Reeder*, 45 Iowa, 273. It is also settled law that the real consideration of a deed may be shown by parol evidence, although it be different from the consideration stated in the deed. *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274. Under a deed of general warranty, it may be proven by parol evidence that the grantee assumed and agreed to pay any lien or incumbrance as a part of the consideration, when the same is not mentioned in the deed. *Carver v. Louthain*, 38 Ind. 530; *McDill v. Gunn*, 43 Ind. 315. It is equally well settled that a deed absolute on its face may be shown by parol evidence to have been executed only as a mortgage. *Ashton v. Shepherd*, 120 Ind. 69, 22 N. E. 96; *Tuttle v. Churchman*, 74 Ind. 311; *Crane v. Buchanan*, 29 Ind. 570; *Chase's Case*, 17 Am. Dec. 300; *Hutzler v. Phillips* (S. C.) 4 Am. St. Rep., note on page 707 (1 S. E. 502); *Stew. Mortg.* § 38. This court said in *Hamilton v. Doherty*, 109 Ind. 37, 9 N. E. 782: "It is a familiar rule of equity that a deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt. No matter what form a transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudged to be a mortgage." See 4 Am. St. Rep., note, pp. 697-708 (1 S. E. 502). The grantor may in the deed, by express reservation, create an equitable mortgage to secure the unpaid purchase money, whether payable in money or otherwise. The reservation of such lien is equivalent to a mortgage taken contemporaneously with the deed, and gives the purchaser the right of redemption. *Lucas v. Hendrix*, 92 Ind. 54, and cases cited; *Harvey v. Kelly*, 41 Miss. 490; *Davis v. Hamilton*, 50 Miss. 213; *Moore v. Lackey*, 53 Miss. 85; *Deason v. Taylor*, Id. 700; *Heist v. Baker*, 49 Pa. St. 9; *Markoe v.*

Andras, 67 Ill. 34; *Carpenter v. Mitchell*, 54 Ill. 126; *Dingley v. Bank*, 57 Cal. 467; 4 Am. St. Rep., note on page 708 (1 S. E. 502); 6 Am. & Eng. Enc. Law, 682, note 4; 28 Am. & Eng. Enc. Law, 184-189, and notes; 1 *Ping. Chat. Mortg.* § 320; 1 *Jones, Mortg.* §§ 228, 229; *Stew. Mortg.* § 37, notes 10-12. This court held in *Lucas v. Hendrix*, supra, that a warranty deed in the statutory form, containing a provision that upon the payment of a sum of money to the grantor the grantee shall be seised in fee simple, and that payment may be compelled by suit, creates an equitable mortgage in favor of the grantor. In *Carr v. Holbrook*, 1 Mo. 240, it was held that a deed made for land, to be absolute on the payment of certain notes, but in default of payment to be void, was to be considered a mortgage. *Pugh v. Holt*, 27 Miss. 461, is to the same effect.

It is clear from these authorities that the grantor in the deed in controversy might have inserted a provision in the deed that a lien was reserved on the real estate to secure the payment of the unpaid purchase money, whether payable in money or support and maintenance of the grantors, and the same would have been an equitable mortgage on the entire estate. Upon the same principle, if it had been written, after the reservation of the life estate in the deed executed in this case, that said life estate was reserved to secure the payment of the unpaid purchase money, however payable, the same would have been an equitable mortgage on such life estate, the same, in effect, as if the whole estate had been conveyed to appellee, and he had executed a mortgage conveying said life estate to the grantors, to secure the said unpaid purchase money. 4 Am. St. Rep. 706, note (1 S. E. 502), and authorities, supra.

This brings us to the final question, may it be shown by parol evidence that the reservation of the life estate was made to secure payment of the unpaid purchase money, payable in support, and allowing grantors to reside on the premises? If a deed absolute in form may be shown by parol evidence to have been executed as a mortgage, it as conclusively follows that a reservation in a deed may be shown by parol evidence to have been executed as a mortgage. The conclusion we have reached disposes of the question presented in regard to the parol evidence admitted over appellant's objections. Considering the reservation as an equitable mortgage, the right of possession under the deed is in appellee. *Parker v. Hubbel*, 75 Ind. 580; *Chitwood v. Trimble*, 2 Baxt. 78. The parties have so construed the deed. Possession was given by the grantors and taken by appellee when the deed was executed, and has been held until the commencement of this action by appellee, who has made improvements and paid the taxes and kept the premises in repair with the full knowledge of the grantors, and without objection from them. *Johnson v. Gibson*, 78 Ind. 284, and cases cited; *Lyles*

v. Leecher, 108 Ind. 382, 9 N. E. 363; Dwenger v. Geary, 113 Ind. 122, 14 N. E. 903.

It follows that the court did not err in rendering judgment on the verdict in favor of appellee. The case of Ikerd v. Beavers, 106 Ind. 483, 7 N. E. 326, cited by appellant, is not in point here, as neither party to this case is seeking to enforce specific performance of any contract or to set aside a contract. There is no available error in the record. Judgment affirmed.

(128 Ind. 501)

ATKINSON v. WABASH R. CO.¹

(Supreme Court of Indiana. Nov. 7, 1895.)

PLEADINGS—MOTION TO STRIKE OUT AVERMENTS—EXCEPTIONS.

1. Where a motion to strike out several parts of a complaint is sustained as a whole, an exception to the ruling as a whole is sufficient, though as to certain of the parts the motion is properly sustained.

2. A motion to strike out cannot take the place of a demurrer, but is proper only in the case of irrelevant matter; and if allegations in a pleading tend, by themselves or in connection with other material allegations, to constitute a cause of action or defense, they should not be stricken out.

Appeal from circuit court, Miami county; O. N. Pollard, Special Judge.

Action by Howard M. Atkinson against the Wabash Railroad Company. From a judgment for plaintiff for a part only of his claim, he appeals. Reversed.

Antrim & Tillett and Henry C. Pettit, for appellant. Stuart Bros. & Hammond and R. P. Effinger, for appellee.

JORDAN, J. Action by appellant against the appellee to recover damages in the sum of \$10,000, arising out of the alleged negligence of the latter in the shipment of certain fine-blooded horses from Wabash to La Porte, Ind. The only question properly presented by appellant for our consideration is that based upon the action of the court in sustaining a motion to strike out certain portions of the amended complaint.

The complaint is in two paragraphs, which, so far as our observation goes, with possibly a slight variation, are substantially alike. The second paragraph, omitting the part wherein it is alleged that the defendant is a corporation and a common carrier for hire, etc., is as follows:

"That on the 12th day of April, 1892, and for six months thereafter, and ever since, plaintiff has been the owner of ten animals of the horse kind, of blooded pedigree, and on said day of the value of ten thousand dollars, and, at the time of the happening of the grievance hereinafter complained of, in sound and perfect condition of health, and free from defect and disease. That during the month of April, 1892, and for a long time prior thereto, defendant was operating a train, scheduled and advertised to the public, desiring to ship goods and horses from Wabash, Indiana,

by Peru, to La Porte, Indiana, to leave Wabash daily at 5 a. m., and to arrive at La Porte daily at 4 p. m. That said animals were young, tender, for racing purposes, and accustomed to the best of care, shelter, and food, and susceptible to cold, and unable to withstand rough usage or exposure to inclement or wintry weather. That defendant on said day had full knowledge of said matters. That the usual and ordinary time for shipment of goods by said route from Wabash to La Porte require ten hours, and no more, as per defendant's schedule.

"Plaintiff says that, on said day, defendant agreed with plaintiff, in consideration of the sum of thirty-one dollars, then asked by defendant, and paid by plaintiff, as tariff in full for said services, to safely ship and transport said animals for plaintiff, without delay, from said Wabash to La Porte, and there deliver them to him in good condition. That plaintiff executed said contract by and in the name of L. L. Daugherty. That a copy of said contract, marked 'A,' is filed herewith, and made a part hereof. That, besides and in addition to said horses, there were three colts which plaintiff desired to ship from said Wabash to said La Porte with said horses, and defendant permitted plaintiff to ship said colts in the same car with said horses without extra charge. That plaintiff did ship said colts in the same car with said horses, and they were safely delivered at La Porte, without damage from said shipment or exposure or in any other cause. That, in pursuance to said contract, plaintiff delivered said ten animals to defendant, in a good and sound condition of health, at 10 p. m. of April 12, 1892, for such shipment. That defendant operated its train on schedule time on the 13th and 14th days of April, 1892, and had at all times on said days the means and ability to transport said animals to said La Porte within twelve hours after 5 a. m., April 13, 1892, and could and should and it was its duty to have done so, and there was nothing to prevent the same being done. But plaintiff avers that said defendant, with full knowledge and ability so to do, and with a knowledge of the premises, carelessly and negligently failed, omitted, forgot, and refused to take said animals and said car so loaded and ready for shipment, and standing upon defendant's side track at said Wabash at 5 a. m. of said April 13th, and with full knowledge that the same were waiting, but operated its said train through and from said Wabash to La Porte, departing and arriving on its scheduled time. That said animals were so loaded for shipment at the instruction of defendant, and from the time of said loading until they were unloaded at La Porte, as hereinafter set out, they were under the control and management of defendant. That said loading for shipment was completed at 10 a. m. of April 12, 1892, and said car delivered by plaintiff and accepted by defendant, in pursuance of said contract, at said time.

¹ Rehearing denied.

That defendant failed and refused to comply with its part of the contract, in this, to wit: That without cause, and having then and there a train and facilities for shipping said car so that the same could and should have been in La Porte by 2 p. m. of April 13th, said defendant negligently, carelessly, and wrongfully failed, refused, permitted, and caused said car and animals to remain en route for the term of time of forty-eight hours, and did not get said car to La Porte until 6 p. m. of April 14th. That from the time of first loading said animals, until midnight of April 13th, the weather was warm and pleasant, and during remainder of said time it became cold, stormy, and wet, and rain, snow, sleet, and hail fell in large quantities, and the atmosphere became very cutting and bitterly cold, and strong winds prevailed, by reason whereof, and by reason of the said negligence, unnecessary delay, fault, and carelessness of defendant as aforesaid, wholly and without fault, want of care, or negligence on the part of plaintiff whatsoever, during the operation of said contract, and while wholly in defendant's care, said animals were exposed, and caught cold, and became sickly and diseased, and, as a result thereof, immediately became, and have ever since remained, injured, damaged, valueless, and worthless in the market, and their health permanently injured and destroyed, a more specific statement of which sickness plaintiff cannot give for want of knowledge. That during said time, under instructions of defendant, plaintiff was compelled to and did unload said animals in said storm. That after the departure of said train at 5 a. m. April 13, 1892, defendant notified plaintiff that it would not take out said car and animals until that hour of the 14th; and plaintiff was compelled to and did unload and distribute said animals about, and boarded them in stables in Wabash, and to reload them at night, for which he was compelled to and did pay the sum of fifty dollars. That plaintiff could not return said animals to his own stables, or leave them in Wabash, or in said car at La Porte, without more danger and equal exposure than that of making said shipment. That said defendant permitted and compelled said car and animals to remain unnecessarily and without cause en route for the term of 48 hours, during all of which time said animals were in its charge exclusively. That the said consideration paid to defendant by plaintiff was the full tariff rate demanded by defendant of plaintiff for said services of shipping, and defendant made no inquiry as to the values of said animals, and made no statement and gave no knowledge whatever to plaintiff that said thirty-one dollars was a reduced rate. The said thirty-one dollars was not a reduced rate, but was the usual and full charge for shipping ten horses from Wabash to La Porte on defendant's schedule.

"Plaintiff says that he has done and performed all of the things required of him to be performed by said contract, except as waived by defendant, as hereinafter stated;

and that, by reason of the said negligence, carelessness, and wrong of defendant, said animals contracted said sickness and disease while in the custody and in charge of defendant. He further says that, at the time of said shipment, each of said animals had just become old enough to train; and, prior thereto, plaintiff had contracted with a trainer and three men to take care of and train said animals, and he was compelled to and did keep said men employed, at an expense of two hundred dollars per month, for four months for said purpose. That said animals, when so becoming diseased, instead of improving, became steadily worse, and were wholly unfit to train, and were rendered worthless in the market; and that plaintiff lost all of his said expenses, by reason whereof he was damaged in the sum of one thousand dollars. That all of the matters and things complained of herein occurred without the fault, want of care, or negligence of plaintiff whatsoever. That plaintiff, by reason of said sickness of said animals, was compelled to and did employ veterinaries to treat them, and purchased a large amount of medicine for them, whereby, for said purposes, he was compelled to and did expend and become indebted in the sum of five hundred dollars for the care and keeping of said horses."

Here follow the further averments to the effect that the animals in question became sick and diseased immediately upon said exposure, but that the fact was not manifest to plaintiff prior to April 20, 1892; that, as soon as he became aware of said disease and sickness, he notified defendant, etc.; and it is alleged, by reason of the matters and things set out, he has been damaged in the sum of \$10,000, and judgment is demanded for that sum.

Appellee filed its motion to strike out so much of each paragraph as was specified in the motion, upon the ground that such matter related to "injuries to the said horses occasioned by exposure to cold, sleet, snow, and rain, due to the sudden change of the weather, and that said injuries were not the proximate result of defendant's alleged delay in shipping said horses." This motion the court, over appellant's exception, sustained, and struck out of each of the paragraphs virtually the same words and averments. The parts struck out of the second paragraph are shown by the words in italics. After the suppression of these portions of the complaint by the court, appellee filed its answer in denial, and the cause was submitted to the court for trial, and there was a finding in favor of appellant in the sum of \$50, and, over his motion for a new trial, judgment was rendered for that amount. The evidence is not in the record.

Appellee contends that this appeal presents no question for the consideration of this court, for the reason, as stated by its learned counsel, that the motion to strike out was addressed to several parts of each paragraph of the complaint; and, as the exception was taken to the ruling as a

whole, they say, and insist, that, conceding there was error in suppressing portions thereof, the motion was, nevertheless, properly sustained as to other parts of the pleading; and, as the exception of appellant to the court's ruling applied to these as well as to the others, it was therefore a joint exception to the whole ruling, and not separate to each ruling necessarily embraced in the motion. To maintain their proposition, counsel seek to have applied the principle asserted in *Railroad Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258, to the effect that if a series of propositions be embodied in the charge of the court to the jury, and the same be excepted to in a mass, and one be correct, the exception is properly denied or overruled.

Under the facts herein, the rule asserted in the case cited and in other decisions of this court of a similar import has no application in support of appellee's contention. The motion was not presented by appellant. Apparently, he had nothing to do with formulating the same. Appellee saw fit to attack the alleged irrelevant portions of the complaint by one motion, and for the reason therein stated, and it was sustained as a whole, and to this ruling appellant excepted. This, under the circumstances, was sufficient. Apparently, as heretofore stated, the motion was based and sustained upon the ground and theory that the injuries and damage to appellant's horses were not in any way due to the negligence of appellee in the delay of shipping said animals; or, in other words, that the negligence of the carrier in not properly discharging his duty in transporting the horses was not the proximate cause, but that the change in the weather, which produced the snow, rain, sleet, etc., constituted the true cause, and that it was an intervening and independent one, for which appellee was not responsible, and one which was beyond its power to foresee or avert. The question is pressed upon us to decide: Which, under the averments in the complaint, is the proximate cause of the injuries and damages of which appellant complains? This question is ably and elaborately argued by the learned counsel for the parties in this action. But this point is not properly presented upon the action of the court in sustaining the motion to strike out, and hence we cannot, consistently with the rules of practice, decide the question. This motion did not perform the office of a demurrer, and the proposition arising in this appeal upon the error assigned is not as to whether the complaint is good or bad upon demurrer; the only proposition upon which our decision is strictly invoked is: Did the court err, to the prejudice of appellant's rights, in sustaining the motion in its entirety, and thereby suppressing the parts or averments of the

pleading in controversy? It is settled that, where averments or matter in a pleading are in any way material, they ought not to be struck out on motion; and the recognized test of their materiality is to inquire whether they tend to constitute a cause of action or defense. If they do, they are not irrelevant, and ought not to be suppressed. The following decisions support this doctrine: *Port v. Williams*, 6 Ind. 219; *Clark v. Railroad Co.*, 44 Ind. 248, and authorities there cited; *Indianapolis, etc., Co. v. Caven*, 53 Ind. 258; *Railroad Co. v. Summers*, 113 Ind. 10, 14 N. E. 733; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833. In the case of *Clark v. Railroad Co.*, supra, this court said: "When a demurrer is sustained to a pleading, the party has the right to amend; but, when a pleading is stricken out, it cannot be amended, for it is out of the record. The party must then either reserve the question by a bill of exceptions, and seek relief in this court, or obtain leave of the court to file another pleading. For this reason, motions to strike out are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party that has to answer or reply to suffer the objectionable matter to remain. *Moloney v. Dows*, 15 How. Prac. 261." We need not and do not decide whether the complaint in this action was or was not upon the theory, under the facts therein outlined, sufficient to entitle the appellant to recover for the alleged injuries to his property; nor do we decide the question raised as to proximate causes. We are, however, of the opinion that the averments or matter eliminated, if not all, at least in part, when coupled with the other material allegations in the complaint, to say the least, tended to constitute a cause of action, and therefore, under the rule, cannot be held as irrelevant. The ruling of the court in striking out these parts of the pleading, in effect, destroyed the theory of appellant's action which he sought to present by his complaint; and it must be presumed that he was prejudiced by the court's ruling in his substantial rights.

We are of the opinion that the portion of the complaint which alleges and claims damages upon the ground that appellant had employed trainers to train and take care of the horses in question was wholly irrelevant as an element of damages, and as to this specification the motion was properly sustained.

For the error in sustaining the motion as a whole, the judgment is reversed, and the cause remanded to the lower court, with instructions to overrule the motion to strike out, except as to the part herein indicated as bad, and for further proceedings in accordance with this opinion.

(143 Ind. 508)

FORSYTH et al. v. CITY OF HAMMOND.

(Supreme Court of Indiana. Nov. 7, 1895.)

**ANNEXATION OF LAND TO CITY—JURISDICTION—
COLLATERAL ATTACK—REVIEW.**

1. A question affecting the jurisdiction of the trial court and the appellate court will be considered though raised for the first time on rehearing in the appellate court.

2. The action of the board of county commissioners in passing on a petition of a city council for annexation of territory to the city, which must give the reasons why, in the opinion of the council, annexation should take place, and which must be on notice to parties interested, is judicial, and therefore courts are properly given jurisdiction of an appeal therefrom.

3. A city council's jurisdiction in annexation proceedings may be attacked collaterally where the conditions prescribed by the statute for jurisdiction do not exist, notwithstanding recitals in the record of the council that they do exist.

4. A city council, having jurisdiction to annex only land adjacent to the city, cannot annex land separated from it by the right of way of a railroad, whether the railroad's interest be a fee or an easement.

On rehearing. For former report, see 40 N. E. 267.

Miller, Winter & Elam, A. L. Jones, J. W. Youche, and Thos. J. Merrifield, for appellants. E. D. Crumpacker, for appellee.

HOWARD, C. J. One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial, function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, and also of this court, it is one that will be entertained at any time.

It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true and are sufficient, seem to be questions calling for a judicial examination and decision. In a similar case (*Grusenmeyer v. City of Logans-*

port, 76 Ind. 549) it was said by Woods, J., speaking for this court, that "the decision of the board in such a case is judicial, and not merely administrative or legislative." But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council and the county board have complied with the statutory requirements in the action taken. It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts, and this court has frequently recognized the right to such appeal. Section 4224, Rev. St. 1894 (section 3243, Rev. St. 1881); *Catterlin v. City of Frankfort*, 87 Ind. 45; *Chandler v. City of Kokomo*, 137 Ind. 295, 36 N. E. 847; *Wilcox v. City of Tipton* (at this term) 42 N. E. —. See, also, *Manufacturing Co. v. Emery* (at this term), 41 N. E. 814. See, also, *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813.

In *Forsythe v. City of Hammond*, 68 Fed. 774, Baker, J., in passing upon an application, made to the United States circuit court for the district of Indiana by one of the appellants in the case at bar, to enjoin the appellee from collecting taxes upon the lands annexed in this proceeding, speaking of the question now under consideration said: "The power to hear and determine whether the conditions prescribed by law for the creation, enlargement, or contraction of a municipal body exist is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement, or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law, ex proprio vigore, creates the municipal body, or enlarges or contracts its boundaries."

Counsel next repeat the contention that the action of the common council of East Chicago, in attempting to annex to that city certain of the lands here in controversy, without first having secured the assent of the owners of that part thereof adjacent to the city, cannot be attacked collaterally in this case. We cited in the original opinion numerous authorities to the proposition that the jurisdiction of an inferior tribunal, as a common council, may be attacked collaterally, and evidence offered to show that the tribunal did not have jurisdiction of the subject matter or of the parties. We have attentively read the acute analysis made of those au-

thorities by counsel, and are still satisfied that the authorities so cited do establish the truth of the proposition stated. We are inclined to think that counsel have not carefully distinguished between facts as to the jurisdiction of a body and facts as to the proceedings and acts of that body after jurisdiction is shown. If there is jurisdiction, then the decision that follows is conclusive, except on direct attack. But jurisdiction itself may always be inquired into, and it is only after jurisdiction is established, both of the subject matter and of the person, that the decision of the tribunal will be invulnerable to collateral attack. As said by this court in *Board v. Markle*, 46 Ind. 96, cited in the original opinion: "The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as in the absence of which the court cannot rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false." See, also, *State v. Hudson*, 37 Ind. 198. As bearing upon the question, see, further, *Rape v. Heaton*, 9 Wis. 328; *Thompson v. Whitman*, 18 Wall. 457; *Withers v. Patterson*, 27 Tex. 491; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108; *Works, Courts*, §§ 20, 23, 25, 26.

In the case at bar it is not doubted that the owners of the lands adjacent to the city of East Chicago, and which it was attempted to annex to the city, had never assented to such annexation, but that the only petition for annexation presented to the common council was by owners of lands not adjacent to the city; yet the claim is made that the question of the right of the council to annex such adjacent lands, and also the nonadjacent lands, is foreclosed by the record. The city council assumed that the petitioners for annexation were the owners of the lands adjacent to the city, and it is said that this assumption is conclusive, although in fact the owners of the adjacent lands did not assent to such annexation. If that contention were good, why could not any person go before a city council, claim falsely to be the owner of adjacent lands, and petition for their annexation to the city, and, if the record of the common council should show that upon such petition the lands were annexed, how could the decision be collaterally called in question? The law, however, gives the council jurisdiction to annex adjacent lands only on the written assent of the owners. It is clear that the common council had no jurisdiction of the subject matter.

In cases cited in the original opinion we think it is shown that this court has more than once decided practically the same question here raised, namely, that attempts at annexation of lands to cities made by common councils not having jurisdiction are void, and may be attacked collaterally, as well as directly. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *City of Delphi v. Startzman*, 104

Ind. 343, 3 N. E. 937; *City of Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551.

Counsel devote much argument and research to show that where the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and settle by its decision, such decision, in general, is conclusive. It needed but a statement of that proposition to establish its truth. But it does not follow that such tribunal, by claiming jurisdiction, can establish it. If the law fixes what is necessary to acquire jurisdiction, the tribunal cannot take jurisdiction not so authorized by law. The law requires notice to parties who are to be subjected to the decisions of the tribunal. Jurisdiction, therefore, cannot be taken without such notice. But as the tribunal must itself decide whether the notice is sufficient, its decision on such sufficiency is conclusive. So, when a petition is to be filed, such petition is necessary to give jurisdiction, and the tribunal, by finding that a petition was filed, when in fact it was not, could not take jurisdiction. But as the tribunal is the only body to pass upon the sufficiency of the petition, whether it is in proper form, has the requisite number of signers, and whether the persons signing have the proper qualifications, etc., its decision on such questions is final.

Stoddard v. Johnson, 75 Ind. 20, one of the leading cases on this subject, and relied upon by counsel, is in harmony with this holding. That case decides that the presentation of a petition for the improvement of a highway gave the county commissioners jurisdiction over the subject matter of the petition, and that whether the petition were in all respects sufficient was a jurisdictional question, which the board had a right to decide for itself. The court, however, is careful to say that it is not to be understood as holding that "any petition, however defective or irrelevant, will be deemed sufficient to invoke the jurisdiction of the commissioners to decide upon its sufficiency, and to impart validity to that decision as against collateral attack." The correct rule is stated in the same case, "that once the jurisdiction of an inferior tribunal is established over the subject matter and the parties to a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevails in favor of the action of the courts of general powers." Had the common council in the case before us acquired jurisdiction over the lands to be annexed and lying adjacent to the city, and had it also acquired jurisdiction over the owners of such lands, then the subsequent proceedings, however defective, would not be void; but, not having acquired jurisdiction over the lands or over its owners, the annexation proceedings were a nullity.

Whether the right of way of the Chicago Calumet Terminal Railway Company was a fee simple or an easement is not material here. If the strips of land belonging to that company, by whatever name the title may

be called, are not within the corporate limits of the city of East Chicago, it is very certain that the land of the petitioner company, and which is separated by those strips from the city limits, is not adjacent to the city. But it cannot rightfully be claimed that these strips are within the limits of the city of East Chicago. They were never annexed, either on petition of their owners or by act of the county board. The city could not levy taxes or street and sewer assessments upon these strips of land, could not make streets or alleys across them, or in fact exercise any jurisdiction whatever over them. The strips are outside the limits of the city, and completely separate the lands of the improvement company from the city limits. How then could the city annex those nonadjacent lands of the improvement company? The statute expressly provides that the lands to be annexed to a city shall be adjacent. Had the city jurisdiction of the subject matter? Could the city, by declaring the lands of the improvement company to be adjacent, make them adjacent? If the common council could annex lands separated from the corporate limits by a right of way 100 feet across, why might it not annex lands a mile distant from the city? The conclusion is irresistible that the city had no jurisdiction of the subject matter; the lands of the petitioner company were not adjacent to the city, and could not therefore be annexed. The petition for a rehearing is overruled.

(13 Ind. App. 529)

TERRE HAUTE & I. R. CO. v. STATE.

(Appellate Court of Indiana. Nov. 7, 1895.)

RAILROAD COMPANIES—REGISTERING TRAINS.

Rev. St. 1894, § 5186, requiring every railroad company at any station at which "there is a telegraph office" to register, on a blackboard kept in a conspicuous place for that purpose, 20 minutes before a passenger train is due by schedule time, whether it is on time, and, if late, how late, does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the daytime.

Appeal from circuit court, Marshall county; A. C. Capron, Judge.

Action by the state against the Terre Haute & Indianapolis Railroad Company, for penalty for failure to schedule the arrival of a night train at a station where it maintained a telegraph office only during the daytime. From a judgment for plaintiff, defendant appeals. Reversed.

R. B. Oglesbee and Miller, Winter & Elam, for appellant. S. N. Stephens, J. D. McLaren, and Wm. A. Ketcham, Atty. Gen., for the State.

REINHARD, C. J. This action was brought by the state against the appellant company to recover a penalty for an alleged violation of what is known as the "Black-board Law." In the court below, the appel-

lee recovered the sum of \$25 and costs. Several errors are assigned, but the question presented may be determined by considering the alleged error of the court in its conclusion of law upon the special finding of facts. The special finding shows that the appellant company did not maintain a telegraph office at its station as a night office; that the train which the appellant failed to bulletin was a train which was scheduled to arrive at said station at 10:08 o'clock p. m., at which time there was no telegraph operator in said office to receive any message concerning the movement and operation of said train; that, as a matter of fact, said train was 30 minutes late, but that the appellant made no announcement whatever on its blackboard concerning the arrival of said train, nor did it post any other information regarding said train. It is earnestly insisted by appellant's counsel that, upon this finding, the judgment of the court should have been in favor of the appellant, and that the court's conclusion that appellant was liable was erroneous.

The statute upon which the present action is based reads as follows: Section 1: "That every corporation, company or person operating a railroad within this state shall, immediately after the taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state, at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such company, or person shall cause to be written at least twenty minutes before the scheduled time for the arrival of each passenger train stopping upon such route, at such station, the fact whether such train is on schedule time or not and if late, how much." Rev. St. 1894, § 5186. The second section prescribes the penalty, and confers power upon the prosecuting attorney to prosecute any action under the law. It is a familiar rule that penal statutes are to be given a strict construction in favor of the persons against whom they operate; but, while this is true, they should never be interpreted so as to make them entirely inoperative, or to place it within the power of those affected by any such statute to circumvent or thwart its purpose at pleasure, if, by a rational interpretation of all its parts together, the purpose of the lawmakers may be ascertained and given effect. The rule of strict construction is not violated by adopting that sense which best harmonizes with the object and intent of the legislature when the entire text is considered as a whole. *State v. Railroad Co.*, 133 Ind. 69, 32 N. E. 817. The statute was designed to give information to those interested in the arrival of trains, so as to relieve the suspense so frequently occasioned to travelers and others thus interested by unexplained delays. *State v. Bridge Co.*, 136 Ind. 195, 35 N. E. 991. This being the purpose of the law, it would seem that the solution of the question before us ought not to be a very difficult task. It is

obvious that it was not the intention of the lawmakers to entail upon railroad companies any additional burdens with regard to the establishment and maintenance of telegraph offices. Such companies are not required by the statute under construction to establish any telegraph office at any station where there was none prior to the enactment of the law, nor to maintain one already established, if unnecessary to the transaction of their business. The object of maintaining a telegraph office by a railroad company at any station on its road is to enable the employees of the company to receive and transmit information concerning the movements and operations of trains. Telegraph offices are also maintained for the accommodation of the general public, but these are generally owned and operated by telegraph companies, and not by railroad corporations. We take it that, if a railroad company chooses not to maintain a telegraph office at any of its stations where one is now carried on, it may, doubtless, dispense with the same altogether, and that there is nothing in the statute to keep it from doing so. In that event, we think such company would not be required to bulletin all trains at such station, notwithstanding trains may stop there regularly. But if the railroad company does maintain an office at such station, or even if a telegraph company operate such office there, we are of opinion that the railroad company is required to give information on its blackboard of the arrival of trains scheduled to stop at the station such as the company may have or be in position to obtain. If it is within the power of the company to dispense entirely with the telegraph office at any station, as we think it is, does it not follow that the company may dispense with the maintenance or operation of such telegraph office at regular periods during any portion of a day of 24 hours, when it deems it proper to do so? In other words, if a railroad company should regard it proper and consistent with its business interests to maintain only a day office, but not a night office, thus not being in a position to obtain any information concerning the movements of its night trains, will it be violating the provisions of this statute by failing to make the announcement therein provided concerning such night trains? We do not think so. Of course, if the railroad company is maintaining a telegraph office during the entire day, it may not refuse to receive and transmit to the public the information required by sending away its operator or dispensing with his presence at irregular periods to suit its own fancy, as this would be placing it within the power of such company to determine at its own will and pleasure which particular train or trains it would, and which it would not, announce on its blackboard. While the enactment does not impose on the company the duty of maintaining a telegraph office at any station, it does make it incumbent upon such company, while maintaining such telegraph

office, to bulletin all trains that stop at such station; and this carries with it the further duty of obtaining such information as may be reasonably at the company's command by means of such telegraph service as it deems necessary to the transaction of its business. We think, as long as the company in good faith publishes all the information received by it, or that is reasonably at its command, the requirements of the statute are fulfilled. The company cannot evade the statute by pretending that, when a particular train was due, it had for a brief and indefinite period dispensed with its operator, and hence had not in its possession the necessary information to place on the blackboard. In the present case, as we have seen, it was found that the appellant was not maintaining a night office. This being true, we do not think the appellant was required to make announcement of the train in question. We think the appellant was entitled to a judgment upon the finding. Judgment reversed, with instructions to the court below to restate its conclusions of law.

(14 Ind. App. 602)

HUSTON et al. v. COSBY.¹

(Appellate Court of Indiana. Nov. 7, 1895.)

APPEAL—OBJECTIONS WAIVED—BILL OF EXCEPTIONS—REVERSAL.

1. Specifications of error assigned, but not argued in the brief submitted, will not be considered.

2. A bill of exceptions must have a caption or introductory part showing that it is a bill of exceptions, and contains the evidence introduced at the trial.

3. Under Rev. St. 1894, § 670 (Rev. St. 1881, § 658), providing that no judgment shall be reversed for formal defects which could be cured by amendment in the lower court, or where the merits of a cause have been fairly tried, a bill of exceptions, insufficient for want of a proper caption, which shows that a fair trial has been had, and a correct result reached, will prevent a reversal.

Appeal from circuit court, Vanderburgh county; J. W. Foster, Judge.

Action by Mary E. Cosby against Erastus P. Huston and others on a note. From a judgment for plaintiff, defendants appeal, defendant Huston alone assigning error. Affirmed.

J. E. Williamson, for appellants. Chas. L. Wedding, for appellee.

ROSS, J. The appellee brought this action upon a promissory note given by the Evansville Public Hall Company and indorsed by Erastus P. Huston and David J. Mackey. The only specifications of error assigned on this appeal are those assigned by the appellant Erastus P. Huston, and are as follows: First. "The court erred in overruling appellant Huston's separate demurrer to the plaintiff's complaint." Second. "The court erred in overruling appellant's motion for a new trial."

The first specification of error has not been

¹ Rehearing denied.

argued; hence it must be deemed to be waived. Specifications of error assigned, but not argued in the briefs of counsel, will not be considered by the court.

The reasons for which a new trial was asked are that the finding of the court is not sustained by sufficient evidence, and is contrary to law. It is contended by the appellee that this court cannot consider the questions attempted to be presented on the ruling of the court below in overruling the motion for a new trial, for the reason that the evidence is not properly in the record. In support of this contention it is urged that, while the evidence is copied into the record, it is not there in the form of a bill of exceptions, in that it is not preceded by a proper caption; that there is no recital, preceding what purports to be the testimony of witnesses, that they were sworn or testified in this cause; and that the bill of exceptions shows on its face that it does not contain all of the evidence given on the trial of the cause. That which purports to be a bill of exceptions containing the evidence has no caption, neither is it preceded by the title of the cause, nor is it identified in any way as a bill of exceptions, nor as a paper filed in said cause. While it is true that the form of a bill of exceptions is of comparatively little importance, and if it is sufficiently formal to show what it is, and presents to the court the question sought to be raised, it is sufficient, yet we cannot accept and treat as a bill of exceptions every paper which a clerk may see fit to copy into a record, unless there is something to show that the paper filed is a bill of exceptions. There must be something identifying it as a bill of exceptions and as a paper filed and belonging to the records in that case. *Railway Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415. What the form of the caption or introductory part of the bill should be is immaterial if it sufficiently shows that it is a bill of exceptions containing the evidence introduced on the trial of the cause. But that it is necessary to have a caption of some kind seems to be settled. *Board of Com'rs v. Mutchler*, 187 Ind. 40, 36 N. E. 534; *City of Alexandria v. Cutler*, 139 Ind. 568, 39 N. E. 237. Without deciding whether or not the paper filed as a bill of exceptions in this case is sufficient, and brings the evidence into the record, we are content to say that we have carefully read the evidence, and think a fair trial has been had, and a right result reached. Having arrived at this conclusion, the judgment should be affirmed. Section 658, Rev. St. 1881 (section 670, Burns' Rev. St. 1894). Judgment affirmed.

(13 Ind. App. 536)

CITY OF FT. WAYNE v. FARNAN.

(Appellate Court of Indiana. Nov. 8, 1895.)

SPECIAL INTERROGATORIES—GENERAL VERDICT.

A finding, in response to a special interrogatory, that an ordinarily prudent person could have passed in safety over the sidewalk upon

which plaintiff was injured, will not control a general verdict for plaintiff, as it was not necessarily inconsistent with plaintiff's exercise of due care.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Bridget Farnan against the city of Ft. Wayne for personal injuries. Plaintiff had judgment, and defendant appeals. Affirmed.

Swayne, Ninde & Ninde, for appellant. Colerick & France, for appellee.

ROSS, J. The appellee recovered judgment in the court below against the appellant for personal injuries received which were caused by falling upon one of the sidewalks of said city, which it is alleged was out of repair and dangerous to pedestrians. Several specifications of error have been assigned in this court, but counsel have argued but one of them. That one calls in question the correctness of the court's ruling in overruling the motion made by appellant for judgment on the answers to interrogatories.

Answers to interrogatories will not control the general verdict unless irreconcilable with it. *Railroad Co. v. Weikle*, 6 Ind. App. 340, 33 N. E. 639; *Railroad Co. v. McHenry*, 10 Ind. App. 525, 37 N. E. 136; *Phillips v. Michael*, 11 Ind. App. 672, 39 N. E. 669. The jury, by their general verdict, it must be assumed, found every fact material to appellee's cause of action in her favor, and that verdict will not be overthrown unless, in their answers to the interrogatories, the jury have found that some material fact does not exist which was necessary to her right of recovery. If the facts specially found in answer to the interrogatories show either that appellant was not guilty of negligence, or that appellee's own negligence contributed to her injury, then the general verdict must fail. The duties of cities to keep their streets and sidewalks in a reasonably safe condition for the use of persons travelling thereon is well settled. *Buscher v. City of La Fayette*, 8 Ind. App. 590, 36 N. E. 371. And it is equally well settled that a traveler is not bound to forego the use of a street or sidewalk simply because it is in a defective condition, unless it is in such a condition that by using it injury would in all probability result therefrom, and the person so using it had knowledge of its condition. *City of Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439. If a sidewalk is out of repair, and a pedestrian using it knows of, or can, by looking, see, its condition, he is bound, if he proceeds, to exercise care commensurate with the danger to be encountered. "Where the place is known to be so dangerous that it cannot be passed without great risk of injury, it is negligence to attempt to pass it." *City of Richmond v. Mulholland*, 116 Ind. 173, 18 N. E. 832.

While we do not hold that all of the inter-

rogatories submitted to the jury called for, or that such answers were, findings of fact, yet we think the facts properly found are insufficient to overcome the general verdict. The jury do not find that appellee was acquainted with the unsafe condition of the walk before the happening of the accident resulting in her injury, or that she might have passed over it in safety had she been reasonably careful. The contention of counsel that, because the jury have found that an ordinarily prudent person could have passed over in safety, she must necessarily have been negligent, or she would not have been injured, is not tenable. Some persons may have been able to pass over the walk in its unsafe condition by the use of extraordinary care, but because other persons might pass over it safely does not imply that appellee was negligent because she was injured while attempting to pass over. If there is any conflict between the general verdict and the answers to the interrogatories, it is not such but what the answers may be true, and yet be reconciled with the general verdict. Judgment affirmed.

(13 Ind. App. 455)

W. B. BARRY SAW & SUPPLY CO. v. CAMPBELL et al.

(Appellate Court of Indiana. Nov. 5, 1895.)

DEMURRER—SUFFICIENCY—CONCLUSIONS OF LAW—SALE.

1. A demurrer "to each, the second and third paragraphs of defendants' answer, for the reason that neither said second and third paragraphs of defendants' answer a good defense to the complaint," is defective in form, and presents no question as to the sufficiency of either paragraph. *Pine Civil Tp. v. Huber Manuf'g Co.*, 83 Ind. 121, followed.

2. A fact cast among the conclusions of law cannot be considered for any purpose.

3. Where the thing sold was worthless, it was not necessary to return it to sustain a defense of breach of warranty in an action for the purchase price.

Appeal from circuit court, Monroe county; R. W. Miers, Judge.

Action by W. B. Barry Saw & Supply Company against John Campbell and others on a note. Defendants had judgment, and plaintiff appeals. Affirmed.

To the second and third paragraphs of defendants' answer plaintiff interposed a demurrer, as follows: "The plaintiff demursers to each, the second and third paragraphs of defendants' answer herein, for the reason that neither said second and third paragraphs of defendants' answer a good defense to the complaint herein." The overruling of plaintiff's demurrer is assigned as error.

James F. Morgan, for appellant. Louden & Louden, for appellees.

LOTZ, J. The appellant sued the appellees on a promissory note. The appellees filed an answer in three paragraphs: (1) The general denial; (2) breach of warranty;

(3) counterclaim. The appellees filed a reply in denial of the second and third paragraphs. The cause was submitted to the court for trial, which at the request of appellant made a special finding of the facts and stated conclusions of law, and rendered judgment in favor of the appellees that the appellant take nothing by its action.

An assignment of error calls in question the action of the court in overruling appellant's demurrer to the second and third paragraphs of answer. Appellant's demurrer is so defective in form as to present no question as to the sufficiency of either paragraph. *Pine Civil Tp. v. Huber Manuf'g Co.*, 83 Ind. 121. It is doubtful whether or not the second paragraph is sufficient, had it been properly tested.

Another assignment of error calls in question the action of the court in overruling appellant's exception to the conclusions of law. The conclusions of law in this case contain certain statements which are properly facts, and are not conclusions of law. It is settled that a fact cast among the conclusions of law cannot be considered for any purpose.

The finding shows that the saw for which the note was given was worthless. No return was therefore necessary.

Judgment affirmed.

(13 Ind. App. 481)

WESTFIELD GAS & MILLING CO. v. NOBLESVILLE & E. GRAVEL-ROAD CO.

(Appellate Court of Indiana. Nov. 6, 1895.)

PLEADING—COMPLAINT—CONTRIBUTION BETWEEN JOINT TORT FEASORS—RES JUDICATA.

1. A pleading in a former suit, though not the foundation of the present action, may supply necessary averments therein, if set out in full in the complaint, and not merely attached thereto as an exhibit.

2. Where judgment was recovered against two defendants for an injury caused by an open and unguarded ditch, which one of them had dug on the land of the other without license, the defendant not at fault is entitled to recover from his codefendant, in a subsequent action, the amount he had to pay on such judgment.

3. While an action in which judgment is rendered against two defendants for an injury resulting from the negligence of one only does not, in the absence of cross pleadings, determine the rights of defendants as between themselves, the fact of the liability of each to plaintiff is adjudicated, both as between them and him, and as between defendants themselves.

Appeal from circuit court, Hamilton county; E. A. Brown, Special Judge.

Action by the Noblesville & Eagletown Gravel-Road Company against the Westfield Gas & Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Kane & Kane, for appellant. Fertiz & Alexander and Roberts & Vestal, for appellee.

GAVIN, J. Appellee sued appellant, averring that it had entered upon the line of appellee's turnpike, and, without leave or li-

cense, constructed a deep, open ditch or trench therein, which it had carelessly and negligently left open and unguarded upon January 2, 1889; that afterwards one Abernathy brought suit against appellee and appellant for damages for injuries received by reason of said trench's being by them negligently and carelessly left unguarded and open; that said appellant and appellee filed answers of general denial, and went to trial, which resulted in a judgment against both, a part of which appellee had paid. For that sum this suit was brought. This complaint was tested by demurrer.

The complaint in the former action was set out in full in this complaint, not merely attached thereto as an exhibit. Its contents were thus properly brought before the court, although the action was not founded thereon. *Knight v. Turnpike Co.*, 45 Ind. 134.

The complaint, as it seems to us, clearly and sufficiently shows that the recovery of the judgment resulted from appellant's wrongful act. Under such circumstances, although both the parties might be liable to the injured party, as between themselves they were not in pari delicto, and, on well-established principles, the appellant, who was the primary and active wrongdoer, can be compelled to make good to the appellee the loss thereby occasioned to it. The rule that there is no contribution nor right of indemnity between joint tort feorsors does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. *Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Wickwire v. Town of Angola*, 4 Ind. App. 253, 30 N. E. 917; *McNaughton v. City of Elkhart*, 85 Ind. 384; *Churchill v. Holt*, 127 Mass. 165; *Gray v. Boston Gaslight Co.*, 114 Mass. 149; *Inhabitants of Lowell v. Boston, etc., Ry. Co.*, 23 Pick. 23; *Elliott, Roads & S.* 856.

It was held in the decision of the main action (*Milling Co. v. Abernathy*, supra) that the parties to this action were, as to Abernathy, not joint, but several, tort feorsors. Appellant, by answer and by offers of evidence upon the trial, sought to avoid responsibility by showing that it did not dig the trench, and was not therefore liable to the plaintiff, Abernathy, in the former action. It insists that this question of its original liability is still open as between itself and appellee, although adjudged and closed as between it and Abernathy. To sustain their contention, counsel rely upon the proposition announced by the authorities, that "the party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have demurred or pleaded." *Jones v. Vert*, 121 Ind. 140, 22 N. E. 882; *Harvey v. Osborn*, 55 Ind. 535; *Leaman v. Sample*, 91 Ind. 236; *Armstrong v. Harshman*, 61 Ind. 52. While this and similar

statements of the law may, doubtless, be regarded as correct, when taken in connection with the circumstances of the cases under consideration and in connection with the other language used, we cannot assent to the literal and far-reaching interpretation which counsel would give them, whereby they claim that, as between the defendants, nothing is settled, but everything is left open for future litigation. On the contrary, we are of opinion that while, in the absence of cross pleadings, the rights of the defendants as between themselves are not adjudicated, yet the fact of the liability of each to the plaintiff is adjudicated and determined, both as between themselves and him, and between each other. If two parties are sued upon a note, and judgment taken without cross pleadings, the question of who should pay the debt as between themselves is left open; but that both are liable to the creditor is adjudicated, and can no longer be disputed, even as between themselves. *Dewitt v. Boring*, 123 Ind. 4, 23 N. E. 1085; *Bulkeley v. House*, 26 Atl. 352, 62 Conn. 459; *Freem. Judgm.* § 158; *Lloyd v. Barr*, 11 Pa. St. 41; 2 Black, *Judgm.* § 599. According to the position taken by appellant that "nothing was adjudicated between the defendants," it was open for appellant to dispute appellee's liability, as well as its own; thus leaving the entire lawsuit to be again fought over. Such a position does not seem to us tenable. The question of both appellee's and appellant's liability was directly in issue in the former cause, and must be regarded as settled, but this does not by any means prevent the appellant from asserting that, although both it and the appellee were in the wrong, yet, as between themselves, there was no good reason why appellant should indemnify the appellee. With these views of the law, we find no cause for reversal. Judgment affirmed.

DAVIS, J., does not participate.

(13 Ind. App. 544)

WINSTANDLEY et al. v. SECOND NAT.
BANK OF LOUISVILLE.

(Appellate Court of Indiana. Nov. 8, 1895.)

BANKS — INSOLVENCY — TRUSTS — PREFERENCE OF
CREDITORS — TRIAL — SPECIAL VERDICT.

On the insolvency of a bank which has collected notes sent to it for collection, and failed to remit the proceeds, a trust will be imposed on the assets of the bank in favor of the person sending them, as against the general creditors of the bank, if it is proven that the moneys collected were deposited in the bank and commingled with other funds of the bank, or if they went into property represented by the assets in the hands of the assignee of the bank.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by the Second National Bank of Louisville, Ky., against William C. Winstandley and others. There was a judgment

for plaintiff, and defendants appeal. Reversed.

Newton Crooke and Geo. O. Iseminger, for appellants. Wm. H. Martin, for appellee.

LOTZ, J. The facts essential to the determination of this appeal appear in the special findings made by the court, and are in substance as follows: The plaintiff below, and appellee here, is a banking corporation organized under the laws of the United States, and does a general banking business in the city of Louisville, Ky. The appellants the Winstandleys and Breyfogle were a copartnership doing a general banking business at Bedford, Ind., under the name of the "Bedford Bank." The Louisville Bank sent to the Bedford Bank, for collection, various claims, aggregating \$1,179.89. Prior to June 2, 1893, the Bedford Bank collected all of these claims, and on June 2d, 3d, and 5th it remitted all of the collections so made, less the exchange, by three drafts drawn on the Chicago National Bank. At the time the Bedford Bank drew the drafts in its favor on the Chicago Bank, it had no funds whatever in the Chicago Bank subject to draft. The drafts so drawn were not paid, nor has any part of the moneys collected ever been paid. On the 6th day of June, 1893, the Bedford Bank made an assignment for the benefit of its creditors, under the insolvent laws of this state; and Daniel W. Parker, one of the appellants, was appointed assignee. There was found to be due the Louisville Bank, of principal and interest, the sum of \$1,259.57. Upon these facts, the court stated conclusions of law, to the effect that the Louisville Bank was entitled to recover the sum above named as against Parker, assignee, and that said claim was a preferred one against the funds in the assignee's hands. A judgment was rendered accordingly, and the assignee ordered to pay the claim out of any funds in his hands as a preferred claim.

An assignment of error calls in question the trial court's conclusions of law. The relation shown to exist between the Louisville Bank and the Bedford Bank is a fiduciary one,—that of principal and agent. The question here presented for decision is, we believe, a new one in this state, and the authorities elsewhere bearing upon it are not in harmony. Under these circumstances, we feel it to be our duty to adopt that rule which leads to the most equitable and just result. It is an ancient rule of the common law that the owner of a chattel who has been wrongfully deprived of its possession may follow it, and recover it, no matter what changes and transmutations it may have undergone, and however much it may be increased in value by the expenditure of labor upon it; provided, only, that the product is still a chattel, and composed of the original materials. Thus, if logs be sawed

into lumber, and the lumber be made into an article of furniture, the owner of the logs may recover the article of furniture. *Coke Co. v. Reitz* (Ind. App.) 39 N. E. 541; *Ellis v. Wire*, 33 Ind. 127.

A court of law, as a general rule, deals only with the legal title; and when the legal identity of a chattel is destroyed, or it cannot be specifically traced into another thing, it is unable to give relief except by action for damages against the wrongdoer or person who converted it. But courts of equity, having greater powers, endeavor to afford a more complete remedy. Thus, any property, either real or personal, held by a fiduciary or trustee, and denominated a "trust," may be reached after it has changed its character and lost its original form. The equity rule is that trust property may be followed by the beneficiary so long as its identity can be ascertained. If a trustee or other fiduciary wrongfully dispose of his principal's property, equity imposes a constructive trust upon the new form or species into which it is converted, so long as it can be traced or followed and its identity ascertained. 2 Pom. Eq. Jur. §§ 1050, 1058; 2 Story, Eq. Jur. §§ 1258, 1259. The principle upon which this rule rests is a very plain and just one. It is founded upon the right of property. The trust property right fully belongs to the cestui que trust, and a change in its form does not change its ownership. So long as either the original or substituted property can be traced or followed, equity will always attribute the ownership to the beneficiary, and will not allow the right to be defeated by the wrongful act of the fiduciary, no matter what form it may assume. The true owner of property has the right to have his property restored to him, not as a debt due and owing, but because it is his property, wrongfully withheld. As between the cestui que trust and the trustee and all parties claiming under the trustee, except purchasers for value and without notice, all the property belonging to the trust, however much it may have been changed in its form or its nature or character, and all the fruits of such property, whether in its original or altered state, continue to be subject to and affected by the trust. *Pennell v. Duffell*, 4 De Gex, M. & G. 387. It was formerly held that these rules came to an end the moment the means of ascertaining the identity of the trust property failed. *Taylor v. Plumer*, 3 Maule & S. 562. In the case of trust moneys commingled by the trustee with his own moneys, it was held that money has no earmarks, and, when so commingled, the whole became an indistinguishable mass, and the means of ascertainment failed. But equity, adapting itself to the exigencies of such conditions, finally determined that the whole mass of money with which the trust funds were commingled should be treated as a trust; and if the trustee deposited the trust funds with his own funds in bank, and

then drew upon the commingled funds, he was presumed to have drawn out his own funds first, and that the remaining funds belonged to the trust. It is not to be presumed that the trustee would commit a wrong, and use the trust funds when he had moneys of his own, idle in the bank. *Clayton's Case*, 1 Mer. 572. But many cases arose in which it was impossible to trace the trust funds beyond the point of conversion. The means of ascertainment failed. Here, again, equity came to the relief of the beneficiary. The case of *Knatchbull v. Hall*, 13 Ch. Div. 696, is considered an enlargement or expansion of the former equitable rules. It was there held that if money be received by a person in a fiduciary character, though not as a technical trustee, and he pays it into his own account in bank, the person for whom he received the money might follow it, and have a charge on the balance in the bank, as shown by the account. The principle here announced has been followed by the supreme court of the United States and by other courts of last resort. *National Bank v. Insurance Co.*, 104 U. S. 54; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499; *Independent Dist. v. King* (Iowa) 45 N. W. 908; *Bank v. Weens* (Tex. Sup.) 6 S. W. 802; *Davis v. Insurance Co.*, 81 Iowa, 496, 46 N. W. 1073; *Third Nat. Bank v. Stillwater Gas Co.* (Minn.) 30 N. W. 440. There are courts, however, that refuse to follow this latter doctrine. *Bank v. Smith*, 21 Blatchf. 275, 15 Fed. 858; *Bank v. Dowd*, 38 Fed. 172.

In case of the insolvency of the fiduciary, the equitable doctrine above stated has been further expanded. If the trust property, either in its original or substituted form, can be traced into the assets in the hands of the insolvent or of his assignee, the fiduciary may have a lien established or a preference decreed over the claims of the general creditors, although the identity of the trust funds is lost; but in such cases it must be made to appear that the trust property is actually represented in the assets. *Cavins v. Gleason*, 105 N. Y. 254, 11 N. E. 504. There are courts which go still further than this, and hold that the beneficiary in the trust is entitled to a preference over the general creditors, although the insolvent may have used the trust property or funds for the payment of his debts, and although the trust property never entered into the estate of the insolvent, nor is represented in his assets. *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Carley v. Graves*, 85 Mich. 483, 48 N. W. 710; *Griffin v. Chase* (Neb.) 54 N. W. 572. We are of the opinion that the latter cases have reached an extremity that can scarcely be upheld upon equitable and just grounds. It is the purpose of equity to do justice, and it should not be perverted so as to work injustice. Thus, if an agent collect \$1,000 for his principal, and, without commingling it

with his own funds, invest it in a speculation, and lose it, and then fails, the trust funds are not represented in his assets, and it would be inequitable to his general creditors to give the beneficiary a preference. If the agent should take the money, and apply it to the payment of his debts, or use it for other purposes, so that it is consumed, it would then form no part of his estate. The beneficiary, under such circumstances, is not equitably entitled to a preference. While it is true that, in using the money to pay his debts, it may have inured to the benefit of the estate, still this may be said of all contract debts. "In a very general sense, all creditors of an insolvent may be supposed to have contributed to the assets which constitute the residuum of his estate." *Cavins v. Gleason*, supra. We know of no reason founded in justice why the beneficiary should have a superior right over the general creditors under such circumstances.

In the case in hearing, if the moneys collected were deposited in the bank, and commingled with other moneys, the appellee would be entitled to have a preferred charge against the funds remaining in the bank, if any; and, if the moneys went into the property now represented by the assets in the hands of the assignee, the appellee would be entitled to a preference over the other general creditors. But there is nothing in the findings to show what was done with moneys collected. While it is true that the presumption is that they were deposited or became a part of the assets, this presumption is not conclusive, for they may have been diverted to other purposes. It is a familiar rule that a party seeking to invoke the judgment of the law must produce the facts which will support the judgment, and no inferences or intendments will be indulged in favor of a special finding or verdict. The facts found do not support the judgment rendered. Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

(13 Ind. App. 350)

INDIANA BOND CO. v. BRUCE.

(Appellate Court of Indiana. Nov. 8, 1895.)

MUNICIPAL CORPORATION — PUBLIC IMPROVEMENTS — ASSESSMENT — PAYMENT TO CITY TREASURER BY CHECK.

1. Under Rev. St. 1894, § 3851 et seq., providing for the payment of assessments for a public improvement, a bond payable in installments having been given by the city for the amount of the assessment, and the assessment pledged as security for its payment, with authority to the holder to enforce the assessment on failure of the city to pay the installments when due, and requiring the property owner assessed to pay to the city treasurer the amount of the assessment before the bond becomes due, a payment by the property owner to the treasurer relieves the property owner from further liability.

2. The failure of the city treasurer, when payment of a special assessment is made to him,

to enter the proper credits on the assessment rolls, and to give the property owner a voucher for his payment, as required by statute, does not affect the validity of the payment.

3. Payment of a special assessment by check, which is accepted by the city treasurer, and paid when presented, is a valid payment as of the date the check was given.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by the Indiana Bond Company against William A. Bruce. There was a judgment for defendant, and plaintiff appeals. Affirmed.

S. M. Richcreek, for appellant. T. S. Rolins, for appellee.

REINHARD, C. J. This action was brought by the appellant, who is the holder of an assessment bond issued to a contractor for a street improvement in the city of Indianapolis, against the appellee, the owner of the property improved. It is averred in the complaint that the first payment on the bonds issued on the assessment became due and payable on the third Monday of April, 1895, that being the 15th day of April, 1895; that said appellee wholly failed and neglected to pay the installment of principal and interest which was then due, whereupon the whole assessment became due and payable. It is also averred that the appellant has been compelled to employ an attorney to bring this action, and that a fee for his services is also due. The appellant demands judgment for an amount sufficient to cover all the unpaid installments, with interest thereon, and attorney's fee; and a decree for the enforcement of the assessment lien against the appellee's real estate. Upon issues joined there was a finding and judgment for the appellee, the defendant below. Error is assigned upon the ruling of the court (1) in overruling the appellant's motion for a new trial; (2) in admitting certain evidence over appellant's objection and exception; (3) in rendering judgment against appellant.

By these several assignments the sole question presented is that of the liability of the appellee upon the facts established by the evidence introduced. These facts tend strongly to show that the appellee was indebted for a sidewalk improvement, and had taken the benefit of the provisions of the city charter, which permits the payment for such improvements, under certain conditions, in 10 annual installments. Rev. St. 1894, § 3847. An installment was due and payable to and at the office of the county and city treasurer on or before April 15, 1895. On the 12th day of April, 1895, or three days before the last day for paying the installment, the appellee's father went to the treasurer's office, and gave the deputy treasurer a check for an amount sufficient to pay this installment, as well as some taxes and payments for street and sewer improvements, having previously ascertained from such treasurer the amount thereof. The check was payable to S. R. Holt, treas-

urer, and was delivered to and accepted by Frank W. Miller, deputy treasurer. At the time the check was delivered and accepted there was a sufficient amount in bank to the credit of the drawer to meet its payment, and this amount remained there on deposit until the check was actually presented at the bank and paid. In the rush of business incident to the closing days of taxpaying time the check was laid aside in the treasurer's office until April 25, 1895, when it was deposited in the bank upon which it was drawn, and with which the treasurer seems to have had an account also, to the latter's credit, and debited to the account of the drawer. No receipt was issued to the appellee until April 25, 1895, the date on which the check was presented in bank and credited upon the treasurer's account, and the memorandum of the treasurer on the tax duplicate shows the payment to have been made on the date just named. On April 22, 1895, the appellant presented its bond to the treasurer of Marion county for payment. Payment was refused, and this suit was instituted.

The bond issued to the contractor is a promise to him by the city of Indianapolis to pay the installments as they become due, each installment being represented by a coupon attached to the bond. The assessments are pledged, by the terms of the bond, as security for the payment thereof; and in case of failure to pay by the property owner when an installment falls due, under the provisions of the statute, the holder of the bond may sue such property owner, and enforce the lien for the entire assessment, including attorney's fees. Rev. St. 1894, §§ 3851-3853. Under section 3851, supra, it is the duty of the treasurer to collect the assessments and give vouchers for the same. The department of finance for the city is required to charge the treasurer with the amounts of the assessments and interest as it accrues. By section 3853, supra, it is provided that the city shall not be liable for failure to collect the installments when due, but a right of action is given the contractor or bondholder for the collection of the claim by enforcement of the assessment lien. It is the duty of the treasurer, when payments are made to him, to enter the proper credits on the assessment rolls. Rev. St. 1894, § 3849. The city is made liable to the contractor for the contract price of the improvements "to the extent of the money actually received by such city from the assessments for such improvements." Id. § 3845. The city, in such cases, is represented by the treasurer. A payment to the treasurer is a payment to the city. He is the agent of the city for the purpose of collecting the money. Had the appellee, on the 12th day of April, 1895, paid the treasurer of Marion county an amount in lawful money, sufficient to cover the installment due from the appellee, we apprehend the city would afterwards have been liable to the appellant for the amount so paid. But, whether it would be liable or not,

we think that, in any event, the appellee, after such payment, would have been discharged from liability. Hence a payment to the treasurer was a full discharge of the obligation of the appellee. Now, we doubt not that the treasurer had a right to refuse to receive in payment the check tendered by the appellee through his father, and so he would have the right to refuse to receive anything in payment except coin and United States treasury notes. But suppose that appellee had tendered the treasurer United States bank notes, and the treasurer had received the same in payment, and laid them away in his vault, neglecting to credit the appellee with such payment, or to issue a voucher for the same, would it be contended that after the expiration of the time for the payment of the installment the appellant could maintain an action to enforce a lien on the appellee's property? In the supposed case it would be held, and justly so, we think, that although the bank notes were not a legal tender, yet, the treasurer having accepted the same, and they having inured to the actual benefit and credit of the city, neither the city nor the appellant could be heard to say that such acceptance was not a legal payment which discharged the appellee's liability. The same rule applies, we think, when a check is given to and accepted by the treasurer in payment of an installment of an assessment for taxes or improvements. The treasurer, of course, accepts the check impliedly on the condition that it will be paid on presentation at the bank. If it turn out that the drawer has no money on deposit, or not sufficient to cover the amount of the check, or if he should withdraw his deposits before the check is actually presented,—in other words, if the check is dishonored,—it would not be a payment. When a check is accepted, and afterwards paid on presentation at the bank, the payment relates back to the time of the giving of the check. This is so in ordinary commercial transactions, and we know of no reason why there should be an exception to the rule in a case like the present one. That such is the rule in the commercial world, an eminent law writer says there is no conflict among the authorities. Such a payment is treated as a form of cash payment, and, if dishonored, the drawee may resort to his original remedy, on the ground that there has been a defeasance of the condition on which the check was given. *Benj. Sales, § 1083.* It may be said to be only a conditional payment, the condition being that the check will be paid on presentation. But, if the condition be complied with, if there be no defeasance, the payment becomes absolute, and relates to the time of the acceptance of the check.

The appellant relies upon the case of *Prather v. State Bank, 3 Ind. 355*, in support of the doctrine that a public officer cannot accept anything in payment except legal tender money.

A similar ruling was made in *Armsworth v. Scotten, 29 Ind. 495*. The doctrine laid down in these cases has been somewhat modified by the later authorities. While it is doubtless still the rule that if a clerk of a court accepts in payment of a judgment or other matter which he is authorized to collect anything but legal tender money, and the payment is not made good to the party ultimately entitled to receive it, such party may treat the matter as if no payment whatever had been made, yet it is now well settled that if such clerk, in payment of any judgment, redemption money, or in other cases where he has power to collect money, receives checks, drafts, etc., and is prepared to pay the parties entitled thereto in legal money, the payment is sufficient. *Bowen v. Van Gundy, 183 Ind. 670, 83 N. E. 687; Hammann v. Mink, 99 Ind. 279; Boyd v. Olvey, 82 Ind. 294; Jessup v. Carey, 61 Ind. 584.* In such cases the officer is also liable on his bond if he fail to pay over the proper amount in lawful money. *Bowen v. Van Gundy, supra.* The officer, in such case, cannot be compelled to receive a check, any more than he could be forced to receive bank notes, or anything but legal tender money. But if he accept something other than lawful money, and receive the benefit thereof, why should he not be held accountable the same as if actual money had been paid him? And if the officer is liable on his official bond for the amount so received, whether it be a legal tender or not, the party entitled to the money cannot be injured by the act any more than if such officer had received nothing but legal tender money, and consequently cannot be permitted to repudiate the officer's act. In *Webb v. Watson, 18 Iowa, 537*, it is said: "To a certain extent the clerk must be recognized as the agent of the purchaser. [The court here refers to a purchaser at a sheriff's sale.] His powers are by no means so unlimited as to authorize him to receive anything else than money as its equivalent for redemption. But when, without fraud on the part of the debtor, he receives such equivalent, and the debtor in good faith receives his acquittance, whatever may be his ultimate liability to the clerk, the creditor or purchaser cannot be heard to repudiate the act of the officer to the extent of defeating the redemption." This language was quoted with approval by our supreme court in *Boyd v. Olvey, supra.* The courts know judicially that the emergencies in connection with the business of collecting money for taxes and public improvements in a city like Indianapolis are such as to make it absolutely impossible that all or any considerable portion thereof should be paid in legal tender money. To hold that the tax collector may not receive a check in payment of taxes or assessments such as the one here in controversy, although such check may be promptly honored when presented for payment, would entail immeasurable burdens upon the property owner as well as the official, without accomplishing a particle of benefit to any, except possibly the promoters of litigation. There never was any good reason for the

rule contended for, and the modern decisions refuse to apply it to the cases of the character of the present one.

But the appellant's counsel insist that the debt in this case was not discharged, because the treasurer gave no receipt, and made no note on the tax duplicate, when he received the check. We are unable to perceive how the failure of the officer to do his duty, if it was such failure, could be used to the injury of one who in good faith has discharged every legal obligation resting upon him. The receipt of the treasurer and the memorandum he is required to make are evidence of payment, but they are not the only evidence thereof. The same may be proved by parol. In the present case there is no disagreement between the officer and the party who made the payment. Both agree that the payment was made. The only person dissatisfied is the holder of the claim sued on, who, had he but waited a day or so, until the busy season of tax collecting had been passed, would doubtless have received his money without the trouble and expense of a lawsuit. We are therefore persuaded that in this case the court has committed no error, and that the appeal should not be sustained. Judgment affirmed.

(13 Ind. App. 507)

BEATTY v. PRUDEN.

(Appellate Court of Indiana. Nov. 6, 1895.)

DRAINAGE — REPAIRS — ALLOTMENT OF WORK — NOTICE TO LANDOWNERS — ACTION TO ENFORCE LIEN — PLEADING.

1. A complaint in an action by a township trustee for reimbursement from an abutting owner for repairing a public drain, brought under Rev. St. 1894, § 5632 et seq., which makes it the duty of such trustee to see that such ditches are kept in repair, is sufficient if it describes the drain, and alleges that it was a public drain, and was duly established and opened as such.

2. An allotment of work on the repair of a public ditch is void and subject to collateral attack where the surveyor failed to give the notice to landowners required by Rev. St. 1894, § 5634.

3. Under Rev. St. 1894, § 5638, providing that on failure of a landowner to perform his allotment of work on the repair of a public ditch, the township trustee shall perform the work, and shall certify the costs to the county auditor, "who shall place the same on the tax duplicate as other taxes," the claim becomes a lien on its entry on the tax duplicate, though not expressly so declared by statute.

4. In an action to enforce a lien for the cost of the repair of a public ditch, the complaint must allege that the cost was certified to the county auditor, and by him entered on the tax duplicate, as required by Rev. St. 1894, § 5638.

5. Rev. St. 1894, § 5634, provides that the surveyor shall cause notices to be posted of the time when and place where objections to allotments of repair work on public ditches may be heard, and further provides for service of a copy of said notice "upon the trustee of the township in which an allotment is made to any highway, as summonses are served upon each resident, owner or occupant of land." Held, that the provision, when properly punctuated by placing a semicolon after the word "served" and removing the comma from between the words "resident" and "owner," requires a copy of the notice to be served on resident owners in the manner in which summonses are served.

v.41N.E.no.22—61

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Action by James T. Pruden, as trustee of Hamilton township, against Alfred M. Beatty. From an order overruling a demurrer to the complaint and a judgment for plaintiff, defendant appeals. Reversed.

O. H. Montgomery, for appellant. W. T. Branaman, for appellee.

REINHARD, C. J. This action was instituted in the court below by the appellee, as trustee of Hamilton township, in Jackson county, against the appellant, to reimburse the former for costs and expenses incurred in cleaning out the appellant's allotment of a public ditch, and to foreclose a lien therefor upon appellant's real estate.

One of the errors assigned and discussed is the overruling of the appellant's demurrer to the appellee's complaint. Appellant's counsel insist that the complaint is insufficient for failing to set forth in detail "all the facts necessary to the legal establishment of the alleged public ditch." We do not think these averments were required in the complaint. The proceeding is under the Acts of 1889, as amended by the Laws of 1891 and 1893 (Rev. St. 1894, § 5632 et seq.). Under the act referred to, all public ditches are, for the purpose of keeping the same in repairs, placed under the supervision of the township trustee, whose duty it is to see that they are kept cleaned out and open. The statute contemplates that only such drains shall be subject to the supervision of the township trustee, for the purposes mentioned, as have been constructed and opened as public ditches. If the ditch is a public one, and opened and used as such, no matter under what law or in what manner it may have been constructed, it becomes subject to being repaired under the provisions of the act cited, and any attack upon the validity of the original construction would be collateral only if made in a proceeding such as the one at bar. In such an action as this it is sufficient in this regard to allege in general terms that a public drain, describing it, has been heretofore duly established and opened as such. Such cases are analogous to proceedings for the enforcement of liens for the improvements of streets or other public highways. While it is essential in such proceedings to show that the improvements are authorized under the law by virtue of which they are made (*Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305), it is not required that the plaintiff go behind the improvements, and show the steps taken in the location and establishment of such highway. It is sufficient if he aver in general terms that the highway existed and was a public one. We think the complaint is not open to the objection named.

It is next urged that the complaint discloses the illegality of the allotments, in that it shows that they were not made

against the several tracts or parcels of land, but against the several owners thereof, there being in fact but one allotment of 7,800 lineal feet, while there are 9 distinct parcels of land affected by it, containing in the aggregate some 350 acres. Three distinct steps are necessary to the successful prosecution of an action of the character of the present one: Firstly. It must be shown that there is a public ditch. Secondly. There must be an allotment by the county surveyor to the respective owners of the lands through which the ditch passes. Thirdly. It must be shown that the repairs were made in compliance with the statute. The first two steps named are necessarily anterior and fundamental to the third, and their performance may be averred in a general way, while as to the last it must be shown that every act was performed which the law requires in order to constitute this step. The act of making the allotment is a separate and distinct proceeding from that of the cleaning out of the ditch, as much as is the original establishment and construction. Under section 5633, Rev. St. 1894, it is the duty of the surveyor to make the allotments, and, if this has been done under color of the statute, and the surveyor had jurisdiction, the allotments are as binding upon the parties, as long as they stand, as the judgment of a court, and are no more subject to a collateral attack. The only mode of calling in question the validity of such allotments is by appeal to the circuit court from the action of the surveyor. Of course, if the latter did not have jurisdiction, the allotments would be absolutely void, and subject to collateral attack. One of the steps necessary to give the surveyor jurisdiction is the giving of notice as provided by the statute. If no such notice was given, the surveyor had no jurisdiction, and the allotments, being void, may be attacked collaterally. *Davis v. Railway Co.*, 114 Ind. 304, 16 N. E. 639; *Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83; *Railroad Co. v. Solce*, 128 Ind. 105, 27 N. E. 429. Assuming for the present that due notice was given, we think the appellant is concluded by the allotment, as, under the cases cited, all relief therefrom must be sought by appeal.

It is next contended that the appellee has not shown himself entitled to any lien. If this were true, and the complaint disclosed that the appellee is still entitled to some relief, the fact that no lien was shown would not be sufficient ground for demurrer; but, as the appellant insists that the complaint does not show the appellee to be entitled to any relief, it devolves upon us to consider the question whether or not the appellee, according to the averments of the complaint, in reality has a lien. The appellant insists that the record of the allotment is the basis of the lien, and that a copy of it must be filed as an exhibit with the complaint. But we do not think the allotment record is the

foundation of the appellee's lien, if he have any. Nor can we yield to the contention that the statute itself creates no lien. Indeed, this court has already decided otherwise. *Daggy v. Ball*, 7 Ind. App. 64, 34 N. E. 246. It is admitted by appellant's counsel that by section 5633, Rev. St. 1894, a remedy is given by a foreclosure of some lien, but counsel insist that, as the lien itself has not been previously created by the statute, the remedy given is futile. The section cited above provides, among other things, that the trustee "may bring suit in the circuit or superior court of the county to collect such expense and fees, and enforce and foreclose the lien on such land," etc. The appellant asks what lien it is that the trustee is here authorized to enforce, and insists that nowhere in the section or other portion of the statute has such a lien been created. It will be seen by an examination of the statute under consideration that it is made the duty of the trustee, on failure of the landowner to perform the work, to proceed at once to have the same completed himself, and that he "shall certify the costs thereof, including his own per diem, to the auditor of the county, who shall place the same on the tax duplicate as other taxes against such person or corporation, and to be collected as other taxes are collected," etc. By being placed upon the tax duplicate, the claim becomes a lien on the property of the landowner to the same extent as any other lien for taxes, and may be collected by the same process. It was not necessary for the legislature to declare in express terms that the claim shall be a lien upon the property of the owner, the same as taxes are liens upon such property. Assessments for such improvements are themselves a species of taxation, and that they are so recognized by the law-making power in this instance is manifested by the expression "as other taxes." The extension of the claim upon the tax duplicate like other taxes places it in the same category with these, and creates a lien upon the owner's property, the same as if the claim were the result of a state, county, or township tax levy. But, while this is true, the trustee is not compelled to leave the collection of this class of taxes to the county officials, but he may proceed to enforce the collection by an action to foreclose the lien. If, however, he does resort to the latter remedy, it devolves upon him to show that he has taken all the preliminary steps essential to the establishment of the lien, and if he fails in this, the complaint will not be sufficient. In the case in hand the complaint contains no averment that the trustee certified the cost of the work to the county auditor, and that the latter placed the same on the tax duplicate of the county. Without this step the appellee had acquired no lien, and was therefore not entitled to a decree of foreclosure.

Is the appellee entitled to a personal judg-

ment against the appellant? That the statute creates a personal liability against every resident landowner whose property has been benefited by such improvements, provided he has had proper notice of the same, we think is obvious. In the first place it provides that the claim, when placed on the tax duplicate, shall be collected as other taxes. That the taxpayer is personally liable for any and all taxes he owes cannot be doubted. But, independently of this, the section (5638) provides that the trustee may recover the outlay and his own fees in an action before any justice of the peace of the township in which the owner resides. As a justice of the peace has no jurisdiction in foreclosure suits, the action contemplated here can only be a personal action. But even this remedy is not confined to a suit before a justice of the peace. He may enforce it in the circuit or superior court, and he may join with it a proceeding to enforce the lien, if he has taken the necessary steps to entitle him to one. Consequently, although the appellee has not shown himself entitled to a decree of foreclosure, he may have a personal judgment against the landowner if the proper allotment has been made against him, or if an allotment has been made in such a manner as not to be subject to collateral attack. If the assessor had jurisdiction to make the allotment in the present case, it would not be subject to a collateral attack. Whether this is so or not depends upon the validity of the notice averred in the complaint. While it might not be necessary to aver that notice was given, yet we think when the pleader undertakes to specify the character of the notice, he must show that it meets the requirement of the statute. The only notice given of the allotment, as disclosed in the complaint before us, was the posting for more than ten days in five public places in the proper township written notices of the place where and the time when the surveyor would hear all objections that might be made to such allotments, and that the surveyor also served a copy of such notice on the trustee of such township. It is also averred that the appellant was a resident of said township. No personal notice appears to have been served on him. In section 3 of the Act of 1889, referred to, which is section 5634, Rev. St. 1894, and section 1204 of Elliott's Supplement, it is provided that the surveyor shall cause to be posted up for not less than ten days in five public places in the township where the lands are situate, through which, or a portion of which, the ditch runs, written or printed notices of the time when and the place where he will hear all objections that may be made to such allotment. It is then provided that "a copy of said notice shall also be served upon the trustee of the township in which an allotment is made to any highway, as summonses are served upon each resident owner or oc-

cupant of land and upon the officers of each corporate road or railroad upon whom summons might be served in any proceeding against said road or railroad allotted a portion of said work. Where the residence of any non-resident owner of such land is known to the surveyor he shall send a copy of such notice by mail to such non-resident owner. If a non-resident owner of land have a known agent in the county a copy of said notice shall be served upon such agent." We have punctuated the quotation just as we found it in the Acts of 1889. In Elliott's Supplement and in the Burns Revision of 1894 the punctuation in the first sentence quoted is somewhat different, a comma being placed between the words "resident" and "owner," making it read thus, "as summonses are served upon each resident, owner or occupant of lands," etc. When thus punctuated the language fails to make any sense whatever, although as given in the Acts of 1889 the meaning is by no means clear. We think, however, it was the intention of the legislature to provide for service of personal notice by copy on the resident landowner, as well as upon the township trustee. Four distinct classes of persons are or may be affected by the allotments, viz.: (1) Resident owners of lands through which, or a portion of which, the ditch runs; (2) non-resident owners of such lands; (3) road or railroad corporations; (4) townships. Each of these it must have been intended should be served with notice of the allotments. Taking them in their inverse order, we find that townships are to be served with notice by copy upon the trustee, road and railroad corporations by copy upon the officers upon whom summons might be served in any proceeding against such road or railroad, non-resident owners whose residence is known by copy sent by mail, and resident owners by personal service of a copy of the notice. When the residence of a nonresident owner is unknown, the posting of the printed or written notices constitutes the only service of notice required, and is doubtless sufficient to authorize a lien, but whether sufficient to authorize a personal judgment may well be doubted. However that may be, we think it is plainly enough provided that resident owners shall be served with a copy of the notice. By placing a semicolon after the word "served" in the above sentence, we think the intent of the legislature becomes plain. The sentence would then read as follows: "A copy of said notice shall also be served upon the trustee of the township in which an allotment is made to any highway, as summonses are served; upon each resident owner or occupant of land, and upon the officer of each corporate road or railroad upon whom summons might be served in any proceeding against said road or railroad allotted a portion of said work." When thus punctuated it is clear that the requirement of service upon each resident owner

or occupant of land is the same as that upon the trustee of the township, viz. by copy of the notice served as summonses are served. There is no reason why personal service should be provided for upon the officers of road or railroad corporations and township trustees and not upon resident owners or occupants of land. Any other construction would render the entire language as to notice absolutely meaningless. To say that a copy of the notice shall be served upon the township trustee as summonses are served upon resident owners or occupants of land would be assuming that summonses are served upon resident owners or occupants in some way different from the method of service upon other people. The simple statement of such a proposition shows its absurdity. Manifestly the provision contemplates personal service by copy of the notice upon the trustee of the township, upon the owner or occupant of the land, and upon the officers of each corporate road or railroad affected by the allotments. It is averred in the complaint before us that the appellant was a resident landowner, and it is also shown that no copy of the notice of the allotment was ever served upon him. The allotment was therefore void as to the appellant, and subject to collateral attack. The surveyor could acquire jurisdiction over him and his land only in the way pointed out, and that was by serving upon him a copy of the notice. Perhaps if some kind of personal notice had been served upon the appellant, and the surveyor had determined that it was sufficient, such determination might be conclusive upon the appellant as against a collateral attack. *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476.

The case of *Town of Cicero v. Williamson*, 91 Ind. 541, is precisely in point when applied to the facts in the case at bar. That was a suit for an injunction to prohibit the town from collecting taxes levied upon the real estate of the plaintiff. The injunction was asked upon the ground that the land against which the taxes had been assessed had never been annexed to the town. It was shown that the proceedings had been had to annex the territory in question, from which proceeding no appeal had been taken. Hence the question arose whether the commissioners had jurisdiction to make the order annexing such territory. If the commissioners had jurisdiction, the proceedings and order could not be attacked in the injunction suit, the same being collateral to the proceeding to annex. In that case, as in this, the statute governing the proceedings required that, besides notice by publication, copies of the notice should be served upon resident property owners. The complaint averred that notice was only given by publication, and that the plaintiffs were residents of the county. The court, speaking through Elliott, J., said: "In our opinion these plaintiffs were entitled to notice as

provided in the statute, and as the proceedings affected them personally, and as they had private rights affecting individual property separate and distinct from their interests in common with other citizens and taxpayers, the proceedings, so far as they affected their individual interests, were unauthorized and invalid. There is a plain distinction between proceedings affecting persons in common with other citizens and proceedings which directly affect their private rights as owners of property, and in the latter case, where the law provides that they shall have notice, they are entitled to it, and, if none is served upon them, there is no jurisdiction over the person. * * * It would be strange indeed if a resident of the state, entitled to notice by express provision of law, should be concluded where no notice at all was given him. If this were so, then a man might lose important rights without having had his day in court, and this is contrary to fundamental principles. This is not a case, taking the averments of the complaint as true, where there was some notice, although irregular and defective, and it is not within the cases which hold that where there is a notice, although defective, the judgment is not void. * * * The case as made by the complaint falls within the rule that a judgment void for want of jurisdiction of the person may be collaterally attacked. We say that there was no notice to known resident property owners, because the publication is notice only to unknown or nonresident owners. It does not, as is plainly evident from a reading of the statute, operate upon residents who are known to the town authorities. The complaint must be held good for the reason that it affirmatively shows that there was no jurisdiction of the person, and that there was nothing in the commissioner's record concluding the appellees from asserting that there was no such notice."

In the present case it may be as truthfully said as it was in the case from which we have quoted that the proceedings which are claimed to conclude the appellant, and to estop him from asserting the invalidity of the allotments, were such as affected the private and property rights of the appellant personally, and distinct from any interest he had in common with other citizens and taxpayers. At all events he was entitled to notice by having a copy thereof served upon him, which was not done. Consequently, the surveyor when he made the allotment against the appellant was without jurisdiction, and his proceedings in the premises were void. The complaint shows that the appellee is entitled to neither a personal judgment nor the enforcement of a lien. The demurrer to the complaint should therefore have been sustained. Judgment reversed.

ROSS, J., concurs in the result.

(15 Ind. App. 123)

TYLER'S ESTATE et al. v. TYLER.¹

(Appellate Court of Indiana. Nov. 7, 1895.)

SUBROGATION—PAYMENT BY WIDOW OF HUSBAND'S DEBTS—DEED TO HUSBAND AND WIFE—DELIVERY TO HUSBAND—RECORDING AFTER HUSBAND'S DEATH.

1. One who furnishes money to her husband's administrator to pay decedent's debts is entitled to recover, on the doctrine of subrogation, though the evidence does not affirmatively show that when she furnished it she had any intention of requiring it to be repaid, where it does not appear that she made a gift of it.

2. A deed to husband and wife jointly, delivered to the husband, but not recorded till after his death, inures to her benefit.

Appeal from circuit court, Knox county; G. W. Shaw, Judge.

Action by Margaret E. Tyler against the estate of Wilson M. Tyler, deceased, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Reilly & Ennison, for appellants. Townsend & Wilhelm, for appellee.

DAVIS, J. The appellee in this case advanced to the appellant, as administrator of her husband's estate, \$32,470, which was used by him in paying just and valid claims against said estate. Her right to recover, if such right exists, rests on the equitable doctrine of subrogation. In her claim it is alleged, among other things, that the said Wilson M. Tyler died seised of a large and valuable estate, in real and personal property, supposed to be worth about \$100,000. There was no agreement that the money should be repaid to her. In the court below, she recovered judgment for the amount of her money so had and received by the administrator, and used in paying such debts.

The first error discussed is that the court below erred in overruling appellant's demurrer to the complaint. Assuming that the correct rule applicable in such cases is enunciated in *Browne v. Frost*, 95 Ind. 248, there was no error in overruling the demurrer. Counsel for appellant vigorously assailed this decision, insisting that it is not sustained by authority, nor supported by sound logic. In this view, we think, counsel are mistaken. In our opinion, the decision is sustained by authority, and supported by logic, but we do not feel called upon to defend it upon either ground. As the rule there announced seems to us to be both just and equitable, we are disposed to follow it without hesitation in this case. The widow, undoubtedly, had such an interest in the estate of her deceased husband, under the authority cited, that she might protect her interest, if she felt disposed to do so, by paying the just and valid claims against the estate. In allowing her to recover the money so paid, no one is injured. She is simply subrogated to the rights of the creditors whose just and valid claims were paid by her. She is only paid what otherwise would have been paid

¹ Rehearing denied.

to such creditors. She gets neither more nor less than they were entitled to receive. The special finding of facts sustains the averments in the complaint, and is sufficient to authorize the judgment in appellee's favor.

In support of the motion for a new trial, it is insisted that the trial court erred in allowing the appellee the full amount of the proceeds of the homestead. In 1871, this real estate was conveyed to her husband. In 1884, through one John L. Butler, the property was conveyed to appellee and her husband jointly, but this deed was not then recorded. It was found among the decedent's private papers after his death, and was recorded by appellant. The delivery of the deed to her husband by Butler inured to the benefit of appellee, and at his death the entire title to the real estate vested in her. Nothing appears in the record tending to show that, when the property was sold after his death, she was not entitled to the full purchase price therefor. It appears that the entire proceeds of the homestead, and also the life insurance payable to the appellee, were had and received by the administrator, and used by him in paying just and valid claims against the estate. There was no error, therefore, in allowing her the full amount of the proceeds of the homestead. It is true the evidence does not disclose that, when she paid these claims, she had any intention of requiring the money to be paid to her. She authorized the administrator to receive the money, and to pay and discharge the debts of her husband therewith. It does not necessarily follow, however, that she is not entitled to recover the money so paid. Her right to recover is not founded on an agreement, either express or implied, that the money should be repaid to her. As we have before observed, her right to recover rests in the equitable doctrine of subrogation to the rights of the creditors whose claims have been paid by her money. If it clearly appeared from the undisputed facts and circumstances that she made a gift of her money to the administrator for the purpose of paying such debts, perhaps she would not be entitled to recover. The evidence, however, does not inevitably lead to this conclusion, and the trial court has not so found. On a careful examination of the record, we do not find any reason that requires us to reverse the judgment of the trial court. There is no error in the record. Judgment affirmed.

BOARD OF COM'RS OF JOHNSON COUNTY v. HEMPHILL.*

(Appellate Court of Indiana. Nov. 6, 1895.)

APPEAL—ASSIGNMENT OF ERRORS—BILL OF EXCEPTIONS—DEFECTIVE BRIDGE—LIABILITY OF COUNTIES.

1. Where a complaint is in two paragraphs, to each of which a separate demurrer is filed, an

*Superseded by opinion, 42 N. E. 700.

assignment that the court erred in overruling the "demurrers" to the complaint renders it necessary to show that both paragraphs are bad.

2. A bill of exceptions will be disregarded unless it appears that it was filed with the clerk after it was signed by the judge.

3. Under the Indiana statutes, the duty of keeping county bridges in repair is imposed upon the county, and any neglect of that duty, resulting in injury to a traveler, renders the county liable.

4. The approaches to a county bridge being a necessary part thereof, it is as much the duty of the county to keep them in repair and reasonably safe for travel as to keep in repair the bridge itself. *Board v. Sisson*, 28 N. E. 374, 2 Ind. App. 311, followed.

Appeal from circuit court, Bartholomew county; Francis T. Hord, Judge.

Action by Joel Hemphill against the board of commissioners of Johnson county to recover for personal injuries resulting from a defective bridge. From a judgment for plaintiff, defendant appeals. Affirmed.

T. W. Woollen, for appellant. M. L. Herbert, for appellee.

ROSS, J. This was an action brought by the appellee in the Johnson circuit court to recover damages for personal injuries alleged to have been received while going upon and across a bridge spanning a creek or stream, the approach to which bridge it was alleged was not in reasonably safe condition for use, etc. The complaint is in two paragraphs, to each of which appellant filed separate demurrers, which were overruled by the court, and exceptions saved.

The first specification of error assigned in this court is as follows: "The court erred in overruling the demurrers to the complaint herein." Under this specification of error, in order that it avail appellant, it is necessary to show that both paragraphs of the complaint are bad. The adjudications in this state are harmonious in holding that, under our statute, the duty of keeping county bridges in repair is imposed upon the county, and that any neglect of that duty, resulting in injury to a traveler, creates a liability on the part of the county therefor. *Board v. Blair*, 8 Ind. App. 574, 36 N. E. 216, and cases cited. And it has been held that the approaches to such a bridge are a necessary part thereof, and that it is as much the duty of the county to keep the approaches in repair and reasonably safe for travel as to keep the bridge itself in repair. *Board v. Sisson*, 2 Ind. App. 311, 28 N. E. 374; *Board v. Deprez*, 87 Ind. 509. As to the correctness of these rulings, we are not called upon to determine, but we may say that they are not in harmony with the rulings of the courts of most of the other states upon that subject. The great weight of authority is that counties, being nothing but a mere political subdivision of the state, whose officers are simply empowered to execute the duties imposed upon them as officers of the sovereignty,—or, in other words, using the public power for

public purposes,—are not liable for injuries resulting from the discharge of such duties. *Barbour Co. v. Horn*, 48 Ala. 649; *Haygood v. Justices*, 20 Ga. 845; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Kincald v. Hardin Co.*, 53 Iowa, 430, 5 N. W. 589; *Board v. Riggs*, 24 Kan. 188; *Brabham v. Supervisors*, 54 Miss. 363; *Reardon v. St. Louis Co.*, 36 Mo. 555; *Ensign v. Board of Supervisors*, 25 Hun, 20; *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781; *Cooley v. Freeholders*, 27 N. J. Law, 415; *Hollenbeck v. Winnebago Co.*, 95 Ill. 151; *White v. Commissioners*, 90 N. C. 437. That this is the just and proper construction to be placed upon the relation of the state and its subjects, and the liability of the former to the latter is evident; but that our courts have adopted and adhered to a different rule with reference to bridges over water courses or county bridges is settled. *Board v. Brod*, 3 Ind. App. 585, 29 N. E. 430; *Board v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, and 34 N. E. 687; *Board v. Blair*, *supra*; *Board v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Board v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Board v. Nichols*, 139 Ind. 611, 38 N. E. 526. And while the correctness of these rulings was seriously doubted by the supreme court in the case of *Cones v. Board*, 137 Ind. 404, 37 N. E. 272, the rule was recognized as firmly settled in this state. Following these authorities, we think each paragraph of the complaint states a cause of action.

The second specification of error assigned is that "the court below erred in overruling the defendant's motion for a new trial in this case." There is evidence to sustain the verdict, but, if it was insufficient, we could not reverse the judgment, for the reason that the evidence is not properly in the record. In order that a bill of exceptions be a part of the record in a cause, it must be filed with the clerk after it has been signed by the judge. *Jemison v. State*, 12 Ind. App. —, 41 N. E. 74, and cases cited; *Prather v. Prather*, 139 Ind. 570, 39 N. E. 310, and cases cited. "Until filed, it is no part of the record; and, unless the filing is affirmatively shown by the proper record, there is no evidence of the fact upon which the appellate tribunal can act." *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731. "A bill of exceptions cannot be regarded as a part of the record unless it is set out in the transcript of the record of the cause as made and certified by the clerk of the circuit court." *Wolf v. Goodwin*, 2 Ind. App. 79, 28 N. E. 192. In the record before us, it nowhere appears that what purports to be a bill of exceptions, containing the evidence, and which is attached to, but is not embraced in, the transcript, and precedes that part of the record containing the copies of the proceeding, order-book entries, and papers filed in the cause, was ever filed with the clerk after it was signed by the judge. Judgment affirmed.

64 Ind. App. 534)

DODGE v. MORROW et al.¹

(Appellate Court of Indiana. Nov. 7, 1895.)

BILL OF EXCEPTIONS—TIME FOR FILING—AUTHENTICATION—BOOK OF ORIGINAL ENTRIES AS EVIDENCE.

1. A ruling on motion to submit issues to the jury, though excepted to at the time, cannot be reviewed, being presented by bill of exceptions signed by the judge, and filed at the following term, and no time for filing a bill having been given.

2. A bill of exceptions is properly authenticated where, at the end of the transcript, the clerk certifies "the above and foregoing to be a full, true, and complete transcript of the pleadings and order-book entries, including the judgment. . . . except the affidavit of defendant in support of motion for continuance, and counter affidavits thereto by plaintiffs, as the same appears of record and of the files in my office at this date," and an order-book entry immediately preceding the bill shows that the bill was filed in open court, and there is a file mark on the bill showing that it was filed with the clerk, and it is also signed by the judge who presided at the trial.

3. A book of original entries is not admissible in evidence; at least, without a showing that the entries were made by a person having personal knowledge, and contemporaneously with the transaction, and that there was a necessity for its introduction.

Appeal from circuit court, Elkhart county; W. J. Davis, Special Judge.

Action by William J. Morrow and others against Henry O. Dodge. Judgment for plaintiffs. Defendant appeals. Reversed.

J. O. Hoover, for appellant. V. W. Van Fleet, for appellees.

LOTZ, J. The appellees sued the appellant for the foreclosure of a mechanic's lien. The complaint averred that the appellees did work upon and furnished materials for the construction of certain buildings owned by appellant. The answer was (1) a general denial; (2) payment; (3) counterclaim; and (4) set-off. The cause was tried by the court. Finding and judgment in favor of appellees. The only assignment of error is the overruling of the motion for a new trial.

One of the causes for a new trial is that the court erred in overruling appellant's motion to require the issues joined to be submitted to a jury for trial. The ruling on this motion is presented by a separate bill of exceptions. The record shows that the appellant excepted to the ruling when made, but no time for filing a bill was given. Subsequently, and at the following term of the court, a bill of exceptions presenting this ruling was signed by the judge, and the bill filed. The appellees insist that the ruling on this motion is not properly presented by the record before us. This position is fully sustained by the authorities. *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. 754.

The other causes for a new trial all relate to rulings of the court on the trial of the cause, and are presented by a separate bill of exceptions, containing the rulings and the evidence given in the cause. The appellees

insist that this bill is not properly authenticated, and for that reason this court should refuse to consider the other causes for a new trial. The clerk of the court, at the end of the transcript, certifies "the above and foregoing to be a full, true, and complete transcript of the pleadings and order-book entries, including the judgment of the court, except the affidavit of defendant in support of motion for continuance, and counter affidavits thereto by plaintiffs, as the same appears of record and of the files in my office at this date." An order-book entry immediately preceding this bill of exceptions shows that the bill was filed in open court. There is also a file mark on the bill, showing that it was filed with the clerk of the court. The bill was also signed by the judge who presided at the trial. The bill is sufficiently authenticated.

One of the causes for a new trial is that the court erred in permitting a witness for appellees to testify as to the value of attorney's fees. It is contended that the statute (Rev. St. 1894, § 7267; Elliott's Supp. § 1701) is unconstitutional, and in violation of section 23 of the bill of rights of the constitution of this state. The position is that the statute allowing attorney's fees grants privileges to one class of litigants which are denied to another class of litigants. The legislative power to compel an unsuccessful party to an action to pay an attorney's fee to his opponent, and laws which impose a penalty of double damages or some similar penalty, have often received the attention of courts of the last resort. Where the penalty has been imposed for some tortious or negligent act, such statutes have generally been upheld; but, where no wrongful or negligent conduct is imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Coal Co. v. Rosser* (Ohio) 41 N. E. 263. If it were necessary to a determination of this appeal that the constitutionality of a statute be determined, this court would not have jurisdiction. In the view we take of it, the appeal can be determined without deciding any constitutional question.

The seventh cause for a new trial is: "For error of law occurring at the trial in the court, over the objection and exception of the defendant, permitting Levi Deitch to read the plaintiff's books of account in evidence." Levi Deitch was a witness for appellees, and their bookkeeper. The witness testified that he made the entries upon the books each day, and in the regular course of his duties. In reference to the items in controversy, he stated that he had no independent recollection that the goods were furnished and work done, but that he would have to depend upon the books, except as to a few items. The usual method of transacting the business was for others to do the work and furnish the materials, and then inform him, or by furnishing him with a mem-

¹ Rehearing denied, 43 N. E. 153.

orandum, from which he made the entries upon the books. The witness was then asked to turn to the books, and read the various entries to the court. The appellant objected to these questions, for the reason, among others, that it had been shown by the witness that the entries were entered upon the representation made by another party, and made after the work was done or materials furnished, and that it was incompetent to prove book accounts in this manner. Twenty-seven questions of this kind were propounded, to which the appellant entered his objections. These objections were overruled, and the witness was permitted to read the items in evidence from the books. A book of original entries is one exhibiting the first or original charges. Such books are admissible in evidence in some jurisdictions. This seems to be the rule in England. *Price v. Earl of Torrington*, 1 Salk. 285. The rule is designed to prevent a failure of justice, and is limited by this necessity. If the proof can be made by any person who has personal knowledge of the facts, then the books are not admissible. If the bookkeeper's memory has failed as to the facts, or if he is dead or beyond the jurisdiction of the court, and there is no other person who has knowledge of the charges, then a necessity may arise. To be admissible, the entries must have been made contemporaneously with the facts to which they relate, and made by the person having personal knowledge of the facts. It was held in an early case in this state that the books of original entries are not admissible. *De Camp v. Vandegrift*, 4 Blackf. 272. The later decisions throw some doubt on this question. This court recently had occasion to review many of the decisions relating to this question, and it needs no further consideration at this time. *Wilber v. Scherer* (decided at this term) 41 N. E. 837. It is sufficient for the purposes of this case to say that there was not a sufficient showing that all the entries introduced or read in evidence were made by the person having personal knowledge, and were made contemporaneously with the transactions; nor was there a sufficient showing of the existence of a necessity such as would prevent a failure of justice. It was error to admit this evidence under these circumstances.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(13 Ind. App. 519)

PACIFIC MUT. LIFE INS. CO. v. HOWELL.

(Appellate Court of Indiana. Nov. 6, 1895.)

ACCIDENT INSURANCE—CONDITION IN POLICY.

In an action on an accident policy providing that the company should not be liable if the accident happened while insured was "upon a rail-

road bridge, trestle, or roadbed (railway officers and employes, while engaged in their prescribed duties as such, excepted)," where the undisputed evidence shows that insured was killed while walking on the roadbed of a railroad company, of which he was not an officer or employe, plaintiff cannot recover.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by Jane Howell against the Pacific Mutual Life Insurance Company on an accident policy. Judgment for plaintiff, and defendant appeals. Reversed.

F. M. Trissal, for appellant. Crooke & Crooke, for appellee.

LOTZ, J. This action was brought by the appellee against the appellant upon an accident insurance policy providing for the payment of \$1,000 to the appellee in the event that Daniel Howell, the husband of appellee, should sustain violent and accidental injuries causing his death. The issues joined were submitted to a jury for trial, and a general verdict in favor of appellee was returned, assessing the amount of her recovery in the sum of \$1,000, upon which judgment was rendered. The policy sued on contains a stipulation to the effect that the company should not be liable if the insured should meet with an accident while "being upon a railroad bridge, trestle, or roadbed (railway officers and employes, while engaged in their prescribed duties as such, excepted)." The undisputed evidence shows that the deceased met his death by being struck by the cars while walking upon the roadbed and track of the Louisville, New Albany & Chicago Railway; that at the time of the accident he was not an officer or employe of that company, or engaged in the discharge of his duties as such; that prior to the accident he was in the employment of the Evansville & Richmond Railway Company, and was returning to his home from his work, and was using the roadbed of first-named company as his route home. It is undeniably true that being upon bridges, trestles, and the roadbeds of a railroad is attended with more danger than being upon the ordinary highways. It was this extra hazard that the policy sought to guard against. It granted this privilege to the officers and employes of the railroad company, and to them only while engaged in their prescribed duties as such. The undisputed facts of this case show that there was a clear violation of one of the express conditions of the policy by the insured, and there can be no recovery. This result may work a hardship to the appellee, but courts cannot make contracts for parties. When they construe and enforce contracts their duties are done. It is doubtful whether the complaint states a cause of action. Judgment reversed, with instructions to sustain appellant's motion for a new trial, and with leave to amend complaint.

(13 Ind. App. 466)

GERMANIA FIRE INS. CO. OF CITY OF
NEW YORK v. WARNER.

(Appellate Court of Indiana. Nov. 5, 1895.)

INSURANCE—ACTION ON POLICY—PLEADING—AR-
BITRATION AGREEMENT—INTERPRETATION.

1. That plaintiff, in an action against an insurance company to recover for a loss, sets forth in his complaint the facts in connection with appraisal proceedings, as provided in the policy, to determine the value of the articles destroyed, and the extent of the injury to those remaining, does not necessarily change the action from one on the policy to one on the award of the appraisers.

2. Where, in an action on an insurance policy, plaintiff sets forth facts connected with an arbitration agreement entered into subsequent to the loss for determining the value of the goods destroyed and the extent of the injury to those remaining, his demurrer to defendant's answer, wherein defendant admits the policy, the loss, the arbitration agreement, and the award to plaintiff, but insists that the proceedings thereunder were invalid for fraud, cannot be considered as admitting the truth of such allegations as do not constitute a good defense.

3. Where an agreement entered into after the loss, and in fulfillment of the clause stipulating therefor in an insurance policy, states that "it is expressly understood that this agreement and appraisalment is for the purpose of ascertaining and fixing the amount of said loss and damage only, * * * and shall not determine, waive, or invalidate any other right or rights of either of the parties," the only question which can be considered as submitted to the appraisers is that of determining the value of the property totally destroyed, and the injury to that not destroyed.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Action by Lee S. Warner against the Germania Fire Insurance Company of the City of New York to recover on a policy of insurance. From an order sustaining plaintiff's demurrer to defendant's answer, defendant appeals. Affirmed.

Chambers, Pickens & Moores, for appellant. Crane & Anderson, for appellee.

ROSS, J. This action was instituted by the appellee against the appellant. The complaint, which contains but one paragraph, omitting the caption, is as follows: "The plaintiff complains of the defendant, and says: That on the 3d day of April, 1893, the plaintiff was the owner and in possession of the following personal property, to wit: Household furniture (useful and ornamental), beds, bedding, linen, family wearing apparel, silver and plated ware, printed books and music, pianoforte, sewing machine, pictures and their frames, fuel, and family stoves, contained in the one and one-half story, shingle-roof, brick dwelling house, occupied by said plaintiff as a dwelling house, and situate at No. 113 on the west side of North Water street, in the city of Crawfordsville, Indiana, and in its additions adjoining and communicating. That on said day, in consideration of the premium of thirty dollars to be paid by the plaintiff, the defendant, by its policy of insurance of that date, a copy of which is filed herewith and made a part of this

complaint (marked 'Exhibit A'), promised and agreed to insure, and did insure, plaintiff's said personal property against loss or damage by fire to the amount of three thousand dollars, from twelve o'clock noon on said 3d day of April, 1893, to twelve o'clock noon on the 3d day of April, 1896. That afterwards, on the 28th day of September, 1893, plaintiff moved his said personal property from said brick building, situate at No. 113 on the west side of North Water street, into the one-story, frame, shingle-roof dwelling house situate on the south side of East Jefferson street, No. 309, in said city of Crawfordsville, Indiana; and the defendant was notified of said change, and consented thereto, and on said date wrote its consent thereto upon the face of said policy, as follows: 'Sept. 28th, '93. This insurance is hereby transferred to cover on same household goods now contained in the one-story, frame, shingle-roof dwelling house situate on the south side of East Jefferson street, No. 113, Crawfordsville, Indiana. Ed. Voris, Agt.' That on the 23d day of June, 1894, said personal property mentioned and described in said policy, and therein and thereby insured against loss or damage by fire, was destroyed and damaged by fire, a part of it being wholly destroyed, and a part badly damaged, in all to the amount of twenty-five hundred dollars. That plaintiff forthwith notified Ed. Voris, defendant's resident agent, and gave notice to the defendant of said loss, by telegraph, informing defendant of said fire and loss. That afterwards, on the 26th day of June, 1894, the defendant sent its adjuster of losses, and state agent, one Frank W. Armstrong, to Crawfordsville, Indiana, and to this plaintiff, for the purpose of adjusting said loss under said policy. That said Armstrong, on said 26th day of June, 1894, as such agent and adjuster, called upon plaintiff for the purpose of adjusting said loss; and, having inspected said premises and the property so damaged by said fire, plaintiff and Armstrong were not able to agree touching said loss and damage to said personal property; and said Armstrong, on behalf of the defendant, demanded that the matter and amount of such loss should be submitted to appraisers, and presented to plaintiff for execution a written agreement for submission to appraisers, upon a printed blank therefor provided by the defendant, wherein the defendant selected as its appraiser one Frederick Geiger. That thereupon plaintiff selected as his appraiser one J. A. Joel, and the names of said appraisers were inserted in said agreement, and the same was then executed by plaintiff and by the defendant, by its said agent, and same reads in the words and figures following: 'This agreement, made and entered into by and between Lee S. Warner, of the first part, and the insurance company or companies whose name or names are signed hereto, of the second part, witnesseth: That J. A. Joel and Frederick Geiger shall appraise and estimate the loss upon the property damaged and destroyed by the fire of June 23, 1894, as specified below, provided that the said appraisers

shall first select a third, who shall act with them in matter of difference only. The award of said appraisers, or any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement. It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of said loss only, to the property hereinafter described, and shall not determine, waive, or invalidate any other right or rights of either party to this agreement. The property on which the loss or damage is to be determined is as follows, to wit: Upon household furniture (useful and ornamental), beds, bedding, linen, family wearing apparel, silver and plated ware, printed books and music, pianoforte or organ, sewing machine, pictures and their frames, at not exceeding cost price, fuel, and family stoves, all while contained, and only while contained, in above-named dwelling house. It is further expressly understood and agreed that in determining the loss or damage upon the property hereinafter mentioned, that said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof at and immediately preceding the time of the fire; and, in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made therefor. In witness whereof, we have hereunto set our hands, at Crawfordsville, Ind., this 27th day of June, 1894. Lee S. Warner. Germania Fire Ins. Co. of N. Y., by Frank W. Armstrong, St. Agt.' That thereupon plaintiff requested that an umpire or third appraiser should be selected by said two appraisers, and said Armstrong, on behalf of the defendant, stated and represented that the selection of such umpire or third appraiser would be necessary only in case said two appraisers disagreed as to amount of loss or damage upon any one or more articles, and that such selection was not necessary, and thereupon the selection of such umpire or third appraiser was waived. That said two appraisers took and subscribed an oath to act with strict impartiality, and made a true, just, and conscientious award of said loss and damage, and then proceeded to appraise, and did appraise, plaintiff's loss and damage upon each of said articles separately; and, in such appraisement of loss and damage, no disagreement or difference whatever as to the amount of loss or damage upon any article arose between said two appraisers, but they agreed throughout as to amount of loss or damage on each and every article, and on said day submitted their award in writing, whereby and wherein the plaintiff's said loss and damage was fixed at twenty-two hundred ninety-nine dollars and fifty cents, which award is in the words and figures following, to wit: "To the parties in interest: We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the loss and damage to be \$2,200.50, twenty-

two hundred and ninety-nine dollars and fifty cents. Witness our hands, this 27th day of June, 1894. J. A. Joel, Frederick Geiger, Appraisers.' That a copy of said agreement for submission to appraisers and the declaration of said appraisers and their said award is filed herewith, and hereof made a part, marked 'Exhibit B.' That said Armstrong, as such agent, was present while said appraisers were making their said appraisement, and knew and had full notice at the time that said appraisement and award were being made, and the amount thereof, and made no objection thereto; but after said award was made, and on said day, informed this plaintiff that he would receive the amount of said award at the expiration of 60 days, and also informed plaintiff that he might place his said house in order and repair, and might repair all damage to said personal property, and dispose of such articles as were bodily or totally damaged; and that plaintiff, in pursuance thereof, and relying upon said consent and information, did repair and restore said house and property, and disposed of said bodily injured property. That on the 29th day of June, 1894, plaintiff made out a particular account and proof of his said loss, signed and sworn to by him, and sent the same by registered mail, postage prepaid, to the defendant; and, in said particular account and proof of loss, plaintiff stated that there was no other insurance whatever on said property, and that he was at the time of the fire the owner of said property so insured, and the actual cash value of the same, and that the fire occurred and the loss was sustained on the said 23d day of June, 1894, and that the fire originated from causes unknown to plaintiff. And plaintiff says he cannot give a more particular statement of the matter and facts set forth in said account and proof of loss, for the reason that the same is now in the possession of the defendant. That afterwards, on the 12th day of July, 1894, defendant returned said account and proof of loss to plaintiff, with certain particular objections thereto; and on the 21st day of July, 1894, plaintiff made out an additional proof of loss, covering the particular points and objections made by defendant, and subscribed and swore to the same, and attached it to said original proof, and on said day sent them by registered mail, postage prepaid, to the defendant. That afterwards, on the 14th day of August, 1894, defendant returned said proofs of loss to plaintiff, without any objections whatever thereto, and on the 15th day of August, 1894, plaintiff again returned the same by registered mail, postage prepaid, to the defendant. That afterwards, on the 27th day of August, 1894, the defendant again returned said proofs of loss, with certain objections thereto, to the plaintiff; and on the 20th day of September, 1894, plaintiff made out and subscribed and swore to a second additional proof of loss, complying with and meeting the objections made by defendant to the said proofs of loss, and attached said additional proofs to said original proofs, and sent

them by registered mail, postage prepaid, to the defendant; and defendant has ever since had, and now holds, the same, and more than sixty days have elapsed and passed since defendant last received said notice and proofs of said loss and fire. That on the — day of September, 1894, the defendant, through its attorney, Smiley N. Chambers, called upon the plaintiff, and demanded that he submit himself to an examination under oath touching his said loss; and on the 17th day of September, 1894, plaintiff did submit himself to such examination, and he was then fully examined by said Chambers touching his said loss under oath. That said personal property was, at the time of such fire and loss, situate and contained in said frame dwelling house, on said Jefferson street, and was the property of this plaintiff, and was of the value of twenty-five hundred dollars, and said house was then occupied by plaintiff as his dwelling. That no part of said loss has been paid, and the same is now due. That plaintiff has duly performed all the terms and conditions of said policy on his part to be performed. Wherefore he demands judgment for twenty-five hundred dollars." Then follows a copy of the policy of insurance, of the agreement for submission, and of the report of the appraisers.

To the complaint the appellant filed an answer, as follows: "The defendant, for second paragraph of answer to the first paragraph of plaintiff's complaint, says: That this action is upon a policy of insurance, whereby the defendant company indemnified the plaintiff, Lee S. Warner, against loss or damage by fire upon certain property in said policy of insurance described, and an award therein made. That among the conditions and provisions of said policy was the following: 'In case differences shall arise touching any loss or damage upon building or personal property after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers,—one to be selected by the assured, and one by the company,—who shall first elect one umpire or third appraiser, and shall then proceed to appraise on each article separately; and, in case of such appraisers' disagreement as to the amount of loss or damage upon any one or more articles, they shall appeal to the aforesaid third appraiser, who, conjointly with them, shall appraise such articles only, and the decision of two of said appraisers under oath shall be binding as to the amount of such loss or damage, but shall not decide the liability of the company under this policy.' And the defendant says: That after it had received notice of said loss, in pursuance of the provisions of said policy, it requested that appraisers be selected in accordance with the terms thereof, to appraise each separately, and to assess the amount of such loss or damage upon each article separately. That, in accordance with said request, an agreement in writing for submission to appraisers was made by the plaintiff and the defendant on the 27th day

of June, 1894, a copy of which agreement is herewith filed and made a part hereof, marked 'Exhibit A.' That, in pursuance of said agreement, this defendant selected one Frederick Geiger upon its part, and the plaintiff selected one J. A. Joel, appraiser on his part; and the defendant says that it made no other agreement and gave no other directions touching such appraisal except that which is contained in said contract in writing. That on said 27th day of June, 1894, the said Joel and Geiger, selected as above stated, took their oath in writing, indorsed upon said agreement (which oath is made a part of said exhibit), whereby they swore they would act with strict impartiality in making the appraisement and estimate of the loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that they would make a true and just and conscientious award of the same, according to their best knowledge, skill, and judgment. Each of them also herein swore that he is not related to the assured, either as creditor or otherwise, and not interested in said property or the insurance thereon. And the defendant avers that the said Geiger and Joel then and thereby undertook on themselves the duty of such appraisers in accordance with the terms and provisions of the submission hereinbefore referred to; and that said appraisers entered upon the performance of their duty, and made an alleged appraisement of the loss and damage to the plaintiff upon the property insured under said policy, and assessed the same at the sum of two thousand two hundred and ninety-nine dollars and fifty cents. And the defendant says that it at that time, and has ever since, denied, and does now deny, said appraisement so made by said Geiger and Joel, and avers that the same is not in accordance with the terms and provisions of submission to them by the plaintiff and the defendant; but the defendant says that the same is illegal, void, and of no effect, for the reasons hereinafter stated. (1) He says that said J. A. Joel, so selected as appraiser by the plaintiff herein, was not a fair and impartial appraiser of said property, but that he was interested in said appraisement, and represented the interests of the plaintiff herein solely, and was adverse to the interests of the defendant; that the said Joel, at the time of his appointment, as the plaintiff then well knew, was related by marriage to the plaintiff herein, and that he was selected as such appraiser by the plaintiff with full knowledge of the fact, and because of the fact, and because the plaintiff knew that he was not a fair and impartial appraiser, but would be partial and favorable to the interests of the plaintiff in such appraisement,—that is to say, that the plaintiff's brother married the sister of said Joel, and that plaintiff's brother and the sister of said Joel were at that time living, and were on friendly and intimate terms both with the plaintiff and with the said Joel. And, further, the defendant avers that, but a short time prior to the

selection of the said Joel as appraiser by the plaintiff, the plaintiff had purchased from the said Joel a stock of goods situate in the city of Crawfordsville, Indiana, and was largely indebted to him at the time of the said appointment and at the time that he made the alleged appraisement of goods; that plaintiff was indebted to the said Joel at the time of such selection and appraisement in the sum of about four thousand dollars, and the plaintiff is unable to say, and does not herein undertake to say, whether or not said indebtedness existing at said time was on account of the purchase of said stock of goods, or on account of money loaned by the said Joel to the said plaintiff, or on account of other business transactions, but avers the fact to be that, at the time of making said appraisement, the plaintiff was indebted to said Joel in a large amount,—of all of which the defendant says it had no knowledge at the time of the selection of said appraisers, nor at the time the appraisement of said goods was made. (2) The defendant avers that a reason why said appraisement was illegal and void was because of the misconduct of the plaintiff towards the said appraisers, and because of the misconduct of each of said appraisers in connection with and touching the making of said appraisement. And the defendant avers that the said Frederick Geiger and the plaintiff were acquaintances at the time said Geiger was selected as appraiser; that they belonged to the same secret society, and were on intimate terms of friendship with one another; and that, at the time the said Geiger appeared for the purpose of making said appraisement, the plaintiff took him into a saloon, and treated him to beer and other liquors, and talked with him touching the appraisement of said goods; and that, during the progress of the making of said appraisement at the house of the plaintiff, the plaintiff furnished beer and wine and other liquors to the appraisers, who drank the same; and that, in making said appraisement, the said appraisers frequently consulted with the plaintiff, in the absence of the defendant or its agents, touching the goods that were lost; and that the appraisers took the statements of the plaintiff as to the value of said goods, and as to the loss and damage thereto, without inspection and without examination, and put into said appraisement a large amount of loss and damage, to wit, nine hundred dollars, on goods that were never inspected by them, and about which they had no knowledge whatever except that which was given to them by the plaintiff himself; and that the said appraisers did not appraise each article of goods alleged to be lost or damaged separately, and did not place upon each separately a sound value and the loss and damage thereto, and did not allow for depreciation by use, as provided in the terms of the policy and in the terms of such submission, but, in many instances, allowed the plaintiff the full amount of cost price of said goods, although the same had been in use and under wear for years; and that said apprais-

ers, acting under the influence and at the request of the plaintiff, appraised said goods at much more than their actual cost price and appraised the loss and damage thereon at much more than the actual loss or damage upon the same,—all of which the defendant had no knowledge of at the time, and had no opportunity to object to, and which the defendant did not learn until after the said appraisement had been completed, and the return made thereon, as set forth in said submission and agreement. (3) And the defendant further avers, as a further objection to the validity of said appraisement, that by the terms of the policy herein sued on, and by the terms of the submission, it was the duty of said appraisers, before proceeding with the work of said appraisement, to select an umpire or third appraiser, and that the three so selected should then proceed to appraise on each article separately. But the defendant avers that said Geiger and Joel selected as hereinbefore stated proceeded to the work of said appraisement without the selection of said umpire, to which the defendant company at the time objected. (4) And, as a further objection to the validity of said appraisement, the defendant says that, by the terms and provisions of the policy, it was provided that the decision of said appraisers returned under oath should be binding as to the amount of such loss and damage, but the defendant says that the said Joel and Geiger did not return their decisions as to the appraisement of the specific articles submitted to them for appraisement under oath, but rendered their return only as set out, by the indorsement upon the submission or agreement hereinbefore set out, marked 'Exhibit A.' And the defendant says that all of said omissions and acts of commission upon the part of said appraisers as hereinbefore set out, which the defendant avers are not within the terms of the submission, nor within the terms of the policy of insurance herein sued on, without the knowledge or consent or approval of this defendant, and that, by reason of all the influences, conditions, acts, and relationships of said parties as set forth in this paragraph of answer, the said appraisement so made, as set out with the complaint, is absolutely illegal and void. Wherefore, the defendant prays judgment that said award be set aside, and held illegal and void, and for judgment accordingly." A copy of the agreement for submission and of the report of the appraisers was filed with this answer.

To this answer appellee filed a demurrer, which was sustained by the court, and this ruling is the only specification of error assigned on this appeal.

It is very earnestly insisted on behalf of the appellant that the theory of the complaint is to recover on the award, and not an action on the policy of insurance. On the other hand, the appellee contends that the action is upon the policy, and that the facts alleged with reference to the appraisement are simply to show notice of the fire,

and want of good faith on the part of appellant. We think the theory of the complaint is the one suggested by the appellee, namely, to recover upon the policy. That is the general scope and tenor of the complaint. The answer, while admitting that the action is upon the policy of insurance, proceeds upon the theory that the question of appellant's liability had been submitted to arbitrators, and an award made. If the agreement entered into between appellant and appellee was a submission of all matters in dispute between them under the terms of the policy of insurance, then the return or award of the arbitrators is conclusive upon them both, and is as effective as the judgment of a court of justice. *Railroad Co. v. Harris*, 126 Ind. 7, 25 N. E. 831; *Baltes v. Machine Works*, 129 Ind. 185, 28 N. E. 319. If, however, it was merely the submission of the question of the ascertainment of the value of the property destroyed or injured, and not to determine the liability of appellant for such property, then it is not an award by arbitrators such as is contemplated by the law as an arbitration. "Arbitration is where the parties injuring and injured submit all matters in dispute concerning any personal chattels or personal wrong to the judgment of two or more arbitrators, who are to decide the controversy." *Shars. Bl. Comm. bk. 3, c. 1, § 2*.

The contention of counsel for appellant that the demurrer of appellee to the answer admits the truth of the facts alleged therein is correct to the extent that a demurrer admits as true those facts which are well pleaded; that is, it admits as true those facts which tend to constitute a defense to the cause of action, but it does not admit as true facts which do not go to make a defense. In other words, the nature of the action is not changed by allegations in the answers that the theory of the complaint is different from what the facts alleged show it to be. To the extent that facts are well pleaded, they are admitted by a demurrer.

The only question submitted to the appraisers under the agreement was that of determining the value of the property totally destroyed, and the injury to that not destroyed. That this was the only question submitted is clear from the language of the agreement, wherein it says: "It is expressly understood that this agreement and appraisal is for the purpose of ascertaining and fixing the amount of said loss and damage only, * * * and shall not determine, waive, or invalidate any other right or rights of either party to this agreement." The appraisers fixed the value of the property destroyed, and the extent of the injury to that not destroyed. To that extent the parties had agreed; and had appellant acknowledged its liability, and tendered to appellee the amount agreed upon by the appraisers, he would have been bound there-

by. The appellant has not only failed to pay or tender the amount thus ascertained, but has denied all liability on the policy. The answer is not sufficient as a bar to the cause of action predicated upon the policy of insurance; hence the court did not err in sustaining the demurrer thereto. Judgment affirmed.

(13 Ind. App. 457)

VERMONT MARBLE CO. v. SMITH et al.

(Appellate Court of Indiana. Nov. 5, 1895.)

SALE—REMEDIES OF VENDOR—RESCISSION FOR FRAUD.

A statement made to a commercial agency by a partnership of its assets and liabilities, "as a basis for credit," in which a space for "loans from friends or relatives or any other obligations" is left blank, when in reality each of the partners had borrowed on his individual note from his wife money which had been put into the firm business, is not sufficient evidence of fraud to authorize the rescission of his contract by one who, in reliance on such statement, had sold and shipped goods to the partnership in the regular course of business.

Appeal from superior court, Marion county; J. W. Harper, Judge.

Replevin by the Vermont Marble Company of Cleveland, Ohio, against Harry O. Smith and August Tamm, Jr., doing business under the firm name of Smith & Tamm, and another, to recover possession of certain property sold and shipped by plaintiff to defendants. There was judgment for defendants, from which plaintiff appeals. Affirmed.

Morris, Newburger & Curtis, for appellant. Smith & Tanner, McCullough & Spaan, and Florea & Seidensticker, for appellees.

DAVIS, J. This was an action in replevin, instituted by the appellant against the appellees to recover the possession of certain personal property. The answer was a general denial. A trial by a jury resulted in a verdict and judgment in favor of appellees. Appellant's motion for a new trial was overruled, and proper exception reserved. This ruling is the basis of the only error assigned in this court. The evidence shows that the appellant, the Vermont Marble Company, was a dealer in marble monuments in the city of Cleveland, and that on February 18, 1893, said company received from the appellees Smith & Tamm a letter dated the day previous, in which it is stated that on February 13, 1893, they had bought out the monument business of Fred C. Smith at 52 and 54 West Georgia street, Indianapolis, and referred plaintiff for reference to R. G. Dun & Co., among others, and asked that said company ship them certain goods on note at 90 days. Appellant wrote, upon the receipt of this letter, to the persons named as references, and also solicited a report from the commercial agency of R. G. Dun & Co. as to the financial condition of Smith & Tamm. At the request of said agency, and on blank furnished to Smith & Tamm

for that purpose, they made out the following report:

Statement as a basis for credit. To R. G. Dun & Co. Concerning the financial condition of Smith & Tamm, of Indianapolis, state of Indiana, as per inventory of February 14, 1893.

Assets.

Merchandise on hand.....	\$2,835 00
Outstanding, including bills receivable, open accounts at their realizable value	
Cash on hand and in bank.....	300 00
Total available assets.....	\$3,135 00
Insurance stock, \$1,000.	

Liabilities.

For merchandise not due...	\$235 00
For merchandise past due..	
Loans from bank.....	
Loans from friends or relatives, or any other obligations	
Total liabilities	235 00
Surplus in business.....	\$2,900 00
Estimated yearly extent of business.	
Real estate, consisting of [describe and value separately, and in whose name held].	
August Tamm, Jr.	
Estimated worth.....	\$1,500 00
Mortgage and other amount unpaid thereon..	
Equity in real estate....	1,500 00
Insurance on buildings, \$400.00.	

Total estimated worth in and out of business according to figures. \$4,400 00

Exemptions.

Smith & Tamm. [Sign here full name of firm.]

References: August Tamm, Jr.

Indiana State Bank. By whom signed. Member of firm.

Wm. T. Noble. Harry C. Smith.

Albert Sahn. August Tamm, Jr.

On or about the day R. G. Dun & Co. received this statement they made report, as to the financial condition of Smith & Tamm, in substance the same as the above statement, to the appellant, who, in reliance on the truth of the facts contained in the statement, then sold and shipped or caused to be shipped to said Smith & Tamm the property in controversy. In the latter part of July or early in August, 1893, said Smith & Tamm made an assignment to the appellee George Seldenwick, for the benefit of creditors, from whom the appellant replevied the property sold and delivered to Smith & Tamm in reliance upon the truth of the facts contained in the statement as to their financial condition. The evidence discloses that about the time of the purchase of the business from Fred C. Smith the said Harry C. Smith borrowed of his wife \$1,350, for which he executed to her his note, and that said August Tamm secured \$1,500 by mortgage on his home, the title to which previous thereto was in himself and wife jointly; and on account of this transaction he executed to his wife his note for \$1,000, and that said Smith & Tamm then paid \$2,700 of the money so received by them respectively to said

Fred C. Smith on account of such purchase. The statement, it will be noticed, apparently purports to relate to the financial condition of Smith & Tamm. There appears in the writing no specific inquiry or statement in relation to the individual indebtedness of the members of the firm, unless the words, "loans from friends or relatives, or any other obligations," should be held to refer to the individual indebtedness of the different members of the firm. It is not claimed that there were any loans or other obligations due from the firm of Smith & Tamm to friends, relatives, or other persons, except the \$235 for merchandise, as disclosed by the statement. Two questions only are discussed by counsel for appellant: (1) That the verdict of the jury is not sustained by the evidence, and is contrary to law; (2) that the court erred in charging the jury that the plaintiff could not recover because of false statements made by Smith & Tamm, unless in making them they knew or believed them to be false.

Counsel for appellant contend that the statement by Smith & Tamm, made as the basis for securing credit, operates as a warranty of its truthfulness, and that the right of the seller to rescind the contract cannot be made to depend upon the knowledge of the purchaser of the correctness of the statement made. Further, they insist that the statements made by Smith & Tamm to the appellant through R. G. Dun & Co. were in fact false in a material respect, in this: that no reference therein was made to the notes executed by them to their respective wives, and that for this reason the appellant had the right to rescind the contract of sale, and recover the goods. In this connection it should be borne in mind the evidence clearly shows that when the statement was made Smith and Tamm both knew of the individual indebtedness of each member of the firm to their respective wives. As it appears without contradiction that Smith & Tamm knew of such individual indebtedness at the time the statement was made, there is, in any view of the case, no available error because of the instruction that the plaintiff could not recover unless in making the false statements referred to they knew or believed such statements to be false. Assuming, for the purpose of determining the question arising on the instruction, that the appellant was entitled to rescind the contract and recover the property if it appeared that Smith & Tamm had made material false statements as to their individual indebtedness, whether they knew or believed such statements were false or not, yet it is apparent from the record, as above indicated, that the instruction, if erroneous, was harmless, for the reason, as before stated, it is shown without dispute that said Smith & Tamm had full knowledge of their individual indebtedness when the statements were made. Knowledge of the fact of their individual indebtedness at the time the statement was made being conceded by them on the trial, the instruction by the court, if erroneous, that

It was incumbent on appellant to prove such knowledge by them, did appellant no injury under the circumstances. What, however, is the fair and reasonable construction of the written statement? It seems to purport on its face, as we have seen, to be a statement concerning the financial condition of Smith & Tamm "as per inventory" of February 14, 1893. There is no pretense that the individual obligations of the partners appeared on the "inventory" of the firm. Under the head "Assets," what assets are referred to? Evidently, it seems to us, the partnership assets of the firm of Smith & Tamm, as shown by the "inventory" made a few days before. Then immediately following, under the head of "Liabilities," there appears, "For merchandise not due, merchandise past due, loans from bank, loans from friends or relatives, or any other obligations," in each instance, in our opinion, apparently referring to the firm obligations. As we have before observed, there is no specific statement or inquiry relative to the individual assets or liabilities of the different members of the firm. It therefore requires a very liberal construction of the statement in behalf of the appellant to construe it as a warranty or representation that the members of the firm were not indebted in any amount on individual obligations. If the statement, however, should be so construed, it must be conceded that it did not, when made, state the truth. If this construction is to prevail, the statements—or rather the silence as to such individual liabilities—were false, and known to be false when made.

Assuming, therefore, that the statement was untrue in this: that it failed to disclose the individual obligations of the members of said firm in the sum of \$2,350, and that the credit was extended to Smith & Tamm by appellant on the faith of the truth of the statement, does such false statement authorize the rescission of the contract and the recovery of the property in controversy in this action? It should be borne in mind that the evidence does not show any intent on the part of Smith & Tamm to defraud the appellant, unless under the circumstances the law implies such fraudulent purpose to them. In this connection we will therefore examine the decisions of the supreme court to which our attention has been called bearing upon the question under consideration. *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, was an action in replevin. The theory of the plaintiffs in that case, as we understand it, was that they were entitled to rescind the contract and recover the goods on the ground that the purchasers knew they were insolvent, and that they fraudulently concealed their insolvency, and obtained the goods with a design not to pay for them. In that case the purchasers were not charged with having made any material false representations respecting their financial condition for the purpose of obtaining credit. In the course of the opinion Judge Mitchell says:

"That the purchasers may have been insolvent when the first bill, or any of the other bills, was purchased, and that they may have known that their debts exceeded their assets, did not of itself constitute such fraud as justified the setting aside the sale after the goods had come fully and fairly into the possession of the buyers. To avoid a sale after goods have been taken into the possession of the buyer, apparently in the ordinary course of his business, there must have been some artifice or trick, or some false pretense or fraudulent suppression of the truth, which enabled the purchaser to obtain possession of the goods; and it must appear that the latter intended at the time of each purchase not to pay for the goods." *Gregory v. Schoenell*, 55 Ind. 101, was also an action in replevin. The action was prosecuted on the ground that the purchaser obtained the property by fraud in making false representations. In the course of the opinion Judge Biddle says: "In such a case, to establish fraud, and authorize a rescission of the contract for that cause, the representations made must have been such as were calculated to deceive a person of common prudence; they must have been false, and known to be false at the time by the person who made them, and the person to whom they were made must have believed them to be true, and relied upon them, and they must have been the inducement which caused him to part with his property." *Frenzel v. Miller*, 37 Ind. 1, was an action on a note, to which the defendants answered by counterclaim, alleging that the note was executed in part consideration for an engine, boiler, and machinery which the plaintiff at the time of the sale falsely and fraudulently represented were in good condition, sound and fit for the purpose for which they were intended, and were in good running order, etc. It was there held that, if the plaintiff made the representations charged, and the defendants, relying thereon, purchased the mill, believing them to be true, and if such representations proved to be false, to defendants' damage, then the defendants were entitled to damages on their answer, notwithstanding the plaintiff did not know that what he said was false. The court quotes with approval the following from *Parsons on Contracts*: "If the statement be in fact false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of fraud in annulling the contract, although the person uttering the statement did not know it to be false, but believed it to be true." 37 Ind. 12. *Booher v. Goldsborough*, 44 Ind. 490, was an action on a note. It was averred in the answer, among other things, that the note was executed in part payment of the purchase price for a steam engine and sawmill which the plaintiffs represented was a No. 1 engine, as good as new, and in no wise injured or damaged; that defendants relied on

said representations; and that said representations were false and untrue. The court held that the answer did not charge fraud. We quote from the opinion as follows: "It is not essential, to constitute fraud, that a person making representations should at the time know that they were false, but they must be made with a fraudulent intent. It is sufficient if they are made recklessly, not knowing them to be true, and for the purpose of influencing the other party in making the purchase or contract." *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139, was an action to recover damages growing out of the purchase of a jackass, induced by false and fraudulent representations. The court said: "An unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist, and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and induces another to act upon his statement, the law will impute to him a fraudulent purpose. * * * The mere fact that a statement is untrue will not warrant the conclusion that there was fraud." In *Furnas v. Friday*, 102 Ind. 129, 1 N. E. 296, the court said: "Although it is true that a complaint seeking a recovery for injuries arising from misrepresentation need not allege that he knew that his representations were false, it is necessary that it should state facts showing that they were fraudulent." In *Roller v. Blair*, 96 Ind. 203, the court said: "Where a party professing to have knowledge falsely represents a thing to exist, and makes the representation for the purpose of securing an undue advantage over the person with whom he is contracting, he is guilty of fraud, although it may not appear that he knew his statement was false." In *West v. Wright*, 98 Ind. 335, the court held that, where one who professes to have full knowledge of the facts asserts those facts with the intent and purpose of deceiving and defrauding another, and succeeds in accomplishing that purpose, it is not necessary to show that he knew the representations to be false. See, also, *Brooks v. Riding*, 46 Ind. 15; *Slauter v. Favorite*, 107 Ind. 291, 299, 4 N. E. 890; *Robinson v. Reinhart*, 137 Ind. 674, 681, 36 N. E. 519.

We will not undertake to reconcile apparent conflict in some of the authorities cited. Neither is it our purpose to formulate a general rule applicable in such cases. Suffice it to say that in this case there was no unqualified affirmative statement that the members of the firm owed no individual obligations. The false representation, if one was made, consists in failing to disclose the fact that such individual indebtedness existed. The appellate court on appeal cannot disturb the verdict of the jury on the evidence on the ground that the failure to make such statement, under the circumstances,

was for the fraudulent purpose of obtaining the property in question. We find no available error in the record. Judgment affirmed.

(13 Ind. App. 539)

GLOBE ACC. INS. CO. v. HELWIG.

(Appellate Court of Indiana. Nov. 8, 1895.)

ACCIDENT INSURANCE—ACTION ON POLICY—CONSTRUCTION—APPEAL—REVIEW.

1. Where, under the evidence, plaintiff is entitled to recover anything, the verdict will be sustained, in the absence of objection that it is excessive.

2. Under an accident policy insuring a person "against the loss of the money value of his time, not exceeding \$25 per week, nor for more than 32 consecutive weeks," a recovery may be had for time actually lost, within the limits prescribed, though the employer of the insured continued his pay during his disability.

3. A joint assignment of error, based on the giving of several instructions, cannot be sustained, if any one of the instructions was correct.

4. The failure of counsel to discuss instructions, the giving of which is assigned as error, is an admission that they are correct.

5. In a suit on an accident policy insuring plaintiff "against the loss of the money value of his time," it was not error to permit plaintiff's counsel to ask him as to his suffering, and how he slept during the disability; the court having instructed the jury that such evidence was not an element of damages, and was only admissible in so far as the discomfort may have interfered with his capacity to perform his work.

6. Refusal to compel a party to produce certain books on the trial is not error if such party was neither notified of the motion, as required by Rev. St. 1894, § 487 (Rev. St. 1881, § 479), nor was present in person or by counsel when the motion was made.

Appeal from superior court, Marion county; S. M. Harvey Judge.

Action by Frank E. Helwig against the Globe Accident Insurance Company on an accident policy. From a judgment for plaintiff, defendant appeals. Affirmed.

G. W. McDonald, A. J. Beveridge, and Chas. F. Coffin, for appellant. McCullough & Spaan, for appellee.

GAVIN, J. Appeal from the judgment of the general term affirming the judgment of the special term. The only errors properly assigned in the general term are (1) that the court erred in overruling appellant's motion for judgment on the jury's answers to interrogatories; (2) that the court erred in overruling appellant's motion for new trial. The first error has not been discussed, and must therefore be deemed waived. *Kluse v. Sparks*, 10 Ind. App. 444, 36 N. E. 914, and 37 N. E. 1047; *Elliott*, App. Proc. § 445. One cause for new trial questions the sufficiency of the evidence. There is no assignment in the motion that the damages are excessive, or the amount of the recovery too large. If, under the evidence, appellee was entitled to anything, it must be regarded as sufficient to sustain the verdict. *Elliott*, App. Proc. § 855. The policy on which the action is founded insured appellee "against the loss of the money value of his time, not exceeding \$25 per week nor for more than 32

consecutive weeks, if during the term of this insurance he shall, solely through external, violent, and accidental means, and from no other cause, be so bodily and physically injured as to be immediately, totally, and continuously disabled from doing anything in and about his usual occupation." It is earnestly insisted that under this policy appellee cannot recover unless he actually lost his wages or salary during the time he was disabled, and that a recovery is not permissible in this case, because the appellee's employer donated to him his regular salary for that entire period. If by reason of an injury insured against appellee actually lost the time from his business, he was entitled to recover the money value thereof up to \$25 per week, even though his pay was continued during his disability. We can see no more reason in holding such payment to inure to appellant's benefit than there would be for refusing to one wrongfully injured by another the right to recover the value of medical services and nursing because gratuitously rendered. *Railway Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39. Appellee was injured by having his foot crushed about 9 o'clock one morning. He was immediately taken home, where he remained suffering until about 4 p. m., when he was driven back to his office, and gave attention to some matters for perhaps an hour. During the next seven weeks he went each day to his office in a buggy sat for an hour or so, with his foot propped on a pillow, opening letters, and discussing the business with traveling men and others who came in. An extra man was employed, who, with others, performed most of appellee's previous duties, which were those of general manager and superintendent of a chair factory. For all of the seven weeks he was disabled from performing many of his duties, but during most of it able to perform some. Counsel argue that, to bring appellee's injury within the terms of the policy, it must have been such as to disable him from doing any and everything pertaining to his occupation. We are not, under the presentations of the case to us, called upon to determine whether or not this be the correct construction, or whether it would satisfy the terms of the policy should there be anything relating to his business which he could not do, or whether the policy means that the insured must be substantially, although not literally, disabled from doing any and everything pertaining to his business. The subject is discussed at length in an article in 35 Cent. Law J. 150. The authorities cited in *Supreme Lodge v. Edwards* (Ind. App.) 41 N. E. 850, decided at this term, may also be applicable to the construction of the policy. Under the evidence, however, it is clear that appellee was, for a short period at least, entirely unable to do anything whatever pertaining to his occupation in the strictest sense in which appellant claims the phrase is used. For this time thus lost he was entitled to be paid by appellant its fair value, not exceeding, of course, the rate fixed in the policy. It cannot, therefore, be held that the

evidence was not sufficient to sustain the verdict.

It is next urged that the court erred in giving of its own motion instructions Nos. 4 and 5. The assignment in the motion for a new trial is that "the court erred in giving on its own motion instructions to the jury Nos. 1, 2, 3, 4, 5." This assignment is joint, and can only be maintained by showing that all of the instructions therein referred to are erroneous. In other words, the assignment, under our practice, must fail if any one of such instructions is correct. The failure of counsel to discuss the first, second, and third instructions amounts to an admission that they are correct. Therefore no question is presented for our consideration under this assignment. *Kackley v. Railroad Co.*, 7 Ind. 169, 34 N. E. 532; *Buchart v. Ell*, 9 Ind. App. 353, 36 N. E. 762; *Insurance Co. v. Slisk*, 9 Ind. App. 305, 36 N. E. 659; *Eddingsfield v. State* (Ind. App.) 39 N. E. 1057; *Town of Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159.

Another assignment in the motion for a new trial is that "the court erred in refusing to give the jury the instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 asked for by the defendant." Under the authorities above stated, if any one of the instructions does not contain a correct statement of the law applicable to the case, no question is presented by this assignment for our consideration. It is not claimed by counsel that the court erred in refusing to give all of the instructions asked by appellant, and therefore it is not necessary to further consider this assignment.

Counsel for appellant also insist that the court erred in permitting counsel of appellee to ask him as to his suffering, and how he slept during the injury. In view of the statement of the court to the jury that such evidence was not an element of damages, and that it was only admissible in so far as the discomfort may have interfered with his capacity to do his work, there was no error in this ruling.

Counsel further contend that the court erred in refusing to compel appellee to produce the book of his company to show how the sum of \$100 per week was paid him. It does not appear that any notice of the motion was given to appellee, or that he was present in person or by counsel when the motion was made. *Rev. St. 1894, § 487* (*Rev. St. 1881, § 479*). Neither is it suggested how the production of the books would have benefited appellant. It was conceded by appellee that the company continued to pay his salary during the time of his injury. Counsel content themselves with the statement that the ruling was erroneous, without any argument or suggestion as to how or why appellant was or could have been benefited by the production of the books. For the reason that no notice is shown to have been given, if for no other, there was no error in the court's ruling.

On the trial, counsel for appellant offered to show by a witness that the class in which

appellee was injured was more hazardous than the one in which he was insured. No issue was tendered raising any such question, the only answer filed being the general denial. Had there been any violation of the contract by appellee, whereby his cause of action would have been defeated, it should have been pleaded, and an opportunity thus given him to reply thereto. We find no error in the record. Judgment affirmed.

(13 Ind. App. 522)

**THORPE BLOCK SAVING & LOAN ASS'N
v. JAMES et al.**

(Appellate Court of Indiana. Nov. 7, 1895.)

MECHANICS' LIENS—PRIORITY OVER MORTGAGES.

1. Where mechanics' liens attach to property between the recording of two mortgages, the former of which is made subject to the latter, the last mortgage will be a first lien to the amount of the first mortgage, the mechanics' liens a second lien, the first mortgage a third lien, and the balance due on the last mortgage a fourth lien, on the land.

2. Mechanics' liens on land and buildings are not rendered superior to the lien of a prior recorded mortgage by the fact that the security of the latter is increased by the erection of the buildings.

3. Rev. St. 1894, § 7258, gives mechanics' liens priority over subsequent liens. Section 7256 gives mechanics' liens on buildings put on land priority, as to the buildings, over prior recorded mortgages on the land. *Held*, that a mortgage recorded prior to the attaching of mechanics' liens for a building put on the land has, as to the land, the priority of lien.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by William E. James and others against Charles Conner to foreclose a mechanic's lien. Thorpe Block Saving & Loan Association and others filed cross complaints as mortgagees of the property. From the judgment determining the priority of liens, the loan association appeals. Reversed.

Carter & Brown, for appellant. John Coburn, D. A. Myers, and Harding & Hovey, for appellees.

GAVIN, J. The appellees, James et al., brought suit to foreclose a mechanic's lien. Appellant and others filed cross complaints. The facts were found specially. Those essential to an understanding of the case in hand are as follows: On April 28, 1892, John and August Wacker sold and conveyed to Charles Conner a certain lot (No. 93) for \$350, of which \$50 was paid in cash, and for the residue notes were taken, secured by a mortgage on the lot, executed on the same day, and duly recorded. By the terms of this mortgage it was made junior to a mortgage to be executed in favor of appellant for \$600. On the Wacker mortgage there was unpaid \$315. On or prior to said April 28th, Conner applied to and secured from appellant the promise of a loan of \$600 to be used in building a house on the lot, and to be secured by a first mortgage on the lot. On or prior to said April 28th, Con-

ner also made a contract with John Bly to erect said house for \$600, on condition of the purchase of the lot. On May 28, 1892, Conner executed to appellant a mortgage on the lot for \$600, which was likewise duly recorded, and on which was due \$654. The proceeds of this loan were paid to the contractor, Bly, about July 20, 1892, who had then erected and completed the house. Of this sum Bly expended \$303 in the construction of the house, and left unpaid to material men and others, who had furnished material or done labor thereon, various sums, aggregating, with attorney's fees, \$408, for which notices of mechanics' liens were duly filed. The conclusions of the court were: That appellant's lien was prior to that of the Wacker mortgage, and the mechanics' liens were superior to appellant's. That the property should be sold, and the proceeds applied—First, to the satisfaction of the mechanics' liens; second, upon appellant's claim a sum equal to the whole amount due thereon, less that applied upon the mechanics' liens. Exceptions to the conclusions of law were duly saved and presented to this court. Judgment was rendered ordering sale, and distribution of proceeds as follows: (1) To payment of costs; (2) to payment of mechanics' liens; (3) to payment on the appellant's mortgage of the amount thereof, less the sum paid on the mechanics' liens; (4) to payment of the Wacker mortgage; (5) to payment of balance of appellant's mortgage, with the surplus over to the owner of the fee. There are some facts bearing upon other points involved in the argument which we deem it needless to set out. Of these points we first dispose.

Complaint is made by appellant concerning \$50 loaned by Coburn to Conner. Since this \$50 was not, so far as the finding shows, ever repaid to him, it may be allowed to pass out of sight. So, also, with the \$85, about which there seems to have been some controversy. According to the finding, this sum was in no way involved in the matters with which this case deals.

The appellees' counsel argue that the mechanics' liens were superior to the Wacker mortgage, because the Wackers agreed that Conner should build a house on the lot, and they must therefore be deemed to have waived their lien. No such agreement appears in the finding, and it is to the finding alone that we can look for the facts upon which the conclusions must be based. We are not, therefore, called upon to determine whether the conclusion drawn by appellees' counsel would follow, even if their premise were well founded. The mere fact that the security was thereby benefited would not make the mechanics' liens superior to their mortgage. By the very terms of the statute (section 7258, Rev. St. 1894), the mechanics' liens take priority only over other liens subsequently created. Section 7256 did not change the law relative to the rights of mortgagees, save as to the buildings. Under nu-

merous cases decided prior to its enactment, the rights of existing mortgages are superior to the claims of the mechanics' liens subsequently attaching. *Davis v. Elliott*, 7 Ind. App. 246, 34 N. E. 591, and cases cited. Appellant's contention concedes that its mortgage is primarily junior to the mechanics' liens, but asserts that the Wacker mortgage, being first in time, is the first lien, and therefore entitled to share first in the fund, but that it is entitled to this money instead of the Wackers, because they have waived their right to it in its favor. Appellant further insists that by waiving its place in its favor the Wacker mortgage has been relegated to the rear of the entire procession. It is somewhat difficult to arrive at a result which seems logical in all its aspects. Leaving out of consideration the agreement in Wacker's mortgage as to the appellant's priority, the relative positions of the liens are quite plain: (1) The Wacker mortgage; (2) the mechanics' liens; (3) the appellant's mortgage. By the agreement, however, a disturbing element is introduced to mar the simple harmony of their relations. By its terms the Wackers yield nothing to the mechanics, but they do bestow upon appellant the right to come in for \$900 ahead of themselves. Thus, then, it may be argued that the appellant is ahead of the Wackers; the mechanics are ahead of appellant; therefore the mechanics are ahead of both the Wackers and the appellant. Or, to express it a little differently, the appellant is behind the mechanics; the Wackers are behind the appellant; therefore both are behind the mechanics. This proposition seems plausible, and was adopted by the trial court, probably upon the authority of *Reilly v. Williams*, 47 Minn. 590, 50 N. W. 826. On the other hand, however, it may be claimed the Wackers have never yielded their place to the mechanics, and are therefore ahead of them, and, they being ahead of the appellant, the Wacker mortgage must be placed ahead of both. This latter position, like the former, is faulty, in not paying due regard to the relative rights of all the parties, derived from the fact that the Wackers waived their rights, to a certain extent, in favor of appellant, but yielded nothing to the mechanics. The supreme court of Minnesota, in the later case of *Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, receded from the position taken in *Reilly v. Williams*, holding it to be plausible but unsound. This latter holding it followed in *Miller v. Stoddard*, 54 Minn. 486, 56 N. W. 131. In *Insurance Co. v. Batchen*, 6 Ill. App. 621, the course adopted in *Reilly v. Williams* is approved, the first being thereby made the last. In *Spaulding v. Crane*, 46 Vt. 292, it was held that a release or waiver of a first mortgage in favor of a dower claimant did not inure to the benefit of an intermediate mortgagee, whose rights were superior to the dower right, but that, although waived in her favor, they

were enforceable against the intermediate mortgagee. In *Bank v. Moore*, 94 N. C. 734, it was declared that under such circumstances the third mortgage, to whom the first had given a priority over it, was to be subrogated to the rights of the first mortgage, and should first receive from the fund the amount due thereon, being then postponed, as to the remainder due upon it, until after the satisfaction of the second mortgage. As to the right of the appellant, as between it and the mechanic's lien holders, to first receive from the fund the amount due upon the Wacker mortgage, we are content to follow the case last cited and the later Minnesota cases, believing that thus the equities of the parties are best worked out. We are, however, unable to perceive any equitable grounds upon which the appellant can claim payment in full in preference to the Wacker mortgage, after the creation of the mechanics' liens subsequent to the execution of the Wacker mortgage, but intermediate between the making of the agreement to yield in favor of appellant and the creation of appellant's lien. The Wackers only agreed to give priority to the appellant for \$900. If, after that arrangement, appellant suffered the creation of other liens which came in before its own, we can see no just ground for transferring the loss occasioned thereby to the Wackers. It was in appellant's power to protect itself from the mechanics' liens by refusing to pay any money unless acquittances of all rights to file liens were executed. If it neglected to so do, it should bear the loss, rather than impose it upon some one who was entirely free from blame. A somewhat different question would be presented had the lien of the mechanics attached before the agreement of waiver was entered into, as was the case in *Bank v. Moore* and *Malmgren v. Phinney*, supra. Since the Wackers yielded precedence only to the amount of appellant's mortgage, and the appellant permitted the mechanics to take a place ahead of them, the Wacker mortgage must come in whenever there had been applied on the mechanics' liens and the appellant's claim, taken together, the amount for which the Wackers gave precedence. The appellant cannot therefore be permitted to first take from the fund the full amount of the Wacker mortgage (because this, with the mechanics' liens, would exceed the amount entitled to preference over the Wacker mortgage), but only so much as will, when added to the mechanics' liens, equal the sum for which the Wackers yielded their priority.

In our opinion, distribution of the proceeds of the property should, after payment of costs in the circuit court, be made as follows (the amounts being stated as of the date of the finding, accrued interest to be added by the trial court on rendering final judgment): (1) Upon appellant's claim, \$245.64; (2) the mechanics' liens, in full, \$408.30; (3) to the Wackers then, mortgage in

full, \$315; (4) the balance on appellant's claim, \$408.36; (5) the surplus, if any, to the owner of the fee. Thus it seems to us every legal and equitable right will be preserved, and exact justice done to each of the parties. No issue has been made or claim advanced to give to the mechanics a superior lien upon the building only, under section 7256, Rev. St. 1894. We have not, therefore, considered their rights thereunder. Judgment reversed, with instruction to the trial court to restate its conclusions of law in conformity with this opinion. The costs of the appeal to be paid one-half by the appellees, the mechanic's lien holders, who recovered below, and one-half by the appellant.

(53 Ohio St. 370)

LAKE ERIE & W. R. CO. v. MACKEY.

(Supreme Court of Ohio. Oct. 29, 1895.)

RECORD ON APPEAL—DEPOSITION NOT MARKED AS EXHIBIT—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—DEGREE OF CARE OF CHILD—QUESTION FOR JURY.

1. It is not error for a reviewing court to refuse to treat as part of a bill of exceptions a deposition claimed to be the identical deposition given in evidence at the trial, where such deposition is attached to the bill only by being placed between the pasteboard back and the stenographer's report (although held with sufficient tenacity to retain its place), and not marked as an exhibit, nor identified by either the trial judge or the stenographer or by any one.

2. Where a petition in an action against a railroad company for personal injuries charges that defendant negligently and unlawfully stopped a freight train across a public highway for a period of more than five minutes, and that while plaintiff, after the expiration of that period, was attempting to cross the street between the cars, defendant, without warning, wrongfully and negligently backed the train, causing plaintiff's injuries, such two charges of negligence are not separable in the sense that one only would be the proximate cause of the injury. Taken together, they constitute a sufficient allegation of negligence as against a general demurrer.

3. A child of nine years of age is not guilty of negligence if he exercises that degree of care which under like circumstances would reasonably be expected from one of his years and intelligence. Whether he used such care in a particular case is a question for the jury. And even though the petition might, if the plaintiff were an adult, be construed as disclosing contributory negligence, an averment that the plaintiff was at the time a child of nine years of age, and of immature experience and judgment, is sufficient to rebut the presumption of contributory negligence.

4. Where, in such case, the evidence at the trial tends to show that a freight train has been permitted to stand across a public street beyond the period of five minutes, to the hindrance or inconvenience of travel thereon, in violation of section 6980, Rev. St., and persons rightfully on the street are passing between the cars of the train, it becomes a question for the jury whether or not it is negligence for the company's servants to move the train without giving timely warning of their intention to do so.

5. Whether, under such circumstances, a child of nine years who attempts to cross, and in doing so climbs upon the coupling of a car, is a trespasser or not, is a question for the jury.

6. It is also a question for the jury whether or not the mere presence of the train is to be

taken as notice to such child that the train is likely to be moved at any time.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

The action below was by one Mackey, by next friend, against the Lake Erie & Western Railroad Company, to recover damages for alleged negligence. A judgment was obtained in the common pleas, which was affirmed by the circuit court. Defendant brings error. **Affirmed.**

Marsh & Loree, W. B. Hackedorn, and John B. Cockrum, for plaintiff in error. Mattingly & Kenney and Edgar B. Kinkead, for defendant in error.

SPEAR, J. 1. A preliminary question is made with respect to the action of the circuit court in overruling a motion to reattach certain depositions to the bill of exceptions. It is recited in the bill that depositions of the witnesses named were given in evidence, and that they are attached, marked, respectively, Exhibits E and F. Proof was heard for and against the claim that the depositions were ever part of the bill. Giving to the testimony a construction most favorable to the plaintiff in error, the question, reduced to its last analysis, is whether a paper claimed to be the identical paper given in evidence at the trial, which was attached to the bill of exceptions only by being placed between the pasteboard back and the stenographer's report, in which position it was held with sufficient tenacity to retain its place, but which paper was not marked or identified as an exhibit either by the trial judge or the stenographer, or by any one, can be treated as a part of the bill. We think it cannot. The circuit court did not err in overruling the motion, nor in refusing to pass upon the weight of the evidence. *Hicks v. Person*, 19 Ohio, 426; *Wells v. Martin*, 1 Ohio St. 386; *Busby v. Finn*, Id. 409.

2. It is insisted that the petition fails to state a cause of action, and that the trial court therefore erred in overruling a general demurrer to that pleading. The criticisms are that there is no averment that the train was unnecessarily detained on the crossing; that the allegations of negligence are mere epithets, and not a statement of the omission of any duty; and that the presumption of contributory negligence arising from the facts stated is not overcome by proper averments. Omitting formal parts, the petition alleges, in substance: That the plaintiff was a minor of the age of nine years. That defendant's track through the village of Coldwater intersects and crosses Main street at grade. That Main street is a common thoroughfare and highway, the principal street of said village, and the point of junction of both a public highway and street crossing, necessarily much used and frequented by the public. On June 5, 1890, the defendant did negligently and unlawfully, and without due care on the part of the servants of

said defendant in charge thereof, leave a long train of freight cars, attached to a locomotive, standing upon and over, obstructing and blocking, said crossing, for a period of more than five minutes, without any attention to said crossing or the consequence to the convenience or life and limb of persons having occasion to pass such obstruction. That at the time aforesaid, during the hour of noon of said day, while said train was so unlawfully standing on said crossing, the plaintiff, a child of tender years and immature experience and judgment, was lawfully passing along said street, going to a point beyond said crossing on Main street. When arriving at said crossing, and in full view of the engineer's position, and in full view of any servant being on the lookout or keeping watch over said train, he found said crossing so obstructed and blocked by said defendant's train. That after remaining at said crossing for more than five minutes, and receiving no warning, plaintiff, in full view of the engineer's proper position, and within the knowledge of ordinary prudence of defendant's servants, attempted to pass over and cross such obstruction. While so passing over said cars, defendant's servants, without any care or attention to said crossing, or the consequence to any one attempting to pass such unlawful obstruction, without due care, without signal, without notice, without warning, did then and there imprudently, carelessly, negligently, and wrongfully start said cars suddenly and violently backward, whereby said plaintiff's right foot was caught between the couplings of two cars, and the injury followed.

If the action were to recover the penalty prescribed by section 4748, Rev. St., or to recover damages arising to any person by reason alone of the obstruction, it would be necessary to aver that the obstruction was continued unnecessarily, for that condition is incorporated in the statute. But section 6980, Id., which provides that "any person who permits any car or locomotive of which he has charge to remain upon or within thirty feet of the center or across any public road, street, or alley, for a period longer than five minutes, * * * shall be fined," etc., does not impose the requirement of showing that the cars were so permitted to remain unnecessarily; and the language quoted clearly implies the duty to remove the obstruction after the lapse of five minutes. Notice of this statute being taken, the neglect of duty is implied from the statement of the fact of continued obstruction. So construed, the petition makes a case of violation of duty; and this, with the averment that the act was negligently done, and the further allegation that the starting of the cars, by which the injury was immediately caused, was done negligently, without warning, and wrongfully, we think, is sufficient charge of negligence as against a general demurrer. The general rule is that allegations which adequately state the facts of negligence are sufficient to constitute a good pleading. An al-

legation specifying the act the doing of which caused the injury, and averring generally that it was negligently done, states a cause of action, although it be not apparent from the complaint how the injury resulted from the negligence alleged. Boone, Code Pl. § 174; Bliss, Code Pl. § 211a; Max. Code Pl. 251; Railway Co. v. Washington, 1 C. O. A. 286, 49 Fed. 347; Rushville v. Adams, 107 Ind. 475, 8 N. E. 292. Nor are the two negligent acts independent of each other. Both concur in constituting an act of negligence, viz. the negligent starting of a train negligently and unlawfully obstructing a street crossing. Burger v. Railway Co., 112 Mo. 238, 20 S. W. 439.

Nor is the petition faulty in that it does not sufficiently negative the presumption of contributory negligence. It is well settled that a child is presumed to possess only such discretion as is common to children, and is therefore held only to the exercise of such care as is reasonably to be expected from children of his own age and capacity. Rolling-Mill Co. v. Corrigan, 46 Ohio St. 233, 20 N. E. 466. The law as to personal responsibility of a child for his acts is declared by Bishop, in his work upon Criminal Law (section 368), in these words: "Since, in reason, criminal capability depends on the understanding rather than the age, there can be no fixed rule of age which will operate justly in every possible case. But an imperfect rule is practically better than none. Therefore, at the common law, a child under seven years is conclusively presumed incapable of crime. Between seven and fourteen the law also deems the child incapable, but only prima facie so, and evidence may be received to show criminal capacity." The rule is sustained by many authorities, and may be regarded as an accepted rule of criminal law; and it would seem that the principle should have application to a case of negligence. Prof. Thompson, in his work on Negligence, at page 1181, comments as follows: "Two questions arise: (1) At what age or period of a child's development shall it be held to be *sui juris* for the purpose of cases of this kind? (2) Whether this is a question of law or a question of fact. When the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide this question as a matter of law. * * * If there is any doubt as to the child being of the age and capacity that in law constitutes one *sui juris*, it should be submitted to the jury to say by their verdict whether he is so or not." The rule is tersely stated by Mr. Justice Hunt in Railroad Co. v. Gladmon, 15 Wall., at page 408, thus: "The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." Unless, therefore, it can be held, as matter of law, that the injured person had the capacity to foresee and avoid danger, negligence will not be imputed to him; and, inasmuch as this presumption will not be visited upon children under the age of 14, it follows that the averment

that the plaintiff was a boy of 9 years of age, and that he was of immature experience and judgment, is sufficient to rebut any legal presumption of contributory negligence from other facts appearing in the petition. 1 Shars. Bl. Comm. 435, 464; 4 Shars. Bl. Comm. 20; Rauch v. Lloyd, 31 Pa. St. 338; Nagle v. Railroad Co., 88 Pa. St. 35, 39; Rhodes v. Railroad Co., 84 Ga. 320, 10 S. E. 922; Thurber v. Railroad Co., 60 N. Y. 326; Dowling v. Railroad Co., 90 N. Y. 670.

3. Defendant's counsel asked the court to charge the jury that "if you find in this case from the evidence that defendant's train of cars occupied Main street crossing in Coldwater, Ohio, for a period exceeding five minutes, and more than the statutory period, and you further find that plaintiff, while said train so occupied said crossing, climbed up between two of defendant's cars in said train, he, by so doing, became and was a trespasser; and, while so trespassing, the defendant owed him no duty in moving the train from such crossing, unless you find from the evidence that defendant and its servants operating the train knew of his presence there,"—which was refused. This request implies that, under the circumstances stated, the plaintiff would, as matter of law, be a trespasser if he climbed up between two of the cars while attempting to cross over. We think this a question of mixed fact and law. The evidence tended to show that, at the time the attempt to cross over was made, the crossing had been obstructed for more than five minutes, to the hindrance of travel thereon, which act of continued obstruction, if proven, was a violation of law, and made the company itself a trespasser. Its cars were where they had no right to be, while, if the boy was rightfully upon the crossing, as the evidence tended to show he was, he was where he had a right to be, and his attempt to pass the obstruction by climbing upon the cars would not make him a trespasser. It was, we think, for the jury to say whether he was a trespasser or not.

Defendant's counsel also requested the court to charge "that if a public highway is completely blocked by a united freight train, attached to an engine, such possession of the highway by the train, even though such possession extends beyond the statutory time, is notice to all traveling public, children and adults alike, of the presence of such train at such place, and that it is likely to be moved at any time; and such train in that condition is not an invitation to any of the traveling public to pass over the crossing by climbing upon or over such train,"—which was refused. One objection to this request is that it ignores the difference between the responsibility of adults and children, already adverted to. Whether or not the presence of a train upon a crossing should be treated as notice to a child of nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the

child, and that, as we have already found, is a question of fact for the jury. Besides this, it might be argued that the train would naturally furnish temptation to such a child, when desiring to pass, to take great risk in doing so, and that trainmen, as reasonable men, ought to anticipate that children would exercise only the discretion usual among children, and, if circumstances indicated their presence at the crossing, to take reasonable precautions for their safety.

The charge as a whole was excepted to. We think it correctly presents the law, and is as favorable to the defendant below as its counsel could well ask.

Other questions were argued. They have all been considered, but we do not find anything in the record which would warrant a reversal of the judgment. Affirmed.

(158 Ill. 375)

GERKE v. FANCHER.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

NEGLIGENCE—DECLARATION—PLEADING—DUE CARE—DIRECTING VERDICT.

1. In an action for personal injuries, allegations in the declaration that the accident took place in the night; that plaintiff had no notice of the danger; that he was injured while in the performance of his duties; and that he was then in the place where his duty required him to be,—constitute, after verdict, a sufficient averment of due care by plaintiff. 57 Ill. App. 651, affirmed.

2. A defect in the declaration is no ground for instructing the jury to find for the defendant, since a motion for such instruction merely raises the question of the sufficiency of the evidence.

3. Evidence that defendant's servants, in trying to extract a heavy wagon from the mud, put a heavy oak timber under a wheel, and left it there, firmly imbedded in the mud, at dark, with the upper end extending so near a railroad track that before the next morning it struck and injured a brakeman riding on a car in his usual place, is sufficient to justify a finding that defendant was negligent.

4. Where the evidence shows without contradiction that the brakeman was standing on the side of the car, where it was his duty to be, an instruction which, by strict construction, assumes that fact, is not cause for reversal.

Appeal from appellate court, Fourth district.

Action on the case by John Fancher against Henry Gerke. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 651. Defendant appeals. Affirmed.

Mills & Filtcraft and Messick & Rhoads, for appellant. Jesse M. Freels, for appellee.

BAILEY, J. This was an action on the case brought by John Fancher against Henry Gerke, to recover damages for a personal injury. The cause was tried by a jury on a plea of not guilty, and a verdict rendered finding the defendant guilty, and assessing the plaintiff's damages at \$1,500. The court, after denying the defendant's mo-

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

tion for a new trial, gave judgment in favor of the plaintiff for \$1,500 and costs. That judgment having been affirmed by the appellate court on appeal, the cause is brought to this court on appeal from the judgment of affirmance.

The declaration, which consists of but one count, alleges in substance that on February 15, 1892 (the day preceding the night on which the plaintiff was injured), the St. Louis, Alton & Terre Haute Railroad Company was operating a railroad through St. Clair county, and through a part of the city of East St. Louis, and also certain railroad yards for coal and freight; that the plaintiff was then in the employ of that company as a switchman in its yards in East St. Louis; that the defendant was then engaged in the coal business, and had servants and teams in his employ in hauling coal from coal cars in the yards of the railroad company, and transporting across the Mississippi river to the city of St. Louis; that it was the duty of the defendant, by his servants, to use ordinary care and prudence in the prosecution of his business of hauling and transporting coal from the coal cars and coal yards of the railroad company to prevent injury to the employes and servants of the railroad company, and especially to the plaintiff; but the plaintiff alleges that the defendant, by his servants, wholly disregarded his duty in this behalf, and negligently and recklessly placed a long, heavy, oak plank or piece of timber, about 16 feet long, 12 inches wide, and 3 inches thick, near and by the side of one of the railroad tracks of the railroad company, in its coal yards, the timber or plank being one which the defendant's servants had been using to pry up one of the wheels of one of the heavy coal wagons of the defendant, which had sunk in the mud or soft ground by one of the railroad tracks of the company; and that the defendant's servants negligently and recklessly left the piece of timber with one end buried in the mud where they had been so using it, and the other end elevated considerably above the surface of the ground, and pointed towards the railroad track, so that the end of it came so dangerously near the side of the track and above the surface thereof that it caught and injured the plaintiff as hereinafter stated. It is further alleged that in the discharge of his duty as switchman, at about 3 o'clock at night or in the morning of February 16, 1892, the defendant was standing on the side of his car or engine, where it was his duty to be; and while he was passing along the track on his car or engine by the place where the timber was so negligently left by the defendant's servants, and without any notice or warning of danger, and without any knowledge or notice of the presence or position of the timber, his right leg just below the knee was brought into contact with the elevated end of the timber so negligently placed and left there by the

servants of the defendant, and his leg was, by the timber, pressed against the side of the car or engine, and mashed, crushed, and torn open, and its strength and usefulness almost wholly destroyed, and the defendant thereby greatly and permanently injured.

The first ground upon which the defendant seeks to have the judgment reversed is that the declaration is insufficient and defective, in that it fails to allege that the plaintiff, at the time of his injury, was in the exercise of reasonable care. No demurrer to the declaration was filed in the trial court, nor was the sufficiency of the declaration challenged by motion in arrest of judgment, and consequently the alleged defect in that pleading is now sought to be taken advantage of for the first time by assignment of error in this court. It is the well-settled rule in this state that, before a plaintiff can recover damages for an injury caused by the defendant's negligence, he must aver and prove the absence of contributory negligence on his own part; in other words, he must allege and prove that he was himself in the exercise of due care. *Railroad Co. v. Hazzard*, 26 Ill. 375. The declaration contains no allegation in express terms that the plaintiff was in the exercise of due care, although the fact is, as we think, alleged argumentatively, and the question is whether the defect is one that was cured by verdict. Before verdict, the intendments are against the pleader, and, upon demurrer to a declaration, nothing will suffice by way of inference or implication in his favor; but, on motion in arrest of judgment,—and the same thing is true where the defect is sought to be availed of on error,—the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial; and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be arrested. *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559. The rule on this subject as laid down by Mr. Gould, in his treatise on Pleading, is as follows: "When the statement of the plaintiff's cause of action, and that only, is defective and inaccurate, the defect is cured by a general verdict in his favor, because, to entitle him to recover, all circumstances necessary, in form or substance, to complete a title so imperfectly stated, must be proved at the trial, and it is therefore a fair presumption that they are proved. But, where no cause of action is stated, the omission is not cured by verdict; for as no right of recovery was necessary to be proved, or could have been legally proved, under such a declaration, there can be no ground for presuming that it was proved at the trial." Gould, Pl. 463. The rule as laid down by Mr. Chitty is that a verdict will aid a defective statement of title or cause of action; or, stating the rule more fully, the same author

says: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or that the jury would have given the verdict, such defect, imperfection, or omission is cured by verdict." 1 Chit. Pl. 712, 713. See, also, *Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241; *Matson v. Swanson*, 131 Ill. 255, 23 N. E. 595; *City of La Salle v. Porterfield*, 138 Ill. 114, 27 N. E. 937; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630; *Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021; *Bowman v. People*, 114 Ill. 474, 2 N. E. 484. It is unnecessary for us to determine how the case would have stood, or whether the defect would have been fatal on error, if the declaration had been silent as to the conduct of the plaintiff at the time of his injury. While it fails to state in terms that he was in the exercise of due care, yet it states facts from which the plaintiff's freedom from contributory negligence may be inferred. It avers that the injury took place in the nighttime; that the plaintiff had no knowledge or notice of the presence or position of the timber by which he was injured; that he was injured in the performance of his duties as switchman; and that, when struck by the timber and injured, he was riding on the side of his car or engine, where it was his duty to be. While these averments may not be in all respects tantamount to an averment that the plaintiff was in the exercise of due care, they tend to show its exercise, and, if sustained by proof, would, as we think, have justified the jury in finding that the plaintiff was free from contributory negligence. In view, then, of the presumptions in favor of the plaintiff which arise after verdict, we are disposed to think that, on motion in arrest of judgment, or on error, the declaration must be held to be sufficient.

It is also insisted that the court erred in denying the defendant's request to instruct the jury peremptorily to find a verdict in his favor. That motion was based (1) upon the supposed defect in the declaration already discussed, and (2) upon the claim that there was an entire absence of evidence tending to charge the defendant's servants with negligence. As to the first of these grounds, it may be remarked, in addition to what has already been said, that a motion to instruct the jury to find a verdict for the defendant is in the nature of a demurrer to the evidence, and raises the question whether the evidence, admitting all that it proves or tends to prove, is insufficient to warrant a recovery. It is therefore difficult to see how a defect in the declaration can be reached in that manner. If the declaration is defective, the point may

be raised by demurrer; or, if the defect is one which is not cured by verdict, it may be raised on motion in arrest of judgment or on error, but such defect cannot be reached by demurrer to the evidence.

As to the second point, we think there was evidence tending to show negligence on the part of the servants of the defendant. The evidence tends to show that a wagon belonging to the defendant, loaded with coal, and in charge of one or more of his servants, became stuck in the mud or soft earth a few feet from the railroad track; that the defendant's servants, being unable to extricate the wagon from the mud, called to their assistance other persons, who, with their teams, were also engaged in hauling coal, and that, in their endeavors to raise the wheel of the defendant's wagon from the mud, they procured the oak plank or timber in question, and endeavored, by means of it, to pry the wheel up, but were unsuccessful; that at about 5 o'clock, which at that season of the year must have been after it had become or begun to grow dark, they abandoned further attempts to extricate the wagon that day, and left it where it was. The evidence as to what was done with the plank or timber when they left is conflicting. The plaintiff's contention is that it was left and allowed to remain with one end deeply imbedded in the mud or earth under the wheel, where it had been used as a lever, and with the other end extending obliquely towards the track, and reaching a point a few inches therefrom, and elevated about 2½ feet above the ground. No witness testifies to seeing the defendant's servants place or leave the plank in that position, but a witness, who was on the ground an hour or an hour and a half after they left the wagon, found it in the position above stated, and it is shown to have remained there during the night, the plaintiff having received his injury from it at about 3 o'clock in the morning, and it was there in the same place the next morning; and the evidence tends to show that it was so firmly imbedded in the earth that a span of mules could not pull it out, and that it was finally extricated by the aid of a locomotive engine. The fair inference from this evidence is that the plank was placed and left in the position in which it was when the plaintiff received his injury by the defendant's servants. It is true, two or three witnesses swear that they took the plank up and laid it down on the ground when they left the wagon, but their testimony only raised a conflict in the evidence, which it was the province of the jury to settle. On motion for a peremptory instruction to the jury to find a verdict for the defendant, the question is whether there was any evidence tending to charge the defendant's servants with negligence, and the fact that there was evidence the other way is unimportant.

Complaint is made of the following instruction given to the jury at the instance of the plaintiff: "The court instructs the jury that if

they believe from the evidence that prior to and on the 15th day of February, 1892, the defendant was engaged in the coal business, and had servants and coal teams engaged in hauling and transferring coal in and from the railroad coal yards of the St. Louis, Alton & Terre Haute Railroad Company in the city of East St. Louis to the city of St. Louis, in the state of Missouri; and that on said 15th day of February, 1892, the servants of the defendant, about five or six o'clock in the evening of that day, left one of said coal wagons of the defendant by the side of one of the said tracks of said railroad company all night, and also negligently left then and there, for such a time, a long, heavy oak plank or piece of timber, about 16 feet long, 12 inches wide, and 3 inches thick, with one end buried in the ground, and the other elevated above the surface of the ground, and pointing towards said track, and reaching near the side of said track and above the surface thereof, as alleged in plaintiff's declaration; and that the plaintiff, while in the discharge of his duty that night as a switchman in the service of said railroad company, with due and ordinary care for his personal safety, and to prevent injury, and without any notice of the presence or position of said timber, and while standing on the side of a car where it was his duty to be, and using due and ordinary care as aforesaid, was brought in contact with the elevated end of said timber so negligently placed and left there by the servants of the defendant as aforesaid, and his right leg was by said timber caught and pinned against the side of said car, and the plaintiff was thereby then and there injured in consequence of the negligence of the defendant, as alleged in the said declaration,—then the jury will find for the plaintiff, and assess his damages at such sum as you believe from the evidence to be just compensation for the injury he has so sustained; not, however, to exceed \$5,000, the amount sued for." It is urged that this instruction was erroneous, for the reason that there was no evidence to support it. This point has already been sufficiently answered. It is also insisted that it is erroneous for the reason that it makes the exercise of ordinary care by the plaintiff a part of its hypothesis, while, under the declaration, all evidence on that subject was inadmissible. That contention also has been sufficiently considered and shown to be untenable. The only other objection urged to the instruction is that it assumes that the plaintiff, while standing on the side of the car, was where it was his duty to be. It may be that the phrase in the instruction thus pointed out is not as felicitously worded as it might have been, and that, by a hypercritical construction, it might be held to assume the fact as contended. But we think it would scarcely occur to the ordinary reader that any part of the passage complained of was intended to be the language of assumption rather than that of hypothesis. The jury would, doubtless, be likely to understand it as sub-

mitting the whole matter to them to be found from the evidence, and would not be misled into supposing that any portion of the matters thus submitted were intended to be assumed as true. But, even if the instruction is subject to the criticism attempted to be made upon it, we do not think that the defendant was in any manner prejudiced thereby. The testimony on that point was all one way, and showed, without material contradiction, that the place where the plaintiff was riding at the time he was injured was the usual place for the switchman to ride under like circumstances, and that it was the proper place for him to be. There being no conflict of evidence on that point, the assumption by the court of the fact thus proved by all the evidence could not have been materially prejudicial to the defendant.

We have carefully examined the whole record, and are of the opinion that none of the assignments of error can be sustained. The judgment will therefore be affirmed. Judgment affirmed.

(158 Ill. 214)

SHIELDS et al., Highway Commissioners, v.
ROSS et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

HIGHWAYS—VACATION—JURISDICTION OF COMMISSIONERS—DEDICATION—MUNICIPAL CORPORATIONS.

1. Proceedings of commissioners of highways attempting to lay out a highway 60 feet wide on land of which half the width lies in an incorporated city whose charter gives it power to open, alter, and abolish streets, are void for want of jurisdiction so far as the half in the city is concerned, since the grant of power to the city is exclusive.

2. And such action is also void as to the half lying outside the city limits, since the statute does not allow a highway less than 40 feet wide to be opened by the commissioners.

3. The fact that the half within the city limits was left out of a plat of the city apparently as part of the highway does not vest the highway commissioners with any jurisdiction over it, especially where the city has in no way accepted any dedication thereof.

4. Under 2 Starr & C. Ann. St. c. 121, § 31, which authorizes highway commissioners to alter or vacate any road when petitioned by any number of landowners not less than 12, or by two-thirds of the landowners residing in the town within two miles of the road, it is not essential to the validity of a vacation of a highway by the commissioners that either the petition on which they act or the order of vacation should recite that the petition was made by the requisite number of landowners.

5. The fact that the road vacated is partly outside the commissioners' territorial jurisdiction does not invalidate their proceedings so far as the part within their jurisdiction is concerned.

Appeal from circuit court, Woodford county; T. M. Shaw, Judge.

Bill for injunction by Jane Rose Ross and Harriet C. Ames against James Shields, Joseph E. Hindert, and Folkert Danakas, commissioners of highways of the town of Mi-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

nonk. Complainants obtained a decree. Defendants appeal. Affirmed.

J. A. Riley and J. S. Stevens, for appellants. Thomas Kennedy and W. W. Ross, for appellees.

BAKER, J. In the matter of this appeal, James Shields, Joseph E. Hindert, and Folkert Danakas, commissioners of highways of the town of Minonk, are appellants, and Jane Rose Ross and Harriet C. Ames are appellees. Said Ross and said Ames are two of the heirs at law of the late Miner T. Ames, now deceased, and each of them inherited from him an undivided one-fifth of certain mining property at Minonk. The property consists of a coal mine, with about 2,000 acres of unmined coal adjoining and adjacent to the shaft, about 80 houses for the use of the miners, and numerous other buildings connected with the plant; and also of a tile factory, tile yard, tile kilns, and clay pits. The coal mine employs about 350 persons, has been in operation for 25 years, and there is annually taken from the shaft some 100,000 tons of coal. The indications are that it can be successfully and profitably operated for 50 years longer. Each day there is taken from the mine about 200 tons of dirt and debris. The dirt and debris taken from the shaft during the past 25 years cover a space 800 feet long, 440 feet wide, and 127 feet high. This pile of refuse cannot be extended west, for immediately adjoining it on that side is the right of way of the Illinois Central Railroad Company. It cannot be extended further east, for the cemetery adjoins it on that side. And the excrement cannot be carried to the south, for in that direction are the tile works, offices, machine shop, carpenter shop, store house, ice house, powder house, wells, cisterns, barns, cribs, etc. The refuse has thus far been dumped to the north and northeast from the main shaft, and the dirt pile now extends across outlet 4 and to and beyond the northern limit of the city of Minonk, and across the strip of ground 66 feet in width that is here in dispute, and upon a tract of land in section 6 that was purchased by the successor of appellees for the specific purpose of using it as a dumping ground for the refuse from the coal mine. On July 2, 1892, a petition was presented to the appellants, who are commissioners of highways of the town of Minonk, asking them to lay out a new road of the width of 60 feet over the lands in sections 6 and 7, owned by appellees and the other heirs of Miner T. Ames, deceased. The commissioners prepared the usual notices for a meeting to hear reasons for and against laying out the road, and fixing the 15th day of July, 1892, as the time and the city hall in Minonk as the place for holding said meeting. This notice was posted on July 5, 1892. On July 15, 1892, the commissioners held the meeting, and granted the prayer of the petition, indorsing the usual memorandum on the

petition, and filing the same in the town clerk's office. They ordered D. H. Davidson, a competent surveyor, to make a survey of the proposed road. On the 22d day of July, 1892, the commissioners made a certificate that they were about to lay out the road on the land in controversy in this suit, and stated that the appellees herein and the other heirs of Miner T. Ames, deceased, were the owners of said land; and they stated in said certificate that they had been unable to agree upon the damages with the said appellees and other heirs of Miner T. Ames, deceased, and that said owners of the land had not released their damages; and they asked for a jury to assess the damages of said owners. This certificate was filed with J. P. Robinson, justice of the peace in Minonk, Ill., on the 22d day of July, 1892. Justice Robinson issued the usual summons to the said landowners. Failing to get service on the said owners, the land notice was served on D. S. Richards, superintendent of the coal shaft owned by said heirs, and notices were posted. On August 19, 1892, the justice issued a venire for a jury. The jury was duly sworn to assess the damages of the landowners, and returned a verdict, allowing \$200 damages to appellees and the other heirs of Miner T. Ames for the land proposed to be taken for the road. Neither of the appellees herein appeared or was represented in said proceedings. On August 20, 1892, the commissioners gave public notice that they would meet on August 27, 1892, to finally determine upon the laying out of the road. They held the meeting on August 27, 1892, and made an order laying out the road, and filed the order and other papers with the town clerk. The order and other papers were afterwards recorded by the town clerk. On August 27, 1892, the commissioners of highways drew a 60-day notice in writing to remove fences. This notice was directed to D. S. Richards, as occupant of the premises, and had attached to it an exact copy of the order of the commissioners laying out the new road, with a copy of survey and file marks attached. This 60-day notice was served on D. S. Richards on the 29th day of August, 1892. And within a few days after the expiration of the 60 days the commissioners of highways entered upon the premises in controversy, and began tearing down the fences, and digging into and removing the pile of refuse from the mine at the place where the proposed road was located, for the purpose of grading and opening said proposed road. The road sought to be opened extended east and west on the section line between sections 6 and 7 for a distance of 512 feet, and was 60 feet in width; the south 30 feet of the strip being wholly within the corporate limits of the city of Minonk, and the north 30 feet being outside of the city limits. Thereupon appellees filed this bill for an injunction to restrain the commissioners of highways from opening a highway or road on the premises in question,

or from in any way interfering with the possession of appellees. A temporary injunction was granted by the master in chancery. The commissioners of highways claimed in their answer the existence of a public highway on and over the premises by virtue of the proceedings based on the petition of July 2, 1892, and independent of said proceedings. Replication was filed to the answer, and proofs were taken, and upon the hearing of the cause a decree was entered making the injunction perpetual.

We think that appellants can take nothing by the proceedings had in 1892. As we understand the case, the city of Minonk is incorporated under an act in force March 7, 1867 (3 Priv. Laws 1867, p. 259), and by that act it is declared to embrace within its boundaries the whole of section 7, township 28 N., range 2 E. of the third P. M., in Woodford county. By its charter it is expressly given power to open, alter, extend, widen, abolish, grade, establish, pave, or drain, and otherwise alter and improve and keep in repair all streets, lanes, avenues, and alleys within its corporate limits. These powers are exclusive. And the doctrine is that statutes conferring in general terms authority upon commissioners of highways to lay out, open, maintain, or vacate roads do not give an authority that can be exercised within the territorial limits of cities and villages, although located within the towns for which such commissioners of highways are elected. *Town of Ottawa v. Walker*, 21 Ill. 605; *Brown v. Baumgarten*, 41 Ill. 254; *Cairo & V. R. Co. v. People*, 92 Ill. 170; *People v. Board of Sup'rs of La Salle Co.*, 111 Ill. 527; *McCartney v. Railroad Co.*, 112 Ill. 611; *People v. Chicago & N. W. Ry. Co.*, 118 Ill. 520, 8 N. E. 824; *Village of Marseilles v. Howland*, 124 Ill. 547, 16 N. E. 883; *Snell v. City of Chicago*, 133 Ill. 413-441, 24 N. E. 532. These commissioners of highways, then, had no jurisdiction whatever in regard to highways or roads within the incorporated city of Minonk. And when they assumed to lay out and open a public road 60 feet wide along the section line between sections 6 and 7, and located 30 feet in width of said road in section 7, and within the territorial limits of the city, their action, at least in respect to said 30 feet, was manifestly null and void, and of no effect whatever. Nor can the 30-foot strip in section 7 be excluded from consideration, and the action of the highway commissioners regarded as effective in respect to the 30 feet in section 6 that was surveyed for a road, on the ground that the land in that section was within their jurisdiction. Their power in the premises was statutory, and in derogation of the property rights of the citizen, and is to be strictly construed. The statute provides in express terms that all public roads established under the provisions of the act shall be of the width of 60 feet, but that short roads, not exceeding 2 miles in length, may be of a width not less than 40 feet, nor more than 60 feet. The statute gives to appellants no authority to take

from appellees their land for the purpose of locating thereon a public road only 30 feet wide.

It seems that in March, 1865, D. H. Davidson, county surveyor of Woodford county, made a survey and plat of the incorporated town of Minonk, and it appears from said plat that 33 feet of ground immediately south of the section line, between sections 6 and 7, and immediately north of outlet 4 and the adjoining outlots on the east, was left out in the plat, apparently as part of a public highway, making with the 33 feet immediately north of the section line a public road 66 feet wide. The making of this plat, to which the proprietor of the land was not a party, was not a dedication of the strip 33 feet wide for the purposes of a street. In fact, on April 3, 1867, the owner of the property, the Associated Land Company of Connecticut, ignoring the plat, conveyed the strip, and also the land south of it, known on the plat as "Outlot 4," as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7, etc. It is true that in some of the subsequent deeds in the chain of title of appellees the premises were described as "Outlot 4 in the City of Minonk." But, even if it be regarded that the giving and accepting of these deeds are tantamount to offers to dedicate, yet an acceptance by the city is as essential to a valid dedication as is an offer by the owner of the property; and we do not find in this record evidence of any such acceptance, or evidence of any matter of estoppel. The little work that was done in 1870 or 1871 was at the railroad crossing on the railroad right of way, and was not on, but west of, the strip of ground in question, and was long prior to the first of the deeds that described the premises as "Outlot 4," and of course had no reference to, and was not an acceptance of, any offer to dedicate impliedly made by such deeds. Besides this, even if we should assume that the strip of ground 33 feet wide and immediately south of the section line is a public highway, or part of a public highway, yet appellants would have no authority to interfere with the possession thereof by appellees. As we have already seen, their jurisdiction as highway commissioners does not extend to streets or public roads within the territorial limits of the city of Minonk, but, on the contrary, the authority of the city over such streets and roads is exclusive. And here the city is not a party to the suit, and, so far as appears, is not claiming, and has never claimed, that said 33 feet of land is any part of a public highway, and has not attempted to interfere with the possession of appellees, or with that of their ancestor.

It is claimed by appellants that Robert Gray was the owner of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 6, lying north of the road in controversy, and that as early as 1860 he threw out 33 feet of his land as part of a public highway, and that subsequently, but as early as 1869, he set out a hedge fence on the north line of the road that he had thrown out; and

that thus there was a common-law dedication of this north 33 feet for a public road. And it is further claimed that for more than 20 years said strip of land was recognized and used by the public as a public road. These claims are contested by appellees. Without any critical examination of the very voluminous evidence found in the record, we may, in the view we take of the case, and for the purpose of the decision, assume the correctness of these contentions of appellants, and that said north 33 feet of land was for more than 20 years a public highway. But the commissioners of highways of the town of Minonk had the right and authority to vacate the public highway upon said 33 feet of ground within the township, provided it was done in conformity with the requirements of the statute in that behalf. Section 31 of the act in regard to roads and bridges in counties under township organization provides that the commissioners may alter, widen, or vacate any road, or lay out any new road, in their respective towns, when petitioned by any number of landowners not less than 12, or two-thirds of the landowners residing in said town within two miles of the road so to be altered, widened, vacated, or laid out. 2 Starr & C. Ann. St. p. 2146. It appears from the record that in 1887 there was presented to the commissioners of highways of the town a petition signed by some 60 landowners residing within two miles of the road known as the "road beginning at the northeast corner of section 7, township 28 north, range 2 east of the third principal meridian, in the county of Woodford, state of Illinois, running thence west along the north line of said section 7 to the northwest corner of the northeast quarter of said section 7," petitioning them to vacate all that portion of the said road lying west of the Minonk Cemetery. It also appears from the record that on March 8, 1887, notice was given of a meeting to be held on March 19, 1887, to hear reasons for and against the vacation of said road; and it also appears from the record that on the 19th day of March, 1887, at a meeting of the commissioners of highways, said commissioners, or a majority of them, made, signed, and sealed an order wherein it was ordered and determined that all that portion of said road that lies west of the Minonk Cemetery and east of the west line of the Illinois Central Railroad land "in said town, be, and the same is hereby, vacated and discontinued." It is insisted that the commissioners had no power to vacate that portion of the highway that they assumed to vacate, and that all their acts in that direction were illegal and void.—First, because a portion of the highway was within the corporate limits of the city of Minonk; and, second, because the petition and order did not confine the attempted vacation to that portion of the highway over which the commissioners had control, but attempted to embrace the whole; and, third, that the proceedings were invalid, because neither the petition nor the order showed jurisdiction on the part of the commissioners to act,

it being the law that highway commissioners have no power over any portion of the streets in incorporated cities or villages. The petition did not, in terms, ask that any portion of a street or road located within the limits of the city of Minonk should be vacated, and the order did not, in terms, vacate any portion of a road or street in said city; and neither the petition nor the order stated the width of the road to be vacated. If we are right in our conclusion that there was a public road immediately north of the north boundary line of the city, and within the township, and no public street or road within the city and immediately south of that line, then it is very plain that all that the commissioners vacated or assumed to vacate was a road 33 feet wide that was outside of the city limits, and within their control and jurisdiction. Even if there was a street 33 feet wide within the corporate limits of the city, and also a road of the same width immediately north of it, and outside of said limits, yet the order of the commissioners simply was to vacate and discontinue that portion of the road "in said town" that lies west of the cemetery and east of the west line of the railroad land. In respect to the matter of public highways, the jurisdiction of the commissioners of highways of the town of Minonk extended only to such highways or portions of highways as were not included within the boundaries of the city of Minonk. In contemplation of law, the public streets and roads within the corporate limits of the city were not in the town of Minonk. The qualifying clause in said order, "in said town," expressly confines the action that was taken by the commissioners to a road or portion of a road within the township, and not within the city. Indeed, it is not to be presumed or taken as matter of legal intendment that the commissioners assumed to do that which they had no authority or jurisdiction to do. But we may regard the matter even from the standpoint that the commissioners intended and assumed to vacate not only the portion of the road that was within their jurisdiction, but also that portion of it that was within the municipality, and therefore not within their jurisdiction. Were their actions in the premises, and the order made by them, for that reason, mere nullities? It seems to us not. Where more is done than ought to be done, that portion for which there was authority shall stand, and the act shall be void quoad the excess only. Broom, Leg. Max. *131. In *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370, we held that where one attempts to dedicate a public street 66 feet in width, he having title to but half of such street, and the dedication of 33 feet of the street fails, the dedication will hold good as to the other half of the street; that being the extent to which the dedicator had power to make a dedication.

It is further claimed by appellants that, to give the highway commissioners jurisdiction to vacate a road, the petition must affirmatively show that at least 12 of the signers of the

petition are landowners in the town, or that two-thirds of the landowners in the town residing within two miles of the road signed the petition; that the petition involved in this case did not state that the petitioners were landowners in the town of Minonk, but simply stated that it was signed by more than 12 landowners residing within two miles of the portion of the road proposed to be vacated; and that the order made by the commissioners and entered of record did not state that the petitioners were such landowners, but simply recited that a petition was presented by certain designated persons, and that the petitioners were "landowners residing within two miles of the said portion of said road." The contention is not only that the fact that either a sufficient number or the required proportion of the landowners in the town are petitioners is jurisdictional, but that it must affirmatively appear from the record made in the matter of the vacation. The case of *People v. Board of Sup'rs of Madison Co.*, 125 Ill. 334, 17 N. E. 804, relied upon by appellants, simply holds that the statute requires commissioners of highways "to keep a correct record of their proceedings at all meetings," and that such record is the only lawful evidence of the proceedings of such commissioners. Here the action had by the commissioners was the making of an order that the road be vacated, and that order fully appears of record, and the evidence shows that everything was done in the premises that is required to be done by sections 34 and 35 of the act in regard to roads and bridges in counties under township organization. The petition to vacate a road that is here in question contained everything that is required to be set forth therein by section 32 of the statute. While the road law provides that the petition shall be signed by a number of landowners not less than 12, or by two-thirds of the landowners residing in the town within two miles of the road to be vacated, yet it does not require that the fact that the petition is so signed shall appear or be recited upon the face of the petition. The altering, widening, vacating, and laying out of roads are not an exercise of judicial powers, and hence it is not sound law to say that no presumption will be indulged in favor of the validity of such proceedings. The highway commissioners are vested by the statute with exclusive jurisdiction over all matters relating to roads in their respective townships. The rule in this state has always been that in the matter of laying out, opening, altering, widening, and vacating roads the presumptions are all in favor of the regularity and validity of the various steps and proceedings that are antecedent and preliminary to the entry of the order laying out, opening, altering, widening, or vacating such roads, but subject to rebuttal by any person questioning the validity of such proceedings. And these prior proceedings may be either attacked or sustained by parol evidence. *Nealy v. Brown*, 1 Gilman, 10; *Fer-*

ris v. Ward, 4 Gilman, 499; *Dumoss v. Francis*, 15 Ill. 543; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Warne v. Baker*, 35 Ill. 382; *Waddle v. Duncan*, 63 Ill. 223; *Henline v. People*, 81 Ill. 269.

The fact that, as a part of the proceedings in 1887 vacating the road, Miner T. Ames, the ancestor of appellees, paid to the town \$150 in money, and executed and delivered to the commissioners of highways of the town of Minonk and their successors in office a deed to another road, seems to be of no particular importance. Such an arrangement was authorized by section 51 of the statute in regard to roads and bridges in counties under township organization.

It may be further remarked, that the proceedings taken by the commissioners of highways in 1892 to lay out a public road over the strip of ground here in controversy is a clear admission and most potent evidence that there was no public road there at that time. *Town of Princeton v. Templeton*, 71 Ill. 68; *City of Chicago v. Hill*, 124 Ill. 646, 17 N. E. 46. For the reasons herein stated, the decree of the circuit court is affirmed. Affirmed.

(157 Ill. 616)

INDIANA, I. & I. R. CO. v. SWANNELL
et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

TRUSTS—ACCOUNTING BY TRUSTEE—CORPORATIONS
—RAILROAD MORTGAGE—EQUITY.

1. On foreclosure of a railroad mortgage, the bondholders agreed that a trustee might bid in the property for the amount of costs and expenses; that each bondholder should deliver his bonds to the trustee, and pay his proportionate share of the costs and expenses, and should share proportionately in the proceeds of any resale by the trustee. The trustee bid in the property, had the sale confirmed, and resold the property. *Held*, that bondholders who had delivered their bonds to the trustee, and had paid their share of the costs and expenses, had an equitable right to share in the proceeds of the resale, even though a majority of the bondholders had failed to deliver their bonds or pay their share of the costs and expenses. *Cushman v. Bonfield*, 28 N. E. 937, 139 Ill. 219, followed.

2. On a sale of such property by the trustee to a new corporation, whose president had full notice of the trust, the property is subject to the trust in the hands of said corporation.

3. Where the original agreement was that each bondholder should receive his share of the proceeds of a resale in certain mortgage bonds, and the corporation that purchased the property refused to issue such bonds when ordered to do so by the court, a money judgment against such corporation for the value of such bonds is proper.

4. A bondholder who has duly deposited his bonds with the trustee, and has paid his share of the costs and expenses, is not deprived of his right to enforce a trust in his favor against the property by the fact that he afterwards received back his bonds from the trustee, released the trustee from further liability, and waived all rights obtained through such trustee, since his rights are not obtained through the trustee, but arise out of his previous ownership of the bonds.

5. Even a bondholder who has failed to pay his share of the costs and expenses, and to whom

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

his bonds have been returned by the trustee, has a right to enforce the trust, since the trustee could not rescind the trust agreement after he had obtained title in pursuance of it.

Appeal from appellate court, First district.

Bill by William G. Swannell against Joel D. Harvey, John Cushman, and the Indiana, Illinois & Iowa Railroad Company. Complainant obtained a decree, which was modified by the appellate court. The railroad company appeals. Affirmed.

The Kankakee & Pacific Railroad Company, being a corporation originally created by and under the laws of the state of Indiana, with power to locate and operate a road from Plymouth, in the state of Indiana, westerly to the boundary line of the state of Illinois, was consolidated with a company organized under the laws of the state of Illinois; the name of the consolidated company being the Plymouth, Kankakee & Pacific Railroad Company, with a capital stock of \$2,500,000. Said railroad company proceeded to procure a right of way, and partially constructed its railroad, and made large outlays of money for the purchase of material and payment of labor. On the 1st day of June, 1871, the Plymouth, Kankakee & Pacific Railroad Company executed 3,600 bonds, each for the sum of \$1,000, due in 30 years, and to secure the same executed a trust deed conveying all and singular its line of railroad and all its property in trust to J. Edgar Thompson and George W. Cass, of the state of Pennsylvania. Three hundred and ninety-eight of said bonds were negotiated and sold to various parties. Thereafter, default in the payment of interest having been made, Samuel T. Hanna and several other bondholders filed a bill, on the 25th day of July, 1874, in the United States circuit court for the Northern district of Illinois, for the purpose of foreclosing the said trust deed. On the 4th day of August, 1876, a decree was entered in said cause, which decree provided, among other things, that said railroad company should pay the amount found due on said bonds, and that, in default of such payment, the property described in said trust deed should be sold by the master in chancery of said court, and the proceeds of such sale applied to the payment of the bonds and coupons described in said decree. Thereupon the property covered by said trust deed was, in pursuance of such decree, on the 12th day of June, 1877, offered for sale by Henry W. Bishop, a master in chancery of said court, the report of the sale of the master, filed June 10, 1878, containing the following statement: "At which sale Mr. John C. Cushman, trustee for bondholders, bid the sum of \$4,000, that sum being the highest sum bid for the same, and he being the highest bidder; and I further report that said bid has not yet been complied with, and respectfully ask of the court further directions herein." Prior to the property being offered for sale, a portion of the holders of said bonds had made an arrangement under which said John C. Cushman was to bid in the property for the use and

benefit of such of the bondholders as might come in and become parties to such arrangement. Such arrangements contemplated a reorganization, the issuance of new bonds to the old bondholders, and the payment of a small sum upon each of the bonds to defray the necessary expenses attending upon such arrangement. No further proceedings were had in said cause until February, 1881, at which time the said Cushman and one Joel D. Harvey filed in said United States circuit court their petition, asking that said Cushman be allowed to complete his bid and receive a deed for said property; and on the 3d day of May, 1881, the said circuit court confirmed said sale to said Cushman, and ordered the said master to execute and deliver a deed to him of said property, and a deed thereof was, on the same day, in pursuance of said order, executed and delivered to said Cushman. On the 11th of July, 1881, said Cushman conveyed said property to appellant, the Indiana, Illinois & Iowa Railroad Company. He took from Harvey, who had become the owner of the greater portion of the bonds for which the foreclosure was had, an indemnifying bond, which, among other things, provided that said Harvey should hold Cushman harmless against all loss, costs, damage, and expenses to which said bondholders or any other person might seek to subject him (Cushman) by reason of such conveyance, and to pay all judgments, costs, and expenses that might be awarded or rendered against him (Cushman), in any court of final or general jurisdiction, in any suit or proceeding growing out of such conveyance, or of his trusteeship for the holder of any bond of the Plymouth, Kankakee & Pacific Railroad Company. In consideration of the conveyance to the Indiana, Illinois & Iowa Railroad Company, Harvey received, according to his testimony, about \$150,000 of the stock of a company known as the "Western Air Line Construction Company." Under an order of reference made by the court in the case at bar, the master found that the new bonds, which the respective bondholders were to receive, by the terms of the reorganization contemplated by the arrangement under which said Cushman made his bid at the master's sale, would, if they had been issued, be worth 33 cents on the dollar, or, in other words, that, if the plan of reorganization had been carried out, the bondholders of the Plymouth, Kankakee & Pacific Railroad Company would have received for the bonds which they held other bonds of the same amount, and now actually worth 33 cents on the dollar.

The original bill in the case at bar was filed by William G. Swannell, since deceased. His executors, Frederick Swannell and Frederick O. Swannell, have been substituted, pending the litigation, in his place and stead. Said original bill charges that, subsequent to the decree of foreclosure in the United States circuit court, and to the bid of Cushman at the master's sale, and before the confirmation of such sale, said Harvey purchased a large num-

ber of said bonds for a nominal sum, and that Cushman and Harvey conspired together to obtain the property, and to defraud Swannell, who filed the bill as a holder of some of the bonds secured by said trust deed, and also to defraud other holders of said bonds of their proportion in the said property, mortgaged as aforesaid. The bill charges that, at the time Cushman conveyed the property, as aforesaid, it was of sufficient value to pay the bonds of Swannell and the other bondholders in full, but that complainant never received anything from the proceeds of said sale. The suit was brought by Swannell, on behalf of himself and other holders of the bonds similarly situated, who might desire to become parties and share the benefits of the suit. The prayer of the bill is that the title acquired by Cushman shall be declared to be in trust for all the bondholders, and that the conveyance from Cushman to the Indiana, Illinois & Iowa Railroad Company shall be charged with the same trusts, and be held in trust for Swannell and the said other bondholders, and that the said railroad company shall be decreed to deliver new bonds in equal amounts, according to the plan of reorganization; and the bill contains, also, a prayer for general relief. During the progress of the cause various intervening petitions were filed,—one by Patrick Dore, the owner of 7 of the bonds; another by Samuel W. Strong, owner of 3 of the bonds; and still another by Henry M. Hooker, the owner of 25 of the bonds. The original bill and the intervening petitions were all referred to a master in chancery, to take testimony and report the same, together with his findings and conclusions, to the court. The master reported in favor of granting relief upon the original bill, in favor of Frederick Swannell and Frederick O. Swannell, executors of the last will and testament of William G. Swannell, deceased; but he recommended that relief be denied upon the intervening petitions of Dore, Strong, and Hooker, respectively. The circuit court of Cook county sustained the exceptions of Dore to the report of the master, and overruled those of Strong and Hooker, respectively, to said report. And thereupon said court entered a final decree that Frederick Swannell and Frederick O. Swannell, executors of William G. Swannell, deceased, recover of the Indiana, Illinois & Iowa Railroad Company the principal sum of \$825, with interest thereon at 6 per cent. per annum from October 25, 1891, such interest amounting to \$96.80, and the total of principal and interest amounting to \$921.80, and that they have execution therefor; that Patrick Dore recover of said Indiana, Illinois & Iowa Railroad Company the principal sum of \$2,310 with interest thereon at 6 per cent. per annum from October 26, 1891, such interest amounting to \$271, and the total of principal and interest amounting to \$2,581, and that he have execution therefor; and that the petitions of Samuel W. Strong and Henry M. Hooker, severally and respectively, be dismissed. From

the decree thus rendered, the Indiana, Illinois & Iowa Railroad Company, Samuel W. Strong, and Henry M. Hooker each appealed to the appellate court of the First district, and assigned errors. And such proceedings were had in the appellate court as that the decree of the circuit court was reversed, and the cause remanded to that court, with directions to enter a decree in favor of Samuel W. Strong against the Indiana, Illinois & Iowa Railroad Company for 33 cents on the dollar of the par value of three bonds, of \$1,000 each, less the sum of \$12, being for the sum of \$978, with interest thereon at 5 per cent. per annum from the 21st day of October, 1891; and to enter a decree in favor of Henry M. Hooker against the Indiana, Illinois & Iowa Railroad Company for 33 cents on the dollar of the par value of 25 bonds of \$1,000 each, less the sum of \$225, with interest at 5 per cent. per annum, being for the sum of \$8,025, with interest thereon at 5 per cent. per annum from the 21st day of October, 1891; and to render decree, in favor of the executors of Swannell and said Dore, respectively, for the principal amount severally found for said executors, and for the principal amount severally found for said Dore, with interest thereon in each case at the rate of 5 per cent. per annum from the 21st day of October, 1891, instead of the rate of 6 per cent. per annum, as directed by the decree appealed from. And the appellate court also made an order in regard to the apportionment and taxing of the costs of that court. The Indiana, Illinois & Iowa Railroad Company now prosecutes this appeal from the order and judgment of the appellate court.

Walker & Eddy, for appellant. T. P. Bonfield, G. W. Cass, Geo. F. White, and Dent & Whitman, for appellees.

BAKER, J. (after stating the facts). There being some differences in the particular circumstances of the case made by the executors of Swannell, and those made by Dore, Strong, and Hooker, respectively, the merits of the case made by each may, to some extent, properly and conveniently be separately considered. And this may be done without repeating, in respect to each of the cases, facts and rules of law or equity that are stated in regard to one case, and that are equally applicable to the cases of some or all of the other appellees. It seems to us that three questions only arise in regard to the decree in favor of the Swannells. They are these: Did John C. Cushman hold the title to the property, at the time he conveyed it to appellant, as trustee for William G. Swannell and other bondholders? Did appellant acquire such title from Cushman with notice of this trust, and therefore take the same subject to the equities of Swannell? Was it proper to render a money decree in favor of the executors and against appellant?

John C. Cushman, at the sale made by the master in chancery, under the foreclosure

decree in the circuit court of the United States for the Northern district of Illinois, bid in all the property of the Plymouth, Kankakee & Pacific Railroad Company as trustee for the bondholders, and he made such purchase in pursuance of a trust agreement, made previous to the day of said master's sale, between him and the holders of 383 bonds out of 398 bonds of said railroad company. In this trust agreement there was embodied a plan of reorganization whereby the old bondholders were to receive bonds in a new company, to be organized by the said Cushman, and to be secured on the same property, such bonds to be issued to the extent of \$23,000 per mile; the old bondholders simply obligating themselves to pay to said trustee, when called upon, their proportions of the expense and costs incurred in the foreclosure proceeding, and in the organization of a new company, in the manner provided by the terms of said trust agreement. Nearly all the bondholders signed this trust agreement previous to the sale, and although Cushman bid off the property at the master's sale as trustee for the bondholders, it appears that a majority of the original holders of said bonds afterwards failed to pay the assessments made upon them for their respective proportions of the costs of the foreclosure sale and reorganization, and it is therefore claimed by appellant that the said Cushman was absolved from the obligation and burden assumed by him under the terms of said trust. Cushman had a right to abandon the sale, and to refuse to complete the same, because of the failure of a sufficient number of bondholders to respond to his call for their shares of the assessment. This would have left the mortgaged property still under the lien, and subject to the equities of Swannell and the other bondholders. A resale could have been had under the decree, and the value of the property thereby applied in payment of their demands. But having, however, bid off the property as trustee for Swannell and others, and having proceeded to complete the purchase made by him as their trustee, he must be held to be absolutely bound by all the terms of said trust until released therefrom by the appellee, Swannell, and the other bondholders. Swannell entered into this trust agreement and delivered his bonds to Cushman. He paid all assessments made upon him by Cushman as such trustee, and the money so paid by Swannell to Cushman was actually and in fact retained and used by Cushman to make up the sum of money necessary to complete the purchase made by him at the master's sale. And William G. Swannell never withdrew his bonds, or received back from Cushman any portion of the assessments paid to him as trustee to perfect such sale, and never in any manner released Cushman from any of the duties or obligations imposed upon him by the trust agreement entered into between them prior

to the day of said master's sale. John C. Cushman could not, therefore, divest himself of any of the obligations imposed by said trust agreement without Swannell's consent. The matter of the relation existing between John C. Cushman and Joel D. Harvey, respectively, and the bondholders who had placed their bonds in the hands of Cushman, was before this court in *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937. We there held that Cushman had bid off the property, rights, and franchises of the Plymouth, Kankakee & Pacific Railroad Company as trustee of such bondholders, and that the trust created was impressed upon and followed the title, which was subsequently perfected in Cushman by the execution of the master's deed, made in pursuance of such sale, and continued up to the time of the conveyances by which the railroad property became vested in the Indiana, Illinois & Iowa Railroad Company; and also held that it was fairly to be inferred, from the terms of the indemnity bonds given by Harvey to Cushman at the time the latter conveyed the property to the Indiana, Illinois & Iowa Railroad Company, as well as otherwise clearly shown by the evidence, that Harvey had full knowledge of the trust reposed in Cushman, and of the equitable interests of Bonfield and the other bondholders in the property, and that said Harvey having in his possession the proceeds of trust property, the law charges him, also, as trustee, and holds him accountable as such. And we may here add that the case appearing in this record in favor of Swannell is in all respects like the case made out for Bonfield in the former litigation, the only substantial difference being that there the relief was granted against Cushman and Harvey personally, while here the decree went against the appellant corporation.

This brings us to the question whether the Indiana, Illinois & Iowa Railroad Company had notice of the trust, and of the restrictions and limitations upon the title of Cushman, at the time that it received the conveyance of the property from him. The record shows that said railroad company was organized on July 8, 1881; that it was organized by Harvey for the express purpose of receiving from Cushman title to the property, rights, and franchises of the Plymouth, Kankakee & Pacific Railroad Company; and that on July 11, 1881, three days after its organization, Cushman made to it a quitclaim deed for the same. And on the day the deed was given, Harvey executed to Cushman an indemnifying bond, in the sum of \$60,000, conditioned that he would hold Cushman harmless against all loss, cost, damage, or expense to which the bondholders of the Plymouth, Kankakee & Pacific Railroad Company, or any of them, or any other person or persons, may seek to subject him, by reason of the conveyances, and pay all judgments, costs, and expenses incurred, awarded, or rendered against him in

any suit or proceeding growing out of the conveyance, or his trusteeship for the holders of any of the bonds of said Plymouth, Kankakee & Pacific Railroad Company. From the date of the organization of appellant, and at the time Cushman executed to it the quitclaim deed for the trust property, and for many years thereafter, Harvey was a stockholder in and director of the company, and its president. That Harvey had full, even plenary, knowledge of the trust that was imposed upon Cushman, appears so clearly, and in so many different ways, in this record, that it is useless to waste time in mentioning them. The knowledge of a person who is a director of a corporation, and its chief executive officer, must be regarded as actual notice to the corporation itself. In no better way can notice be imputed to it. The company, then, must be considered to have taken the property covered by the trust with full knowledge of the trust imposed upon it. It had ample notice of the rights and equities of Swannell and the other bondholders, and it cannot now be heard to say that it is an innocent purchaser of the property for value. It took its title under the Cushman conveyance, charged with all the conditions and limitations imposed upon it by the trust agreement between Cushman and the bondholders for whom he undertook to act. The railroad company simply stepped into Cushman's shoes, and Swannell has the right to follow the property and hold the company as his trustee. The doctrine is that a purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee, from whom he purchased, and this even though he is a purchaser for a valuable consideration. 2 Pom. Eq. Jur. § 688; 27 Am. & Eng. Enc. Law, pp. 251, 285; Trustees v. Kirwin, 25 Ill. 62; Fast v. McPherson, 98 Ill. 496; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Insurance Co. v. Slee, 123 Ill. 57, 12 N. E. 543; Phillips v. Commissioners, 119 Ill. 623, 10 N. E. 230.

The remaining question in regard to the Swannell claim has reference to the propriety of a money decree against appellant for the value of bonds such as should have been issued according to the terms of the trust agreement. The circuit court first entered an interlocutory decree, that appellant, within 60 days from the date of such decree, execute and deliver bonds such as called for by the original plan of reorganization, secured by mortgages as therein provided; but appellant failed and refused to comply with the requirements of such decree. And thereupon the court entered a final decree against appellant for the value of such bonds, as shown by the report of the master and the evidence reported therewith, together with interest from the date of the report, and awarded execution therefor and for costs, as upon a judgment at law. Harvey received, as consideration for the transfer of the property, rights, and

franchises of the Plymouth, Kankakee & Pacific Railroad Company to the Illinois, Indiana & Iowa Railroad Company, paid-up stock to the amount of \$150,000 in the Western Air Line Construction Company, a corporation formed under the laws of the state of Iowa for the purpose of completing the construction of the railroad in question. According to the testimony of Meekling, an experienced railroad builder, who went over the railroad in 1880 or 1881 at Harvey's request, he and said engineer agreed that the property in its then condition, as left by the Plymouth, Kankakee & Pacific Railroad Company, was of the value of \$900,000. It appears from the testimony of Harvey that the original capital stock of the construction company was \$1,000,000; that he got \$150,000 of this stock, paid up, for the property of the old railroad company; that the other parties in interest paid for the residue of the stock in cash; and that said stock was then worth its par value, but it has since so declined in value as that there have been some sales of it as low as eight cents on the dollar. It would be inequitable and unjust, and a destruction of the contract rights of the bondholders, to now compel them to receive, in satisfaction of their claims, their respective proportionate shares of said \$150,000 construction company stock, that is now almost worthless, on the ground that, in the plan of reorganization, there was direct authority to the trustee to sell and transfer all the right, title, and interest in the property of every bondholder becoming a party to such plan of reorganization, and under that authority it was sold and transferred to appellant for \$150,000 in construction company stock. The power authorizing the trustee to sell and transfer, "providing he shall deem it for our interest to make such transfer," was coupled with the provision that he should "receive for us, in exchange therefor, such securities as are provided for by the plan of reorganization hereto annexed for our respective interests in the property purchased." And the securities for which provision was made in the plan of reorganization were that the bondholders should receive new bonds for the principals of their old bonds, secured by a first mortgage on the railroad property, not exceeding \$23,000 per mile of the main track, and second mortgage or income bonds for the coupons and accrued interest due on their existing first mortgage bonds. It is suggested that, in Cushman v. Bonfield, supra, it was in effect held that the purchase price received by Harvey, as the value of the property at the time of the conversion, was a trust fund, to be held for distribution among all the bondholders, in accordance with their respective equities, and the intimation seems to be that that case is an authority that the particular relief granted in this case is improper. The Bonfield Case establishes that a personal decree against Harvey and Cushman was proper relief for a court of chancery to grant, but it was not there held that it was the only relief admissi-

ble under the circumstances of the transaction. The beneficiary in a trust is not bound to enforce an individual liability against the trustee, for he has the alternative remedy of following the trust property. *Bradley v. Luce*, 99 Ill. 234; *Long v. Fox*, 100 Ill. 43; *Breit v. Yeaton*, 101 Ill. 242; 27 Am. & Eng. Enc. Law, p. 261, and authorities cited in note 4. In the *Bonfield Case* the chancellor granted one mode of relief, while in this case he allowed appellees to follow the property into the hands of appellant.

In the matter of the intervening petition of Patrick Dore, it appears that Dore, the owner of seven bonds, became a party to the trust agreement of November 21, 1876, and duly executed and delivered to Cushman a power of attorney authorizing him to act in respect to said bonds in purchasing the property and disposing of the same; that he delivered said bonds to Cushman, and paid to him the two assessments called for, to be used in perfecting title in Cushman for the benefit of the bondholders, said assessments amounting to \$35 and \$28, respectively. And Cushman testifies that this money, so received "was used in the costs and expenses of the foreclosure proceedings in the United States court." The sole and only difference between the case of Dore and that of Swannell is that, on July 9, 1881, Cushman handed back to Dore his seven bonds, and took from him a receipt and discharge which reads as follows: "Chicago, Ill., July 9, 1881. I have this day received from John C. Cushman seven first mortgage bonds of the Plymouth, Kankakee & Pacific Railroad Company, numbered 440, 441, 443, 444, 445, 448, and 449, with interest coupons thereto attached, numbered from 6 to 60, inclusive. And I hereby release said Cushman from all further duty or liability in connection therewith, as my attorney or representative, and agree to hold him harmless therein, and waive all rights that I may have attained through or by him." It appears that Cushman tried to induce Dore to assign his interests to Harvey for \$413, but that Dore refused to accept the offer, saying he would rather lose it all. Cushman told him that he had nothing more to do with the road, that he could do nothing more for him, and for him to go and see Mr. Harvey, and gave him Mr. Harvey's address. Thereupon Dore demanded his bonds, and they were delivered to him upon his signing the receipt in question. It is manifest from the evidence that, when he received his bonds back from Cushman, on July 9, 1881, it was his intention and purpose to insist upon his rights, and claim his interest in the property covered by the decree of foreclosure. Even if effect can be given to the release from further duty and from liability, and to the waiver of rights embodied in the receipt, yet such release and waiver do not affect the equitable rights enforced by the decree herein. The relief granted by the court is not a per-

sonal decree against Cushman, and is not an enforcement of his personal liability as trustee; and the rights which the decree enforces are not rights or equities which Dore obtained by or through Cushman, but rights and equities which were vested in Dore under and by virtue of the mortgage and decree of foreclosure. Wipe out the bid of Cushman, and the acts done by him, yet the equities of Dore in the property of the Plymouth, Kankakee & Pacific Railroad Company still exist, and the fact still remains that appellant has converted that property to its own use, with full notice and knowledge of such equities.

The difference between the case of Samuel W. Strong and that of Dore is this: Both the assessments paid by the latter were used in perfecting the title in Cushman, while, of the two assessments paid by Strong, one, that for \$15, was so used, while the other \$12 was returned to Pearce, the agent of Strong. The circumstances under which this was done may be stated. Strong gave to Pearce a written order as follows: "You will please deliver to L. G. Pearce, Esq., on presentation of this order, which shall be your receipt in full, and a complete discharge from all liability, three first mortgage bonds of the Plymouth, Kankakee & Pacific Railroad Company, being numbers 426, 427, and 366, for one thousand dollars each, and coupons thereto attached, together with the power of attorney authorizing you to act as trustee to represent said bonds." Cushman swears that he drafted this order, and that Strong had frequently talked with him, and knew that the plan of reorganization had completely failed. Of course, the discharge from liability in this order did not work the result of releasing the equities that Strong, as a bondholder, had in the property and under the decree. If it be urged that the Swannell suit was brought only on behalf of himself and such other holders of the bonds of the Plymouth, Kankakee & Pacific Railroad Company as are similarly situated, and that said suit proceeds directly upon the theory of the trust agreement made between Cushman and the bondholders, and that, therefore, these general equities of Dore and of Strong in the railroad property, and under the decree of foreclosure, do not arise, and are not involved in the original suit of Swannell, and consequently not here enforceable, we may say that we regard what is hereinafter said in respect to the intervening petition of Henry M. Hooker, and in respect to the cases made on the petitions of Dore and of Strong, as conclusive against any such suggestions or result.

It appears that the Third National Bank of Chicago formerly held the 25 bonds which its receiver afterwards sold to Hooker, and which Hooker now owns. The bank was a party to the trust agreement, and gave to Cushman a power of attorney authorizing him to purchase the railroad property at the mas-

ter's sale for its benefit, and to receive for it new bonds in a reorganized company, and delivered to him said 25 bonds. Cushman, on January 12, 1877, acting under the trust agreement, bid \$4,000 for the property at the master's sale, that being deemed sufficient to pay costs and expenses, and it was struck off to him, as trustee of the bondholders. He bid in the property for the benefit of the bank, as well as for the benefit of other stockholders. Neither of the two assessments made on the bank were paid, either by the bank or the receiver. Quite a considerable time thereafter Cushman returned the bonds and the power of attorney to the receiver. There was no rescission of the trust agreement, either as to the assignor of Hooker, or Strong, or Dore. Neither the return of the bonds and the power of attorney to the receiver of the bank, to Strong, and to Dore, respectively, nor the restitution to Strong of the \$12, received for the last assessment, nor the failure of the bank and its receiver to respond to assessments, nor the release and discharge contained in the order signed by Strong, nor the release and the waiver of rights embodied in the receipt of Dore, worked such a rescission as to the rights and interests of either of the interveners. It is a fundamental condition of the law governing the rescission of contracts that the parties must be restored to their original positions as nearly as possible. Cushman could not retain his bid, made in his capacity of trustee of Dore, Strong, the bank, and other creditors, and his claim upon the property of the railroad company, obtained by means of the powers of attorney and the trust agreement, and yet successfully maintain that the contract and agreement between him and said bondholders was rescinded, and that the trust relations existing between him and them were at an end. He could not shake off the trust without abandoning his bid and all claim to the property. This he did not do, but procured a confirmation of the sale to himself, and a vesting in himself of the title to the property which was the subject of the trust. If he had thrown up his bid and abandoned all claim to the property, then these intervening bondholders, and the other bondholders in whose interest the mortgage was foreclosed, could readily have procured a resale of the property and the application of the proceeds of such sale in payment of their bonds. The plan of reorganization and the powers of attorney defined the relations between the holders of the bonds and Cushman, and gave Cushman whatever interest he had in the property, and whatever power he had in the event any of the bondholders failed in making payment of assessments for costs, expenses, and fees. This plan of reorganization and these powers of attorney made no provision by virtue of which Cushman could forfeit the rights and interests of any of the bondholders who were parties to the trust agreement. The authority given to enforce payment of assessments is

carefully and specifically pointed out in item 4 of the plan of reorganization. It is there provided that the trustee may borrow the pro rata shares of bondholders who fail to pay their shares of the purchase money, "or any other person may provide the same, and any sum so borrowed or provided for such purpose shall be repaid, with interest at the rate of ten per cent. per annum by the bondholders for whose benefit it was borrowed or provided, before he shall be entitled to receive any bonds or other proceeds of such sale from said trustee; and should such sum, with interest, remain due and unpaid for one year from the date of its advancement, said trustee shall upon demand by the party making such advance, sell the interest of said bondholders in the proceeds of said sale at public auction, giving ten days' notice thereof in some daily newspaper of the city of Chicago, of the time and place of sale, to the highest bidder thereof for cash, and after paying costs of such sale, and the money and interest thereon before advanced, said trustees shall pay the residue, if any, to said bondholder, or his legal representative, on demand." It is claimed that the equities of Dore, Strong, and Hooker are not the same as the equitable rights of Swannell, and that, therefore, they cannot come in under his bill, and are not entitled to the same relief. We think that the gist of the original bill is the relation of trustee and cestui que trust that existed between Cushman and the bondholders by virtue of the powers of attorney and the plan of reorganization, the violation of the trust, and the transfer of the property with notice to appellant. All the bondholders who were parties to the trust agreement had a beneficial interest in this property, were in equity the real owners of it, and in equity to be regarded as tenants in common. The difference between the cases of Swannell, Dore, Strong, and Hooker we regard as simply differences in the immaterial circumstances of each particular case. There is such a community of right and interest among the appellees in the question at issue, and in the remedy, as makes it admissible that the intervening petitioners should come in under the original bill of Swannell. Pom. Eq. Jur. § 269; Walker v. Matthews, 58 Ill. 196; Railroad Co. v. Schuyler, 17 N. Y. 592.

The judgment of the appellate court is affirmed. Affirmed.

(158 Ill. 248)

MAXWELL v. PEOPLE.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

SWINDLING—CONFIDENCE GAME—INDICTMENT—INSTRUCTIONS.

1. 1 Starr & C. St. p. 782, c. 38, par. 143, § 98, which provides a punishment for "every person who shall obtain or attempt to obtain, from any other person or persons, any money

¹ Reported by Louis Belso, Jr., Esq., of the Chicago bar.

or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game," applies to all cases of swindling in which advantage is taken of the confidence reposed by the victim in the swindler, even though no false or bogus checks or other commercial paper are used.

2. Under 1 Starr & C. St. c. 38, par. 468, § 6, which declares any indictment sufficient which states the offense in the terms of the statute creating it, and paragraph 144, § 99, which declares that in indictments under section 88 it shall be a sufficient statement of the offense to charge that defendant did feloniously obtain or attempt to obtain from a person named his money or property by means and by use of the confidence game, an indictment charging that defendant did "unlawfully, willfully, and feloniously obtain from [complainant] \$15 of his money, of the value of \$15, by means and by use of the confidence game," sufficiently describes the offense.

3. Where the evidence shows that the swindling was done by means of a trick at cards, and that the victim, by means of false representations in regard to the uses of such cards, was induced to take an interest therein, it is proper to charge that if defendant, by false representation and encouragement, induced the victim to part with his money, he should be found guilty.

Error to circuit court, Jackson county; Joseph P. Robarts, Judge.

Indictment of Thomas Maxwell for obtaining money by means of the confidence game. Defendant was convicted, and he brings error. Affirmed.

The first instruction given for the prosecution was as follows: "(1) If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Thomas Maxwell, by false representation and encouragement, induced the prosecuting witness, Simon P. Rudesill, to part with fifteen dollars of his money by a trick at cards, or any other device or trick, in manner and form as charged in the indictment, then the defendant is guilty, as charged in the indictment, and you should find the defendant guilty."

This is an indictment against plaintiff in error and one Anderson for obtaining money from one Simon P. Rudesill by means of the confidence game. The two counts of the indictment are as follows: "The grand jurors, chosen, selected, and sworn in and for the county of Jackson, in the name and by the authority of the people of the state of Illinois, upon their oaths present that Thomas Maxwell and William Anderson, late of the county of Jackson and state of Illinois, on the third day of November, in the year of our Lord one thousand eight hundred and ninety-three, at and within the county aforesaid, did then and there unlawfully, willfully, and feloniously obtain from one Simon P. Rudesill fifteen dollars of his money, of the value of fifteen dollars, by means and by use of the confidence game, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois. And the grand jurors aforesaid, chosen, selected, and sworn in and for the county of Jackson aforesaid, in the name and by the authority of the people of the state aforesaid, upon their oaths aforesaid, do further present that the said

Thomas Maxwell and William Anderson, late of the county of Jackson and state aforesaid, on the 3d day of November, in the year of our Lord one thousand eight hundred and ninety-three, at and within the county aforesaid, did then and there unlawfully and feloniously obtain from one Simon P. Rudesill three United States legal tender treasury notes for the payment of fifteen dollars, the personal property then and there of the said Simon P. Rudesill, by means and by use then and there of the confidence game, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois." Anderson pleaded guilty. Plaintiff in error pleaded not guilty. The only testimony introduced by the state was that of the prosecuting witness, Simon P. Rudesill. The accused introduced no evidence. At the close of Rudesill's testimony, the defendant demurred to the evidence, and moved to exclude it from the jury. The motion was overruled, and defendant excepted. Seven instructions were given on behalf of the people, and seven on behalf of the defendant. The jury returned a verdict of guilty, fixing the punishment at imprisonment in the penitentiary for five years, and finding the age of the defendant to be 26 years. Motions for new trial and in arrest of judgment were made and overruled, to which rulings exceptions were taken. Judgment was rendered and sentence pronounced in accordance with the verdict. The case is brought here by writ of error from that court.

The facts are substantially as follows: Rudesill, a farmer, 25 years old, while on his way, with his wife and child, from Cape Girardeau, Missouri, to Hamilton county, Illinois, was detained at Carbondale, Jackson county, waiting for a train to go north on the Illinois Central Railroad, on November 3, 1893. While he was walking on the platform of the depot, he was accosted by Maxwell, the plaintiff in error, who asked him if he was travelling, and was told that he was going north to Ashley, and from there to Dahlgren. Maxwell then asked him if he would throw some bills along the road for him,—bills for clothing and a lottery. He told Rudesill that he would pay him for his trouble, saying that he could take the bills, and, when the train stopped, distribute them on the platform. Rudesill agreed to do so, and Maxwell said he would go and get the bills, and be back soon. Rudesill then went back into the ladies' waiting room, where his wife and baby were. "Pretty soon Maxwell came back, and took me in a little closet, and showed me the secret. He had some cards, four or five or six, about three inches long, and about an inch and a half wide, blank on one side. One had writing on it, '500' in figures, and below it was 'Fifty cents.' Maxwell said that was fifty cents a draw. 'You draw one of the cards, and you get fifty cents' worth, or two dollars' worth, or two dollars and a half's worth.' He showed me a card that had a 'C'

on it, that began to spell 'Clothing,' and said: 'Do you see that dot in the middle of the "C"?' I said I did, and he said that was the card to draw, and doubled them over in his hand. I took out the card, and it had the 'C' on it with a dot in it. Just then William Anderson came in, and Maxwell said something about his not being concerned in it. Anderson said he had a right to be there. Maxwell said: 'Well, I can show it to him, too.' And he showed him the cards, and told him to draw. Anderson drew, and missed it. Anderson said: 'I will bet you twenty dollars you can't draw it.' Maxwell said: 'I will bet you thirty dollars; I have got a check here for thirty dollars, and I will bet you thirty dollars that I can.' Anderson said he did not want any checks,—he wanted cash; and he went down in his pocket, and got the money. I said: 'Mr. Maxwell, I can let you have it.' And he said, 'All right,' and took the money, and put it up. Anderson took the cards, and handed them to Maxwell to draw. Maxwell said: 'You can draw it.' I thought all I had to do was to draw that card with a dot in the 'C.' I could see it plain, but, when I drew it, somehow I missed; I drew the wrong card. Maxwell said: 'Now, you d— fool, see what you have done. Go back in the room, and sit there for thirty minutes, and I will go and get the money at the bank.' He did not come back. He did not present the check to me. He reached in his pocket as though he was going to bring it out. I did not see any note, check, or anything of the kind. I told him I would let him have fifteen dollars; I let him have fifteen dollars, and he was to give it back to me. I do not mean to state that he offered me any sort of instrument for this money. Maxwell never offered me any bogus check or note, or bogus draft. It was just a trick with cards, with a dot in the 'C.'" Then Rudesill went out on the platform, and made some inquiries as to Maxwell. The police, who had suspicions of Maxwell, informed him that Maxwell and Anderson had just jumped on a freight train on the Illinois Central, and had gone south. Rudesill asked the policeman to telegraph south, and have them arrested, which was done. Anderson was the partner and confederate of Maxwell.

J. F. Taylor, for plaintiff in error. M. T. Moloney, Atty. Gen., and John M. Herbert, State's Atty. (T. J. Scofield and M. L. Newell, of counsel), for the People.

MAGRUDER, J. (after stating the facts).

1. Objection is made to the indictment upon the ground that it does not embrace in its averments every criminal fact that is material to the punishment sought to be inflicted. It is insisted, in other words, that the indictment should specify all the facts with such certainty that the offense may judicially appear to the court. We do not regard the indictment as bad, for the reason thus

stated. Section 98 of division 1 of the Criminal Code, under which the indictment was found, is as follows: "Every person who shall obtain or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years." 1 Starr & C. St. p. 782, c. 38, par. 743. There are two statutory provisions which justify the framing of such an indictment under said section 98 as is set out in the record in this case. The first is section 6 of division 11 of the Criminal Code, which provides that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which stated the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." 1 Starr & C. St. p. 857, c. 38, par. 468. *Scott v. People*, 141 Ill. 195, 30 N. E. 329. The second is section 99 of division 1 of the Criminal Code, which immediately follows said section 98, and specifically refers to the crime therein described, and is as follows: "In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain (as the case may be), from A. B. (here insert the name of the person defrauded or attempted to be defrauded) his money (or property, in case it be not money), by means and by use of the confidence game." 1 Starr & C. St. p. 782. In view of the two statutory provisions thus quoted, we held, in *Morton v. People*, 47 Ill. 468, that an indictment precisely like the one here was good.

2. It is claimed that the proof in the case at bar does not describe such an offense as is defined by section 98. In support of this contention, counsel for plaintiff in error invokes the well-established rule that, where particular words of a statute are followed by general words, the general words are restricted in meaning to objects of the like kind with those specified. *Bish. St. Crimes* (2d Ed.) § 245. It is therefore urged that section 98, by employing the words "by means or by use of any false or bogus checks, or by any other means, instrument or device," has reference exclusively to the obtaining of money or property by the use of false or bogus checks, or by the use of other false or bogus commercial paper or paper of the same specific class as checks. There might be force in the application of the rule thus invoked by counsel if it were not for the use of the words "commonly called the confidence game," which immediately follow the word "device." These words imply that the statute was intended to embrace any other means, instrument, or

device, besides the use of false or bogus checks, which comes within the meaning of what is commonly called the "confidence game." The object of the rules embodied in the maxim, "Noscitur a sociis,"—that is, that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated,—is to ascertain and carry out the legislative intent, and not to defeat such intent. The rule will not be applied where its application would contravene the plain meaning of a law. 23 Am. & Eng. Enc. Law, pp. 439, 442. "General words will be construed, even as against defendants in penal statutes, more broadly than the specific, where such appears clearly to have been the meaning of the legislature." Bish. St. Crimes, § 246. Although statutes imposing penalties and fines are strictly construed, yet the construction must not be so strict as to defeat the legislative intention; and accordingly we have held that, even in the case of such statutes, it is proper to apply the principle of interpretation laid down in section 1 of the act in regard to the construction of statutes (Rev. St. c. 131, par. 1; 2 Starr & C. St. p. 2329, c. 131, par. 1), which provides that "all general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the legislature may be fully carried out." *Hankins v. People*, 106 Ill. 628. It being the evident intention of the statute to punish the obtaining, or attempting to obtain, money or property by any means, instrument, or device commonly called the "confidence game," it would be a very narrow construction of the statute to restrict its meaning to such devices as consist only in the use of false or bogus checks, or other commercial paper of like character. The generic or family characteristic by which other means, instruments, or devices are included within the same genus as the device specifically mentioned, is not so much indicated by the word "checks" as by the words "false or bogus." The obtaining of money by means or use of what is false or bogus is the offense aimed at. This is further apparent from the designation, in section 99, of the victim as "the person defrauded or attempted to be defrauded." It is difficult to give a definition of what is commonly called the "confidence game." In *Morton v. People*, supra, we said: "The nature and character of the so-called 'confidence game' has become popularized in most of the cities and large towns, and even in the rural districts, of this broad Union, and is well understood." But no attempt was made to give any definition that should be applicable to all cases. On the contrary, speaking there of the devices referred to in section 98, we said: "As these devices are as various as the mind of man is suggestive, it would be impossible for the legislature to define them, and equally so to specify them in an indict-

ment. Therefore, the legislature has declared that an indictment for this offense shall be sufficient if the allegation is contained in it that the accused did, at a certain time and place, unlawfully and feloniously obtain or attempt to obtain the money or property by means and by use of the confidence game, leaving to be made out by the proof the nature and the kind of the devices to which resort was had." The popular idea of the confidence game, as understood "in most of the cities and large towns, and even in the rural districts," of the Union, is best expressed in the definition thereof in Webster's International Dictionary, and is as follows: "Confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler." We think that the facts of this case show a swindling operation in which advantage was taken of the confidence reposed by the prosecuting witness in the plaintiff in error, who is unquestionably shown to have been a swindler. We are therefore inclined to think that, under the proofs here, the offense committed by plaintiff in error was within the meaning of the language used in section 98.

3. Objection is made to the first instruction given for the prosecution upon the alleged ground that it calls the attention of the jury to what counsel calls "irrelevant matter." The matter said to be irrelevant is the element of "false representation and encouragement," which was united with the trick at cards, in order to induce the prosecuting witness to part with his money. We think that all the facts together constituted the "swindling operation." When plaintiff in error represented that he was a commercial traveler, and had advertising cards or circulars to distribute, he was guilty of false representation. He was equally guilty of false representations when he induced plaintiff in error to believe that Anderson was a disinterested outside party, anxious to become acquainted with the scheme in hand, and that he himself had a check in his pocket, and would go to the bank and get it cashed, in order to return to the prosecuting witness his money. In all this there was an element of false representation. So, when plaintiff in error offered to pay the prosecuting witness for distributing the cards or circulars, and interested him in the scheme of drawing the cards so as to get a card calling for so much money's worth of clothing or jewelry, he encouraged him to part with his money. These elements of false representation and encouragement were mingled with the trick of the cards in such a way as to gain the confidence of the victim, and throw him off his guard.

Counsel say that, by the use of the words "false representation" and "trick at cards," the first instruction confounds the offenses described in sections 97 and 100 with the offense named in section 98. Section 97 refers

to false representations in writing of his own respectability, wealth, or mercantile correspondence or connections, whereby the offender gains credit, and thereby defrauds his victim. The instruction cannot be understood as referring to false representations of this nature. Section 100 refers to games or devices by the fraudulent use of cards, as explained in *Blemer v. People*, 78 Ill. 265. There was here no such game of chance or trick with playing cards as is intended by section 100.

We find no error in the record which would justify us in reversing the judgment. Accordingly, the judgment of the circuit court is affirmed. Affirmed.

(153 Ill. 289)

PYLE et al. v. PYLE et al.¹

(Supreme Court of Illinois. Oct. 16, 1895.)

APPEAL — RECORD — EVIDENCE — WITNESS — INSTRUCTIONS — WILL CONTEST.

1. Where the transcript on appeal does not show whether process was served on one of defendants, but a supplemental record filed by leave of court shows that since the first transcript was certified the sheriff's return was amended so as to show service on such defendant, it will be presumed that such amendment was properly made, and that service was made as therein stated.

2. The fact that a final decree was taken without answers from certain defendants, who were duly served, without entering their defaults, cannot be assigned as error by other defendants.

3. Under Rev. St. 1893, c. 51, par. 2, § 2, which provides that no party to any civil action may testify when any adverse party sues or defends as representative of a decedent, unless called as a witness by such adverse party, a defendant in a chancery suit whose interest is the same as that of the complainants, and whose codefendants defend as executors of a decedent, cannot testify for the complainants.

4. Under Rev. St. 1893, c. 51, par. 5, § 5, which forbids husbands and wives to testify for or against each other, except in certain cases, when they "may testify for or against each other in the same manner as other parties may," a husband cannot testify for his wife, even in one of the specified cases, if they are both parties and there are adverse parties defending as representatives of a decedent; since in such case he could not testify even though his wife were not a party. *Treleaven v. Dixon*, 9 N. E. 189, 119 Ill. 548, followed.

5. It is improper to ask an expert witness a question which, instead of embodying an hypothetical statement of the facts, calls on the witness, in view of the evidence, to pass on the whole issue.

6. The verdict of a coroner's jury is prima facie evidence of the cause of death.

7. It is proper to refuse cumulative instructions.

8. An argumentative instruction which also gives unfair prominence to portions of the testimony should be refused.

9. In a will contest it is error to instruct the jury that in determining the question of sanity they may consider whether the provisions of the alleged will are consistent with the testator's previously expressed intentions. *Rutherford v. Morris*, 77 Ill. 397, followed.

Appeal from circuit court, St. Clair county; Benjamin H. Canby, Judge.

Bill by Mary Pyle and others against Joseph Pyle and others to set aside an alleged will of Harrison Thompson, deceased. Complainants obtained a decree. Defendants appeal. Reversed.

The fourth, sixth, and ninth instructions given at the request of the complainants were as follows: "(4) The court instructs the jury that, if you believe from the evidence that about seven years before the execution of the paper in question Harrison Thompson was insane, and was treated by his family physician for insanity, and that the cause of such insanity was the bringing of a lawsuit against him, Harrison Thompson, in court, and that said lawsuit was not finally settled and determined until after the execution of the said paper in question, and during the time said suit was pending and undetermined in the court the said Harrison Thompson was an old man; and if you further believe from the evidence that said Harrison Thompson worried over said suit, to the extent that it unbalanced his mind, and finally caused him to commit suicide,—then, if you also believe from the evidence that the suit in question had dethroned the reason of Harrison Thompson at the time of the execution of the supposed will in question, and that said Harrison Thompson was of unsound mind and memory when he executed the same, then it is your duty to find the paper in question to be not the will of Harrison Thompson, and your verdict should be in favor of the complainants." "(6) The court instructs the jury that, in determining whether the paper in question offered as a will is entitled to be so regarded, the paper itself may be considered, in connection with all the other evidence in the case, in determining the question of sanity or unsoundness of mind. And if the jury believe, from the evidence, that the deceased, Harrison Thompson, before executing the said pretended will, had expressed any fixed purposes and intentions regarding the disposition of his property at variance with the provisions of the alleged will,—that is to say, if the said Harrison Thompson had, previous to executing the paper in question, expressed his intention of doing equally by his children in his will, when in fact he did not distribute his property in his will equally,—then the jury may consider whether or not the provisions of the will are inconsistent with sanity itself, and with his previously expressed and fixed purposes; and if the jury find that they are so, then these facts, also, may be weighed by the jury in determining the question of sanity or unsoundness of mind of the said Harrison Thompson at the time of executing the paper in question." "(9) If you believe from the evidence that, some years before his death, Harrison Thompson was bitten by a horse, and immediately thereafter had a severe attack of sickness, and also met with business troubles, in consequence of which he lost his reason and became insane; and if you

¹ Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

believe from the evidence that he continued insane, and finally committed suicide while insane, and if his will was made but eight months before such death from suicide; and if you believe from the evidence that he was insane at the time of making said will,—then your verdict should be against the will, and in favor of the complainants."

Fred B. Merrills, guardian ad litem, and Wilbur N. Horner, for appellants. Hamill & Borders, for appellees.

BAKER, J. This is a bill in chancery filed by Mary Pyle and others against Joseph Pyle and Charles Pyle, executors of Harrison Thompson, deceased, and against the several devisees and legatees under the will of said Thompson, for the purpose of setting aside said will and the probate thereof, and having said will declared void and of no effect, and not to be the last will and testament of the said deceased. The charges in the bill are: A want of mental capacity in said Harrison Thompson to make a will; and undue influence. The issues joined between the parties were submitted to a jury, and the jury returned a verdict that the instrument of writing produced was not the last will and testament of Harrison Thompson, deceased. Motions for a new trial were overruled, and the court rendered a final decree against the validity of the supposed will, and setting aside the same and the probate thereof, and declaring the same to be null and void. Thereupon this appeal was taken. Joseph Pyle and Charles Pyle, the executors, have assigned errors, as have also Millard Thompson, Willard Thompson, and Samuel Thompson, infants, by their guardian ad litem.

First. It is objected that Edward Rogers, a minor, was a necessary party to the suit; that, although he was made a party to the bill, yet he was not served with process; and that the fact that a guardian ad litem was appointed and answered for him does not cure the error. In the transcript of the record certified by the clerk of the circuit court of St. Clair county on the 17th day of April, 1894, it does not appear whether the summons dated August 8, 1893, was or was not served on said Edward Rogers. But it appears from the amended or supplemental record certified by said clerk on the 7th day of May, 1894, and filed herein by leave of court, that said summons was duly served on said Edward Rogers on the 9th day of August, 1893. The clerk certifies the summons and return contained in said amended transcript "to be a true and correct copy of the summons issued to the September term, A. D. 1893, and the sheriff's return thereon as amended since certifying to the original record in this cause, as the same now appears on file in my office." It must be presumed that the amendment to the sheriff's return was properly and lawfully made, and that said Edward Rogers was duly in court when his guardian ad litem was appointed and answered.

Second. It is assigned for error both by the appellants Joseph Pyle and Charles Pyle, executors of Harrison Thompson, deceased, and by the appellants Millard Thompson, Willard Thompson, and Samuel Thompson, that a final decree was rendered in the cause without any answers being filed by or for the defendants James Thompson and Mamie Thompson, or either of them, and without any default being taken against them or either of them. It is undoubtedly an error of which a defendant may avail himself, that a final decree was entered against him without his having answered the bill, and without entering his default, and taking the bill as confessed. *Blair v. Reading*, 99 Ill. 600; *Wilson v. Spring*, 64 Ill. 14; *Crabtree v. Green*, 36 Ill. 278. But James Thompson and Mamie Thompson are not here assigning errors. They have not appealed, and are not complaining of the decree. The rule is that appellants cannot allege errors which relate exclusively to parties who are not complaining and are not before the court. *Tibbs v. Allen*, 27 Ill. 119; *Richards v. Greene*, 78 Ill. 525; *Clark v. Marfield*, 77 Ill. 258; *Van Valkenburg v. Trustees*, 66 Ill. 103. At the most, there was simply judicial error, of which James Thompson and Mamie Thompson alone could avail; and they having been duly served with summons, the court had jurisdiction of their persons, and the decree against them was not a nullity. *Town of Lyons v. Cooledge*, 89 Ill. 259.

Third. James Rogers was examined as a witness for the complainants. This was done over the objection of the solicitors for both the executors, and for Millard, Willard, and Samuel Thompson, that he was a party to the suit, and also the husband of Ellen Rogers, who is one of the heirs and also a devisee under the will. It is suggested that James Rogers had no interest in the suit other than an inchoate right of dower, and that such interest would not disqualify him from testifying as a witness. The first of the objections urged against his competency was not that he was interested in the result of the suit, but that he was a party to the suit. If the only objection to his competency had been his interest in such result, then, since his interest by way of an inchoate right of dower was uncertain, remote, and contingent, and not a present, certain, and vested interest, it would seem that such objection would not have been well taken, either at common law or under the statute. 1 Greenl. Ev. (15th Ed.) § 390. But the rule of the common law is that a party to the record, in a civil suit, cannot be a witness either for himself or for a cosutor in the cause. *Id.* § 329. And under sections 1 and 2 of the act in regard to evidence and depositions in civil cases (Rev. St. 1893, c. 51), no party to a civil suit can be allowed to testify therein when any adverse party sues or defends as the executor, devisee, or legatee of any deceased person, unless when called as a witness by such adverse party so suing or defending. It is true that such witness was called by the complainants,

and that said complainants in their bill made him a party defendant, but all the interest he had in the subject-matter of the suit, i. e. an inchoate right of dower, was on the side of the complainants, who were endeavoring to set aside the will of the deceased, and adverse to the rights of the executors and those of Millard, Willard, and Samuel Thompson and their guardian ad litem, over whose objections he was permitted to testify. It is immaterial that neither he nor his wife, Ellen Rogers, was joined as a party complainant, and that both were named as parties defendant. Simply naming them as defendants instead of complainants did not make them parties adverse to the complainants. A court of equity will disregard the mere matter of form as to whether they are named in the pleadings as complainants or defendants, and will look to the substance of the matter, and see on which side of the controversy their real interest lies. Otherwise it would be easy to evade the law, and the force and effect of the statute. That from which section 2 of the statute intends to protect these executors and infant devisees is the testimony of parties to the suit whose interests are adverse to theirs.

But, waiving all question of James Rogers' being a party to the suit, Ellen Rogers, his wife, was made a party to the bill, and was a necessary party, she being both an heir of the deceased and a devisee under his will. As an heir, she would be entitled to receive in fee one-third of all of the property of which her deceased father died seised, while under the will she would be entitled to only a contingent life estate in 99 acres of land, and even this subject to forfeiture in the event she should "under any circumstances sell or attempt to sell and convey said land, or in any way incumber the same by mortgage or otherwise." The rule is that it is the real and actual interest that disqualifies a witness, and not the belief, understanding, or feeling in regard to such interest, as seems to be supposed by appellees. 1 Greenl. Ev. § 387. We think it is manifest, from the will and the evidence, that the interests of Ellen Rogers are in fact adverse to those of her children, and to those of the executors and the infant devisees, Millard, Willard, and Samuel Thompson, and that her actual interests are with the complainants, and will be subserved by setting aside the will. And the question arises whether or not her husband is a competent witness when called by such complainants and his competency objected to by the executors and devisees under the will. We think that it can properly be said that in this litigation the appellants, who are proponents of the supposed will of the deceased, are adverse parties to appellees, who filed the bill, and asked that the said instrument of writing, and the probate thereof, should be set aside and declared to be void and of no effect and not the last will and testament of Harrison Thompson, deceased. Section 5 of the evidence and depositions act provides that "no husband or wife shall, by vir-

tue of section 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage * * * except in cases where the wife would, if unmarried, be plaintiff or defendant, * * * and except in cases where the litigation shall be concerning the separate property of the wife, * * * in all of which cases the husband or wife may testify for or against each other, in the same manner as other parties may under the provisions of this act." In *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189, this court quoted at length said section 5, and also quoted from section 2, which provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section [section 1], when any adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person, unless when called as a witness by such adverse party." And it was there said, "Then, how may 'other parties' testify for or against each other under the provisions of this act? The word 'party,' in the other provisions of the act, is clearly distinguished from the word 'person,' and always means party to a suit, or party in interest in the suit. It cannot, then, have been intended that it should have the same meaning in this section. Giving it that meaning, other parties cannot testify in any civil action, suit, or proceeding, of their own motion, or in their own behalf, when any adverse party sues or defends as the executor of a deceased person, and therefore husband and wife cannot testify for or against each other in those instances. This is the construction we gave to the act in *Crane v. Crane*, 81 Ill. 165, and that ruling was approved and followed in *Warrick v. Hull*, 102 Ill. 280." And to the same effect is *Way v. Harriman*, 126 Ill. 132, 18 N. E. 206, where the adverse parties were the heirs of the deceased person, instead of the executor, as in *Treleaven v. Dixon*, or executors or devisees, as is here the case. The same rule is laid down in *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589. Appellees rely on the cases of *Pigg v. Carroll*, 89 Ill. 205, and *Mueller v. Rebhan*, 94 Ill. 142. In the first of these cases, which was a bill filed by heirs of an intestate against other heirs of such intestate, for the partition of lands inherited, and for relief in respect to advancements as affecting the rights of the parties, it was held that the husband of one of the heirs was a competent witness in her behalf. While *Mueller v. Rebhan* was a contest over a will, yet at the same time it was simply a litigation among the children and heirs of a common ancestor, and the purpose and result of the suit merely were to determine the relative portions of the estate that each child or heir was entitled to. The principle upon which these decisions were based is that the statute in question was intended, in this regard, to protect the estates of de-

ceased persons from the assaults of strangers, and relates only to proceedings wherein the decision sought would tend to reduce or impair the estate, or deprive the heirs of it, and has no reference to the relative rights of the heirs at law, as among themselves. In the subsequent case of *Brace v. Black*, 125 Ill. 33, 17 N. E. 66, the deceased devised a considerable portion of his property to his grandchildren, and to one of his children he devised nothing. At the trial the complainants in the bill were offered as witnesses to prove the insanity of their father; but the court, upon the objection of the guardian ad litem for the minor grandchildren, who were devisees, refused to allow them to testify. The action of the circuit court in the premises was sustained by this court, and it was said: "The object of the suit is not merely to adjust rights between heirs at law, as in *Pigg v. Carroll*, 89 Ill. 205. It is to take the estate from the legatees, some of whom are not heirs at law, and vest it in the heirs at law. There was, therefore, no error in refusing to allow these parties to testify." The said case of *Brace v. Black* cannot, in principle, be distinguished from the case at bar. Here the appellants Millard Thompson, Willard Thompson, and Samuel Thompson, as well as several other of the grandchildren of the deceased, were devisees under the will. And, as we have already seen from *Treleaven v. Dixon* and other cases, a husband can testify only "in the same manner as other parties may under the provisions of the act"; and other parties to suits cannot testify as against executors, heirs, or devisees of a deceased person, unless when called as witnesses by such executors, heirs, or devisees; and therefore a husband cannot testify in a suit where his wife is a party or is directly interested, and there are executors or devisees whose interests are adverse to those of the wife, and the husband is not called as a witness by such executors or devisees. We are satisfied that it was error to permit James Rogers to testify as a witness in the case over the objections of appellants; and there can be no question but that his testimony was material and important, and in all probability it largely influenced the jury to return the verdict that they rendered.

Fourth. We think that some of the questions put to Dr. Kell, Dr. Campbell, and Dr. Keeley, and permitted to be answered by them over the objections of appellants, were improper. It is not the proper practice to ask of a witness called as an expert a question which does not embody a hypothetical statement of the facts, but which directly calls upon the witness to put himself in the place of the jury, and in view of the evidence submitted pass upon the whole issue. *City of Decatur v. Fisher*, 63 Ill. 241; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142; *Railroad Co. v. Moffitt*, 75 Ill. 524; *Railway Co. v. Shires*, 108 Ill. 617; 1 Greenl. Ev. 440. The ruling in *Schneider v. Manning*, 121 Ill. 878, 12 N. E. 287, does not sustain the action of the circuit court in this case. Here there

was a conflict in the evidence, and the experts had heard testimony on both sides of the case, and they were called upon to give their opinions upon the evidence that they had heard. On the other hand, in *Schneider v. Manning* the medical expert, Dr. Hays, was called as a witness by the proponents of the will, and testified that he had heard all the evidence introduced by the contestants. He was then asked this question: "Having heard that evidence on the part of the contestants, state whether or not, in your opinion, from a medical standpoint, from that evidence, Hugh McGlennon was of sound or unsound mind on September 6, 1879." It was held that it was not error to overrule an objection to that question. It was, in substance, assuming the truth of the facts testified to by the witnesses for the contestants, and asking the opinion of an expert upon the case thus made. The better and proper practice, however, is to put a question to the witness reciting the supposed facts hypothetically upon which the opinion of the expert is wanted.

Fifth. It was not error to admit in evidence the verdict of the coroner's jury at the inquest held on the body of Harrison Thompson, deceased, for the purpose of showing, *prima facie*, that he committed suicide. *Insurance Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467.

Sixth. It was not error to refuse the second and sixth of the instructions offered by appellants. The propositions of law contained in them were embraced in other instructions that the court gave.

Seventh. Complaint is made of instructions 4, 6, and 9 given for appellees. Instruction 4 is argumentative; and it also gives an unfair prominence to fragmentary portions of the testimony introduced by the complainants in the bill. It should have been refused. And instruction 9, which is substantially like it, should also have been refused. An instruction substantially like instruction 6 was condemned by the judgment of this court in *Rutherford v. Morris*, 77 Ill. 397, 419-425.

For the errors indicated herein, the decree is reversed, and the cause remanded. Reversed and remanded.

(153 Ill. 699)

PARKER v. ORR.¹

(Supreme Court of Illinois. Nov. 1, 1895.)

ELECTION—AUSTRALIAN ELECTION LAW—MARKING BALLOTS.

1. 3 Starr & C. St. p. 570, c. 26, § 23, which says that the voter shall prepare his ballot by making in the appropriate margin or place a cross opposite the name of the candidate of his choice, is merely directory, and does not render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so. *Parvin v. Winberg* (Ind. Sup.) 30 N. E. 790, distinguished.

2. Writing the word "Yes" or "Get" in the square on the margin of an affirmative vote for a

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

constitutional amendment does not invalidate the ballot.

3. Signing the voter's name to the ballot invalidates it, as tending to impair the secrecy of the ballot.

4. Making a single mark, or a circle, instead of a cross, or writing out the party name, or making crosses wholly outside the proper squares, will also invalidate the ballot, as tending to destroy its secrecy.

5. Where a voter makes crosses opposite the names of two political parties, one of whom has no candidate for a particular office, the ballot should only be counted for the other candidate for that office, and not for the candidates on both tickets.

6. Where a voter writes in the name of a candidate of his own, and marks a cross so that it is uncertain which candidate it refers to, his vote counts for neither.

Appeal from Christian county court; Lyman G. Grundy, Judge.

Petition by Norman N. Parker against Robert W. Orr to contest an election. Defendant obtained judgment. Petitioner appeals. Affirmed.

J. E. Harrison and Ricks & Creighton, for appellant. J. C. McBride and Taylor & Abrams, for appellee.

WILKIN, J. This is a proceeding begun in the court below by the appellant to contest the election of appellee to the office of superintendent of schools for Christian county. It appears from the petition filed that at the November election, 1894, Robert W. Orr was the nominee of the Democratic party, Nina S. White of the Republican party, and Eugene E. Chumley of the People's party; that by the canvass of the votes cast for these candidates Orr received 3,215, White 3,195, and Chumley 489; whereupon a certificate of election was duly issued to Orr, who qualified and entered upon the duties of the office. Other tickets on the ballots had no candidate for that office. It is insisted by petitioner that Miss White was in fact legally elected. The grounds of the contest are that in each voting precinct of the county the judges failed to count a certain number of votes for either of the candidates, which should have been counted for White; that they counted for Orr votes which should have been counted for White, and counted for Orr votes not legally cast for him. The answer denies these grounds, and avers that in each of the precincts votes were cast for Orr which should have been, but were not, counted for him; that votes cast for him were counted for White, and that votes were counted for White which were not legally cast for her. On a recount of the ballots the court found that White received 3,168 votes and Orr 3,160, to which no objection was made. There were counted for Chumley 488, and 75 by agreement rejected, as being votes for neither party, leaving 111 in dispute. Of these the court counted 35 to White, 44 to Orr, and rejected 32 altogether, thus giving Orr a total of 3,204 and White 3,203, and declaring Orr duly elected by a majority of 1 vote.

It is contended by counsel for appellant that under our statute only a cross can be used upon the ballots to indicate the voter's choice of candidates, which cross must be in the form indicated in the statute, and placed in the circle or square; and, unless the elector so marks his ballot, it must be rejected. In other words, they insist that the language of section 23 of the ballot law of this state (3 Starr & C. St. p. 570, c. 26), which says "the voter shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate or his choice for each office to be filled," etc., is mandatory, and must be strictly complied with, else the ballot is void. They also insist that every mark upon a ballot cast, not necessary to indicate the voter's choice of candidates, as indicated in said section 23, should be treated as a distinguishing mark, and render the whole ballot void. In support of these positions several decisions of the courts of other states are cited, but in view of the language of the statutes under which those cases are cited, we do not regard them as in point here. For instance, the case of *Parvin v. Wimberg* (Ind. Sup.) 30 N. E. 790, much relied upon by counsel for appellant, was decided upon a statute of that state, section 45 of which provides that, as indicating the voter's choice of candidates, a stamp shall be used, by stamping the squares immediately preceding their names (Laws 1889, p. 179); and it was held the use of the stamp, and the placing it in and upon the square, were mandatory. Section 23 of our statute does not say with what the cross shall be made; neither does it mention squares or circles opposite the names of candidates, but requires the cross to be made "in the appropriate margin or place opposite the name," etc. If the desire is to vote for all the candidates of a party, the cross is to be placed at the "appropriate place preceding the appellation or title of such party," etc., nothing being said about a circle. It is true that by construing section 14, prescribing the form of the ballot, with section 23, it appears that by "appropriate margin or place" is meant the circle or square on the ballot; but there is not, as in the Indiana statute, a direct command that the cross shall be made in a square or circle. Neither does our statute, as we construe it, prescribe the form of the cross to be used. It provides that it shall be "by making * * * a cross (X) opposite the name," etc. Manifestly, placing the capital X in parenthesis was merely to indicate to the voter how the cross might be made; and it cannot be seriously insisted that the statute commands the cross to be so made. That is to say, even if it were held that the statute is mandatory, its requirements would be satisfied by complying with the language "by making a cross" in either of three forms, viz. in the form of a capital X, as indicated in the statute, in a form similar to a capital T, or by crossing two lines together thus:

+. See Webst. Int. Dict. defining "Cross." There is, therefore, a manifest difference in the requirement that a voter shall use a stamp furnished for that purpose to indicate his choice of candidates, and that he shall make a cross. A failure to use the stamp is a positive violation of the law; a failure to make a distinct, well-formed cross may be the result of inability or inadvertence. It would be impracticable, therefore, to give effect to our statute construed to be mandatory as to the form of the cross to be made to indicate the voter's choice.

It has always been held in this state that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with the law, effect will be given to that intention. In other words, that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot. See *McKinnon v. People*, 110 Ill. 305; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704. The ballot law of 1891 does not, in our opinion, change the rule in this regard, unless to give effect to such intention would tend to destroy the secrecy of the ballot. On the contrary, section 26 expressly provides: "If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office;" plainly meaning that, if the voter's choice can be ascertained from his ballot, it shall be counted, if it can be done consistent with the provisions and the object of the act. It was the intention of this amendment, as expressed in its title, to provide for the printing and distribution of ballots at public expense, for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot. "Whenever our statutes do not expressly declare that particular informalities do not avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if, in a given case, the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials; that is, as objects in themselves, and not merely as means." *Wigm. Austr. Ballot System* (2d Ed.) p. 195. To say that any mark on a ballot other than a cross in the proper place makes it void, is to go beyond the language of the statute, and in direct conflict with section 26, supra.

The statute being directory, and not mandatory, as to the manner of voting prescribed in section 23, it remains to be determined what is its proper construction. In settling this question two objects must be kept in view, viz. the secrecy of the ballot and the intention of the voter. It was evidently the intention of the legislature to declare what

should absolutely destroy a ballot, or prevent its being counted, by section 26, supra: "If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." Observing this mandatory language, if a voter's intention can be gathered from his ballot, without laying down a rule which may lead to a destruction of its secrecy, that intention should be given effect. Nothing is said in the act about distinguishing marks, but if a mark or character is used which, though indicating an intention to vote a particular party ticket, or for certain candidates, at the same time serves the purpose of indicating who voted it, thereby furnishing the means to designing persons of evading the law as to secrecy, the ballot should be rejected. It logically follows that the voter's intention must be manifested by a cross, substantially in the place designated, which the judges of election, or the court on a recount, can see was an honest attempt to follow the directions of the law. For instance, on one of the ballots cast at this election the voter simply wrote at the head of the Democratic ticket the word "Democratic," on others a single mark was made across or through the circle or square, on others a circle within the circle or square was made, and on still others irregular characters were so used. On one ballot crosses were made opposite the names of candidates, but entirely outside of the squares. In these there was no attempt by the voter to indicate his choice by making a cross in the appropriate place. On another, seemingly regular in other respects, the name "Martin Lynch" is signed at the bottom. These marks and names may tend to show an intention on the part of the voter to vote tickets so marked, but they disregard the plain directions of the law, and furnish the means whereby the secrecy of the ballot could be destroyed. Therefore we think all such ballots were properly rejected by the court below. On the other hand, ballots appear in the record on which it is clear that the voter attempted to make a cross in the proper place to indicate his choice of candidates, but succeeded more or less imperfectly. It being clear in such cases that the intention was to conform to the statute, and not to distinguish the ballot, they were properly counted. On one of the ballots, opposite the word "Yes," on the proposed constitutional amendment submitted, the word "Get," as read by counsel for appellant, was written in the square; opposing counsel insisting that the word was meant for "Yes." It is insisted by counsel for appellant that this word as here used is as much a distinguishing mark as is the name "Martin Lynch" to the ballot above referred to. We do not think so. The name signed

to the ballot could serve but one purpose,—namely, to indicate who voted the ballot. The word "Yes" or "Get" tended to indicate the voter's choice upon the proposition submitted, and that it served the further purpose of distinguishing the ballot is, to say the least, a very remote conjecture. On several of the ballots counted for either candidate names of candidates were erased by drawing a pencil through them, and these it is insisted are invalid as having distinguishing marks. What we have already said referring to section 26 is a sufficient answer to this contention.

Applying the rules indicated to the ballots in this record, we find that of the 32 rejected all were properly excluded except 8, 4 of which should have been counted for each of these candidates. In these the voter made a well-defined cross in the Democratic or Republican circle at the head of the ticket (four in each), but also made a cross in another circle opposite a party name on which there was no candidate for superintendent of schools. While such ballots could not be counted for candidates upon both tickets, because the voter in that case marked more names than there were persons to be elected to the office, that rule cannot apply to these candidates; that is to say, where a voter made a cross in the Republican circle, and did the same in the Independent Republican circle, on which last-named ticket there was no candidate for superintendent of schools, he did not mark more names than there were persons to be elected to that office, but expressed his choice for Miss White. And so, where a voter made a cross in the Democratic circle, but did the same in the People's Silver circle, on which there was no candidate for the office, the vote should have been counted for Orr. Of the disputed votes counted for Orr one was marked in the Democratic circle with a character

like this: , and had no other marks upon

it. We are unable to discover in the mark any resemblance to a cross, or see wherein the voter attempted to make a cross of any kind, and therefore, under the rule laid down, the ballot should have been rejected.

It is earnestly insisted that another ballot counted for Orr, marked in the Democratic circle in this way: , should have been re-

jected. The marks were made with ink, and while it is somewhat blurred, and cannot be said to be a cross, strictly speaking, still we think it shows an attempt on the part of the voter to make such a mark, and was therefore properly counted. But if it were otherwise, the result which we reach upon the whole record would not be changed, because on one of those counted for Miss White the mark in the Republican circle is like this:

. Certainly there is no more reason for

saying that one of these characters was intended for a cross than the other. We think

they were both properly counted. On three of the tickets counted for Miss White a cross was made in the Republican circle, but on one of them the name "R. W. Orr" and on the other two the name "Robert W. Orr" was written under the name "Nina S. White," and a cross made in the square opposite, but extending somewhat below her name. It would seem that the voter in each of these cases intended to vote the Republican ticket, except for Miss White, but to vote for Orr as against her. If the cross in the square opposite the name "White" had been made directly opposite that of "Orr," the vote would, under the provisions of the statute and our recent decision in *Sanner v. Patton* (Ill. Sup.) 40 N. E. 290, have been a regular vote for Orr. We are, however, of the opinion that it is, to say the least, uncertain from these ballots which of the candidates the voter intended to vote for, and therefore, under section 26, supra, they should not have been counted for either.

Our conclusion, then, is that, in any view of the case presented, appellee was entitled to his certificate of election, having at least a majority of three votes. The judgment of the county court must therefore be affirmed. It may properly be added that it is the duty of every voter under this law to ascertain and follow the provisions of the statute and the directions of the secretary of state in his instructions sent out with the ballots, and that whenever, through negligence or willfulness, he disregards that duty, he does so at the peril of losing his vote. Affirmed.

(153 Ill. 560)

VAN FRANK et al. v. UNITED STATES
MASONIC BEN. ASS'N.¹

(Supreme Court of Illinois. Nov. 1, 1895.)

MUTUAL BENEFIT INSURANCE—EVIDENCE—ASSESSMENT—RECORD.

1. In an action against a mutual benefit insurance association, its records are prima facie evidence in its favor in respect to the rights of its members. 56 Ill. App. 203, affirmed.

2. Where, by the articles of association, members are assessed according to their ages on the death of a member, a vote of the directors instructing the secretary to levy an assessment on certain named deceased members, and to pay their beneficiaries, constitutes an assessment by the board of directors.

3. The fact that notice of an assessment is mailed before its date does not invalidate the assessment, since that cannot prejudice the members.

4. Statements of a member that he does not intend to pay assessments any longer may be shown in a suit on his membership policy, in connection with proof of his failure to pay subsequent assessments. 56 Ill. App. 203, affirmed.

Appeal from appellate court, Third district.

Assumpsit by Carrie C. Van Frank, in her own behalf, and Robert G. Van Frank and Esther N. Van Frank, minors, by Carrie C. Van Frank, their next friend, against the

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

United States Masonic Benevolent Association of Council Bluffs, Iowa. Defendant obtained judgment, which was affirmed by the appellate court. 56 Ill. App. 203. Plaintiffs appeal. Affirmed.

The appellee, a mutual benefit association organized under the laws of the state of Iowa, with its principal office at Council Bluffs, Iowa, on the 27th day of October, 1890, issued two certificates of membership on the application of T. H. Van Frank, which were payable in case of his death, during the continuance of the contract evidenced by each certificate, to Carrie Van Frank and children, and, in case of death of any of the beneficiaries, to the survivors or the legal representatives of T. H. Van Frank. The association was organized to furnish its members life insurance by means of collection of assessments levied to raise money to pay death losses. By its articles of incorporation, which are its charter, its manner of insuring and paying death benefits is as follows: Applications for membership are received only from Free Masons. These applications are sent to the home office, and, if approved, one or two certificates of membership, providing for the payment of 75 per cent. of an assessment on the members of that division, not, however, exceeding \$2,500 to each certificate, are issued to the applicant. When one or more members of either division die, who is in good standing, and who has paid all previous assessments, the board of directors make an assessment on the members of the division to which the deceased member belonged, and the secretary transmits a notice to each member subject to such assessment, advising him of the amount of the assessment and the time within which the same shall be paid. This notice of the assessment is deemed to be given when deposited in the post office, addressed to the member at his last known post-office address. The members have 30 days within which to pay the assessment; that is, 30 days from the date of the notice of the assessment sent to them by the secretary. If the member does not pay his assessment within such period of 30 days, then his certificate "shall cease and be of no effect." At the end of 90 days, after these proofs of death have been received for which the assessments were levied, computation is made by the officers of the association of the amount collected by means of such assessment; and the association is then to pay to the deceased member 75 per cent. of the amount received of such assessment from the members of the division to which the deceased member belonged, such benefit not to exceed \$2,500 for each certificate. Assessments were made to be due and owing six times a year, on the 1st days of January, March, May, July, September, and November. T. H. Van Frank paid his assessments until the one levied for September 1, 1891. That assessment was made by the directors of the association on August 11, 1891, to be dated

September 1, 1891, on account of the death of the holders of eight certificates. The amount to be paid by Van Frank on that assessment was \$8.80, and a notice dated September 1st was written and mailed August 29th, directed to him at his post-office address at Quincy, Ill., postage prepaid. About the same time, a sheet showing the name of each member residing in Quincy, and the amount of his assessment, was forwarded to P. F. Jasper, teller of the First National Bank, that payment might there be made, and Jasper notified Frank of the receipt of the sheet and the assessment. Neither that nor any subsequent assessments were paid by Van Frank. The latter told Jasper "the assessments were getting to heavy for him, and he had concluded to drop it." On April 16, 1892, the assured was accidentally drowned, and suit was brought on the two certificates of membership, and on trial a verdict and judgment were entered for the defendant. That judgment was affirmed on appeal to the appellate court of the Third district, and this appeal is prosecuted.

J. C. Broady and J. F. Carrott, for appellants. Clark Varnum, for appellee.

PHILLIPS, J. (after stating the facts). Appellant contends there was not evidence showing the death of the persons holding the eight certificates, the assessment for which Van Frank failed to pay, and hence the association has shown no necessity for making an assessment, and in the absence of such necessity, if any was made, it would be void. The record of the association is *prima facie* evidence in respect to the rights of its members, and it is not necessary to prove the death of members or the fact of membership, to authorize a call for assessment, otherwise than by a copy of the record of the board of directors. In *Bagley v. Grand Lodge*, 131 Ill. 498, 22 N. E. 487, it was held: "He being a member of the association, the records made by it were evidence against him. * * * If the theory of the plaintiff is correct, and it is required of the defendant to establish in the first instance, otherwise than by its record, and by direct and affirmative testimony, all the conditions precedent to the call of the assessment, then the burden would be imposed upon it of producing the witnesses to prove the death of every member who had died since the incorporation of the order whose beneficiary certificate had been paid, and that every such member was in good standing when he died, and also of showing every dollar paid into the beneficiary fund and paid out of that fund during the same period of time. All this would be necessary in order to show what moneys had been received, and what payments had been made, by reason of which the beneficiary fund has fallen below \$2,000, and a new assessment thereby justified, under the laws and regulations of the order."

It is then urged that the record fails to show an assessment was in fact made. The evidence shows a meeting held at the office of the association on August 11, 1891, by the board of directors, when, on motion, the secretary was instructed to levy an assessment September 1, 1891, for the following deceased members (naming those holding the eight certificates), and pay their beneficiaries. By article 18 of the association, members were assessed according to their ages upon the death of a member of a division, and the action of the board sufficiently determined the assessment, as the article provided the amount of the assessment according to age on each surviving member of that division. That resolution, in connection with the article, amounted to an assessment by the board of directors.

By the membership certificate it appears that the assessments were to be issued bi-monthly, commencing with January 1st. Notice of the assessment of August 11th was mailed August 29th, the notice bearing date September 1st. It is urged, because of this fact appearing in evidence, the assessment is void. The validity of the assessment did not depend on the date of mailing the notice, nor on the date of the notice. The right to have notice of the assessment existed in the assured, which notice must be given in the manner provided by the articles of association and the certificate of membership. Notice of the bi-monthly assessment is not necessarily mailed as of the first of the month, as article 19 of the association provides: "Immediately after such assessment is made, the secretary shall transmit by mail to each member subject thereto a notice," etc. The mailing notice before the 1st September, dated of that date, was authorized by the articles of association, and could not prejudice the assured, but was for his benefit and advantage.

Error is assigned in permitting the witness Jasper to testify to a conversation with Van Frank, the assured, in which he testified that, after he had notified Van Frank of receiving the sheet with names of members and amount of assessment, the latter replied the assessment was getting too heavy for him, and he had concluded to drop it. The undertaking on the part of the assured was that he was to pay his assessments or lose the benefit of membership. He could change the beneficiary at pleasure, as provided by article 23 of the association; pay assessments or not, as he chose. It was in the power of the assured to deprive the beneficiary of any interest, and his declarations that he no longer intended to pay assessments, when shown in connection with the fact that he failed to pay an assessment within the time required, whereby the policy lapsed, was competent evidence. *Hansen v. Supreme Lodge*, 140 Ill. 301, 29 N. E. 1121.

Twenty-two instructions were asked for plaintiff; ten were given. To enter into a discussion of all these refused instructions could subserve no useful purpose. We have care-

fully examined these refused instructions, and hold there was not error in refusing to give the same; nor was there reversible error in giving instructions for the defendant. That no recovery could be had by plaintiffs was found by the appellate court on the facts, and the evidence clearly sustains the judgment of that court. We find no error in the admission or exclusion of evidence, nor in refusing instructions asked by plaintiffs. There is no reversible error in instructions given for defendant. The judgment of the appellate court of the Third district is affirmed. Affirmed.

CARTER, J., having been of counsel in the case on the trial in the trial court, took no part in the decision of the case in this court.

(158 Ill. 567)

WILSON et al. v. WILSON et al.¹

(Supreme Court of Illinois. Nov. 1, 1895.)

DEED—DELIVERY—EVIDENCE.

A man executed a deed conveying land to his children, and gave it to one of them, telling her to keep it, and that, if he never called for it, she must put it on record at his death. He remained in possession of the land till his death, mortgaged it, offered it for sale, and exercised others acts of ownership over it. The deed remained in the daughter's hands, and was not recorded till after his death. *Held*, that there was no effectual delivery of the deed.

Appeal from circuit court, McDonough county; Charles J. Scofield, Judge.

Bill by William Wilson and others against Samuel Wilson and others. Defendants obtained a decree. Complainants appeal. Modified.

Agnew & Vose, for appellants. Sherman & Tunncliffe, for appellees.

BAKER, J. William Wilson and others filed their bill, and afterwards their amended bill, against Samuel Wilson and others, to set aside a deed to and for partition of certain lands described in the bill, derived from a common ancestor, Samuel Wilson, who is referred to in the record as "Col. Wilson." The bill named one O. F. Piper also as a party defendant. The defendants answered, Piper filing a separate answer, claiming liens on the land in controversy represented by two different mortgages. He also filed his cross bill praying foreclosure of the same. Upon a hearing before the chancellor upon the amended and cross bills, answers, replications, exhibits, and proofs, a decree was entered dismissing the complainants' bill and amendment thereto for want of equity, and ordering foreclosure of the mortgages in accordance with the prayer of the cross bill. To reverse that decree the complainants prosecute this appeal.

No question is made of the justice of that

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

part of the decree foreclosing the mortgage held by O. F. Piper. The complaint is that the court below erred in not decreeing partition of the lands in controversy in accordance with the prayer of the original and amended bills. And the "bone of contention" is a deed made by Col. Wilson, purporting to convey said lands to three of his children, Lizzie Elson, Ed. and Samuel Wilson, defendants herein, and claimed by them to have been delivered. Complainants deny that the deed was ever delivered, and upon the question of delivery rests the decision of this case. The undisputed facts in the case are that on September 2, 1889, Col. Wilson was the owner of a large farm, situated in McDonough county; that on said day he made and acknowledged a deed purporting to be an absolute and unconditional conveyance of said land to the defendants Lizzie, Ed., and Samuel, and shortly thereafter handed the same to said Lizzie, in whose possession it has remained ever since; that said deed was never recorded until the day following the death of the grantor, who died intestate, November 30, 1893, and left surviving him the complainants and the defendants Lizzie, Ed., and Samuel, his only heirs at law. At the hearing a large number of witnesses were examined, most of whom were put upon the stand for the purpose of disproving on the one side, and on the other of establishing, the fact of delivery of the deed in controversy. Lizzie Elson and Samuel Wilson were permitted to testify over the objection of complainants. This was error. Complainants sue as the heirs of their deceased father, whose title is here disputed; and the defendants, seeking to disprove such title, were therefore not competent witnesses. *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796.

Disregarding such of the testimony as was incompetent, a clear preponderance of the evidence shows that Col. Wilson always treated the land in question as his own, as well subsequent as prior to the alleged delivery of the said deed. The land remained on record as his until after his death, up to which time he paid the taxes thereon with his own money. At different times subsequent to said alleged delivery he made repairs on the premises, leased the land to tenants, collected rents for his own use, and advertised the land for sale in a public newspaper. And on March 1, 1890, he made and delivered to O. F. Piper a mortgage deed thereon to secure a loan of \$500. All of these acts were done with the knowledge and acquiescence of the defendants. The evidence further shows that one of said leases was drawn up by defendant Samuel Wilson, and signed by him as agent for his father, who was named therein as owner and lessor. The defendants always spoke of the land as their father's, and so treated it. In a reply in suit wherein Col. Wilson was plaintiff, tried in September, 1891, Samuel Wilson

swore that this land belonged to his father, and that he and his brother Ed. were his father's tenants. There also appears in evidence the following letter, written by defendant Lizzie Elson, and mailed by her to complainant Alice M. Luck: "Peoria, Ill., Feb. 28, 1894. Dear Alice: Your letter was received to-day noon. * * * I have had that deed in my possession for some time. Father gave it to me, and told me to keep it, and, if he never called for it,—which he never did,—that at his death I must have it put on record. He saw the deed shortly before he went down to Jim's. He was well then, and it was still his desire that I should keep the deed. It is not likely he would change his mind in so short a time. * * * Lizzie." Such a state of facts is not at all consistent with the claim that Col. Wilson delivered this deed to the defendants. The mere placing of the deed in the hands of one of the grantees did not of itself necessarily constitute a delivery. In such a case the inquiry is, what was the intention of the parties at the time? and that intention, when ascertained, must govern. *Jordan v. Davis*, 108 Ill. 386; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Oliver v. Oliver*, 149 Ill. 542, 36 N. E. 955. It seems clear that this deed was placed by her father in the hands of Lizzie Elson with the mutual understanding that if he at any time desired to withdraw it she should return it to him, but that "if he never called for it" she should, at his death, have it recorded. In other words, there was no intention, at the time, to convey a present, absolute title to the defendants, but the intention was that the deed should take effect at the grantor's death, and vest the title in the defendants, provided he died without having recalled the deed. There was in no sense an attempt to deliver to the grantees in escrow, as contended by counsel for the defendants, but merely a transfer of the possession of the deed to one of the grantees; the grantor at the time, however, reserving a future control over it. To constitute delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. A deed for an interest in land must take effect upon its execution and delivery, or not at all. *Bovee v. Hinde*, *supra*; *Cline v. Jones*, 111 Ill. 563; *Stinson v. Anderson*, 96 Ill. 373. We think the mortgaging of the land by Col. Wilson subsequent to his placing the deed in the custody of Lizzie Elson, his offering the land for sale, and exercising the other acts of ownership over it, heretofore mentioned, were sufficient to constitute a withdrawal of the deed. *Stinson v. Anderson*, *supra*. But, even if they were not, the deed is nevertheless void, for it was not to take effect until the death of the grantor. That was an attempt to make a testamentary disposition of property without complying with the statute of wills. *Cline v. Jones*, *supra*. The circuit court er-

ed in dismissing the complainants' original and amended bills. The decree is therefore reversed, and the cause remanded to that court, with directions to enter a decree in accordance with the prayer of said bill. Reversed in part, and in part affirmed.

(158 Ill. 431)

ORR v. NATIONAL FIRE INS. CO.¹

(Supreme Court of Illinois. Nov. 1, 1895.)

Appeal from appellate court, Third district. Assumpsit by Abner R. Orr against the National Fire Insurance Company. Plaintiff obtained judgment, which was reversed by the appellate court. 56 Ill. App. 627. Plaintiff appeals. Affirmed.

Calhoun & Steely, for appellant. Thos. Bates and Lawrence & Lawrence, for appellee.

PER CURIAM. The questions involved in this case are the same as those presented and decided in *Orr v. Insurance Co.* (in which an opinion was filed at the present term of this court) 41 N. E. 854. The reasons given in the opinion for affirming the judgment in that case are equally applicable to this, and need not be repeated here. The judgment of the appellate court will be affirmed.

(158 Ill. 600)

GUILFOIL v. ARTHUR et al.¹

(Supreme Court of Illinois. Nov. 1, 1895.)

TRUSTS—CHARITIES—EQUITY—PARTIES—ESTOPPEL.

1. A deed conveyed land in trust for the "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," an unincorporated association, and directed that the grantees should hold the land "for said widows and orphans of the members" of such brotherhood, under regulations made by it, "provided that the brotherhood may use the property or dispose of it for any charitable purpose, for the use of said widows and orphans." Held, that the trust thereby created, being a charitable one, was not void for uncertainty.

2. Where the trustee of a trust that is subject to the regulations of an association ignores the terms of the trust deed, a court of equity has jurisdiction to remove him, and appoint a new trustee, at the suit of the individual members of a committee appointed by the association to look after such trust, since they may sue for the benefit of all the numerous beneficiaries.

3. A trustee who has accepted a deed conveying land to him in trust, and has taken possession of the land, is estopped to allege that the trust is invalid because the grantor's title was obtained illegally.

Appeal from circuit court, Coles county; Francis M. Wright, Judge.

Bill by P. M. Arthur and others against John G. Guilfoil. Complainants obtained a decree. Defendant appeals. Affirmed.

This was a bill in equity brought by P. M. Arthur and others, grand officers of the Grand International Brotherhood of Locomotive Engineers, against John H. Guilfoil. It is alleged, in substance, in the bill, among other things, that certain real estate in Coles county, Ill., was conveyed by deed on August 2, 1886, by Mary J. Mitten to John H. Guilfoil, in

trust for the widows and orphans of deceased members of the Brotherhood of Locomotive Engineers, and under such rules and regulations as shall be provided by the brotherhood; that the rental value of said property is \$1,000 per year over and above taxes, repairs, etc.; that John H. Guilfoil entered upon possession of said property immediately after such conveyance, with his family; that he has received the uses, rents, and profits thereof, and converted them to his own use; that he refuses to account to the officers of said brotherhood for such rents, or any part thereof; that Guilfoil, as such trustee, has mismanaged said estate, is committing waste thereon, and that he is insolvent,—and prays that he may be removed as such trustee; that a trustee be appointed by the court to take charge of said property; that an account be taken of the rents and profits received by Guilfoil from said estate, and a decree therefor, etc. The defendant put in an answer to the bill, in which he denies any such organization as that of the Grand International Brotherhood of Locomotive Engineers; denies that orators hold positions in such organization as alleged; denies that he was bound by the by-laws and constitution of such organization; that any such organization existed; admits possession of said property, but denies that he holds possession as trustee for such organization; admits that Mary J. Mitten conveyed said property to him August 2, 1886, and denies that orators have any interest in said premises conveyed in any manner by virtue of said conveyance, and denies that he has any personal property, etc.; denies that such organization accepted said property, and denies that he has ever received property and money as alleged; denies the power of such organization to affect said property or his interest by resolution, etc. It is also set up in the answer that the property originally belonged to one Nixon; that he and others formed a lottery scheme; that the farm was put in to be drawn; that Mary J. Mitten drew the farm, and conveyed it to defendant. On the hearing the court found the allegations of bill true; that said Grand International Brotherhood of Locomotive Engineers is an organized body, with constitution and by-laws, etc. A decree was rendered removing John Guilfoil as trustee, and appointing William Burgess trustee of the said property, etc., for the uses and purposes, etc., with bond at \$20,000; orders and adjudges that John Guilfoil pay to said William Burgess, as trustee, \$3,652, as found by the court to be due from him; that said Guilfoil deliver up possession of said premises to said William Burgess, and that John Guilfoil, within 20 days, execute and deliver to said Burgess a proper and sufficient conveyance of said premises, and in default thereof that the master make such deed; that, in default of the payment of said \$3,652 by said Guilfoil, Burgess proceed to collect the same, etc.; that, upon receiving possession of said property, said Burgess proceed to advertise

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

and sell said property at public sale, and bring proceeds into court.

A. J. Fryer and J. W. Craig, for appellant.
Horace S. Clark, for appellees.

CRAIG, J. (after stating the facts). There is no substantial controversy in regard to the facts in this case. On the 2d day of August, 1886, Mary J. Mitten, who held the legal title to certain lands in Coles county, executed and delivered to the defendant, John H. Guilfoil, a deed conveying the lands to him in trust. The deed was as follows: "This indenture witnesseth: That Mary J. Mitten, a widow, of Marion county and state of Indiana, conveys to John H. Guilfoil, as trustee in trust for the widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers, as hereinafter provided for, in consideration of the sum of twelve thousand dollars, the following real estate in Coles county, in the state of Illinois, to wit: Northwest quarter of section twelve (12), town twelve (12), range seven (7) east of the 3d P. M.; also all that part of the north half of the northeast quarter of section twelve (12) which lies west of the right of way of Illinois Central Railroad; also that part of the southwest of the southeast quarter of said section twelve (12) which lies west of the right of way of said railroad; also all that part of the southeast quarter of section one (1), town twelve (12), range seven (7), which lies west of the said right of way of said railroad,—subject to tax and assessment of A. D. 1886. Said Guilfoil to hold said property for said widows and orphans of the members of the Brotherhood of Locomotive Engineers, under such rules and regulations as shall be provided by the brotherhood; provided that the brotherhood may use the property or dispose of it for any charitable purpose for the use of said widows and orphans, and provided said Guilfoil shall, so long as he acts as trustee, receive any reasonable pay as such trustee. In witness whereof, the said Mary J. Mitten hereby waives homestead interest in the same, has hereto set her hand and seal, this 2d day of August, 1886."

Guilfoil entered into possession of the lands conveyed under the deed. He has received the rents and profits ever since, but he has failed to account for the rents, and he has suffered the property to run down. The Brotherhood of Locomotive Engineers, by resolutions adopted, accepted the conveyance for the uses and purposes named in the deed, but Guilfoil has absolutely refused to hold and manage the property as contemplated by the deed, or as requested by the rules and regulations adopted by the brotherhood. Indeed, he has ignored the trust, and holds the property in defiance of the terms and conditions of the deed upon which he secured it. Under such circumstances, was the decree removing Guilfoil as trustee authorized, or was it erroneous? Where lands are conveyed in trust, and the

trustee enters into possession of the property under the deed, it is a plain proposition that he is bound to observe the terms and conditions of the instrument under which he receives a conveyance of the property; and if he fails to discharge his duty as trustee, and attempts to divert the property to a use not contemplated by the deed, or appropriates it to his own use, a court of equity will remove him, and appoint a trustee who will carry out the trust as contemplated by the instrument under which it was created. This rule is so familiar and so well understood that it will not be necessary to cite anything to sustain it. But it is said in argument that the brotherhood is not a corporate body, and cannot sue or be sued, and, having no power to sue or be sued, it cannot authorize any of its members or officers to bring this action, and hence the bill cannot be maintained by complainants. The brotherhood is an organized body, with a constitution and by-laws, but it was never incorporated. At common law a voluntary association not incorporated cannot sue or be sued, but this action was not brought in the name of a voluntary association, and the rule excluding such associations from suing or being sued has no application in this case. It is a general rule, and one well understood, that all persons interested in the subject-matter of the litigation should be made parties complainant or defendant. But there are exceptions to this general rule. In section 97, Story, Eq. Pl. in speaking of the subject, the author says: "The most usual cases arranging themselves under the head of exceptions are (1) where the question is one of a common or general interest, and one or more may sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, * * * and it is impracticable to bring them all before the court." In section 107, in the discussion of the third class of cases, where the persons in interest are numerous, it is said: "As there is privity of interest, the court will allow a bill to be brought by some of the parties, on behalf of themselves and of all the others, taking care that there shall be due representation of all substantial interests before the court." In *Beatty v. Kurtz*, 2 Pet. 584, where a bill was brought by and in the name of a committee of a voluntary society regularly appointed for the purpose of protecting certain property, it was held that complainants were entitled to maintain the bill. It is there said: "If they [the complainants] are proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction, to prevent a disturbance of that possession, under circum-

stances like those stated in the bill, we do not see any serious objection to their right to maintain the suits." See, also, *Mears v. Moulton*, 30 Md. 145; *Phipps v. Jones*, 20 Pa. St. 263; 2 Beach, Priv. Corp. §§ 901, 902; *Birmingham v. Gallagher*, 112 Mass. 190; *Lloyd v. Loaring*, 6 Ves. 773. Here, as has been seen, the real estate was conveyed in trust for the widows and orphans of the deceased members of the Brotherhood of Locomotive Engineers, with power conferred on the brotherhood to dispose of the property for the uses and purposes specified. The organization appointed a committee to look after the property, with authority to employ counsel, and sell the lands, etc. This committee instituted suit in the name of the complainants, officers of the Brotherhood of Locomotive Engineers, to enforce the trust, and, the action of the committee having been reported to the association, the institution of the suit in the names of the complainants was ratified and confirmed. It thus appears that the action was brought in the names of the complainants, for and in behalf of the members of the organization, the Brotherhood of Locomotive Engineers. From the allegations of the bill, and from the evidence introduced in its support, it is plain that the complainants are not suing in their own interest; but, on the other hand, the sole object of the bill is to enforce the trust and save the property involved for the members of the brotherhood. The bill might have been brought in the names of all the members of the Brotherhood of Locomotive Engineers, as persons jointly interested in the property. But where the members of an unorganized association are numerous, as is the case here, the action may be brought in the name of a portion of the members, who sue for themselves and in behalf of all the other members, or, as was done in *Beatty v. Kurtz*, supra, the action may be maintained in the name of a committee of persons regularly appointed by the organization. The allegations of the bill are not as specific and definite in regard to the capacity in which the complainants sue, if tested by a technical rule, as they should be; but, when all the allegations of the bill and amended bill are considered, we think the capacity in which the complainants sue sufficiently appears.

It is next claimed that the trust is too vague and uncertain to be enforced. In *Perry on Trusts* it is said: "It is immaterial how uncertain, indefinite, and vague the cestui que trust or final beneficiaries of a charitable use, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed." Here we apprehend that the trustee named in the deed, and the brotherhood, under the authority conferred by the deed, could determine with certainty the persons entitled to share in the proceeds of the property conveyed. Indeed, the possession in the deed

objected to is not as objectionable as the one sustained by the court in *Society v. England*, 106 Ill. 127.

It is next claimed that a court of equity will not grant the relief claimed, on the ground that the property was drawn in a lottery, which was illegal and contrary to law. The fact that this property may have been disposed of in a lottery before it was conveyed by Mary J. Mitten to John H. Guilfoil on August 2, 1886, in trust does not affect the deed or the rights created by that instrument. How or of whom Mary J. Mitten acquired the title to that property is a matter which does not enter into this controversy. She having conveyed it to Guilfoil in trust, he, having accepted the deed, and assumed the trust, is estopped by the recitals in the deed of conveyance to him, and whatever rights legitimately arise upon the facts admitted by these recitals may be asserted. *Byrne v. Morehouse*, 22 Ill. 603; *Pinckard v. Milwine*, 76 Ill. 453; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430. It is a familiar rule of law that a trustee who enters into possession of lands cannot claim adversely to the title under which he enters, and that the principle of estoppel applies to the relation between trustee and cestui que trust, and prevents the former from repudiating the contract by virtue of which he is in possession. *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Willison v. Watkins*, 3 Pet. 43. The appellant, Guilfoil, accepted the deed of trust, entered into the possession of the property under it, and by these acts he is estopped from charging its invalidity. *Albretch v. Wolf*, 58 Ill. 189. He cannot go behind the deed after accepting its provisions and occupying the land under it. When called upon to accept, he has no right to go behind the deed, and call upon the court to inquire whether his grantor's hands are clean or not. That is a matter in which he is in no way concerned. If Mrs. Mitten had acquired the land in bad faith or illegally, and the brotherhood had aided her in thus obtaining the land, it was the duty of appellant to object when the trust was offered to him. He had no right to remain silent then, and, when called upon to account, attempt to hold the lands himself, and call in question the prior acts of his grantor, or the person or persons for whose use the property was conveyed. If a plaintiff needs the aid of his illegal transaction in any respect to support his case, he cannot be heard. But here the case of the complainants is in no way dependent upon the original unlawful transaction in regard to the lottery, but is wholly based upon the trust created by the deed from Mary J. Mitten to Guilfoil. A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. *Armstrong v. Toler*, 11 Wheat. 258.

In our opinion the decree for \$3,652, for the use and profits of the land, is amply sustained by the testimony of William Bird, M. C. Nixon, and Lewis L. Lehman, and the other evidence in the record, and this without taking into account the use, rents, or profits prior to the filing of the bill of complaint on March 13, 1890. The decree of the circuit court will be affirmed. Affirmed.

(158 Ill. 396)

BALTIMORE & O. R. CO. v. STANLEY.¹
(Supreme Court of Illinois. Oct. 11, 1895.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—INSTRUCTIONS.

Where the declaration alleges that the accident occurred at a certain public crossing, and the court of its own motion instructs the jury that plaintiff cannot recover unless it did occur at that place, it is proper to refuse as unnecessary instructions as to the law governing accidents at places other than crossings.

Appeal from appellate court, First district.

Action on the case by William M. Stanley, administrator, against the Baltimore & Ohio Railroad Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 215. Defendant appeals. Affirmed.

E. R. Jewett, for appellant. Jesse Cox, for appellee.

CARTER, J. This was an action brought by William M. Stanley, administrator of the estate of Robert Waade, deceased, against the Baltimore & Ohio Railroad Company, to recover damages arising from the death of Waade, caused, as alleged, by the negligence of the railroad company in running one of its trains over and across Sixty-Seventh street in the town of Hyde Park on February 20, 1888, whereby the deceased, in walking on the highway over the tracks of the railroad, was struck by a passenger train, and killed. On the first trial of the cause the jury failed to agree, but on the second trial the plaintiff recovered a judgment for \$5,000, which, on appeal, was affirmed in the appellate court.

The refusal of the trial court to exclude the evidence from the jury, and to direct a verdict for the defendant, upon motion of defendant's counsel, is regarded by this court as proper under the rule laid down in *Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773; *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Frazer v. Howe*, 106 Ill. 563. The court cannot say that the evidence given at the trial, with all the inferences that could justifiably be drawn from it, is so insufficient to support a verdict for the plaintiff that the verdict returned should be set aside. And under the rule as found in the cases cited it is only when such is the case that the court

will be justified in excluding the evidence and directing a verdict for the defendant. On February 20, 1888, when the accident occurred, there were six tracks which crossed Sixty-Seventh street. These tracks were used by three different railroad companies, the Illinois Central, the Michigan Central, and the Baltimore & Ohio. On the night of the accident the Illinois Central South Chicago suburban train was due to pass Sixty-Seventh street at 10:37, and the Baltimore & Ohio passenger train (which it is alleged killed the deceased) was due at 10:49, going east. The deceased, in company with one Julius Mann, came to the crossing from the west, going east. There were two freight trains on the tracks, one going north and the other south. Corcoran, with a team and wagon, had stopped at the west side of the crossing, waiting for the tracks to be cleared so he could cross over. The deceased and Mann saw Corcoran with his team waiting, but concluded they could cross the tracks, and started to do so. Mann succeeded in crossing the railroad in safety, but Waade was killed. It was alleged in the declaration that Waade was killed on the crossing, and evidence was introduced tending to prove that fact. On the other hand, it was contended by the railroad company that the deceased was killed on its right of way, some 800 feet south of Sixty-Seventh street. No person saw the deceased at the time he was struck by the train, and hence the uncertainty in regard to the place where he was struck. The body was found 825 feet south of Sixty-Seventh street, near the switchman's shanty. McCarthy, the switchman, testified that he met the deceased man 350 feet north of his shanty, going south on the right of way. This was only a short time before the deceased was killed, and he was then, if this evidence was true, some 500 feet south of the crossing. The testimony of Julius Mann, Corcoran, and Hermann Mann conflicts with the testimony of McCarthy, the switchman, in this regard. Julius Mann, who was Waade's companion the night of the injury, testified that they passed on the crossing at Sixty-Seventh street, in front of the freight train coming north, and were about to cross another of the tracks to the east of this point, with Waade a few steps in front of Mann, when the train came from the north which is claimed to have struck Waade, and Waade disappeared. Corcoran and Hermann Mann saw Julius Mann and the deceased enter upon the tracks at the Sixty-Seventh street crossing. This controversy of fact as to the point where deceased was struck by the train has been determined adversely to the appellant by the jury and the appellate court, and it is not within our province to reverse their finding in this respect. *Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773. The declaration of the appellee alleges that the deceased was struck and killed at the railroad crossing at Sixty-Seventh street, and no allegation is contained in

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

either count of the declaration that the deceased was injured at any other place than at the public crossing at Sixty-Seventh street. The jury were instructed that it was their duty "to determine from the evidence where the deceased was when he was struck. The plaintiff alleges that the deceased was struck at Sixty-Seventh street, while passing along Sixty-Seventh street over and across the railroad tracks, and this is denied by the defendant company. Unless from the evidence you believe that deceased was struck by the engine of the defendant while deceased was passing along Sixty-Seventh street over and across the railroad tracks, you must find the defendant not guilty; or, in other words, if from the evidence you believe that the deceased was struck and killed by an engine of the defendant, and further believe from the evidence that deceased when he was struck by such engine was not passing along Sixty-Seventh street, but was on the railroad track several hundred feet from Sixty-Seventh street, then you must find that the evidence does not support the allegation of plaintiff that deceased was struck while passing along Sixty-Seventh street, and, unless you find that that allegation has been proved, you must find the defendant not guilty." This instruction was given by the court on its own motion, and is complained of by the appellant because it was substituted by the court in the place of instructions asked to be given by appellant instructing the jury that the defendant company was not liable in case the jury found from the evidence that the deceased was struck and killed upon the right of way of the defendant at a place other than a public crossing. The instruction given by the court embodied the theory upon which the plaintiff claimed a right of recovery, and announced very clearly the law applicable to such theory, and directed the jury in a plain, strong statement of the law that plaintiff could not recover at all unless it was shown that it was at the public crossing where plaintiff's intestate was struck by defendant's train. The two instructions offered by defendant's counsel and denied by the court were predicated on the principle of law that a person who is or may be a trespasser on the tracks or right of way of a railroad company cannot recover unless it is shown by the testimony that the injury was willfully or wantonly inflicted. But in this case the claim of appellee limited the right of recovery to the injury received by Robert Waade at the public highway crossing, and instructions concerning the willful or wanton conduct of the defendant company at a place other than a public crossing were not applicable, and the refusal of the court to give them did not injure the company in its defense, and was not error. The instruction given was broader and stronger in its scope and effect for the company than those it asked the court to give, and the refusal to give which it insisted was error. Finding

no error in the record, the judgment of the appellate court will be affirmed. Judgment affirmed.

(153 Ill. 386)

SILVA v. HOPKINSON et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

CONSTRUCTION OF WILL—RULE IN SHELLEY'S CASE.

A testator devised land to his two daughters, "to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either [daughter] the surviving one to inherit the portion of the deceased sister, if she dies without issue." Held, that under the rule in Shelley's Case the two daughters took an estate in fee.

Appeal from superior court, Cook county; W. G. Ewing, Judge.

Bill by Evangeline S. Hopkinson and Emma H. Bowers against Frank P. Silva. Complainants obtained a decree. Defendant appeals. Affirmed.

F. S. Moffett, for appellant. Lackner & Butz, for appellees.

WILKIN, J. Frank P. Silva, the appellant, on January 23, 1893, entered into a contract with Evangeline S. Hopkinson and Emma H. Bowers, appellees, to purchase from them certain real estate in Chicago,—lot 9 of the subdivision of lots 15, 21, 22, 23, and 24 of Hopkinson's resubdivision of lots 4, 8, 9, and 10 in block 13 of the Blue Island Land & Building Company's subdivision, known as "Washington Heights," as said subdivision is recorded in the recorder's office of Cook county. Silva, upon examining the abstract of title to the property, refused to comply with the contract, on the ground that the fourth clause of the will of William Hopkinson, deceased, by virtue of which appellees claim title to the premises, did not vest the fee absolutely in them, and therefore they could not convey a perfect title to him. Appellees thereupon filed their bill in the superior court of Cook county to compel a specific performance of the contract. A demurrer was interposed to the bill on the grounds above set forth, which was overruled. Defendant electing to stand by his demurrer, the court entered a decree in accordance with the prayer of the bill, and the cause is brought to this court on appeal.

The fourth clause of said will is as follows: "After the death of my said wife, Jane Hopkinson, I give and devise and bequeath all of my estate, both real and personal, of which I may be possessed, with all or any right, title, or interest in lands or personal property I may acquire after the date of this will, to my only two children, Evangeline Sarah Hop-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

kinson and Emma Jane Hopkinson, to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then and in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either one of my daughters the surviving one to inherit the portion of the deceased sister, if she dies without issue." Appellant insists that the title in appellees is subject to be defeated in the event of their dying without issue. Stopping with the sentence, "and to their lawful heirs," the devise to the daughters is an estate of freehold, with a gift to their lawful heirs in fee; and under the rule in *Shelley's Case* the word "heirs" is one of limitation of the estate, and not of purchase, and the daughters would take the fee. *Baker v. Scott*, 62 Ill. 87; *Riggin v. Love*, 72 Ill. 553; *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. 868; *Hageman v. Hageman*, 129 Ill. 168, 21 N. E. 814; *Fowler v. Black*, 136 Ill. 363, 26 N. E. 576; *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974. But counsel for appellant says, in determining what construction shall be put upon this will, we must ascertain the intention of the testator, as he has in and by his will expressed it. This is a frequent objection to the rule referred to, but no principle of law is better established than that, although the testator did intend the first taker to have but a life estate, yet, if the technical words are used, that intention, be it ever so clearly expressed, will be defeated, and the first devisee allowed to take the whole estate. *Carpenter v. Van Olinder*, *Fowler v. Black*, and *Vangieson v. Henderson*, *supra*. The only method in which an instrument employing the word "heirs" can be shown not to be within the rule is by showing that the word was not employed in its strict legal sense. *Carpenter v. Van Olinder*, *supra*. And therefore, unless the subsequent language in the foregoing clause of the will: "But, in the event of their death without issue, then and in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of one of my daughters the surviving one to inherit the portion of the deceased sister, if she dies without issue,"—shows that the testator used the words "lawful heirs" in some other than the technical sense, the question of intention does not arise in the case. It is also well settled that the words must be given their legal effect, even though the subsequent words are inconsistent therewith, unless they make it clear that they were not so used. *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. 63, and authorities there cited. The subsequent language in this will falls far short of making it clear that the testator used the word "heirs" in other than their legal sense. There would seem to be, from the whole language of the clause, no greater reason for saying

that by the word "heirs" he meant issue than for saying that by the subsequent word "issue" he meant heirs. We are of opinion then that the devise is within the rule, and that a fee-simple title is vested in appellees. This disposes of the contention that by the clause of the will in question an executory devise was made. The daughters, taking the fee, have the absolute power of disposition, and no executory devise can in such case exist. *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751. The judgment of the superior court will be affirmed. Affirmed.

(157 Ill. 499)

CUNNINGHAM et al. v. CITY OF PEORIA.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—CONFLICTING PETITIONS.

1. Where two petitions by property owners for the improvement of a certain street are presented to the city council, one asking for an asphalt, and the other for a brick, pavement, the council may ignore the petition having the fewer signatures, and pass an ordinance in conformity with the other petition.

2. A paving ordinance which provides that the surface of the concrete base on which the pavement is to rest shall be parallel with the surface of the finished pavement does not mean that such base shall be on a level with such surface.

3. Where the ordinance, by its own terms, fully specifies the nature, character, and locality of the proposed improvement, the fact that it also refers to documents on file in the department of public works does not render it invalid.

4. An ordinance which provides that a street pavement shall be paid for by special taxation "upon the lots, blocks, tracts, or parcels of land contiguous to the improvement," does not include the intersecting streets among the property to be taxed.

Appeal from Peoria county court; Samuel D. Wead, Judge.

Petition by the city of Peoria for confirmation of a special tax. F. O. Cunningham and others filed objections, which were overruled, and they appeal. Affirmed.

W. T. Whiting, for appellants. W. T. Irwin, for appellee.

BAILEY, J. This is an appeal by certain property owners from the judgment of the county court of Peoria county, confirming a special tax, levied in pursuance of an ordinance of the city of Peoria, to pay the expense of paving Jefferson avenue, in that city, from the southwesterly line of Wayne street to the southwesterly line of Cornhill street. The ordinance under which the special tax was levied is as follows:

"Section 1. That North Jefferson avenue, in the city of Peoria, Illinois, between the southwesterly line of Wayne street and southwesterly line of Cornhill street in said city, be, and the same is hereby, ordered improved in the following manner, that is to say: Said avenue, between the points above designated

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

on each side of the roadway thereof, between the street intersections on the line of said avenue hereby ordered improved between the points above named, and around the corners of each of said street intersections to the curb lines on each side of each of said intersecting streets, and to a point opposite the lot line of the lots abutting upon said avenue hereby ordered improved, shall be curbed with Berea sandstone curbing, or other stone curbing of equally as good quality, said curbing to be not less than three (3) feet long, eighteen (18) inches in depth, and four (4) inches in thickness, said curbing to be firmly set in such manner as to leave the roadway in the center of said avenue, to be improved, the full width of forty (40) feet, the top of said curbing, when set, to conform to the established grade of said avenue, and said part of said avenue shall be improved in the manner herein provided for, the full width of forty (40) feet, the whole of said distance between said points above designated. That said avenue shall be paved the whole of said width and distance as above designated, with the best quality of 'hard-burned paving brick.' Before said brick pavement is laid, said part of said avenue to be improved shall be excavated and graded twelve (12) inches below the surface of said pavement when finished. All soft or spongy places in the roadbed of said avenue not affording a solid foundation, and newly-made excavations for trenches or other purposes, shall be well rammed and compacted; the whole of said roadbed then to be thoroughly rolled to insure a solid foundation. Said roadbed thus prepared to be the form the finished pavement shall be when completed. The form of the cross section of said pavement, when completed, shall be an arc of a circle, forming thereby a gutter on each side of said roadway at the curbstone seven (7) inches in depth below the established grade of said avenue; the center of said roadway along said avenue, when completed, being at the same elevation as the top of the curbstone on each side thereof. On the roadbed thus formed shall be placed a bottom layer of concrete six (6) inches in thickness. Said concrete shall be composed of one part (by bulk) of American hydraulic cement; two parts of clean, sharp, well-screened sand, and five parts of broken stone; the sand and cement shall then be thoroughly mixed dry and made into mortar of proper consistence with the least possible amount of water, and thoroughly worked; the broken stone shall be thoroughly cleaned and free from dirt, well-drenched with water, but containing no loose water in the heap, and shall then be added to the mixture. The same shall then be thoroughly mixed and spread upon the roadbed, prepared as above designated, and thoroughly compacted by ramming until free mortar appears upon the surface. The upper surface of said concrete, when thus prepared and placed, shall be exactly parallel with the sur-

face of the pavement when completed. Upon the concrete foundation prepared as above designated there shall be spread a layer of clean, sharp, well-screened sand two (2) inches in thickness. Upon this cushion of sand shall be placed courses of said 'paving brick' upon their edge and crosswise of said street; said brick shall be placed close together in straight even courses, with all joints broken and no brick broken or parts of brick shall be used in any course except when necessary to break joints. Said brick to be so laid shall be 2 inches by 4 inches by 8 inches in size. Upon the surface of said pavement, after it has been laid as herein provided for, there shall be spread a sufficient quantity of clean, dry, well-screened sand to fill all crevices and interstices in said pavement, and well swept into the said crevices and interstices.

"Sec. 2. That the cost of making said improvement as above provided for, including the expense of levying and collecting the same, shall be paid for out of a fund raised by special taxation upon the lots, blocks, tracts, and parcels of land contiguous to said improvement, which said special tax is hereby levied and assessed severally upon the said lots, blocks, tracts, and parcels of land contiguous to said improvement, according to the frontage of said several lots, blocks, tracts, and parcels of land, in accordance with the provisions of article nine (9) of the act of the general assembly of the state of Illinois, entitled 'An act to provide for the incorporation of cities and villages,' approved the 10th day of April, A. D. 1872, and the amendments thereto.

"Sec. 3. That the work and construction of said improvement, the quality and character of the materials used therein, and the grade and finish of said improvement, shall all conform to and comply with the plans, profiles, and specifications for said improvement now on file in the office of the department of public works in the city of Peoria, which are hereby made a part of this ordinance, reference being had thereto for greater certainty; and the work required for the making of said improvement, together with the materials required therefor as provided for herein, shall be performed and supplied under the supervision and direction of the department of public works of the said city of Peoria, and the contract for the carrying out of said improvement, together with the work and materials therefor shall be let to the lowest and best bidder therefor in the manner provided by law.

"Sec. 4. That Edward S. Easton, William L. Slagle, and James R. Conway be, and they are hereby, appointed commissioners to make an estimate of the cost of said improvement, including labor and materials, and all other expenses attending the same, and the cost of making and levying the assessments therefor, and said commissioners shall report their said estimate to this council in writing."

In pursuance of this ordinance the proper petition was presented by the city council to the county court, under which commissioners were appointed, who made and filed their assessment roll. Various property owners interposed objections to the confirmation of the special tax, which were overruled, and judgment was thereupon entered, confirming the assessment roll, and from that judgment this appeal is taken.

The first point made by the appellants is that the ordinance providing for the improvement was illegally passed by the city council over the petition and objections of the property owners whose property fronts on the improvement, and who own a majority of the front feet to be taxed. This objection is based upon the fact appearing in the evidence, that a petition was presented to the city council, praying for the passage of an ordinance providing for the paving of the avenue in question with Trinidad asphalt sheet pavement, while the ordinance actually passed, and under which the tax was levied, provides for paving it with brick. The evidence, however, tends to show that two petitions by property owners in relation to improving the avenue were presented to the city council, one praying to have it paved with asphalt, and the other with brick, and the evidence tends to show that the latter bore the largest number of signatures. We are left to infer from the evidence that the names of some of the property owners appeared on both petitions, and we are unable to find any clear and satisfactory evidence that the petition asking for an asphalt pavement was signed by a majority of the owners of property abutting upon the avenue to be improved. Whatever may have been the duty of the city council, under the provisions of the statute, if only one petition signed by a majority of the property owners had been presented, and that had prayed for an asphalt pavement, it was clearly authorized, under the circumstances proved, to ignore the petition for asphalt pavement, and to grant the prayer of the petition praying for brick pavement.

The next point made is that the ordinance providing for the improvement does not sufficiently specify or describe the nature, character, and locality of the improvement. The fault of description insisted upon grows out of the fact that the ordinance requires the surface of the concrete base, upon which the brick pavement is to rest, to be parallel with the surface of the finished pavement; and counsel seem to suppose that being "parallel with" means "on a level with" the surface of the finished pavement, and it is argued that the superposition of two inches of sand and four inches of brick on top of such roadbed will bring the surface of the finished pavement in the center of the street six inches above the level of the curbstone, rather than on a level with it, as the ordinance provides. Counsel in their brief say

that, in constructing the improvement in conformity with the ordinance, "it will be a physical impossibility to make the surface of the concrete base exactly parallel—that is, on a level—with the surface of the pavement when completed." It is difficult to see how counsel could have fallen into such a misapprehension. "Parallel with the surface of the pavement when completed," does not necessarily mean "on a level with its surface." Here it obviously means that the line of the surface of the concrete bed shall be parallel with, and six inches below, the surface of the line of the pavement when completed; and placing two inches of sand and four inches of brick on such surface only brings the center of the pavement, when completed, up to the level of the curbstone, as provided by the ordinance.

Objection is also made that the ordinance is void because it refers, for greater certainty in the description of the proposed improvement, to the plans and specifications on file in the department of public works of the city of Peoria. It is claimed that, as the statute provides that reference may be made to "maps, plats, plans, profiles, or specifications on file in the office of the proper clerk," reference to such documents on file in any other department of the city government is nugatory. If that is admitted, the consequences contended for would not seem to follow in this case. The ordinance itself, by its own terms, specifies the nature, character, locality, and description of the improvement with sufficient certainty to answer the requirements of the statute; and the fact that the reference to documents on file in the department of public works is nugatory in no wise invalidates the specification of the improvement, which is already sufficiently full and precise.

The next and last point submitted on behalf of the appellants is that the special tax levied under the ordinance by the commissioners was not extended upon all the lots, blocks, tracts, or parcels of land contiguous to the improvement, as contemplated by the ordinance. This is said to be so, because no tax is levied upon the abutting streets. We are disposed to hold that the ordinance, in providing for taxation "upon the lots, blocks, tracts, or parcels of land contiguous to the improvement," did not include, or intend to include, among the property to be taxed, the streets which abut upon or intersect the avenue to be improved. We are unable to see that the terms used are essentially different in their meaning from the words "contiguous property," used in the statute, and it has not been held, so far as we are aware, that an ordinance providing for a special tax upon contiguous property must be construed to include as a part of such property the abutting streets. While it is true, as has been held in some cases, that the land included in abutting streets may, under the proper circumstances, be

made the subject of assessment for local improvements, it will not be presumed that the streets are intended to be included in general specifications which do not in terms include them.

We are of the opinion that none of the points made by the appellants are well taken, and the judgment confirming the assessment will be affirmed. Judgment affirmed.

(158 Ill. 339)

WHIPPLE v. GIBSON.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

EQUITY—PARTIES—QUIETING TITLE.

A purchaser of land had a deed made to a third person for his benefit. Discovering that there was an error in the deed, he had a correct deed made to another grantee, also in trust for him, and caused suit to be brought by such second grantee against the first grantee to quiet title. *Held*, that the suit could not be maintained, since the second grantee was not the real owner of the property.

Appeal from superior court, Cook county; Phillip Stefn, Judge.

Bill by Frances A. Gibson against George C. Whipple, Helen P. Whipple, his wife, Jacob S. Hoffman, E. C. Langheinrt, George H. Bartlett, Theodore C. Bartlett, Charles H. Bradley, and Emerson C. Felton. Complainant obtained a decree. Defendant George C. Whipple appeals. Reversed.

Cutting, Castle & Williams, for appellant. Peck, Miller & Starr, for appellee.

WILKIN, J. E. C. Felton owned No. 18, Union Park Place, in the city of Chicago, the title being in Hiram C. Kittridge, and on March 10, 1887, caused it to be conveyed to Jerome H. Trunkey, taking back an agreement in writing to the effect that the property was held in trust, subject to Felton's order, less any obligations due him at any time before retransferring the same. On March 17, 1888, Trunkey and wife conveyed the same by quitclaim deed to George C. Whipple. About March 15, 1889, Mrs. Christina Hertel owned block 1 in the subdivision of L. C. P. Freer of the W. ½ of the S. E. ¼ of section 33, township 38 N., range 14 E., of the third P. M., in the town of Lake, Cook county, Ill. This property was traded for the Union Park Place property, which Whipple deeded to Mrs. Hertel. At the same time she executed and delivered to Whipple a deed intended to convey said block 1, but which by mistake described it as being in the "southwest quarter," instead of the "southeast quarter," of section 33, etc. This deed was executed, recorded, and acknowledged March 15, 1889. Felton claims that he continued to be the owner of the Union Park Place lot, Whipple holding it in trust for him, the same as Trunkey had done, and that he made the exchange with Mrs. Hertel, Whipple conveying to her by his

directions, and receiving the deed to block 1 in trust for him, on the same terms as he had held the Union Park Place lot. He afterwards discovered the mistake in the last-named deed, and procured from Mrs. Hertel another, conveying the premises by correct description to Frances A. Gibson. This deed was dated March 14, 1889, but was not acknowledged until August 9, 1889. It was recorded April 15, 1890. On the 10th of January, 1893, this bill was filed in the name of Mrs. Gibson, as complainant, to remove the former deed to Whipple, and certain contracts by him, as clouds upon her title. Whipple answered, denying the complainant's title to the premises, and also filed a cross bill, setting up title thereto in himself, and praying that the mistake in the deed to him be corrected, and his title confirmed. Upon the hearing the court granted the prayer of the original bill, and gave Whipple a lien upon the premises for \$154, and interest from July, 1890, and ordered the complainant to pay the same. The cross bill of Whipple was dismissed for want of equity.

The decree below is manifestly erroneous in granting the relief prayed in the original bill. Nothing is better settled than that a complainant in a bill to remove a cloud upon title must prove his ownership to the property. The evidence in this case shows that Mrs. Gibson is not the real owner of the property in question, and that she neither has nor claims to have any interest in this suit. On the contrary, it is perfectly clear that E. C. Felton is the real party in interest, and that he is simply seeking to use the name of Mrs. Gibson to settle a controversy between himself and George C. Whipple. Felton himself testified: "I purchased the premises in question from Mrs. Hertel. I had it deeded to Mrs. Gibson, because it was nonproductive, speculative property, with the expectation that, if anything did happen to me,—that I should be taken away,—that she should have the property. As between us, it was a gift. I am under obligation to her for many kindnesses, and I intend to give her that property whenever I am through with it; or, if I should be taken away, I want her to have that property. I deeded her the property for that reason. She lives in Denver, Colorado. I took possession of it January 6, 1873, by building wire fence, and posting sign with this writing: 'Gibson, by Felton, Agt.' The deed was made at my suggestion. I made no other deed to Mrs. Gibson. I found that a mistake had been made in a former deed from Mrs. Hertel to Whipple. Then I went and got this deed made from Mrs. Hertel to Mrs. Gibson. No consideration passed to Mrs. Hertel for the deed to Mrs. Gibson. The consideration all passed at the time the first deed to Whipple was made. That deed was never in the control of Mrs. Gibson, nor in her actual possession. I presume I had it in my possession from August, 1889, to April 15, 1890. When I had that deed made, I had found the error in the Whipple deed. I never called Whipple's

¹Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

attention to that fact. I never suggested, in all the talk about the sale, that there was any reason why he couldn't make it; that his deed was defective. He never knew it till he got the abstract. I am the same Felton who was co-complainant in the original bill, frequently mentioned in this case." It is manifest from his testimony that Felton instituted, not only the former suit, but also this one, and that it is for his sole benefit, and not that of Mrs. Gibson. It is also clear, that even if he had taken the second deed from Mrs. Hertel to himself, and filed this bill in his own name, he could not maintain it on his own testimony. He admits that the intention of all parties was to place the title in Whipple by the first deed from Mrs. Hertel, and that the mistake in the description of the property was a mutual one. Whether he consented to that conveyance for the purpose of placing the title in Whipple in trust for himself, as he claims, or to secure Whipple in the payment of indebtedness due him, he had no right to attempt to take advantage of the mistake in the manner he did, and then ask a court of equity to help him carry out his scheme by setting aside the former deed. On his own theory of the case, he has a plain and adequate remedy against Whipple, to compel him to perform his trust. The deed from Mrs. Hertel to Whipple conveyed the equitable title to him, and her subsequent deed to a party having full knowledge of the former conveyance, and the mutual mistake therein, is entitled to no consideration whatever in a court of equity. The original bill should have been dismissed for want of equity.

We cannot say the order dismissing the cross bill was not authorized by the evidence, but we are unable to see why the rights of Felton and Whipple, the real parties to this litigation, may not be adjusted upon the cross bill and answer thereto, especially if the parties are allowed to amend the same. By his own showing, Whipple is not the absolute owner of the property, but holds the title thereto in the nature of a mortgage. He claims that the deed from Trunkey to him for the Union Park Place property was upon the consideration of his surrendering to Felton his promissory note for \$940, and the payment of \$1,500 in money, and he says he at the same time gave Felton an agreement in writing as follows: "Goldy & Zurburg, Real Estate, Renting, and Loan Agency, 111 La Salle St. Chicago, March 16, 1888. I hereby agree to deed the house and lot known as 18 Union Park Place in the city of Chicago to the order of E. C. Felton on or before the first day of May, 1888, on said Felton paying me \$2,500; the above place being the same I received deed of from J. H. Trunkey this day. Dated this 16th day of March, 1888. G. C. Whipple." He also says, speaking of the trade for the property in litigation: "I had been advertising the Union Park Place property a great deal. I wanted to get my money out of it. It wasn't a profitable property, and I had the incum-

brance renewed on it twice. Felton brought in some property to trade for it, but I wasn't satisfied with it. About the last of February, he brought in this 83d street property. I told him I would investigate it, and I did so, and became satisfied it would be a good deal, and told him so. I told him to fetch in his man. He said Mr. Hertel, the son of the owner, was a young fellow, and he said he could handle him a good deal better than I could. I told him to go ahead, and I would make the deal. He brought in a contract on March 1st, and I signed it. Felton wanted to know what he was going to get out of it, and I told him if he would go ahead, take care of this piece of property, pay the taxes on it, see to the whole thing, and try to get a customer as quick as he could for it, after deducting the money which I had paid in, with interest and expenses, we would divide the remainder equally. I did this because my health was poor, and I had a great deal of real estate at the time. Felton said he was satisfied with it. Felton never claimed to be the owner of either piece of property up to this time." Of course all this is denied by Felton, his claim being that he received no consideration whatever from Whipple for the conveyance to him of the Union Park Place property, but that it was simply placed in his name in trust. A controversy of fact so bold and irreconcilable is seldom met with in the consideration of cases, and yet there is testimony in the record tending to support both contentions. If further proceedings are had in the cause, it should be referred to a master to state his conclusion upon the evidence, and either party should be allowed to introduce additional testimony, if he wishes to do so.

The decree below will be reversed, and the cause will be remanded to the superior court, with directions to dismiss the original bill, at the cost of the complainant therein, and for further proceedings upon the cross bill not inconsistent with this opinion. Reversed and remanded.

(157 Ill. 655)

HUGHES et al. v. BELL.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

Where exhibits attached to a bill of exceptions after the judge's signature are identified and referred to in the bill itself, and are stated in the judge's certificate to be attached thereto, the exhibits are to be treated on appeal as being incorporated in the bill of exceptions. 55 Ill. App. 379, reversed.

Appeal from appellate court, First district. Replevin by Ella M. Bell against Eugene A. Hughes and others. Plaintiff obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 379. Defendants appeal. Reversed.

¹Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Elia, Grover & Graves, for appellants: Coolidge, Lee & Lee, for appellee.

BAKER, J. This was an action of replevin, brought by appellee against appellants in the circuit court of Cook county. A jury was waived. At the trial the court found the issues for appellee, and rendered judgment accordingly. That judgment was affirmed by the appellate court, for the reason, as stated in its final order, that a number of exhibits follow, instead of precede, the certificate and signature of the trial judge to the bill of exceptions. The court, therefore, as further stated in said order, declined to consider any and all of the errors assigned in that court. We are now asked to reverse the judgment of the appellate court for the alleged error in having declined to consider the cause upon its merits, and having affirmed the judgment of the trial court for the reasons stated in its final order.

The original bill of exceptions, incorporated into the transcript of record by stipulation, consists of 103 pages, shown in the record as pages 1 to 103, inclusive. The first 91 pages consist of the oral testimony, offers of evidence, judgment, order, propositions of law, etc. Page 92 contains the signature and certificate of the trial judge, which certificate refers to the exhibits in question. Pages 93 to 103, inclusive, show nine exhibits, designated as Plaintiff's Exhibits A, B, C, and D, and Defendants' Exhibits A, B, C, D, and E (documentary evidence offered at the trial). Page 104 of the record contains the stipulation of counsel that the "foregoing bill of exceptions" may be incorporated and made a part of the transcript of the record without transcribing, etc. The first documentary proof offered at the trial was a bill of sale, which is referred to and identified on page 4 of the bill of exceptions in the following words and figures, to wit: "Counsel for plaintiff offers in evidence the bill of sale made by Edwin Bell, Jr., to Ellen M. Bell, dated May 27, 1893, bearing certificate of record of S. B. Chase, recorder, Cook county, state of Illinois, May 29, in Record Book 3539, page 261." "Said bill of sale is marked 'Plaintiff's Exhibit A,' and a copy thereof attached to this bill of exceptions, and made a part thereof." The other exhibits are referred to and described in the bill of exceptions in the same manner. All of these exhibits in every way correspond with the descriptions of and references to them in the body of the bill. The certificate of the trial judge, appearing on page 92 of the bill of exceptions, is as follows: "Forasmuch, therefore, as the matters and things aforesaid and above set forth do not otherwise appear of record, the defendants tender this, their bill of exceptions (including the exhibits hereunto attached), and ask that the same be signed, sealed, and approved by the said judge of the said circuit court of Cook county, which is done accordingly this

11th day of July, A. D. 1894. E. F. Dunne, [Seal.] Judge of the Circuit Court of Cook County."

In our opinion, the true test as to whether exhibits are properly a part of the bill of exceptions is not merely whether they precede the certificate and signature of the trial judge, but whether they are so identified by the bill of exceptions as to show conclusively that they are the ones submitted to the trial court. *Legnard v. Rhoades* (Ill. Sup.) 40 N. E. 964; *Railway Co. v. Walsh*, 150 Ill. 607, 37 N. E. 1001; 2 Am. & Eng. Enc. Law, p. 220, and authorities cited in note 7. It is manifest that the exhibits here in question were so identified. The appellate court should therefore have considered the errors assigned in that court. For this error the judgment of the appellate court will be reversed, and the cause remanded to that court, with directions to consider and determine the cause upon its merits. Reversed and remanded.

(157 Ill. 460)

LAKE SHORE FOUNDRY CO. v. RAKOWSKI.¹

(Supreme Court of Illinois, Oct. 11, 1895.)

APPEAL—REVIEW—NEGLIGENCE.

The question of contributory negligence is one of fact not reviewable by the supreme court.

Appeal from appellate court, First district.

Action on the case by Adam Rakowski against the Lake Shore Foundry Company. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 213. Defendant appeals. Affirmed.

G. E. Read and W. N. Low, for appellant. O'Donnell & Coghlan, for appellee.

PHILLIPS, J. This action was for personal injuries, in the superior court of Cook county, by appellee against appellant. The jury returned a verdict for plaintiff below for \$3,000. Motion for new trial was overruled, and judgment entered on the verdict. On appeal to the appellate court this judgment was affirmed. From the judgment of the appellate court this appeal is prosecuted. No instructions were requested by either party in the trial court, and none were given. No error is urged in this court as to the admission or exclusion of evidence. The only question urged here is that the appellee was not, at the time of the injury, in the exercise of due care and caution. The question is one solely of fact, and has been settled adversely to appellant by the judgments of the trial and appellate courts, and they are conclusive. There are no questions of law in the case for this court to consider. *Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773; *Hawk v. Railroad Co.*,

¹ Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

147 Ill. 399, 85 N. E. 139; Canning Co. v. Innes, 125 Ill. 410, 17 N. E. 720. The judgment of the appellate court of the First district is affirmed. Affirmed.

(157 Ill. 668)

VILLAGE OF RIVERSIDE v. WATSON.
(Supreme Court of Illinois. Oct. 11, 1895.)

APPEAL—JURISDICTION—FREEHOLD.

A bill to enjoin the erection of a bridge on land to which both complainant and defendant claim title in fee involves a freehold, within the meaning of the statute regulating appeals. 54 Ill. App. 432, affirmed.

Appeal from appellate court, First district.

Bill by the village of Riverside against Alexander Watson. Defendant obtained a decree, and the appellate court dismissed an appeal therefrom. 54 Ill. App. 432. Complainant appeals. Affirmed.

The bill in this case was filed in the superior court of Cook county by the village of Riverside, setting up that it is a municipal corporation, and that it is the owner in fee simple, for the public use, of all public parks, grounds, streets, and commons in said village, and also certain other lands described in the bill; that appellee proposed to construct a bridge across the Desplaines river, which bridge, if constructed, will be wholly upon the public park and ground belonging to appellant. The bill prays, in substance, as follows: "That title of your orator to said premises may be established; that said premises be declared and decreed public park and commons; that title to the same vest in your orator in trust; and that defendants, their agents and attorneys, be perpetually enjoined from erecting said bridge,"—and for general relief and injunction. The abutments and approaches of the proposed bridge on the north side of the Desplaines river are intended to rest upon a strip of ground alleged to be 25 feet off the east side of block 14 of that part known as "Second Division of Riverside," while on the south side they are proposed to rest upon what is known in a certain plat as "Columbus Boulevard." The answer of appellee denies that appellant was ever seised of any interest in block 14, but claims title to a 25-foot strip, being part of block 14, on the north side of the river, in himself, and sets forth that, while a plat was made by him of his lands on the south side of the river, on which was located Columbus Boulevard, parallel with and extending to the river, said plat was made merely for convenience, and that roads and streets were made subservient to rights of private owners, and that they have not been dedicated to public use, and that said plat was not approved by the village of Riverside. While, indirectly, part of the relief asked for in this bill is for an injunction to restrain the construction of this bridge, and indirectly, also,

the question of the boundary line of Columbus Boulevard, and the portion of block 14, aforesaid, are involved, the main question presented by the pleadings in this cause is that as to whether title to this property is in appellant or appellee. The cause was referred by the superior court to the master in chancery, to take proofs and report the same to the court with his conclusions. The master reported that he found appellee to be the owner of the easterly 25 feet of block 14, and that the equity of the cause was with the defendant; that the temporary injunction should be dissolved, and the bill dismissed for want of equity. The superior court, upon a hearing, overruled all exceptions to the master's report, and dismissed the bill. An appeal was taken to the appellate court, and that court on motion dismissed the appeal, on the ground that a freehold was involved, and that it had no jurisdiction of the cause. The case comes to this court solely upon the question as to whether or not it was error of the appellate court to refuse to entertain this appeal.

F. F. Reed, for appellant. John A. Henry, for appellee.

PHILLIPS, J. (after stating the facts). The questions involved in this proceeding are only to be ascertained from the bill, answer, and replication, and an examination of these indicates very clearly that the true question at issue is as to ownership of the lands abutting on each side of the Desplaines river, on which it is proposed to construct this bridge. Adjudication must first determine that question, before the injunction would be permitted to stand. If title to this property is in the village of Riverside as public grounds, then the relief should be granted. It is not for us, however, at this time to determine that question, or pass any opinion upon the merits of this case. The pleadings show very clearly that a freehold is involved, and that the appeal should have been taken directly to this court. No briefs are filed by either appellant or appellee on the merits of the controversy. We have heretofore held that an appeal of this character only brings to this court such matters as might lawfully have been considered in the appellate court by virtue of an appeal to that court, and therefore only the question of jurisdiction can be considered here. If it be found that no freehold is involved, correct practice would require that the order of dismissal be reversed, and the cause remanded to the appellate court, with instructions to find upon the issues of fact, and render final judgment upon errors assigned. If a freehold is involved, the court is powerless to do more on this appeal than to affirm the order of the appellate court. *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. 28.

Finding, as we do, that a freehold is here involved, and that the order of the appellate court dismissing the appeal to that court was

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

properly entered, the judgment of the appellate court dismissing the appeal must be affirmed. Leave will be given appellant to withdraw the record filed herein, to be refiled for writ of error from this court, if it so desires. Judgment affirmed.

(158 Ill. 477)

ANDREWS et al. v. PEOPLE ex rel. KERN,
Treasurer.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

MUNICIPAL CORPORATIONS—ORDINANCES—LOCAL
IMPROVEMENTS—JURISDICTION.

1. A city ordinance providing for a special assessment need not state that the proposed improvement is within the city limits. *Stanton v. City of Chicago*, 39 N. E. 987, 154 Ill. 23, *West Chicago St. R. Co. v. People*, 40 N. E. 599, 155 Ill. 299, and *Young v. People*, 40 N. E. 604, 155 Ill. 247, followed.

2. Where separate objections to a special assessment are filed by the owners of different lots, several distinct final judgments of confirmation may be rendered thereon. *Browning v. City of Chicago*, 40 N. E. 565, 155 Ill. 314, and *Zeigler v. People*, 40 N. E. 607, 156 Ill. 133, followed.

3. An order of the city council staying for one year a petition for confirmation of a special assessment does not deprive the court of jurisdiction to enter judgment of confirmation within the year. *Wister v. People*, 40 N. E. 574, 156 Ill. 180, followed.

Appeal from Cook county court; Frank Scales, Judge.

Application of the people, on the relation of Charles Kern, county treasurer, for judgment for delinquent taxes. Milo J. Andrews and others filed objections, which were overruled, and they appeal. Affirmed.

Taylor, Randolph & McWilliams and Woolfolk & Browning, for appellants. W. J. Donlin and Harry Rubens, Corp. Counsel, for appellee.

PER CURIAM. This is an appeal by several property owners from the judgment of the county court of Cook county rendered against the lands of appellants, upon the application of the county collector for judgment upon a delinquent special assessment of the city of Chicago, assessed for a system of main sewers in certain streets enumerated. The objection is made that the ordinance and the notices failed to locate the proposed improvement within the territorial limits of the city of Chicago; also, that, in the matter of the application by the city of Chicago for the confirmation of the said special assessment, there were several distinct final judgments of confirmation, on separate pieces of property, and that, therefore, there was no valid judgment upon which to predicate the application for judgment by the county collector of Cook county; and, also, that the city council of the city of Chicago had passed an order staying the said application for confirmation in the

said special assessment case for one year, and that the said stay was never set aside, and that several of the orders of confirmation were entered subsequent to such stay order, and within the year. These questions have been decided by this court adversely to appellants' contentions in several recent cases, and it is unnecessary to restate here the grounds upon which they were so decided. See *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. 565; *Stanton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987; *West Chicago St. R. Co. v. People*, 155 Ill. 299, 40 N. E. 599; *Young v. People*, 155 Ill. 247, 40 N. E. 604; *Zeigler v. People*, 156 Ill. 133, 40 N. E. 607; *Wister v. People*, 156 Ill. 180, 40 N. E. 574. Following these cases, the judgment must be affirmed. Judgment affirmed.

(157 Ill. 637)

LIGARE v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

EMINENT DOMAIN—EVIDENCE OF DAMAGES—APPEAL—MISTAKE IN JUDGMENT.

1. On appeal from condemnation proceedings, the entry of judgment of compensation for less than the sum awarded by the verdict may be assigned as error by the defendant, even though done through inadvertence; since it is not his duty to move in the trial court for a correction of the error.

2. Where the pleadings do not show that the defendant owned more than the lot of which part is to be condemned, it is reversible error to require him, in proving damages to the part not taken, to show the damage, on the theory that he also owned the adjoining lot, even though he admitted that he owned it.

Appeal from circuit court, Cook county; Frank Baker, Judge.

Petition for condemnation by the city of Chicago against George C. Ligare. There was judgment of condemnation. Defendant appeals. Reversed.

J. W. Waughop, for appellant. J. D. Adair, for appellee.

CARTER, J. Appellee filed its petition in the circuit court of Cook county, under article 9 of the act concerning cities and villages, to condemn the north 16 feet of lot 1 of R. S. Thomas' subdivision of part of the southeast fractional $\frac{1}{4}$, section 27, township 39 N., range 14 E. of third P. M., for an alley. Appellee, the owner, filed his cross-claim or petition, stating that the lot had a frontage of 32 feet, and that the half of the lot not taken would be too small for any profitable use, and that the city should take and pay for the whole lot, and that the same was worth \$150 per front foot, or the total sum of \$4,800. The jury fixed the compensation to be paid for the north 16 feet at \$1,770, and found that the remainder of lot 1 and lot 2 would not be damaged. After overruling the motion of appellant for a new trial, the court rendered judgment for \$1,760.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Appellant prosecutes this appeal to reverse that judgment.

The entering of the judgment for a less amount than the verdict seems to have been a mere inadvertence, and might have been corrected on the motion of either party. Counsel for appellee seems to contend that it was the duty of appellant to move such amendment of the record in the court below as would make the judgment conform to the verdict, and insists that, because he has not done so, the judgment should stand. But this view is certainly an erroneous one. It was the duty of the petitioner to see that a correct judgment was entered. The respondent was not charged with any duty in that respect. His property was being taken from him for public use without his consent, and he was not bound to see that no mistake was made by those engaged in administering the law, whereby he was to be deprived of his property. This error, however, might perhaps be corrected without awarding a new trial, were it the only one; but, from a careful examination of the record, we are satisfied that the trial court erred in its rulings respecting the admission and exclusion of the testimony of certain witnesses.

There was no reference in the petition of the city, or in the cross claim or petition of the respondent, to lot 2, or to any tract, lot, or parcel of land other than lot 1; and it was proper for the respective parties, in the production of their testimony, to confine it to the allegations of the parties and to the point at issue. But during the production of the evidence on the part of the petitioner, it was shown that, by the admission of the respondent, he owned lot 2, which adjoined lot 1 on the south, and the court refused to permit the respondent to prove any damages to the 16 feet of lot 1 not taken for the alley, treated independently of lot 2, but required respondent to so frame his questions, both on direct examination of his own witnesses and on cross-examination of those of his adversary, as to compel the witnesses to treat lot 2 and the south 16 feet of lot 1 as one entire tract. This was clearly erroneous. The property had previously been divided into separate lots. Such division was recognized by the petitioner in its petition. No mention was made of lot 2 until made by the witnesses on the trial, and the respondent had the right, in examining and cross-examining the witnesses, to treat the lots as separate tracts. He had the right to show, if he could, that by the condemnation of the north 16 feet of lot 1 for an alley, the remainder of the lot was lessened in value in a greater degree than it was reduced in dimensions, without any regard in the first place to lot 2. It is equally true that it was competent for the petitioner to show that respondent owned lot 2, and that it was so situated and used that, by uniting it with the adjoining half of lot 1 not taken, such half of lot 1 would not be damaged, or, at least, not so much dam-

aged as it otherwise would be. But the effect of the ruling of the court was, in the midst of the trial, when it could not have been reasonably anticipated by the respondent, to make him prove the petitioner's case in connection with his own. It might well be that lot 2 was so circumstanced, built upon, or used that the remaining half of lot 1 could not be joined to it, and both treated as one tract, without detriment to both. While these facts could be developed on the trial, the respondent should not have been required, in the first instance, to treat both lots as one, and denied the privilege of examining the witnesses as to them separately. Even if the conclusion were found to be the proper one, that they could be used advantageously as one tract, still, in eliciting the testimony, it was clearly proper for the respondent to treat the lots separately, and it would doubtless have been to his interest to do so. The trial court held that respondent should not be permitted to divide his property in adducing his evidence. The division, however, had been made previously, and was recognized by the petitioner in its petition, and the respondent was treating the property as it was then situated, but the court compelled him to ignore this division. While it would have been competent for the petitioner to show, as before stated, that the half of lot 1 not taken could be advantageously joined to lot 2, and, when so joined, would not be damaged, or so greatly damaged, still the question of damages should have been confined to lot 1, and the jury should have so confined it in their verdict.

It is also objected that the ordinance does not sufficiently locate the property and the improvement as being within the corporate limits of Chicago. This objection is without force, and the question raised has so often been decided by this court in recent cases that no further mention of it is necessary.

For the errors indicated, the judgment is reversed, and the cause remanded to the circuit court. Reversed and remanded.

(153 Ill. 36)

DEMPSTER et al. v. PEOPLE ex rel. KERN,
Treasurer.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

APPEAL—RECORD—SPECIAL ASSESSMENT.

1. Where the record on appeal from a judgment for a delinquent special assessment shows that the appellant filed an objection in the county court on the ground that the assessment had never been confirmed on his land, that the court overruled such objection, and that the appellant assigned that ruling as error, the question of the confirmation of the assessment is properly raised in the supreme court.

2. Lots in one addition to a city cannot be sold to satisfy a delinquent special assessment levied on lots in another addition, belonging to the same owner.

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

Appeal from Cook county court; Frank Scales, Judge.

Application by the people, on the relation of Charles Kern, county treasurer, for judgment for delinquent taxes. Clancey J. Dempster and others filed objections, which were overruled, and they appeal. Reversed.

Osborne Bros. & Burgett and R. F. Pettibone, for appellants. W. J. Donlin, for appellee.

BAKER, J. This is an appeal from a judgment of the county court of Cook county for the sale of certain real estate in Lansingh's Second addition to Chicago for a delinquent special assessment. It is claimed by appellee that there is no question presented by the record herein for the decision of the court, because the errors assigned have to do with the alleged invalidity of the judgment of the court below, and the bill of exceptions fails to show any exception taken to the judgment that was rendered by that court. The proper mode of making defense to an application for judgment for the sale of real estate for delinquent special assessments is by filing objections in writing, specifying the particular causes of objection relied upon. Revenue Act, § 191; Cities and Villages Act, art. 9, §§ 40, 44. Here appellants duly filed objections in writing to the rendition of judgment against certain specified lots in Lansingh's Second addition, and among these objections was this: "(8) No assessment has ever been made or confirmed for said proposed improvement upon either or any of the parcels of land above mentioned." The practice act (section 59) provides that if, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and shall reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause. In the case at bar, the bill of exceptions, which is signed and sealed by the county judge, recites as follows: "Which was all the evidence offered or introduced by either party on the trial of this cause; and thereupon the court overruled each of the objections filed in this cause, to the action of the court in overruling which objections the owners duly except." And the very first of the assignments of error made upon the transcript of the record filed in this court is this: "(1) The court below erred in overruling the objections of appellants numbered, respectively, 3, 4, 5, 7, and 8." In this condition of the record, we are wholly unable to conclude otherwise than that there is properly presented for the decision of this court the question whether it appears from the record, as matter of fact, that no assessment for the proposed improvement was ever made upon or confirmed against either or any of the

parcels of land against which judgment was asked.

The record of the various proceedings had in the matter of the special assessment for the improvement in question—i. e. the laying of six-inch drains in Millard avenue from Ogden avenue to West Twelfth street, in the city of Chicago—was given in evidence in this cause, and, looking into that record, we find that the assessments that were made by the commissioners and returned into court, and in respect to which there was judgment of confirmation, were assessments made upon certain designated parcels of land in Kedzie's subdivision, while the tracts of land described in the tax judgment, sale, and redemption record, and in the newspaper publication of the list of delinquent lands and lots, and the parcels of land that were returned by the collector as delinquent, and the sale of which was asked, were specified parts of designated lots and blocks in Lansingh's Second addition. And we further find from the maps, plats, and other testimony in the record that it is very clearly and without question shown that each and every of the parcels of land in Lansingh's addition that is involved in this appeal, and the sale of which was asked, and decreed by the judgment of the court, includes a portion of land against which no special assessment whatever for the improvement was ever either made or confirmed. A special assessment is a charge upon the land benefited, not a charge against the owners of such land; and for a failure to pay the assessment the land upon which it is levied, and that only, can be sold to satisfy the lien. It goes without saying that portions of land upon which no assessment is made, confirmed, or levied cannot lawfully be sold to satisfy the liens upon other portions of land, even though they immediately adjoin such other portions. It was error to overrule objection 8 to the rendition of judgment. For that error the judgment against the property of appellants in respect to which this appeal was taken is reversed. The cause is remanded to the county court. Reversed and remanded.

(153 Ill. 432)

GILMORE v. COURTNEY.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

ACTION ON BUILDING CONTRACT—ARCHITECT—INSTRUCTIONS—APPEAL—JURISDICTION.

1. Under Act June 16, 1887, requiring a building contractor, as a condition precedent to suit on his contract, to furnish the owner with a sworn statement as to his subcontractors, a suit on such a contract should be dismissed where there is no proof of the giving of such statement.

2. Where a building contract provides that payment shall only be made on the architect's certificate, it is not a sufficient excuse for failure to procure such certificate that the contractor feared to apply for it because he believed the

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

architect to be fraudulently prejudiced against him.

3. The mere fact that an architect's decision is, in the opinion of others, erroneous, does not show that it is void as fraudulent.

4. Where, in an action by the contractor on a building contract, defendant claims damages because of failure to complete the contract, and also for delay, an instruction which limits the right of recoupment to the latter item, ignoring the former, is erroneous.

5. Where the appellate court reduces the judgment of the trial court, and affirms it for the reduced amount, "the amount involved" in the case, which, under Rev. St. 1893, c. 37, § 25, limits the right of appeal to the supreme court, is the amount of the original judgment of the trial court.

Appeal from appellate court, First district.

Assumpsit by Thomas E. Courtney against Arnold P. Gilmore. Plaintiff obtained judgment, which was modified by the appellate court, 54 Ill. App. 417. Defendant appeals. Reversed.

Appellee instituted his action of assumpsit against appellant on a building contract, filing the common counts only. Subsequently, and before trial, he filed a special count. The special count, after setting up this contract, alleges: "Notwithstanding said contract, said defendant, acting under the direction of said architect, who fraudulently acted as the agent and attorney for said defendant, and entirely failed to act as arbitrator under said contract, and said defendant, conspiring with said architect to defraud said plaintiff by deducting large sums of money for delays said to have been caused by said plaintiff, and upon other false and pretended charges, deducted large sums of money from the amount due said plaintiff, has neglected and refused to carry out and fulfill his part of said contract." The contract was entered into on July 15, 1889. The plaintiff claimed a balance due on the contract price, amounting to about \$528, and for extra work, damages by reason of detention, etc., \$1,426.05; and the defendant pleaded the general issue, and insisted he was damaged by reason of delay \$450, and damages for failure of appellee to complete his contract \$602.23. From the evidence it appears that appellant entered into a contract with appellee by which the latter was to do the excavation and furnish the material and do the mason work of a four-story apartment house in the city of Chicago. By the terms of the contract, the work was to be done in accordance with plans and specifications under the direction of the architect, who, it was stipulated, should act as arbitrator on all questions of damage, allowance for extra work, and work left out, and all questions as to the intent and meaning of the contract. It was also agreed that the consideration for the work should be \$12,923, payment to be made from time to time at the direction and upon certificate of the architect that all the terms of the contract had been complied with, reserving, however, 10 per cent. of the amount until 30 days after completion of the work. The work was to

be completed on or before October 1, 1889, and, for a failure so to do, it was agreed the contractor should allow the owner \$25 for each and every day the completion of the building was delayed, as fair rental and liquidation of damages, and not as a penalty. By the plans and specifications made a part of the contract, nothing was to be allowed as extras except work agreed upon in writing, and accepted by the owner, previous to its commencement by the contractor. The contractor was, by the plans and specifications, to refill around all walls and areas; remove all surplus sand and obstructions; point up exterior and interior joints above grade; build all walls plumb and true, laid to a line exact height for joists; on completion, remove all rubbish, leaving work in perfect condition, and rubbish made by the mason left on the premises to be removed by the owner at cost of contractor.

Under the amendment to section 35 of the mechanic's lien act, as amended in 1887 (in force) it is provided that the original contractor, whenever he desires to draw any money from the owner, lessee, or agent on his contract, shall make out and give a statement under oath of the number and names of the subcontractors, mechanics, or workmen in his employ, or persons furnishing material, and how much, if anything, is due or to become due, etc.; and, until that statement is made in manner and form as therein provided, the contractor shall have no right of action or lien against the owner on account of such contract. As found by the jury on special findings, the appellee quit work about December 1, 1889, and did not complete his contract with appellant. A special finding was asked, as follows: "Did Courtney complete his contract, and perform it either literally or substantially, and, if so, which?" The jury found specially, "Substantially." The jury further found that the architect did not refuse to act as arbitrator under the contract, and appellee quit work about December 1, 1889. At the trial no final certificate from the architect was produced by plaintiff, showing his right to any balance due whatever, either under the contract or for extras or damages. Its absence was sought to be excused by proof of fraudulent conduct on the part of the architect, which justified plaintiff in refusing to submit disputes to his arbitration. It does not appear from the evidence that, after appellee quit work, he furnished a verified statement under the act of 1887. The only evidence seemingly relied on to show fraud on the part of the architect was a conversation growing out of appellee's application for a certificate to the architect, which he declined to give without a sworn statement, which appellee insisted should not be required of him, and had not been by others with whom he contracted, and he claims the architect said: "I want you to understand that I am opposed to everything and everybody, and in favor of the owner." The conversation was

shortly after the work commenced, and subsequently the appellee applied for and received certificates from the architect. On trial, at the close of plaintiff's evidence, defendant moved the court to instruct the jury to find for the defendant, which motion was renewed at the close of all the evidence, both of which motions were denied. A verdict in favor of plaintiff for \$1,550 was returned, and a motion for new trial was entered, claiming error in giving instructions for plaintiff, in refusing and modifying instructions asked by the defendant, etc. On appeal the appellate court affirmed the judgment to the amount of \$902.22, and required a remittitur to the amount of the residue, which was entered. An appeal was prosecuted to this court, and, in addition to the questions arising on the record, the appellee moved to dismiss the appeal, because the amount of \$1,000, exclusive of costs, was not involved, which motion was reserved to the final hearing.

Collins, Goodrich, Darrow & Vincent, for appellant. G. P. Merrick, for appellee.

PHILLIPS, J. (after stating the facts). By the amendment to section 35 of the law in relation to liens, approved June 16, 1887, in force at the time this contract was entered into and the work done thereunder, it was incumbent on the contractor to render the statement under oath as required by that amendment as a condition precedent to the right of action against the owner. No compliance therewith being shown, the motion to find for the defendant, made at the close of plaintiff's case, should have been allowed. That motion, renewed at the close of all the evidence, should have been allowed. When parties to a building contract agree upon an arbitrator to settle disputes, and where the contract provides that no money is payable thereon except upon the certificate of the architect, the decision of the arbitrator is final, in the absence of fraud or mistake. In *Snell v. Brown*, 71 Ill. 133, this court laid down the rule as to what is sufficient fraud to reject an architect's decision under such a contract. It was there held that, where a party voluntarily enters into an agreement that a third person shall estimate work done, and pass upon its quality, with power to reject and condemn all material which in his opinion does not conform to the contract, he cannot avoid or disregard it except for fraud clearly proved. As to what is necessary to constitute sufficient fraud to reject the architect's decisions, the court says: "It is true, his conduct may be impeached and his estimate set aside for fraud; but fraud cannot, as is assumed in the instructions for appellees, be presumed merely because his estimates for work done pursuant to the terms of the contract are less than the measurement of the quantity actually done. Even if he, by mistake in judgment, erred in condemning or rejecting work, it would be no ground to impeach his estimate. To prove that the esti-

mate is fraudulent, it is not sufficient merely to show that work was rejected or condemned which, in the opinion of others, should not have been rejected or condemned. It may, indeed, be proved as a circumstance tending in some degree to establish fraud, but is not conclusive. The evidence must show that the engineer knowingly and willfully disregarded his duty, and rejected or condemned work which he knew, or at least should have known, fully conformed in all respects to the terms of the contract." In *Trustees v. Lynch*, 5 Gilman, 526, the court says: "The contract between the parties, so far as the record shows, was voluntarily and fairly entered into. Neither party is at liberty to disregard it, nor can the court make for the parties a contract different from that which the parties have made for themselves. By the terms of the contract under which the work was done, the determination of the chief engineer as to the amount or quality of the work done is made final and conclusive. In an action for work done under a contract, the estimate of a chief engineer furnishes the only evidence of the amount of work done; and neither party is permitted to show such estimate to be erroneous, or to impeach it except for fraud. If the board of trustees should unreasonably refuse to cause the work to be estimated by their chief engineer, the contractor would then have a right to resort to other evidence to show the amount of work done; but neither party can resort to such evidence while the other observes and insists upon the contract. Such we believe to be the law of this case, as made by the parties themselves." In *McAuley v. Carter*, 22 Ill. 53, it was held that "where parties to a building contract agree that a superintendent should pass upon the work, and certify as to the payments to be made, his decision is binding, unless fraud or mistake on his part shall be shown." In this case the court says (page 57): "This being the contract of the parties, the case on the part of the appellees was made out by producing and proving the final certificate of the superintendent. That was the condition, and the only one, on which their right to recover rested; and, when produced, it must be held, in the absence of fraud, as conclusive. No evidence of the amount of work done, or of its character, was admissible. Both parties are concluded by the certificate of the superintendent." It was also held that the same party might lawfully act as the agent for the owner and as arbitrator for the disputes. In *Michaells v. Wolf*, 136 Ill. 69, 26 N. E. 384, it was held "that where provision is made in the building contract for the payment of the price, or a portion or portions of a price, upon the certificate or certificates of the architect in charge of the construction of the building, the obtaining or presentation of such certificate is a condition precedent to the right to require payment, and such condition must be strictly complied with, or a good and sufficient excuse shown." To the same effect are *McAvoy v. Long*, 13 Ill. 147; *Coe v. Lehman*,

79 Ill. 173; *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Arnold v. Bournique*, 144 Ill. 132, 33 N. E. 530.

The failure to apply for a certificate to the architect by the contractor being a condition precedent, he had not a right to assume the architect would refuse to act, or, in acting, would do so fraudulently. On these several grounds, we are of opinion there was error in refusing the instructions asked by the court to find for the defendant. Where the contractor had complied with the requirements of the contract, and applied for a certificate, and it was refused wrongfully, or there were fraudulent acts on the part of the architect, or mistakes, which he refused to correct, in such case such facts might be shown. It is not sufficient that, for fear of a wrongful refusal or fraudulent act or mistake, one of the parties may altogether refuse a compliance, or attempted compliance, with the contract. The second instruction given for plaintiff was therefore erroneous. That instruction was: "The court further instructs the jury, as a matter of law, that by the terms of the contract which makes the architect sole arbitrator as to all questions of dispute that might arise under the performance of the same is not meant that the architect may willfully, capriciously, or arbitrarily decide disputes, but that he should exercise his judgment fairly and equitably between the parties, and, if the jury believe from the evidence that the architect in this case decided disputes willfully, the plaintiff is not bound by law to accept such willful decisions made by the architect." The question, materially one of law, was whether, under the contract, the plaintiff could elect that he would not apply for a certificate, fearing the architect would be unfair. The third instruction for plaintiff is also erroneous. It is as follows: "The court instructs the jury, as a matter of law, that if they believe from the evidence in this case that, during the progress of the work in question, the parties to the contract offered in evidence in this case agreed to submit matters in dispute to arbitration, and waived that clause in the contract making the architect sole arbitrator and umpire, then the jury may disregard such portion of the contract, and the plaintiff is entitled to have a recovery in this case for the balance of the contract price, and the cost of the extra material and labor, and damages for delay, as the evidence shows such balance on such contract, extra labor, and delay was fairly and reasonably worth, less damages, if any, caused by plaintiff's delay, if from the evidence they believe he has caused any delay." The instruction excludes from consideration by the jury damages claimed by appellant for a failure to comply with and complete his contract on the part of appellee, which was the largest item of defendant's claim, and which was shown by defendant's witnesses. A discussion of the modification of instructions asked by the defendant would unnecessarily extend this opinion.

The motion entered by the appellee to dismiss this appeal for want of jurisdiction in this court, it appearing of record that said appeal was prayed from a judgment of the appellate court against appellant for less than \$1,000, exclusive of costs, cannot be sustained. By section 25, c. 37, Rev. St. 1893, it is provided: "In all cases determined in said appellate court in actions ex contractu wherein the amount involved is less than one thousand dollars exclusive of costs, * * * and the judgment is affirmed or otherwise disposed of, * * * the judgment shall be final, and no appeal or writ of error shall be prosecuted therefrom. In all other cases appeals shall lie," etc. This case, when the appeal was taken to the appellate court, involved, exclusive of costs, \$1,550; and the sum involved in the judgment on the appeal to the appellate court determines the right of appeal from that court. *Kaiser v. Cox*, 116 Ill. 26, 4 N. E. 384. The motion to dismiss the appeal is denied.

The judgment of the appellate court of the First district and the judgment of the superior court of Cook county are each reversed, and the cause is remanded to the latter court for new trial. Reversed and remanded.

(142 Ind. 569)

STATE ex rel. EAGY, Trustee, v. MILLS et al.
(Supreme Court of Indiana. Nov. 22, 1895.)

TOWNSHIP TRUSTEES—OFFICE RENTAL.

Township trustees who are compensated under Rev. St. 1894, § 8084, with a per diem of two dollars for each day necessarily employed, and who are not required to keep their offices open continuously, are not entitled to reimbursement for money paid for office rental.

Appeal from circuit court, Randolph county; L. J. Monks, Judge.

Application for mandamus by the state on the relation of James J. Eagy, trustee, against Joel Mills and others, constituting the board of commissioners of Randolph county. The issuance of the writ was denied, and the relator appeals. Affirmed.

Shockney & Shockney, for appellant. E. L. Watson and S. A. Canada, for appellees.

HACKNEY, J. This proceeding was by the appellant to require, by the writ of mandamus, that the appellees, the board of commissioners of Randolph county, approve and allow the report of the relator, as trustee of Wayne township, in said county, in which report he presented vouchers and asked allowances for moneys paid as and for rentals for an office in which to conduct the business of said township. There are some technical questions as to the sufficiency of the petition, and of the appellant's right, if the claims are valid, to maintain the proceeding, but our conclusion upon the prime question, the validity of the claims, renders it unnecessary for us to pass upon such questions. That there should be a discretion lodged somewhere to permit township trustees to rent

office rooms, and to make their trust funds liable therefor, seems to us important. Many of the trustees in this state have large populations over which to exercise the duties of their offices, and some are occupied constantly in the discharge of those duties. Others have small populations, and their duties occupy but a small fraction of their time. That all should incur the expense of an office room is as unreasonable as that some should be without such room. Hence we say that a discretion should be permitted in the matter. That it should be permitted does not establish its existence, and its existence is the all-important question upon the issue before us. It is not claimed by counsel that an express authority exists to incur a liability for any such purpose, but that it exists by implication is claimed, from the nature of the duties of the office, and the fact that the legislature has seen fit to compensate trustees with a per diem of but two dollars for each day necessarily employed. This compensation, it is said, does not justify an expenditure by the trustees for office rentals. Any rule on the subject must be general, so far as the right may exist by implication, and to say that every trustee has business enough to justify the renting of an office is unreasonable. Nor can we find the implication from any distinction within the class who are paid a per diem, between those of much and those of little business, which authorizes even those having the most business to incur on behalf of their trust an indebtedness for such purpose. If we may imply a legislative intention on the subject from the enactments concerning the duties and salary of the office, it must be that it was intended that if an office room became necessary it should be paid for from the salary. Trustees are now classified so that those in townships whose population is more than 100,000 shall receive \$2,500 as an annual salary for all services. Rev. St. 1894, § 8084. Those in townships whose population is over 75,000 receive \$1,800 per annum, and those in townships having over 25,000 and less than 75,000 population receive not less than \$1,000 nor more than \$1,500. Such trustees are required to keep their offices open each day in the year, excepting Sundays, etc. Rev. St. 1894, § 8085. The townships not included within these special provisions are paid a per diem, as we have shown. This classification suggests the intention of the legislature to select from the whole number those whose population and business, within the judgment of the legislature, justify the maintaining of office rooms, and to provide a salary sufficient to enable them to pay rentals. Whether it was intended to require that office rentals should be paid from salaries by those special classes is not necessary for us to decide, but we must conclude that the discretion necessary to a classification, as we have shown, has not been intrusted to another, but to some extent, at least, has been exercised by

the legislature itself. The distinction made by the legislature in this classification requires that those of the special classes shall, as we have shown, keep their offices open every week day, etc., while those within the per diem class are neither required nor expected to give attention to the duties of the office every week day, but are required to set apart such days of the week or month as the business of their townships may require. Rev. St. 1894, § 8083 (Rev. St. 1881, § 6008). Whether, by implication from the phrase "shall keep their office open," as employed with reference to the special classes of trustees, we could say that they are required to maintain an office room, and whether such maintenance is chargeable to their trusts, is not before us, but, as to the per diem class, there is no such expression in the statutes. It is not our privilege to supply omissions of the legislature, if there has been an omission to provide for offices for trustees; nor are we at liberty to create or delegate the power to trustees to make expenditures not expressly or by necessary implication granted by the legislature, however much we should deem the expenditures just and reasonable. That there is no authority to the per diem class of trustees to incur an indebtedness on behalf of their trusts for office rentals, we have no doubt, and that it requires such authority from the legislature has been already decided in an analogous case. See *Board v. Axtell*, 96 Ind. 384. In that case it was held that in the absence of a statute requiring it the county superintendent was not entitled to maintain an office at public expense. The exact question now before us has been considered by us in the case of *Kerlin v. Reynolds* (at the present term) 41 N. E. 827, and the conclusion was there reached that office rentals and other office expenses were not proper charges. It follows from what we have said that the circuit court did not err in sustaining the appellees' demurrer to the complaint and alternative writ. The judgment is therefore affirmed.

MONKS, J., took no part in the decision of this cause.

(144 Ind. 165)

McGREW v. KITCH.¹

(Supreme Court of Indiana. Nov. 21, 1895.)

RIGHT TO APPEAL—ACCEPTING BENEFITS OF JUDGMENT.

A sale of land set off to one by judgment in partition bars his right of appeal.

Appeal from circuit court, Huntington county; J. F. Cox, Special Judge.

Action by Mary O. Grayston against William McGrew for partition. On judgment for partition, defendant appealed. Pending appeal, plaintiff sold her interest to Daniel Kitch, who, on motion, was substituted as plaintiff. Kitch filed an answer in bar of appeal, alleging a sale by defendant of the

¹ Rehearing denied.

interest set off to him by the partition. On hearing for dismissal of appeal. Appeal dismissed.

Kenner & Lesh, for appellant. Saylor & Saylor, for appellee.

MCCABE, J. The appellee, Mary C. Grayston, sued the appellant for partition. The court overruled a demurrer to the complaint for want of sufficient facts. The defendant answered by a general denial and affirmative answers, to which the plaintiff replied by a general denial and several affirmative replies. A trial of the issues by the court resulted in a special finding of the facts at the request of the defendant, upon which the court stated certain conclusions of law favorable to the plaintiff, and upon which the court rendered judgment of partition in accordance with the prayer of the petition, over appellant's motion for a new trial. There was no exception to the conclusions of law. No error is assigned thereon. The errors assigned are on the action of the court in overruling the demurrer to the complaint and overruling the appellant's demurrer to the second, third, and fifth paragraphs of appellee's reply.

We are met by a verified answer in bar of the appeal by the appellee. After the report of the commissioners in partition had been confirmed, and the judgment rendered, and before the motion for a new trial had been passed on, it was made to appear that the plaintiff, Mary C. Grayston, had sold and conveyed the portion of the real estate set off to her to Daniel Kitch. The court thereupon sustained a motion to substitute said Kitch as plaintiff. He filed a plea in bar of the motion for a new trial, which plea, on motion, was struck out. The answer in bar of the appeal states: That after the rendition of the judgment of partition, on October 24, 1894, the commissioners to make partition were selected by agreement of the parties, and appointed by the court accordingly. That appellant filed exceptions to their report, which were tried by the court, overruled, and judgment of partition rendered. After said final judgment, to wit on December 15, 1894, the appellant sold the lands set off to him to Jacob Boos for the sum of \$10,000, and he conveyed the same to said Boos by warranty deed, and put him in possession thereof. On December 17, 1894, said Kitch, well knowing all the facts herein alleged, and relying on them as having been done in good faith, purchased of the appellee, Grayston, the lands set off to her for the full value thereof, to wit, \$5,400; and said Mary C. Grayston, her husband joining, conveyed her said portion of said lands so set off to her to said Kitch. That she had for years before the rendition of said judgment claimed to own the undivided one-third of the real estate described in the complaint, which claim was open and notorious. Where-

fore appellees say that the appellant ought not to prosecute an appeal of said cause, or in any way call in question the title and ownership of the land so acquired by the substituted appellee, Daniel Kitch. The only fact alleged in this answer in bar of the appeal which has any resemblance to matter in bar of an appeal is that relating to the sale by the appellant of the portion of the lands set off to him after the judgment confirming the partition. The right of appeal, though conferred by statute, may be forfeited and waived in many ways. It is an established principle of law that a party cannot prosecute an appeal, and thereby seek to reverse a judgment, the benefits of which he has accepted, voluntarily, and knowing the facts. After such acceptance, he is estopped to reverse the judgment on error, and the same may be treated as a release of errors. *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127; *Railroad Co. v. Johnson*, 84 Ind. 420; *Patterson v. Rowley*, 65 Ind. 108; *State v. Kamp*, 111 Ind. 53, 11 N. E. 960; *McCracken v. Cabel*, 120 Ind. 266, 22 N. E. 136; *Sterne v. Vert*, 111 Ind. 408, 12 N. E. 719; *Clark v. Wright*, 67 Ind. 224; 2 Enc. Pl. & Prac. 174, 175, and authorities there cited; *Glassburn v. Deer* (Ind. Sup.) 41 N. E. 376. This rule is founded on the principle that a party in a court of justice will not be allowed to acquire advantages by assuming inconsistent positions.

The case of *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127, was something like the present case. There it was sought to foreclose a mortgage on three separate tracts of land. The defendants resisted the foreclosure as to one tract only. Such resistance resulted in the defeat of the foreclosure as to that tract, but there was a decree of foreclosure as to the other two tracts. From that decree the plaintiff in that case appealed to this court. The appellees thereupon filed in this court a verified special answer in bar of the errors assigned, alleging therein that after the judgment and decree were rendered in the trial court the appellant caused a copy of the decree and order of sale to be issued out of the office of the clerk of the circuit court, and placed them in the hands of the sheriff, who proceeded to advertise and sell the two tracts of land embraced in the decree. It was averred that at such sale the appellant became the purchaser of both tracts of land so sold for the sum of \$1,050, the proceeds of which, it is charged, she received before prosecuting this appeal. It was there said, at page 234, 108 Ind., page 127, 9 N. E., by Mitchell, J., speaking for the court, that: "A party cannot accept the benefit of an adjudication, and yet allege it to be erroneous. It does not alter the case that there was no controversy respecting the several tracts upon which the decree was given in appellant's favor. The appeal was, and must of necessity have been, from the

whole decree as given. Having availed herself of so much of the decree as was favorable to her, both the statute (section 632, Rev. St. 1894; section 620, Rev. St. 1881) and the common law affirm that an appeal is thereafter denied to the appellant. Any other rule might result in bringing about embarrassing complications, and manifest injustice to the appellees in case a reversal of the decree should result. * * * If she may now hold on to what she has thus acquired, and yet reverse the judgment so far as it is unfavorable to her, the appellees will not be in the same situation they would have occupied in case the reversal had been secured before the sale of the other tracts. When the decree appealed from was rendered, the appellant had the election either to appeal or adopt the decree as it was, and avail herself of its benefits. Having decisively elected to pursue the latter course, she must now be confined exclusively to the course first adopted. Every consideration leads to the conclusion that the appeal cannot now be maintained." The foregoing language is very applicable to the present case. It is true, here the undivided two-thirds of the lands, as alleged in the complaint, belonged to the defendant, and was not in controversy in the suit. But according to the plaintiff's contention she owned, as she alleged in her complaint, the undivided one-third of said lands. That claim extended to and permeated every inch of that portion of the lands that was set off to the defendant by metes and bounds in the decree, and continued to hamper and cloud his title to all of it until the plaintiff's claim was extinguished as to that part by the decree setting off to her another portion. That enabled him to sell the tract set off to him free from her claim. In so selling it he secured the whole of the purchase price, \$10,000, free from any claim in the plaintiff to share therein. It cannot be said that he did not, in so doing, accept the benefits of the decree, or that it did not benefit him. It may be that he was entitled to all the land freed from the appellee's claim. That, however, could only be established by a decree to that effect after a trial of the issues. Until such decree, her claim was a cloud on his title to every inch of the land. The decree removed that cloud as to that part set off to him by metes and bounds, and he accepted the benefits of such removal by selling the same for \$10,000, freed from her claim. He is therefore brought within the principle of one accepting the benefits of a judgment or decree, and thereafter seeking to reverse the same for alleged error in the proceedings. This he cannot do. This answer in bar of the appeal was filed on the same day the transcript was filed in the office of the clerk of this court, April 19, 1895. On August 28, 1895, the appellant's attorneys indorsed on the transcript, immediately following said answer, a waiver of notice of the filing of

such answer. Thus they show that they have had notice of its contents nearly three months, and yet they have not denied its truth, or in any manner questioned its legal sufficiency. Therefore, under the established rules of practice in this court, we are authorized to presume that the facts stated in the answer to the assignment of errors are true. *Glassburn v. Deer*, supra; *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, and 34 N. E. 441. The appellant having waived the errors alleged, if any were committed in the proceedings leading up to the judgment by accepting the benefits thereof, his appeal therefrom is dismissed.

(143 Ind. 425)

CITY OF BEDFORD v. NEAL.¹

(Supreme Court of Indiana. Nov. 19, 1895.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—EXCESSIVE DAMAGES.

1. One who has knowledge of the defective condition of a sidewalk before going upon it in the dark is required to exercise more care than if he were ignorant of the defect, or if there were no defect, and it were daylight.

2. In an action for injuries caused by a defective sidewalk, which plaintiff went upon in the dark, with knowledge of its defective condition, a verdict for plaintiff is erroneous where there is no evidence that she used any care, or her knowledge of the condition of the sidewalk, to avoid injury.

3. In an action for injuries caused by a defective sidewalk, there was evidence that plaintiff simulated that she had suffered more injury in consequence of her fall than she had in fact sustained, but such evidence was contradicted, and there was evidence that all the injury she claimed resulted from the accident. *Held*, that a verdict for plaintiff would not be disturbed.

Appeal from circuit court, Monroe county; R. W. Meirs, Judge.

Action by Addie Neal against the city of Bedford to recover for personal injuries caused by a defective sidewalk. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Martin and John D. Alexander, for appellant. James E. Boruff and Brooks & Brooks, for appellee.

McCABE, J. The appellee sued the appellant in the Lawrence circuit court to recover damages on account of a personal injury received by her in falling down on a sidewalk in said city, which it is alleged the defendant negligently suffered to be and remain in an unsafe condition. The venue was changed to the Monroe circuit court, where a trial of the issues formed resulted in a verdict for the plaintiff, assessing her damages at \$5,000, upon which the court rendered judgment over appellant's motion for a new trial.

Error is assigned here on the action of the court in overruling appellant's demurrer to the complaint, its motion to quash the summons, and its motion for a new trial. Among

¹ Rehearing denied, 43 N. E. 815.

the reasons assigned in the motion for a new trial are that the damages assessed are excessive, that the verdict is contrary to law, and not sustained by sufficient evidence. There is evidence strongly tending to show that appellee had feigned and simulated that she had suffered more injury in consequence of her fall than she had in truth and fact sustained, but that evidence was contradicted, and there was evidence sufficient to show that all the injury she claimed resulted from the accident had in fact directly resulted from her fall. The jury having settled that conflict in her favor, and the court having overruled the motion for a new trial, we cannot, under the long and well-established rule, disturb their finding in that respect by reweighing the evidence.

But the appellant contends that the evidence does not support the verdict, because it fails to show that the appellee's negligence did not contribute to her injury, and, further, that it fails to show that the appellant was guilty of negligence in failing to keep the sidewalk in question in repair, and in a reasonably safe condition for pedestrians to travel over. The sidewalk in question was made of planks nailed onto stringers, two stringers lying side by side on the sidewalk, and running parallel therewith. The planks constituting the walk were laid close together, across the stringers, and nailed thereto. The walk had got old, and the boards were warped by the sun, so they turned up at the ends. From these causes many of these boards became loose from the stringers, and would slip about on them, and sometimes would get clear off of the stringers, onto the grass at the side of the stringers or sidewalk. The plaintiff passed over the walk during the day that she received the injury she complained of, that being October 22, 1894. On the evening of the same day she and one Mrs. Hitt, with whom she was living, went from Mrs. Hitt's house down into town to the post office; and on their way passed over the walk in question, when the appellee saw it again. On their way back, about half an hour after they had passed over the sidewalk, they came onto it again, when it was about 7 o'clock in the evening, and getting dark. The plaintiff being in front, and Mrs. Hitt behind her, a loose board on the sidewalk, being stepped on by her, flew up, and struck the plaintiff in the abdomen, causing her to fall down across the sidewalk in an unconscious condition. She was afterwards removed in a buggy to Mrs. Hitt's house. It appears that she knew all about the condition of the sidewalk at the time she ventured upon it and received her fall and injury. The ground at the side of the walk was only about five or six inches lower than the board walk, and there was grass on the ground. There is no evidence to show what degree of care she used to avoid danger in passing over the walk at the time she was injured. It is not enough for the plaintiff,

in such cases, to prove the negligence of the defendant; the plaintiff must also prove that his own negligence or want of ordinary care did not contribute to bring about his own injury. *City of Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235. It is true it is the duty of a city to keep the streets and sidewalks thereof in a reasonably safe condition for travel (*City of Lafayette v. Larson*, 73 Ind. 367; *City of Huntington v. Breen*, 77 Ind. 29; *City of Washington v. Small*, 86 Ind. 462; *City of Aurora v. Bitner*, 100 Ind. 396; *City of Logansport v. Dick*, 70 Ind. 65; *City of Crawfordsville v. Smith*, 79 Ind. 308; *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977; *City of Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *City of Michigan City v. Ballance*, 123 Ind. 334, 24 N. E. 117; *City of Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65); but that duty and obligation does not absolve the plaintiff from the duty and obligation to exercise ordinary care for her own safety (*Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, and authorities there cited; *Brucker v. Town of Covington*, 69 Ind. 33; *President, etc., v. Dunsont*, 2 Ind. 586; *Riest v. City of Goshen*, 42 Ind. 339; *Jonesboro, etc., Tp. Co. v. Baldwin*, 57 Ind. 86; *City of Indianapolis v. Cook*, 99 Ind. 10).

As before stated, the appellee knew all about the defect in the sidewalk when she ventured upon it the last time, and in the dark, whereby she received her fall and injury. It is true that it is settled law in this court that because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk. *City of Huntington v. Breen*, supra; *Wilson v. Railroad Co.*, 83 Ind. 326; *Id.*, 93 Ind. 237; *Nave v. Flack*, 90 Ind. 205; *City of South Bend v. Hardy*, 98 Ind. 577; *Town of Albion v. Hetrick*, 90 Ind. 545; *Turner v. Buchanan*, 82 Ind. 147. But the doctrine to be extracted from these cases is that a person with knowledge of the defect or danger must, in attempting to pass, exercise care proportioned to the known danger to avoid injury, and, as a consequence, the appellee in the case before us having knowledge of the defective and unsafe condition of the sidewalk when she entered upon it the last time in the dark, she was required to exercise more care than she would have been required to exercise had she been ignorant of the defect, or there then had been no defect, and it had been daylight. *City of Huntington v. Breen*, supra; *Town of Gosport v. Evans*, supra; *City of Indianapolis v. Cook*, supra; *City of Richmond v. Mulholland*, 116 Ind. 173, 18 N. E. 832; *City of Ft. Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038; *City of Columbus v. Strassner*, supra. It is true the appellee was only required to exercise ordinary care under the circumstances to exculpate her from the charge of contributory negligence. No

one can be charged with negligence contributing to his own injury who exercises ordinary care, under all the circumstances, to avoid the same. Ordinary care, however, is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circumstances. Therefore, what would constitute ordinary care to avoid injury in passing over a defective and unsafe sidewalk in the dark by one ignorant of its defective and unsafe condition would not constitute ordinary care in one thus passing who had knowledge of its defective and unsafe condition. There is not a particle of evidence that the appellee used any care to avoid the accident or harm to herself. Nor is there any evidence that she used her knowledge of the defective or unsafe condition of the sidewalk to avoid injury to herself. There was therefore a total lack of evidence to establish one of the indispensable elements of the plaintiff's cause of action, namely, that the plaintiff's negligence or failure to exercise ordinary care, under the circumstances, for her safety did not contribute to bring about her injury. The jury had no right to infer the existence of that fact without proof. *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. 892. Moreover, the evidence comes very nearly establishing without a conflict that the appellant was not guilty of negligence. The evidence overwhelmingly establishes that the sidewalk in question was suffered to be and remain out of repair as above indicated for a long time previous to the injury complained of. The uncontradicted evidence shows that complaints of the unsafe condition of the sidewalk had been brought home to the city authorities, and that they caused it to be repaired by nailing down the loose boards, and supplying the missing ones, and nailing them down securely, and that a few days before the accident a boy lost some money by its falling through the cracks in the sidewalk, and that his father and another boy had torn up the sidewalk, by prying loose a number of the boards, in search of the lost money. This occurred only two or three days before appellee's injury. There was no evidence to show that the city authorities had received any notice of these depredations before the appellee's injury. Conceding that the city would not be liable without such notice, appellee's learned counsel contend that this evidence of repair is overwhelmingly contradicted by the witnesses on behalf of the appellee. As we construe their testimony, there was no such overwhelming contradiction of repairs. They were all testifying as to the general condition of the sidewalk, and that it had for a long time been out of repair, not that such repairs had not in fact been made; but there may be one witness that denied that any repairs had been made. But, as the judgment must be reversed for the failure to prove the appellee's freedom from contributory negligence, we will refrain

from any further comment on the evidence as to the appellant's negligence. We have examined the complaint, and are of opinion that the circuit court did not err in overruling the demurrer thereto.

The trial court erred in overruling the appellant's motion for a new trial. The judgment is reversed, and the cause remanded, with instructions to grant appellant's motion for a new trial.

(142 Ind. 546)

FOLAND v. TOWN OF FRANKTON et al.
(Supreme Court of Indiana. Nov 19, 1895.)

MUNICIPAL CORPORATIONS—INDEBTEDNESS—WHAT CONSTITUTES—CONTRACT FOR LIGHTING—INJUNCTION—PLEADING.

1. Where a municipal corporation contracts for water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, within the meaning of Acts 1891, p. 389 (Rev. St. 1894, § 4377), since the debt for each year does not come into existence until the compensation for each year has been earned. *Crowder v. Town of Sullivan*, 28 N. E. 94, 128 Ind. 486, followed.

2. In an action to enjoin a town from executing a contract for lighting, an allegation in the complaint "that the contract as intended to be made and entered into is an absolute and unconditional promise to pay," etc., adds nothing to the complaint, where the court knows from the allegations concerning the terms of the proposed contract that the amount to be paid is to be paid at the end of each year, and that no debt is created within the meaning of Rev. St. 1894, § 4377, until the compensation mentioned is earned.

3. In such case allegations that "said town will not have money to meet said indebtedness when the same matures, above the amounts necessary for the actual running expenses of said town, and will not receive from the present levy sufficient funds to pay such indebtedness, and cannot make a levy in time to pay the same as it matures," are mere conclusions, and present no question.

4. The expense of light, water, labor, and the like, for a municipal corporation, is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues, which may be applied to such purpose, even though the effect is to postpone judgment or other creditors.

Appeal from circuit court, Madison county; A. Ellison, Judge.

Action by John W. Foland against the town of Frankton and others to enjoin defendants from entering into a certain contract for lighting the streets of such town. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Diven & McMahan, for appellant. Goodykoontz & Ballard, for appellees.

MONKS, J. Appellant brought this action to enjoin appellees from entering into a certain contract for lighting the streets of said town. Appellees filed a demurrer to the complaint, which was sustained, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The only error urged calls in question the action of the court in sustaining the de-

murrer to the complaint. So far as necessary to the determination of the questions presented, the complaint is as follows: "That the appellee is about to enter into a contract with the Frankton Natural Gas & Oil Company, by the terms of which the town agrees to pay three hundred dollars in one year for twenty-five street lights, and twelve dollars for each additional street light, and at the termination of each year thereafter, for five years, to pay said gas company the sum of three hundred dollars, and twelve dollars additional for each light over twenty-five, which contract, as intended to be made and entered into, is an absolute promise to pay said amounts at said times, and thereby creating an indebtedness against said town. That said town is now indebted in the sum of twenty-seven hundred and fifty dollars. That the board of trustees is proposing to create said indebtedness aforesaid, and that no petition has ever been signed by a majority of the resident owners of the taxable real estate of said town to contract said debt for lighting the streets, or any debt. That said town has need of money, and will not have money to meet the said indebtedness when the same matures, above amounts necessary for the actual running expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness so created, and cannot make the levy in time to pay the same as it matures."

It is earnestly insisted by appellant that appellees, by said contract, would create an indebtedness, and that the same could not be incurred unless a majority of the owners of taxable real estate of said town should petition the board of trustees to contract such debt or loan, as provided by section 4377, Rev. St. 1894 (Acts 1891, p. 389). This question was, after a careful consideration, determined by this court, against the contention of appellant, in the case of *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94. It was held in that case that where a municipal corporation contracts for a useful and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. In the case cited, this court said: "It may be true that the contract creates an obligation for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential for the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light and water, the result would be disastrous, for it is a matter of common knowledge that it requires a large outlay of money to provide machinery and appli-

ances for supplying towns and cities with light and water, and no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss the point at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited; *City of New Albany v. McCulloch*, 127 Ind. 500, 28 N. E. 1074; *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. City of Davenport*, 36 Iowa, 396; 1 Dill. Mun. Corp. (4th Ed.) § 135." See, also, *Laycock v. City of Baton Rouge*, 35 La. Ann. 475; 15 Am. & Eng. Enc. Law, 1126. It is clear from these authorities that the execution of the contract in question would not create a "debt" within the meaning of section 4377, Rev. St. 1894, and therefore no petition was necessary. Appellee had full power to contract for gas under the provisions of section 4301, Rev. St. 1894 (Acts 1883, p. 85), for any period not exceeding 10 years. The allegation in the complaint "that the contract, as intended to be made and entered into, is an absolute and unconditional promise to pay," etc., adds no strength to the complaint; neither does the demurrer admit this statement to be true, as claimed by appellant. The court knows from the allegations concerning the terms of the proposed contract that the \$300 to be paid for gas is to be paid at the end of each year, and that no debt is created within the meaning of section 4377, Rev. St. 1894, until the compensation mentioned is earned. Appellant cannot, by an averment that the contract has a certain meaning, change the legal effect of the contract as he has stated it in the complaint. The allegation "that said town will not have money to meet said indebtedness when the same matures, above the amounts necessary for the actual running expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness, and cannot make a levy in time to pay the same as it matures," are mere conclusions, and present no question. The facts, if any there were, showing that the town will not have money to meet said indebtedness, or that it will, by the proposed contract, overreach its current revenues, should be stated, and not the mere conclusions of the pleader. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 161, 39 N. E. 443, and cases cited. The complaint in this case was filed February 19, 1894; and, under the existing law, it would seem that the board of trustees

of the town could have made a levy of taxes in time to pay the installments under the proposed contract, depending, perhaps, the first year, upon whether the same was collected by the marshal of the town or the county treasurer. The expense, however, of light, water, labor, and the like, is essential to the maintenance of corporate existence, and constitutes current expenses payable out of the current revenues, which may be applied to such purposes, even though the effect is to postpone judgment or other creditors. *City of Valparaiso v. Gardner*, supra; *Town of Fowler v. F. C. Austin Manuf'g Co.*, 5 Ind. App. 489, 32 N. E. 596; *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 Iowa, 515; *Laycock v. City of Baton Rouge*, supra. There is no error in the record. Judgment affirmed.

(142 Ind. 538)

WESTFIELD GAS & MILLING CO. v. MENDENHALL et al.

(Supreme Court of Indiana. Nov. 19, 1895.)

MUNICIPAL CORPORATIONS—REGULATING PRICE OF GAS—ACCEPTANCE OF FRANCHISE.

Rev. St. 1894, § 4306, authorizes a municipal corporation to enact an ordinance regulating the supply and distribution of natural gas, and exacting a fee from companies using its streets in supplying it. *Held*, that where a city passed an ordinance granting the right to lay natural gas mains in its streets, prescribing the maximum price to be charged, and requiring an approved bond that a company accepting such privilege would comply with the ordinance, the price fixed by the ordinance is binding on a company whose bond has been presented to and accepted by the city, and in whose favor the city has waived its right to exact a fee for the use of its streets.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Denny J. Mendenhall and others against the Westfield Gas & Milling Company to enjoin defendant from refusing to supply gas to them. From a judgment for plaintiffs, defendant appeals. Affirmed.

Kane & Kane, for appellant. L. S. Baldwin and J. F. Neal, for appellees.

JORDAN, J. Appellees, by their action, sought to enjoin the appellant from carrying out its purpose to deprive them of the use of natural gas from the plant of the appellant, upon the ground that the former had refused to pay a price therefor in excess of the maximum rate fixed by an ordinance of the board of trustees of the town of Westfield, Ind., under which ordinance appellant exercised the right to use the streets of said town in the construction and operation of its natural gas plant. Appellant unsuccessfully demurred to the complaint, and, upon its refusal to further plead, a judgment was rendered awarding the relief asked by appellees.

The only question presented by this appeal is as to the alleged error of the court

in overruling the demurrer to the complaint. The following, we believe, is a correct résumé of the material facts as they are alleged in the complaint: "(1) That the appellees are citizens of the town of Westfield, in Hamilton county, Indiana, and patrons and consumers of appellant's gas company, and consumers of natural gas furnished by said appellant in said town. (2) That defendant is a corporation duly organized and operating under the laws of said state, and having its office and principal place of business at said town, and was organized for the purpose of owning, controlling, and operating gas wells, and also a gas plant in said town to supply natural gas for light and fuel to residents and citizens of said town, and is now engaged in said business, and has been so engaged since and pursuant to an ordinance passed by the board of trustees of said town, etc. (3) That said town of Westfield is a municipal corporation, duly organized and existing under the laws of the state of Indiana. (4) That on the 4th day of January, 1889, the board of trustees of said town duly and legally passed an ordinance regulating the supply of natural gas to the citizens of said town. (5) That said ordinance was duly published in the *Westfield News*, a newspaper printed and published in said town, on the 11th day of January, 1889, and became of effect on the 2d day of January of said year; that a copy of said ordinance is filed herewith, and marked 'Exhibit A.' (6) That, among other things, said ordinance fixed and established a maximum schedule that should be charged to consumers for the supply of said gas, which schedule and the prices authorized to be charged for kitchen and cook stove are as follows, to wit, eighty cents per month for twelve months,—\$9.60 per year. (7) That said ordinance further provided that before any corporation, firm, individual, or company desiring to pipe the town of Westfield, Indiana, for the supply of natural gas shall do any work toward the laying of any mains or pipes in any street, alley, or public grounds thereof, such individual, corporation, firm, as the case may be, shall, if the board of trustees so elect, execute a bond to the town of Westfield, Indiana, in the penal sum of \$3,000, to the acceptance of and the approval of the said board, in which one or more of the sureties shall reside in Hamilton county, Indiana. That afterwards, on the 4th day of February, 1889, the defendant, desiring to occupy said streets and alleys with its pipe, did, at the request of said trustees, file its written acceptance of said ordinance and bond, as in said ordinance required, which said bond and acceptance the board of trustees approved. (8) That said board of trustees approved and accepted said bond, and that said defendant laid its pipes and mains in the streets and alleys of said town, all of which was done subject to the filing and acceptance of said bond, and in pursuance of

said ordinance. (9) That it was further agreed between said company and said board of trustees, before the filing and acceptance of said bond, that in consideration of said town waiving its right by law to require defendant to pay a license fee for the privilege of occupying and using said streets, alleys, and grounds aforesaid, and operating said plant therein, said defendant would furnish said gas to consumers in said town in accordance with the schedule of rates and prices fixed by said ordinance. (10) That on the 20th day of April, 1894, defendant published in the Westfield News notice to gas consumers, as follows, to wit: 'Notice to Gas Consumers: Notice is hereby given that all persons using gas from the Westfield Gas and Milling Company, whose five-year contract expires on or before May 1st, 1894, will be charged on and after that date \$1 per month per cook stove, instead of 80 cents as heretofore. A. L. Binford, Pres't. W. B. Hill, Sec'y.' (11) That the defendant has been giving out in speeches that it intends to raise the rates for the use of gas in kitchen and cook stoves, and that the stoves referred to by defendant are kitchen stoves on which the contract has expired, or is about to expire, all of which would be in violation of said ordinance. (12) That plaintiffs have, since the adoption of said ordinance and the execution and approval of said bond, fitted up and plumbed their respective dwelling houses and kitchen and cook stoves, at great expense to them, for the use of said gas, by which said stoves have been rendered unfit for any other kind of fuel. That plaintiffs desire to continue the use of said gas for their kitchen stoves, and have always been ready and willing to pay said rate as fixed by said schedule, but defendant refuses to accept said rate, and threatens to exact from said plaintiffs and other consumers the sum of one dollar per month for each kitchen or cook stove, in violation of said ordinance, and will do so unless restrained by the order of this court. * * * A copy of the ordinance is filed with the complaint, and marked 'Exhibit A.'" There are other averments in the pleading, but it is not necessary to set them out, as the foregoing sufficiently present the particular point herein involved.

The ordinance in question was made a part of the complaint, and treated by the parties as an exhibit. Sections 1 and 6 are substantially as follows: By section 1 the privilege or right is granted to any corporation, company, firm, etc., having its principal office in the town of Westfield, to lay and extend its gas pipes and mains upon and through the streets and public grounds of that town, for the purpose of supplying it and its inhabitants with natural gas, under and subject to the restrictions named in the ordinance. Section 6 provides that before any corporation or company, etc., shall lay any pipes or mains in the streets of the town, it shall execute a bond to

the approval of the board of trustees, and that any such company or corporation, etc., shall furnish gas to consumers under such rules and regulations as it shall adopt, at and for not exceeding the schedule of prices following, to wit: Kitchen stoves, 80 cents per month, or \$9.60 per year. The schedule continues, fixing the maximum price to be charged consumers for the use of gas in heaters and grates, etc. The contention of appellant is that the town of Westfield had no power by ordinance to regulate the price of natural gas to consumers in this manner, and that appellant is not bound by the terms and conditions of this ordinance; while, upon the other hand, appellees deny this contention, and contend that the town had the power under the law to adopt this ordinance with these restrictions, and, as appellant acquired its rights thereunder to the use of the streets of the town by expressly accepting the same, and executing its bond as provided, it became bound by its terms and conditions; that the provision or stipulation to furnish gas to the consumers of the town at a price not to exceed that fixed in the ordinance, when agreed to by the appellant, was in the nature of a contract between it and the town, which inured to the benefit of any citizen thereof who desired to obtain gas from appellant; and that the same may be enforced by appellees. By an act of the legislature approved March 7, 1887 (Acts 1887, p. 36; Rev. St. 1894, § 4306), incorporated towns and cities are empowered to enact a general ordinance to reasonably regulate the supply, distribution, and consumption of natural gas within their respective corporate limits, and to require a fee of the persons or companies for the use of the streets granted to them by these municipalities. It was held, in effect, by this court, in the appeal of Citizens' Gas & Mining Co. v. Town of Elwood, 114 Ind. 332, 18 N. E. 624, that such a general ordinance must allow all companies, corporations, or persons to use the streets as near as practicable on equal terms and conditions; that the statute of 1887, at least impliedly, forbids the grant of special privileges by special contract or license to any one company, corporation, or person to the exclusion of others. The board of trustees of the town of Westfield seems to have been exercising the power lodged in it by the statute cited, and by the adoption of the ordinance in controversy extended to all persons similarly situated, upon equal terms and conditions, the benefit of the franchise thereby granted. The town had the right, in granting the use of its streets, to impose such reasonable requirements, terms, regulations, and conditions therein upon those accepting the privileges and benefits of the grant as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers. The authority to prescribe such terms and conditions, if not expressly conferred by the act of 1887, may at least be rea-

sonably inferred therefrom, in order that the full force and effect may be given to the power expressly granted. *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *City of Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. —, 39 N. E. 433, and authorities there cited. There was no compulsion upon the appellant to accept the rights upon the terms and conditions imposed under the ordinance. It did so, however, voluntarily and unreservedly. By executing the bond in question and the written acceptance of the franchise, there was a clear manifestation of consent upon appellant's part to accept the rights granted upon the terms and conditions proposed by the ordinance, and to be bound thereby. Having accepted the franchise granted by the ordinance, and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privileges under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town who desire to use its fuel upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance. The town could not, by its subsequent action, impair or restrict the rights granted to, accepted, and exercised by appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed, by which it is expressly obligated. *City of Indianapolis v. Consumers' Gas Trust Co.*, supra. In the case cited the character, effect, and rights acquired under a similar ordinance passed by the city of Indianapolis were considered, and that decision and the authorities therein cited support the conclusion reached in the present appeal. In the case at bar the fact also appears that in consideration of the town waiving its right to exact the license fee, the appellant agreed to furnish gas to consumers in accordance with the prices fixed in the schedule. The business of manufacturing and distributing gas for fuel and illuminating purposes by means of pipe laid in the streets of a town or city is a business of a public character. It is the exercise of a franchise belonging to the state, which has been granted to an individual or corporation, under legislative authority, through the action of such municipalities. The services rendered and to be rendered for such a grant are of a public nature and the grantee owes a duty to the public. *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, and authorities cited. The privileges and rights to the streets of the town of Westfield were awarded to appellant, and it was, as it appears, exempted from the payment of a fee which the town, under the statute, was expressly authorized to exact for the grant in question. As a consideration for all this, appellant agreed to furnish gas to the inhabitants of the town at a price not to exceed the maximum rate fixed. This obligation it assumed and bound itself to dis-

charge, and this obligation the law will enforce, and appellant cannot successfully be heard in a court of justice to contend that it, under the circumstances, is of no binding force. Its learned counsel cite the case of *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, and insist that this case is conclusive upon the questions herein involved. In this contention, however, they are clearly mistaken. In that case, as it appeared, the appellant, for some time prior to the adoption of the ordinance in controversy, had been engaged in furnishing natural gas to the citizens under a former grant to it by the trustees of that town. By a subsequent ordinance the board of trustees fixed a maximum rate to be charged in the future to consumers. The gas company did not accept any rights under this subsequent ordinance, or agree to be bound by the prices therein fixed. This case is clearly distinguishable from the one now under consideration. It does not appear that the ordinance now in controversy impaired or changed any prior existing rights and privileges held or enjoyed by appellant herein. There is no apparent error in the action of the court in overruling the demurrer to the complaint, and the judgment is therefore affirmed.

(149 Ind. 94)

TATE v. HAMLIN et al.¹

(Supreme Court of Indiana. Nov. 19, 1895.)

APPEAL—NOTICE—ORDER FOR PUBLICATION.

Rev. St. 1894, § 663 (Rev. St. 1881, § 651), provides that when it appears to the supreme court by statutory proof that the appellee in a case appealed after the close of the term is not a resident, and that a notice of the appeal cannot be served on the attorney of record in the court below, the court may order that the notice of the appeal be given in some newspaper for three weeks, etc. Rev. St. 1894, § 652 (Rev. St. 1881, § 640), provides that after the close of the term an appeal may be taken by the service of the notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were had, etc. *Held*, that appellant is entitled to the order for publication notice only when the appellee is shown to be a nonresident of the state, and that service of the notice cannot be had on his attorney of record.

On petition for a modification of the opinion. Overruled.

For prior report, see 41 N. E. 356.

MCCABE, J. The petition asks us to modify our former opinion and judgment so that the appeal shall be dismissed for a failure of appellant to comply with rule 36 of this court. It seems to be supposed that we would have done so at first if such relief had been asked by the appellees. Appellees' counsel vigorously complain that the decision presents the anomalous aspect of holding that an appellant is entitled to relief on the ground of excusable neglect where he causes process to issue to and be served on agents whose authority has expired five years previously, to the knowledge of the ap-

¹ See 47 N. E. 5. Rehearing denied.

pellant. Counsel says: "How preposterous it would be for one to direct process to a person whom he knew had been out of life five years, and then, when his action was challenged, to urge that his neglect was excusable. Such is the exact force of this decision. It will lead to more confusion in the nisi prius courts than has ever followed from any decision defining excusable neglect." Just what the nisi prius courts will ever have to do with a question of practice in this court under one of its written rules touching the dismissal of appeals in this court for negligence is something the learned counsel has not deigned to enlighten us upon. Since counsel is so emphatic in opposition to excusing the neglect of the other side to comply with the strict letter of one of our rules, it might be well for him to inquire whether he has not by his own neglect waived the point he is now urging. He entered a special appearance in this court for the appellees for the sole purpose, as stated in the motion, of moving to dismiss the appeal for want of jurisdiction, in that appellees had not been served with notice. The only reason urged in argument in support of the motion was that the appeal was not perfected or taken, without the service of such a notice, and as the time limited for taking an appeal had expired the appeal should be dismissed. Having decided that the appeal is and was perfected by filing the transcript with a proper assignment of error indorsed thereon, we went beyond the brief and argument of counsel, and inquired what effect rule 36 of this court had upon the question. Counsel, abandoning his former position, comes now, and asks this court, under the guise of a motion to modify its former judgment, to dismiss the appeal for failure of appellant to comply with rule 36 of this court. No such reason for dismissing the appeal was hinted at or suggested on the argument, though appellees' learned counsel filed two able briefs in support of the motion to dismiss. And yet counsel gravely tell us that "this result of the court's ruling cannot be regarded otherwise than astounding,"—because, we presume, the motion to dismiss was not sustained on grounds never mentioned, and presumably never thought of, by the learned counsel before the decision was made. What we meant in the original opinion was that, while the case falls within the strict letter of the last clause of rule 36 of this court, yet it did not fall within the spirit of the rule. We did not intimate nor intend to intimate that a failure to comply with the regulations provided by statute or the rules of this court, in taking and perfecting appeals here, could be excused on the ground that the party or his attorney did not or could not understand the law or the rule of the court. But we meant simply that the practice of the clerk of this court—of many years' standing, and seemingly sanctioned by this court—of issuing

process against the attorneys of appellees had afforded just grounds for misleading the attorneys of the state into the erroneous supposition that this court was of opinion that such practice was authorized by the statute. And hence to apply the rule to appeals heretofore taken, to the extent of dismissing the appeal for want of compliance with the rule, would be to punish a party by a dismissal of his appeal without cause, or for his negligence seemingly superinduced by this court. A failure to comply with the rule in appeals hereafter in this respect, and a failure to take action in appeals heretofore taken within 90 days after the announcement of this decision, may subject such appeals to dismissal under the rule. Counsel interested in another appeal, where the appellee is a nonresident, have supposed our former opinion held that service on an attorney of record is worthless. That is not the holding. The holding was that service of notice on an attorney alone would not be good, even if it was that kind of notice authorized to be served on the attorney of the adverse party, because the provision authorizing such notice requires notice also to be served on the clerk. But counsel in the other case call our attention to the section providing for publication notice where, as in their case, the appellee is a nonresident of the state. It reads as follows: "Whenever it shall appear to the supreme court, by satisfactory proof, that the appellee in a cause appealed after the close of the term is not a resident of this state, and that a notice of the appeal cannot be served upon the attorney of record in the court below, the court may order that notice of the pendency of the appeal be given in some newspaper printed and published in this state, for three weeks successively; after which the court shall proceed in all respects as if the defendant had been served with process." Rev. St. 1894, § 663; Rev. St. 1881, § 651. The meaning of this section is that if the notice provided for in the section referred to in the former opinion cannot be given, by reason of the nonresidence of the appellee, and that no service of the unofficial kind of notice can be got upon his attorney of record, notice may be given by publication. The two sections must be construed together. If the appellee is a nonresident of the state, and service of notice cannot be got on his attorney of record, then neither kind of notice of the appeal as provided in section 652, Rev. St. 1894 (Rev. St. 1881, § 640), can be given, because the appellee is out of the state, and a summons cannot be served on him. The other kind—the unofficial notice—cannot be given, because, as we before held, to make it complete, it must be served both upon the clerk of the trial court and the attorney of the adverse party. The meaning of the section just quoted is that it must be shown that neither kind of notice provided for in the

former section can be given before publication notice can be ordered. When the appellee is shown to be a nonresident of the state, and that service of notice cannot be got on his attorney of record, then it is shown that neither kind of notice provided for in the former section can be given, even though notice may be served on the clerk; and then, and not till then, is the appellant entitled to an order for publication notice. The petition is overruled.

NEW YORK, C. & ST. L. R. CO. v. OSTMAN.¹

(Supreme Court of Indiana. Nov. 20, 1895.)

RAILROAD COMPANIES—ACTION FOR DEATH OF FIREMAN—PETITION—INCONSISTENT FINDINGS—RISKS OF EMPLOYMENT.

1. In an action against a railroad company for the death of a fireman, caused by his head striking a cattle chute so constructed that the window of the engine cab, when passing, was only 13 inches from it, the complaint alleged that deceased did not then and there nor theretofore know that said chute was so negligently left in such close proximity to his engine, and that by the exercise of reasonable diligence he could not have known or ascertained it. *Held* to sufficiently show the diligence of deceased and his want of knowledge of the dangerous proximity of the chute.

2. It does not follow that because a fireman could have seen a cattle chute for half a mile on the track, he could know its exact distance in inches from the railroad track, and a finding of such fact is not inconsistent with a finding that he did not know, and did not have any reason or opportunity to know, of the danger arising from such chute being in too close proximity to the track.

3. A finding that a fireman who was struck by a cattle chute built too close to the track did not know, and did not have any reason or opportunity to know, of the existence of the danger, is not inconsistent with a rule of the company, shown by such findings, that "train and engine men must familiarize themselves with the tracks in dangerous points upon the lines."

4. Where a cattle chute is constructed in dangerous proximity to a railroad track, the defect is not one of the risks assumed by a fireman.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by Emma Ostman, administratrix of the estate of Charles Ostman, deceased, against the New York, Chicago & St. Louis Railroad Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

Morris, Bell, Barrett & Morris, for appellant. Ninde & Ninde, for appellee.

HOWARD, C. J. The appellee filed her complaint to recover from the appellant damages for the negligent and wrongful killing of her intestate, Charles Ostman, who was also her husband. The trial resulted in a verdict for \$4,000 damages. The complaint shows that on the day of the accident—April 8, 1891—appellant was operating a line of railroad in this state passing through the station at Burr Oak, where the intestate was killed. Charles

Ostman was at the time a locomotive fireman in the employment of the appellant company. It is alleged that the appellant at the time maintained at Burr Oak station certain side tracks and switches, connected with its main line, and also certain cattle pens and chutes, and that such cattle chutes were placed too close to the railroad tracks, insomuch as to render them extrahazardous and dangerous to the firemen and other employes on passing trains. It is alleged further that Ostman, at and prior to the accident, did not know, and could not learn by the exercise of diligence, of the close and dangerous proximity of the chutes to the track; but that appellant did then and for a long time previous thereto know that the chutes were too close for the safety of the employes. It is then alleged that Charles Ostman, at said time and place, without his fault, and while he was in the discharge of his duties, looking to the rear of the train for signals, was struck on the back of his head by said cattle chute, and was so injured thereby that death resulted. Counsel for appellant urge that the complaint is insufficient for the want of an allegation that the decedent "could not then and at that time have seen the chute in time to have avoided the injury," and because it is not alleged that "he could not then and at that time, if he had exercised reasonable care, have discovered the chute in time to have avoided the injury." It is, however, alleged in the complaint "that said deceased did not then and there nor theretofore know that said cattle pens, cattle chute, and gates were so negligently left in such close proximity to his said engine and cab as to make it dangerous or extrahazardous for him to pass the same in the position he was in, in the discharge of his said duties, as aforesaid." And the further allegation is made "that the said deceased, by the exercise of reasonable diligence, did not and could not have known or ascertained that said cattle chute and gates were in such dangerous proximity to said side track, or to the said engine and cab on which he was then and there engaged in the discharge of his duties." These allegations are ample to show the diligence of the decedent, and his want of knowledge of the dangerous proximity of the cattle chute. We think the complaint is good beyond question.

From the special verdict it appears, among other things: "That the deceased, for eighteen months prior to his death, was in the employ of the defendant as a locomotive fireman, and for sixteen months prior to his death said deceased was employed by said defendant as fireman on its engine 169, and continued to be so employed till his death as hereinafter set forth. That during said period said deceased, in the discharge of his duties, passed said station at Burr Oak twice each and every week, and frequently did switching and work at said station. That during all said period the defendant had a side track and spur switch at said town of Burr Oak, both of

¹ Superseded by opinion, 45 N. E. 651.

which were located north of the main track of said railroad. That said side track was about 800 feet long, the east switch of which was 400 feet east of the cattle chute herein-after described, and the west switch of which side track was west of the depot hereinafter described. That at said point 450 feet west of said east switch the defendant had and maintained near to and on the north side of said side track cattle pens, from which there was a cattle chute about eighteen feet long, leading from said pens, so near to the track that by the aid of fences, gates, and floors the stock was driven from said pens into the defendant's cars to be transported. That said chute was constructed as follows: Three oak posts six inches square were planted in the ground about equally distant from the north rail of each side track. Said posts were eleven feet six inches high. One of said posts was located on the west side of said cattle chute, and one about the middle, and one on the east side thereof. That a fence was constructed from each of said posts north to said cattle pens. That said fence, from the said middle post north to the cattle pens, divided said chute into two parts. That by means of said middle fence the said chute between it and said west fence was six feet and two inches wide, and the chute between said middle fence and the east fence was the same width. That said fences were constructed of pine boards six inches wide and six inches apart. That a gate was constructed out of pine boards, so that the boards of said gate were so adjusted to said fence that each board of the gate was located in each space between the boards of the fence; and said gate was about eighteen feet long and three feet six inches wide, and was operated by being pushed towards and from the car to be loaded. At the north end of the gate was a board or batten nailed across the ends of the gate boards to hold them in place, and on the west side of the south end of the gate was a similar board nailed across the ends of the boards of the gate, and on the east side of the gate and fence were boards nailed so as to allow the gate to move north and south along the spaces between the boards of the fence. The said board, so nailed across the south ends of the gate boards, was placed on the west side of the gate, so that when the gate was shoved northward the north edge of said board would strike the face of said post, and prevent said gate from slipping back till the south end thereof was back flush with the south face of the post; but because of said board striking said post the south end of the gate at the time the deceased was killed was six inches further south than the post, and six inches nearer the track than said post. That the south face of said post was, at the time said deceased was killed, thirty-eight inches north of the center of the top of the north rail of said side track, and the south end of said gate, at the time said deceased was killed, was thirty-five inches north of the said center of said rail. That the cab of said engine

is eight feet and six inches wide. That the distance between the north side of said cab at the window thereof where deceased was so looking out, and the part of said cattle chute his head came in collision with, was thirteen inches; that said distance between said cab and said cattle chute made the said cattle chute so placed extrahazardous for the deceased and other trainmen of said defendant; that the deceased did not know, nor have any reason or opportunity to know, any part of said chute was within said distance of thirteen inches of said cab as it passed the same, but that the defendant and its proper agents and servants did know that said chute was said distance from the cab window as it passed said chute; that said chute had for a long time, to wit, for several years before the deceased was killed, come in collision with parts of defendant's trains as they passed the same, and frequently knocked off markers from cars and collided with brake wheels attached thereto; that said defendant had notice of said facts, and that said chute was the distance aforesaid from said track and cabs as they passed the same, long enough before the deceased was killed to have removed the same to a safe distance from trains passing the same, and yet during all said time before and up to the time the deceased was killed the defendant negligently failed to remove the same, but negligently maintained the same at said dangerous distance from said track and cabs as they passed the same. That the said cattle pens and chute could be seen for a distance of one-half mile and more along the track each side thereof. That when deceased was killed he was firing on said engine 169, which was then and there pulling a local freight train eastward over said railroad. That it became and was necessary to take a car then standing on said spur switch into said train, which was coupled onto said engine at the west end of said side track, and was being pulled out over said side track eastward and past said cattle chute at the time said deceased was killed, at the rate of about ten miles per hour. That while said train was so moving eastward over said side track it became and was then and there the duty of said deceased to lean out of the said cab window on the north side of said cab, and look backward for signals, and to see if everything was all right. And the said deceased was so then and there and at the time he was killed, carefully, and in the proper discharge of his duty, looking out of said window, and looking back for signals, and to see if everything was all right, at the time his head and part of his shoulders were properly in said window and outside thereof, so that, as he passed said chute, his head came in collision with said cattle chute, whereby his skull was mashed in and broken, and said deceased was killed. That he died within a few minutes after he so struck said cattle chute. And we, the jury, further find: That the board so nailed on the west side of the south end of said gate was longer up and down by

the space of two inches than the said gate was wide, and that the upper end of said board was two inches higher than the upper edge of said upper board of said gate, and that said board was so placed upon the south end of said gate that the south edge thereof was from a half inch to one and one-half inches further south than the south end of said boards of said gate. That the top end of said board was further south than the lower end thereof by the space of one inch. That when said deceased was looking out for signals, and to see if everything was right, as aforesaid, and as he passed said cattle chute, the back of his head struck the outer edge of said board so nailed across the south end of said gate as aforesaid, by which collision he was killed as aforesaid. That at the time said Ostman was employed as a fireman on the defendant's road, to wit, eighteen months prior to April 8, 1891, said defendant railroad company delivered to said Ostman, and said Ostman received and familiarized himself with, its books of rules and instructions, and at the time of his injuries on April 8, 1891, he knew and was familiar with the same. That there was in force on said defendant's road, as shown by said book of rules and instructions, at the time of the employment of said Ostman, and continuously to a time subsequent to April 8, 1891, the following rules: 'First. All persons entering into or remaining in the service of this company are warned that in accepting or obtaining employment they must assume the risk attending it. Each employé is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, to the public, and to property, especially in switching cars and in all movements of trains. Second. Employés of every grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in the proper condition for the services required, and, if not, to put them in proper condition, or see that they are so put before using them. Also train and engine men must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employés to incur any risk whatever from which, by the exercise of their own judgment, and by personal care, they could protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of a superior or otherwise.' The third rule has reference to economy in the use of fuel. 'Fourth. They must assist in keeping a constant lookout upon the track, and must instantly give the engine man notice of any obstruction or signal they may perceive.' And we further find that said deceased did not know that said cattle chute was so close to said track or to his cab as it passed the same as to be dangerous to him, or that it would come into collision with him as he passed the same, and while he was discharging his duties as such fireman. And we,

the jury, further find that said deceased was so injured and killed without any fault whatever on his part."

Counsel for appellant contend, first, that the special verdict is insufficient, for the reason that it is not found "that appellee's intestate did not know, and had no opportunity to learn, of the dangerous proximity of this cattle chute to appellant's side track." In this it would seem that counsel are in error. It is expressly found "that said deceased did not know that said cattle chute was so close to said track or to his cab as it passed the same as to be dangerous to him, or that it would come into collision with him as he passed the same." It is also found "that the deceased did not know, nor have any reason or opportunity to know, any part of said chute was within said distance of thirteen inches of said cab as it passed the same." The very findings are therefore made which counsel say should be made in order to have the verdict sufficient on the question of the decedent's knowledge. It does not follow that because the decedent could have seen the cattle chute for half a mile that he could, therefore, know its exact distance in inches from the railroad track. To see the chute at a distance along the track is one thing; to see how close it is to the track as the train passes along at the rate of 10 miles an hour is quite another thing. The decedent was not a track man, nor a station hand, but a fireman, who knew the structure only as he passed on his engine, from trip to trip. He had good reason to rely upon the presumption that such a structure would not be so erected and maintained as to endanger those who were passing upon appellant's engines. The finding, therefore, that he did not know, and did not have any reason or opportunity to know, of the existence of the danger, is quite in harmony with his situation and surroundings. Neither is this conclusion inconsistent with the rules of the company, as found in the verdict: "Train and engine men must familiarize themselves with the tracks and dangerous points upon the lines." But from the passing train it is hardly conceivable that a cattle chute should seem to be a dangerous point. The presumption to one riding upon an engine must be that this chute, like all others along the line, had been built and was maintained with due care by the company. It is not easy to understand how its dangerous proximity should be discovered from the train, except in looking out at the moment of passing; and even then it would seem to be a difficult thing to judge of the exact distance. Two feet distant, though apparently too close, might not, perhaps, be a dangerous proximity; and yet a good eye, in moving rapidly along, might not be able to distinguish 2 feet from 18 inches, or even from 13, the point of danger. Besides, these rules themselves make it the duty of the trainmen to "assist in

keeping constant lookout upon the track," and they "must instantly give the engine man notice of any obstruction or signal they may perceive." The decedent was attending to this duty at the very time he was struck on the back of the head by a projection of the cattle chute, which he had every reason to believe was placed at a safe distance from his engine. The rule that applies to the knowledge which an employé should have of the tools and machinery and places which he himself uses or occupies, cannot be applied to the knowledge which he has of things with which he has no opportunity of coming in contact. If an employé has charge of an engine, a brake wheel, a lantern, a ladder, or any other machine, tool, or place, he may well be held chargeable with knowledge of the condition of the thing so in his charge. Whether he has knowledge of the condition of other things must depend upon his opportunities, if any he has had, of becoming acquainted with them. Many of the authorities cited by counsel in this connection are hence not in point.

It is found that the batten board across the end of the gate extended nearer to the passing car by from half an inch to one and a half or two inches than the nearest edge of the posts of the cattle chute, and also that it was by this extended edge of the batten board that the head of the deceased was struck. It appears, accordingly, that if the batten board had been pushed back flush with the nearest edge of the post, the head of the deceased might not have been struck, and he would have passed in safety. If that were so, it does not seem that the cattle chute would have been absolutely dangerous, or at least that it would have been extrahazardous. But can it be said that one who was upon a rapidly passing engine had opportunity to judge of a difference in distance so small as from one and a half to two inches between his track and an object outside? Yet it was that small difference of distance that marked the line of danger. It is not to be contended that it was the duty of decedent to leave his train, and go out along the line of road and measure the distance of each cattle chute or other object from the track line, and thus learn whether those objects were at a safe distance. That duty he had a right to assume had been performed by his employer, who was required to furnish him a safe place to perform his duties, including the duty of looking for signals. He was attending to his duties, and had a right to believe that others, including the employer, had attended to their duties. The defect, besides, could not be one of the risks assumed by him as a hazard of his service. He took service with the assumption that all the cattle chutes, as well as other appurtenances of the road, had been so constructed and were so maintained as to allow him full freedom,

with safety to himself, to perform the duties of his employment. It is true that if the defect were patent, and of such a character that the decedent could, and therefore should, have known it, he would be charged with such knowledge. The jury, however, found not only that he did not know, but that he did not have any reason or opportunity to know, of the danger. In addition, the circumstances surrounding the case, as stated in the verdict, lead to the same conclusion. The cattle chute was not a structure with which the fireman had anything to do; neither was he given any right of inspection over it. His duties confined him to his engine and tender, to watching out for obstructions along the track, and to observing signals from other trainmen, and communicating the same to the engineer. His employer was required to furnish him a safe place to perform these duties, and, on failure to do so, in case of injury for which the employé was not at fault, and by reason of defects which he did not know, and could not by reasonable observation become acquainted with, the employer is liable for damages.

In *Blondin v. Quarry Co.*, 11 Ind. App. 395, 39 N. E. 200, a stonecutter, whose employment was disconnected with that of other classes of employés, was at work dressing a stone, when an undressed stone, insecurely placed, fell upon him. It was the duty of those who put the undressed stones in place to secure them sufficiently until the cutter should reach them. It was held (Reinhard, J., speaking for the court) that the defendant company was negligent in not providing the injured employé with a reasonably safe place in which to work. The stone which caused the injury had been put in place by one who had full charge of that work. And it was further held that the stonecutter, having no knowledge of the insecure placing of the stone, was not at fault by reason of not having made inspection of the condition in which it was placed. Such inspection of the work of other classes of employés was not a requirement of his service. In *Pennsylvania Co. v. Sears*, 136 Ind. 460, 84 N. E. 15, and 36 N. E. 353, it appeared that a brakeman, while engaged in his duties on one of the appellant company's trains, was struck on the head by an overhanging bridge, the brakeman not knowing that the bridge was so low as to strike his head. It was held that the danger was not a risk assumed by the brakeman as a hazard incident to his employment, and that he had a right to presume that the company would construct and maintain its tracks and bridges in a safe condition for the use of its employés in the discharge of their duties. In *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627, the court, quoting from *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49, the general rule that one who engages in the employment of another takes upon himself the

natural or ordinary risks incident to his service, says: "But there are well-defined exceptions to this general rule, one of which arises in the obligation or duty of the master not to expose the servant, while conducting his business, to perils or hazards which might have been provided against by the exercise of due care and proper diligence on the part of the master." It is further said in the same case, citing *Railroad Co. v. Swett*, 45 Ill. 197, that "a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances; and if, from a defective construction of its road and appurtenances, an injury happen to one of its servants, the company is liable for the injuries sustained." To the same effect, *Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324. See, further, *Railroad Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584, and other authorities cited in *Pennsylvania Co. v. Sears*, supra. That an employé may know of the existence of a dangerous structure, and yet have no knowledge that it is dangerous, and therefore not be chargeable with contributory negligence, or with having assumed the risk of such danger as one of the hazards of his employment, is sufficiently shown from the foregoing cases. See, further, *Hawkins v. Johnson*, 105 Ind. 29, 4 N. E. 172, a carefully considered case, in which Judge Zollars, citing numerous authorities, reaches a like conclusion. Also, *Scanlon v. Railroad Co.*, 147 Mass. 484, 18 N. E. 209; *Ferren v. Railroad Co.*, 143 Mass. 197, 9 N. E. 608. From the verdict, and from what we have already said as to the dangerous proximity of the cattle chute, and particularly of the extended batten board across the ends of the gate boards, it is apparent, we think, that the appellant is chargeable with negligence in the erection and maintenance of the structure which caused the death of appellee's intestate. The company knew for years that the chute was in such dangerous proximity to the track, that it had often come into collision with parts of passing trains, "and frequently knocked off markers from cars, and collided with the brake wheels attached thereto," yet had failed to remove the structure from such dangerous proximity to its track.

Counsel also contend that the verdict is not supported by the evidence, and ask us to discredit some of the testimony given in the case. This we cannot do. The witnesses were before the jury, and the jury must be the judges of what weight their evidence is entitled to. The learned judge who presided at the trial saw no reason to question the fairness of the trial, and we can discover none. Neither are we able to discover the great danger to the interests of appellant which will result from the affirmance of this judgment. We are inclined to think counsel have drawn upon their imagination, rather than upon observation and judgment.

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All that appellant needs to do, as suggested in *Railroad Co. v. Rowan*, supra, is to maintain its cattle chutes and other appurtenances of its road so that it will constitute a safe place in which its employes may perform their several duties. The judgment is affirmed.

(142 Ind. 529)

GILLENWATER v. CAMPBELL.

(Supreme Court of Indiana. Nov. 19, 1895.)

ACTION TO QUIET TITLE—DEMURRER—COUNTER-CLAIM—INFANT'S CONVEYANCE—VOIDANCE—RETURN OF CONSIDERATION.

1. A demurrer under Rev. St. 1894, § 342, subd. 6 (Rev. St. 1881, § 339, subd. 6), on the ground that several causes of action have been improperly joined, must be taken to the whole complaint, and not to one of several paragraphs.

2. Rev. St. 1894, § 1067 (Rev. St. 1881, § 1055), permits every defense to the action to be shown under a general denial. Rev. St. 1894, § 353 (Rev. St. 1881, § 350), provides that any matter arising out of and connected with the cause of action may be set up as a counterclaim. *Held*, that a cross complaint in an action to quiet title, alleging that defendant was the owner of and entitled to the immediate possession of land, that plaintiff without right was in possession of said land, and praying for possession and damages, set up a counterclaim which could properly be pleaded with a general denial.

3. Rev. St. 1894, § 3330 (Rev. St. 1881, § 2917), prohibits infants from conveying their lands. Rev. St. 1894, § 3340 (Rev. St. 1881, § 2921) provides that the joint deed of the husband and wife shall be sufficient to pass the lands of the wife. *Held*, that the conveyance of an infant feme covert and her minor husband is voidable, not void.

4. Rev. St. 1894, §§ 3364, 3365 (Rev. St. 1881, §§ 2944, 2945), providing that restoration of the purchase money must be made to avoid the conveyance of an infant feme covert, in which her husband, being of full age, has joined, or to avoid the conveyance of an infant who falsely represents himself to be of age, do not require an offer to restore the purchase price, where it was alleged that the husband was not of full age, and the facts pleaded did not disclose any representation by the infant as to age.

5. Privies in blood may avoid the voidable contracts of infants.

Appeal from circuit court, Grant county; R. T. St. John, Judge.

Action by Charles Campbell against Leonard Gillenwater and others to quiet title. From a judgment for plaintiff, defendant Leonard Gillenwater appeals. Reversed.

Kidd & Hunter and J. D. Slick, for appellant. Henry & Elliott, for appellee.

HACKNEY, J. The appellee sued the appellant, with Leonard Gillenwater, Sr., and Ivy Gillenwater, seeking to quiet his title to a described 82.24 acres of land in Me-chingo-me-sea's reservation in Grant county. The complaint alleged that on January 8, 1888, Jane Gillenwater, then the wife of Hugh Gillenwater, an adult, was the owner in fee simple of said lands, and sold the same to Campbell for the sum of \$3,280, paid to her; that she was then a minor, but attained her majority on the 12th day of March, 1890; that on said 6th day of January, 1888, she and her said husband joined

in a deed of general warranty conveying said lands in fee simple to said Campbell. It was further alleged that said Hugh died October 8, 1888; that said Jane intermarried with Leonard Gillenwater, Sr., on the 25th day of March, 1889, and thereafter, on the 12th day of April, 1890, died intestate, leaving, as her only heirs at law, her said husband, Leonard Gillenwater, Sr., Leonard Gillenwater, the appellant, and Ivy Gillenwater, her two children; that said conveyance had never been disaffirmed, and said purchase money had never been tendered back, but that said named heirs were claiming some interest in the land, against which claim it was prayed appellee's title should be quieted. The defendants answered in denial, the appellant and Ivy Gillenwater by guardian ad litem. Upon a trial by the court there was a finding and judgment for the appellee. A motion for a new trial as a matter of right was filed on behalf of the appellant and Ivy Gillenwater, which motion was sustained, but subsequently, upon the announcement of the death of said Ivy, it was ordered that the record show the granting of said motion only as to this appellant. It appears, therefore, at this point, that the interest, if any, of Leonard, Sr., and Ivy Gillenwater, as the heirs of Jane Gillenwater, was foreclosed by said judgment, and upon the new trial left to be determined only such interest as descended to the appellant in the event that said deed should be avoided. At this point in the proceeding the appellant filed a cross complaint in three paragraphs, making the appellee and Leonard Gillenwater, Sr., defendants thereto. The third paragraph, being thereafter dismissed, need not be further noticed. Leonard Gillenwater, Sr., did not appear to the cross complaint, was not served with process thereon, and no steps further were taken by or as to him. The appellee's demurrer for want of facts and for the improper joinder of causes of action was sustained to the first paragraph, and a demurrer for want of sufficient facts to second paragraph of cross complaint. Upon the second trial there was a finding and judgment for the appellee over appellant's motion for a new trial. The assigned errors here urged are: (1) "The court erred in rendering judgment for appellee, for the reason the complaint of appellee does not state facts sufficient to constitute a cause of action;" (2) sustaining the demurrer to the first paragraph of cross complaint; (3) sustaining the demurrer to the second paragraph of cross complaint; (4) overruling the motion for a new trial.

The first assignment, it will be observed, is addressed, not to the sufficiency of the complaint, but to the action of the trial court in rendering judgment. Under this assignment counsel attack the sufficiency of the complaint. We do not stop to inquire whether this method of attack should be recognized under our practice, nor do we consider the

question made upon the complaint, since the same questions arise upon the action of the trial court in sustaining the demurrers to the cross complaint. The first paragraph of cross complaint alleged generally that the appellant was the owner in fee simple of the undivided one-half of said lands; that he was entitled to the immediate possession thereof; that Campbell then held, and for more than one year held, without right, the possession of said lands, and unlawfully kept appellant therefrom, to his damage in a sum stated; that the mesne profits of said land during said period were \$500; that Gillenwater, Sr., was asserting an adverse claim of title to the lands; and it was prayed that appellant be given possession and damages, and that his title be quieted against said Gillenwater, Sr. As to the appellee, it is manifest that the facts so pleaded do not constitute a cause for quieting title; indeed, no such relief was sought against him, but plainly the cause so pleaded is for possession as to an undivided one-half, and damages for detention, and mesne profits. The statutory cause of demurrer, "that several causes of action have been improperly joined," applies to the whole complaint, and not to one of several paragraphs. *Fletcher v. Piatt*, 7 Blackf. 522; *Bougher v. Scobey*, 18 Ind. 151. The demurrer we are considering could not, therefore, have been properly sustained for misjoinder of causes.

The only proposition advanced by the appellee in support of this ruling of the lower court is that the appellant had also pleaded an answer in general denial, under which Rev. St. 1894, § 1067 (Rev. St. 1881, § 1055), permitted "every defense to the action, * * * either legal or equitable." The pleading in review was not simply a defense; it sought affirmative relief, and was, so far as it related to damages, in the nature of a counterclaim. Counterclaim is not a defense. *Stotsenburg v. Fordice* (Ind. Sup.; at present term) 41 N. E. 313, 810. So far as it alleged an ownership in the appellant, the pleading was but the equivalent of the general denial; but that allegation was a part of the theory that appellant could recover possession and damages from the appellee, and was not intended as a mere negative of the appellee's allegation of title in himself. Tested as a cross demand for possession and damages, it must be determined whether the relief demanded "is any matter arising out of or connected with the cause of action," as required by the Code (Rev. St. 1894, § 353; Rev. St. 1881, § 350), for, as said in *Standley v. Insurance Co.*, 95 Ind. 254, "there must be some legal or equitable connection between the matters pleaded as a counterclaim and the matters alleged in the original complaint." The matters pleaded "might be the subject of an action in favor of the" appellant, but could not properly be considered as tending "to reduce the plaintiff's claim." The question returns, therefore, are

the matters pleaded "connected with the cause of action" alleged in the complaint? They relate to the same land. They depend upon the ownership, by the plaintiff or the defendant, of the land. The cause of action pleaded in the complaint and that alleged in the first paragraph of cross complaint have such intimate legal connection as permitted them to have been united in one action, if such causes concurred in the same person. Rev. St. 1894, § 279 (Rev. St. 1881, § 278). It is the policy of the law that, when litigation must be resorted to for the adjustment of disputed rights, every question logically connected with such disputed rights shall be determined and put at rest in one action. We conclude, therefore, that the appellant might properly demand at least the possession of the land, the title to which was put in issue by the complaint. If he had sought, in this paragraph, to quiet his title as against the appellee, he certainly would have been permitted, in connection with that demand, to seek possession and damages. Instead of a prayer to quiet title, he alleged his ownership, and demanded possession and damages. This, we think, he had a right to do.

The facts pleaded in the second paragraph of cross complaint were substantially the same as those pleaded in the complaint, except that it was alleged that Hugh Gillenwater, at the date of the execution of the deed to Campbell, was under the age of 21 years. This difference, it is claimed by the appellant, rendered the deed to Campbell void, and not merely voidable. It is now the thoroughly established rule that the executed contracts of minors are voidable, and not void. The following are some of the decisions of this court to that effect: *Fetrow v. Wiseman*, 40 Ind. 148; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, 86 Ind. 87; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897; *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80. The same rule has been adopted with reference to the executory contracts of minors in regard to personal property, and as to the conveyances of insane persons, whose insanity was not of record when the deed was executed. *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113; *Musselman v. Cravens*, 47 Ind. 1; *Richardson v. Pate*, 93 Ind. 423; *Schuff v. Ransom*, 79 Ind. 458; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Somers v. Pumphrey*, 24 Ind. 231. It is true, as appellant's counsel suggest, that by statute infants are forbidden to alien their lands. Rev. St. 1894, § 3330 (Rev. St. 1881, § 2917). It is also true, however, that "the joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife." Rev. St. 1894, § 3340 (Rev. St. 1881, § 2921). With these statutes in existence, and, doubtless, construing them

together, the rule that the deeds of infant married women are voidable has been evolved. The solemn character of the instrument of conveyance, and the essential rule that unchallenged records of title import verity, require that absolute invalidity shall not attach to such instruments; while the welfare of the minor requires that they may be avoided, if seasonable opportunity be accepted, and, if not, the repose of titles demands an estoppel. There is no express limitation upon the effect of the joint deed of the husband and wife, so far as the infancy of the husband is concerned; and, if there were, we presume the rule that such conveyance is voidable, and not void, would obtain for every reason that those are so held where the wife is a minor. This paragraph of the cross complaint does not allege a return of the purchase price of the lands, and objection is made that infancy is a personal privilege, and does not survive to privies in blood, nor to privies in estate; and therefore, that when Jane Gillenwater died, never having disaffirmed her deed, no right existed in the appellant to assert the infancy of his mother in avoidance of her deed. That a return of the purchase money is essential to a disaffirmance is claimed under the provisions of sections 3364, 3365, Rev. St. 1894 (sections 2944, 2945, Rev. St. 1881). By the first of these sections, where the conveyance is "by an infant feme covert of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age," restoration of the purchase money is required. It was alleged that Hugh Gillenwater was not of full age when he joined his infant wife in her conveyance. Whether the reasons for a distinction between the cases where the husband is over and where he is under his majority are valid is a legislative question. We find that the distinction is made. By the second of the sections above referred to restoration is necessary in all sales of real estate by an infant who disaffirms, "if said infant falsely represented himself * * * to be" over 21 years of age. The facts pleaded in the cross complaint do not disclose any such representation. An answer to the third paragraph of cross complaint alleged that the husband, Hugh, falsely misrepresented his age, but that answer went out by the dismissal of that paragraph of cross complaint. That privies in blood may avoid the voidable contracts of infants and persons of unsound mind has been frequently held and recognized in this state. As to infants, see *Harbison v. Lemon*, 3 Blackf. 52; *Law v. Long*, supra; *Price v. Jennings*, 62 Ind. 111. See, also, 1 *Devil. Deeds*, § 87; 10 *Am. & Eng. Enc. Law*, pp. 637, 638. As to non compotes, see *Northwestern, etc., Co. v. Blankenship*, 94 Ind. 535; *Somers v. Pumphreys*, 24 Ind. 231; and cases cited in each. It is the rule, also, that privies in estate may avail themselves of the disability of infancy or insanity of the principal where such principal has theretofore, or does

concurrently with the plea of the privy, disaffirm, and avoid his contract. The rule that infancy is a personal privilege, and is not assignable for the avoidance of contracts, applies to those cases where advantage is sought by one who is but a privy in estate. See *Pitcher v. Laycock*, 7 Ind. 398; *Price v. Jennings*, supra; *Shrock v. Crowl*, 83 Ind. 243; *Borum v. Fouts*, 15 Ind. 50, *Wright v. Bundy*, 11 Ind. 398; *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873. We conclude, therefore, that the second paragraph of cross-complaint was not subject to any of the objections urged against it.

There is much discussion upon the weight and sufficiency of the evidence, and in some instances as to its admissibility. Upon the question of estoppel against the appellant because of false representations by Hugh Gillenwater as to his age, it is sufficient to say that no such question is in the case. As to the sufficiency of the evidence upon any of the questions discussed, opinion need here be given, since another trial upon the theory essential under our conclusions will probably avoid all such questions. The judgment of the circuit court is reversed, with instructions to overrule the appellee's demurrer to the appellant's first and second paragraphs of cross complaint.

(144 Ind. 19)

COATS v. GORDON et al.¹

(Supreme Court of Indiana. Nov. 21, 1895.)

ESTOPPEL—AGAINST MARRIED WOMAN.

The fact that a married woman, who executed with her husband, to secure a debt of the husband, a mortgage on land owned by her and him as tenants by entireties, knew that the mortgage as to her was invalid, and took no steps to notify the mortgagee of her interest in the land, will not estop her from denying the absolute ownership of the husband in it.

Appeal from circuit court, Steuben county; S. A. Powers, Judge.

Action by Mate L. Coats against Theron A. Gordon and another to cancel a mortgage. Judgment for defendants. Plaintiff appeals. Reversed.

Cline & Dawson and Robt. W. McBride, for appellant. Frank S. Roby and N. W. Gilbert, for appellees.

HACKNEY, J. The appellant and her husband executed their joint mortgage of certain real estate to secure to the appellee Gordon a promissory note by said husband to said Gordon. The note and mortgage were assigned to the appellee Carver, who, by cross complaint, sought a judgment against said husband, and also a foreclosure against him and the appellant. The complaint was by the appellant for a cancellation of the mortgage, and the theory thereof was that said real estate, at the date of said mortgage, was owned by her and her husband as tenants by entireties; that the debt was that of her husband, and that her re-

lation thereto was, by reason of the execution of said mortgage, that of a surety. The answer and the cross complaint were upon the theory that the appellant had been estopped to claim the ownership of said real estate. The question for decision arises in various forms, but for the purposes of the case may be considered upon the special findings. It was specially found that at the date of the execution of the mortgage the appellant and her husband owned the real estate as tenants by entireties; that their deed had not then been placed upon record; that the husband, who was insolvent, desired to and did purchase a horse from Gordon, and executed his individual note for the purchase price; that the appellant received no interest in said horse, or benefit therefrom; that the appellant, at the time of the execution of said mortgage, well knew that it was invalid; she knew that it was the intent and purpose of her husband to deliver the same to said Gordon, and to receive said horse; that she permitted her husband to take said mortgage to the said Gordon, who resided 11 miles distant, and to deliver the same to Gordon in her absence. It is further found that the appellant's husband, both before and after the execution of said mortgage, represented to Gordon that he was the owner, in his own right, of said real estate, and that from its value and the absence of liens it was ample security for said note. There were also findings as to Gordon's reliance upon the representations of Coats, and, after finding the sum due upon the note, it was stated, as conclusions of law, that the appellant was not entitled to recover, and that Gordon should recover upon his cross complaint. The appellees seek to uphold the conclusions of the trial court upon the theory that the appellant was, by the facts found, estopped to deny the absolute ownership, by her husband, of said real estate. On behalf of the appellant it is claimed that she was but a surety for the debt of her husband,—a fact apparent upon the face of the transaction; that under section 5119, Rev. St. 1881 (section 6964, Rev. St. 1894), she had no power to become a surety for the debt of another; and that the facts found do not constitute an estoppel against her. The facts found connect the appellant with the transaction only in the execution of the mortgage. No affirmative act or declaration of hers beyond the execution of the mortgage can be considered in determining the existence of an estoppel. She received no part of the consideration. The form of the transaction, and the intention of her husband and of Gordon, was to constitute the husband the principal debtor. The negative elements of the estoppel urged are that when the appellant executed the mortgage she knew it to be invalid, and that she remained at home, permitting her husband to go to Gordon, 11 miles distant, and deliver the mortgage as security for the debt, and

¹ Rehearing denied, 42 N. E. 1025.

failed to notify Gordon that she was, as to said real estate, a tenant by entirety with her husband. Counsel suggest no doubt that the case falls within section 5119, Rev. St. 1881 (section 6964, Rev. St. 1894), unless an estoppel was made out. The appellant's knowledge of the invalidity of the mortgage was but a knowledge of the law, which, in legal contemplation, was known also by Gordon. The representations of the husband were not found to have been by the authority or with the knowledge of the appellant, and do not enter into the facts tending to establish an estoppel as against the wife. In *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, it was held that a married woman was not estopped to assert the invalidity of her note, payable in bank, and negotiated before maturity, together with the mortgage of her real estate, where, in fact, the consideration was not for her benefit, but was for the use and benefit of her husband. It was denied that any statement in the paper as to the character of her obligation could estop her to set up, as against an innocent holder, her true relationship to the obligation. It was said that "the cases in which married women have been estopped from claiming the protection of the statute are cases where some statement, affidavit, or representation has been made by the party to be estopped, which has been in good faith relied upon by the other contracting party, so that to permit her to show the truth would be to assist in the perpetration of a fraud." In *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554, it was held that a married woman could not be estopped by the mere form of the contract, and it was there said: "A person may not deal with a wife, with knowledge of the fact, and of her want of power to bind herself for the benefit of others, and, relying upon the form of the contract, assert that he had no knowledge of her actual relation to the transaction. He should have inquired. After inquiry, he may govern himself according to the facts or the information received from her." We are aware that recent cases have modified the rule above quoted so far as it applies to dealings directly with and apparently on behalf of the wife in her separate interest. This case, however, does not fall within the modification. In *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565, it was said: "One contracting an incumbrance on the estate of a married woman cannot, however, deal with her at arm's length, knowing that she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to incumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for her benefit or for the benefit of another; and, unless misled by the conduct or representations of the wife, he will be held to have acquired a knowledge of the facts which pre-

dent inquiry would have disclosed." So it may be said, we think, that when accepting the mortgage of a married woman to secure the debt of her husband, with knowledge that it is executed for that purpose, and that the wife has no power to incumber her lands for any such purpose, he is equally bound to make inquiry of her, or from some source that will bind her, as to her interest in the lands, and thereby to acquaint himself with the facts upon which his action may be taken, and upon which he may assert that diligence required of him who pleads an estoppel. Here the appellee Gordon, without inquiry from the appellant, and without an examination of the records, placed his confidence in the statements of Coats, parted with his horse, and accepted an invalid mortgage. No statement and no conduct of the appellant, as we have shown, in addition to the form and character of the mortgage, were relied upon by the appellee Gordon as concluding the appellant in the transaction with her husband. If the failure of the appellant to seek out and notify Gordon that the property was not that of her husband is such as, standing by itself, would estop her to claim the ownership thereof, the statutory provision (section 5119, Rev. St. 1881; section 6964, Rev. St. 1894) which declares any such contract void would become a dead letter. There would then be no case, where the wife knew of her ownership, and failed to notify the creditor, that the statute would protect her. Such mortgages have time and again been held void. See *Allen v. Davis*, 101 Ind. 187; *Vogel v. Lechner*, supra; *Warey v. Forst*, 102 Ind. 205, 28 N. E. 87; *Brown v. Will*, 103 Ind. 71, 2 N. E. 283; *Cupp v. Campbell*, supra; *Engler v. Acker*, 106 Ind. 223, 6 N. E. 342; *Jones v. Ewing*, 107 Ind. 313, 6 N. E. 819; *Wolf v. Zimmerman*, 127 Ind. 488, 26 N. E. 173. It is true that a married woman may be bound by an estoppel in pais, but since the duty rests upon the person dealing with her to inquire of her, or from some source which will bind her, as to her relations to the contract, and since it is his duty to show that the contract is one which she is not forbidden to make, such person is in no position to claim an estoppel when he had neglected to so inquire as to her interests and her right to make the contract, but has blindly accepted the false statements of another. The judgment is reversed, with instructions to sustain the motion of the appellant for judgment in her favor upon the special findings.

(13 Ind. App. 581)

PALMER v. NOLTING et al.

(Appellate Court of Indiana. Nov. 22, 1895.)

STREET SPRINKLING—ASSESSMENTS—LIEN—FENCLOSURE—ATTORNEY'S FEES.

1. Rev. St. 1894, § 3861, provides that the cost of street sprinkling shall be assessed pro rata against "the property holders" along the line

of such street "as the cost of street improvements is assessed," and section 3862 provides that the rights of contractors and the liability of the city with regard to street sprinkling "shall be the same as in the case of street improvement assessments." *Id.* § 3846, makes assessments for street improvements liens on abutting property. *Held*, that assessments for sprinkling were liens on the abutting property, and not merely personal claims against the property owners.

2. Rev. St. 1894, § 3844, provides that the lien for street improvements shall include costs of foreclosure and reasonable attorney's fees. *Held*, that on foreclosure of a lien for street sprinkling plaintiff was entitled to reasonable attorney's fees.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by Henry T. Nolting and others against Elizabeth G. Palmer to foreclose a lien for street-sprinkling assessments. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hammond & Rogers and D. H. Bowles, for appellant. S. M. Richcreek, for appellees.

GAVIN, J. Section 3860, Rev. St. 1894, being section 89 of the law known as the "Indianapolis Charter" (Laws 1891, p. 187), authorizes the board of public works to let contracts that the streets, etc., of the city may be swept or sprinkled. Section 3861 provides that "the cost of such sprinkling or sweeping shall be assessed pro rata against the property holders along the line of such street, alley or public place, as the cost of street improvements is assessed, except that such city shall not be liable to pay for the sprinkling or sweeping of any street or alley crossings, but the total cost of such sprinkling shall be paid for by the abutting property holders." By section 3862 it is declared: "The duties of the department of finance and of the treasurer, the rights of contractors, and the liabilities of such city in relation to such street sprinkling or sweeping assessments, shall be the same as in the case of street improvement assessments." But the installment mode of payment is expressly excluded. The position taken by appellant is that the law creates only a personal liability, and not a lien upon the real estate, and that the court below acquired no jurisdiction over appellant, she being a nonresident and the notice being by publication merely. By the law relating to street improvements then in force, it is provided that the cost shall be estimated by the running foot, and the total cost, exclusive of one-half the cost of street and alley intersections, apportioned "upon the lands or lots abutting thereon." Provision is made for the payment of the other half of the cost of street and alley intersections. It is further directed, referring to the entire cost, that the city shall be liable to the contractor for the contract price, to the extent of moneys actually received, and that "the owners of property bordering on such street or alley shall be liable to the city for their proportion of the cost, exclusive of one-half

the cost of street and alley intersections, in the ratio of the front line of their land or lots, whether platted or not, owned by them, to the whole cost of the improvement for that part of said street or alley on which said lands or lots are located and which is uniform in extent and quality of improvement. * * * Said city shall have separate and several liens upon such lands or lots from the time the contract for such improvement is finally let, for the respective assessments against each lot or parcel of land." Rev. St. 1894, § 3845. "Lots or lands bordering on such street or alley shall be assessed and liable to the payment of such assessment primarily. * * * This section shall be deemed to include the assessment, principal and interest, together with costs of foreclosure and a reasonable attorney's fee." *Id.* § 3846. After authorizing the issue of bonds in certain cases, it is further provided in section 3853 that "the owner of the bonds hereinbefore provided for, or in case no bonds have been issued, then the person to whom is due and owing the amount of such unpaid assessment for the performance of such work, shall have the right to proceed in any court of competent jurisdiction to foreclose the liens or unpaid assessments, recovering interest, cost and a reasonable attorney's fee, and to have the proceeds of the sale applied on his claim."

It is the duty of the board of public works to make out an assessment roll, with names of property owners and descriptions of property adjoining the place of the improvement, with the pro rata assessment against each piece of property. This, when completed, must be delivered to the department of finance, whose duty it is, on completion of the work, to deliver to the treasurer a copy, which constitutes the local assessment duplicate, upon which must be appropriate columns and a place for the satisfaction of the lien. It is the duty of the treasurer, upon payment, to enter the proper credit and satisfaction thereon. Sections 3848, 3849. Counsel dwell earnestly upon the language of the sprinkling statute, that the cost shall be assessed against the "property holders," and would give it such controlling force as to exclude the creation of a lien by the further provisions of the statute. We are, however, unable to see that an assessment against the "property holders" necessarily excludes the existence of a lien upon the property to secure the payment of the assessment. On the contrary, taking all the provisions of the statute together, it seems clear to us that the legislature not only intended that it should be thus secured, but has plainly expressed this intention. Under the street-improvement law both the city and the contractor are given liens upon the property adjoining the improvement, and the contractor is given the "right to proceed in any court to foreclose the liens," etc. We do not see how the provision of the sprinkling statute that "the rights of contractors shall be the same as in

case of street improvement assessments" can be made effective or carried out unless the sprinkling contractor be given a right to a lien just as has been granted to the improvement contractor. Counsel refer to *Sharpe v. Speir*, 4 Hill, 76, as deciding the point here involved. We do not so read it. There one assessment was to be "made and collected 'in the same manner as is provided for assessing and collecting' street expenses 'by the 3d section of this act.'" That "manner" was by distress and sale of goods and chattels. The court therefore decided that a collection by sale of lands authorized in the seventh section of the act (Laws 1824, p. 224) was not applicable to the assessment under consideration. There is here no such limitation upon the rights of the contractor.

We cannot regard as controlling, in appellant's favor, the fact that the legislature of 1895, after the question here raised had been made public and cast some doubt upon the construction of the statute, in amending it, omitted the words "property holders," and substituted "the lots, tracts and parcels of land" therefor. We are the rather inclined to consider that by the change of phraseology the legislature desired to remove what little possibility of cavil concerning the meaning of the statute might exist. Neither are we able to agree with appellant that the "claim" of the contractor for which the property may be sold is the assessment only. The lien includes interest, costs, and attorney's fees, more or less of which necessarily accrue and attach when suit is brought. Such is the expressed will of the legislature, as plainly written as it possibly could be. We see no way open to the courts to disregard it. Judgment affirmed.

(144 Ind. 635)

TUCKER v. HYATT. 1

(Supreme Court of Indiana. Nov. 21, 1895.)

EVIDENCE—PROOF OF HANDWRITING—PRESUMPTIONS—HARMLESS ERROR—BREACH OF MARRIAGE PROMISE.

1. On an issue as to the genuineness of plaintiff's signature to a release pleaded in bar, her signature to an affidavit for a change of venue and her verified reply of non est factum in the action may be used as a standard with which to compare the disputed signature.

2. The fact that a witness had only become acquainted with the handwriting of a person whose signature to an instrument is disputed since the opening of the trial is not in itself enough to make his evidence as to the genuineness of the handwriting incompetent.

3. On an issue as to the genuineness of plaintiff's signature to a release pleaded in bar, her counsel may submit to the jury, for comparison of signatures, the release and her verified reply of non est factum, without offering them in evidence, as such papers are a part of the record.

4. Where, in an action for breach of marriage promise, plaintiff's competency to enter into the marriage contract is not denied, the error, if any, in admitting a decree of her divorce from a former husband, is harmless.

5. In an action for breach of marriage promise, plaintiff need not allege or prove her capaci-

ty to enter into the marriage contract, as such capacity will be presumed.

Appeal from circuit court, Miami county; H. B. Shirely, Judge.

Action by Imogene Hyatt against Albert Tucker for breach of promise of marriage Judgment for plaintiff. Defendant appeals Affirmed.

Hiram S. Biggs, L. W. Royse, and Wm. B. McClintic, for appellant. J. D. McLaren, E. C. Martindale, and F. D. Butler, for appellee.

HOWARD, C. J. This was an action brought by the appellee against the appellant for damages for breach of promise of marriage. The trial resulted in a verdict for \$6,000 in favor of appellee, upon which judgment was rendered. Numerous errors are assigned on this appeal, but counsel discuss only the overruling of the motion for a new trial.

To the complaint of appellee, appellant pleaded a written release of the marriage contract, claiming that such release had been signed by her for a consideration of \$300. The appellee, however, denied the execution of the release, and evidence went to the jury on both sides of the issue so formed. The appellant produced three witnesses, Albert L. Keysecker, his wife (Luganda Keysecker), and Joseph Tillman, who each testified that they were acquainted with the handwriting of the appellee, and that the signature to the release was her genuine signature. On the cross-examination of these witnesses the court permitted appellee's counsel, over the objection of appellant, to place in the hands of the witnesses the appellee's affidavit for a change of venue and her verified reply of non est factum, and have the witnesses compare appellee's signatures to those papers with the signature to the release. It is claimed that this was error. In *Thomas v. State*, 103 Ind. 419, 2 N. E. 808, the defendant denied having written a disputed letter. On cross-examination he was shown other letters, and asked to say in whose handwriting they were. Objection was made to such cross-examination on the ground that the letters so offered for comparison "were not papers in the case, and were not referred to in the examination in chief." The letters offered for comparison were not admitted to be genuine, but there was evidence to show that they also had been written by the defendant. It was held that the cross-examination was proper. So in 1 Whar. Ev. (3d. Ed.) § 710, it is said: "There is little question that a witness may on cross-examination be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation." The rule in England, as fixed by statute (17 & 18 Vict. c. 125, § 27), is that "comparison of a disputed writing with any writing proved to the satisfaction of the

1 Rehearing denied, 43 N. E. 872.

judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." We think there can be little doubt that in this state, after some fluctuation in our decisions, the rule is that any writings admitted to be genuine, or writings which are properly papers in the case for any purpose, may be used, by way of comparison, to prove or disprove the genuineness of the writing in dispute. *Sewing-Mach. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053; *McDonald v. McDonald* (at this term) 41 N. E. 336, and cases cited. The writings used for comparison in the case at bar, being the affidavit made by appellee for a change of venue and her verified reply, were both "papers in the case"; and under the rule above stated it was not error to allow these papers to be used by the witnesses, on cross-examination, to compare the signatures of appellee thereto with the signature to the release.

Complaint is next made that two of appellee's witnesses were allowed to testify as to the genuineness of the signature to the release, from having seen appellee write, although their knowledge of her handwriting had been acquired only since the controversy began. It may be noted that appellant opened the way for this line of evidence by calling witnesses who were shown to have only a like acquaintance with appellee's handwriting. Moreover, it does not appear that appellee's handwriting was executed on any of the occasions referred to for the purpose of manufacturing evidence for the trial. The witnesses simply gave the facts as to the source of their acquaintance with the handwriting. The weight which might be given the evidence was a question for the jury. The mere circumstance that a witness has become acquainted with handwriting since the opening of a trial is not in itself enough to make his evidence as to the genuineness of the handwriting incompetent. We do not think any abuse of discretion is shown in the admission of the testimony complained of.

Fault is also found that counsel for appellee took the verified reply and the release, and submitted them to the jury for comparison of the signatures. These papers were a part of the record, and were before the court and jury for all proper purposes. It was not necessary to introduce them in evidence. They were already in for that purpose, and might therefore be commented on by counsel and inspected by the jury. *Colter v. Galloway*, 68 Ind. 219; *Boots v. Canine*, 94 Ind. 408; *Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011.

Counsel for appellant finally contend that the court erred in admitting in evidence a transcript of the record and decree of divorce of the appellee from her former husband, as entered in the circuit court of the county of

Otsego, in the state of Michigan. Even if it was error for any reason to admit this evidence, the error was harmless, for appellee's competency to enter into the marriage contract with appellant was not denied. She did not need to allege or prove that she was a woman, that she was of marriageable age, that she was unmarried, or that she was otherwise competent to enter into a contract of marriage. Her capacity to enter into such contract will be presumed, in the absence of averment and proof to the contrary. In *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363, which like this was an action on breach of marriage contract, it was contended that the complaint was bad because it was not alleged that the parties were of marriageable age. The court said: "There is nothing in this objection. The presumption is, as to all contracts, that the parties were competent to contract, until the contrary is made to appear." By section 359, Rev. St. 1894 (section 356, Rev. St. 1881), it is provided that "all defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." Appellee was not required to allege her capacity to enter into the contract. It was for appellant to plead specially, in bar, her want of capacity. "In an action of this kind," said *Lotz, J.*, in *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, and 34 N. E. 100, also an action for breach of promise of marriage, "there are many things that a defendant may plead in bar of a recovery, and there are many things that he may give in mitigation of the amount of recovery. The rule is that if he relies on a matter in bar he must plead it specially." Appellant, therefore, not having filed an answer averring appellee's want of competency to enter into the marriage relation, she was under no obligation to prove such competency. But, even if such evidence were necessary on the part of appellee, we are of opinion that the certified copy of the decree of the Otsego county, Mich., circuit court,—a court of general jurisdiction, and having a judge, a clerk, and a seal,—as such copy is set out in the record, was sufficient for the purpose for which it was offered. The proceedings and decree are authenticated by the clerk and judge of that court as required by the act of congress in such case made and provided. Rev. St. 1894, § 458 (Rev. St. 1881, § 454). See, also, section 479, Rev. St. 1894 (section 472, Rev. St. 1881); *Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Teter v. Teter*, 88 Ind. 494; *Hamilton v. Shoaff*, 99 Ind. 63. No available error appearing, the judgment is affirmed.

(142 Ind. 560)

CONSUMERS' OIL CO. v. NUNNEMAKER.

(Supreme Court of Indiana. Nov. 21, 1895.)

CONTRACTS—RESTRAINT OF TRADE.

1. A contract by which defendant, formerly a dealer in oil in the city of H., agreed to refrain from following such occupation for five years

within the state of Indiana, the city of Indianapolis excepted, is unreasonable and void as a restriction of trade.

2. A contract by which one formerly dealing in oil in the city of H. agreed not to prosecute such business within the state of Indiana, the city of Indianapolis excepted, for the period of five years, is not divisible, and, being void as to the restriction within the state, is void as to the restriction in the city of H.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by the Consumers' Oil Company against Ephraim Nunnemaker for an injunction. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Olds & Griffin, for appellant. W. B. Reading, for appellee.

JORDAN, J. Appellant instituted this action to enjoin appellee from pursuing the business of selling oil and gasoline, and delivering the same to consumers, in the city of Hammond, Ind. The action was commenced upon a written contract made and entered into by and between appellee and one H. T. Benham, who is described as "trustee and manager," on the 3d day of February, 1893. The complaint avers: "That on and prior to said date the said defendant was the owner of one horse and one spring wagon, and three tanks, and harness, cans, and other utensils, for use in his said business, as hereinafter alleged, and was engaged in the business of a retail oil and gasoline merchant, and in selling and delivering oil and gasoline to the citizens of the city of Hammond, in Lake county, Ind., and in conducting his business he traveled through the streets of the said city of Hammond, calling upon residents of said city, at their places of business and residences, and sold and delivered them oil at the places desired by them for the use of said citizens. That he had at that time established a trade in business in that line. That upon said date he entered into a written agreement with one Henry T. Benham, described in said contract as 'H. T. Benham, trustee and manager,' a copy of which is attached hereto and marked 'Exhibit A,' and made a part hereof, by which contract the said defendant, in consideration of three hundred dollars to him in hand paid by said Benham, the receipt of which was acknowledged, sold, transferred, and conveyed to the said Benham, his successors and assigns, all his right, title, and interest in and to his oil and gasoline business and plant, including the good will and reputation of said business, and all and singular the materials, chattels, and personal property, of every nature and kind whatsoever, belonging to, or in any way pertaining or used in or about, said oil and gasoline business, among other things including one (1) horse, one (1) spring wagon, three (3) tanks, harness, cans, utensils, etc., consisting of everything used by the said defendant in his said business; and the said defend-

ant further contracted and agreed with said Benham, his successors and assigns, that he, the defendant, would not, during the period of five years then next ensuing after the 4th day of February, 1893, do anything within the state of Indiana, outside of the city of Indianapolis, in the line of selling or delivering oil or gasoline to the houses of consumers, by horse and wagon, or otherwise, neither in his own behalf, nor in his own name, nor in connection with any partnership or corporation, nor as the agent of any person, partnership, or corporation, or in anywise do anything that would interfere with, or compete with, or work against, the profit, advantage, and business of the said Benham, as trustee and manager, or in any other name or style whatever which he might assume, or by which he might be known, or his successors or assigns, during the said period of five years. Said defendant further covenanted and agreeing in said contract that he would not, during said period of five years, within said territory, accept any employment, directly or indirectly, nor receive, solicit, or fill orders, in any capacity whatsoever, for any oil or gasoline, to be sold direct to, or delivered at the houses and places of business of, consumers, by wagon or other conveyances, after the manner of the business hereinbefore described and carried on, as aforesaid, by the said defendant, as oil merchant and dealer, or as commission merchant or agent; and further agreed that he would not countenance, promote, or encourage the business of any competitor of the said H. T. Benham, trustee and manager, or of his successors or assigns, within the territory aforesaid, during the said five years aforesaid; and further agreeing, stipulating, and authorizing any court of law or equity to interpose its authority to compel the performance of said contract, and to restrain any breach of the terms thereof." It is further alleged that, before the violation of the contract in question, Benham sold, assigned, and transferred all of his right, title, and interest in and to the property so purchased to plaintiff, a corporation duly organized under the laws of the state of New Jersey, and also assigned and transferred the written contract, and all right, title, interest, and good will of said business, in the territory aforesaid, to plaintiff. It further avers that the defendant has entered into, and is pursuing, his said business of selling and delivering oil to the consumers of said city of Hammond, in violation of his said contract, and is threatening to so continue, in violation of the rights of plaintiff, inasmuch as he comes in competition with plaintiff, who is engaged in the same business. Appellee's insolvency is also alleged, and a copy of the contract is filed with the complaint. An injunction is prayed for, to restrain the appellee from further pursuing his business in the city of Hammond. A demurrer for insufficiency of facts was sustained to this

complaint, and this ruling of the court is assigned as error.

We are not favored with a brief upon appellee's part, but infer from statements in the brief of the learned counsel for appellant that the contract in controversy was assailed by the appellee upon the ground that it sought to prohibit him from selling and delivering oil at any place in the state of Indiana, outside of the city of Indianapolis, and constituted an unreasonable restraint upon trade, and was, therefore, invalid, and not enforceable in any respect. Appellant contends that, notwithstanding the territory is the entire state of Indiana, with the exception mentioned, in which appellee is restricted from pursuing his business as an oil merchant, the restraint is a reasonable limitation, and that the complaint based upon the contract in question set forth a sufficient cause of action for the relief thereby sought. It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interests of the public, is valid, and may be enforced by an injunction, upon a proper showing of facts. *Beard v. Dennis*, 6 Ind. 200; *Duffy v. Shockey*, 11 Ind. 70; *Spicer v. Hoop*, 51 Ind. 365; *Baker v. Pottmeyer*, 75 Ind. 451; *Beatty v. Coble* (at this term) 41 N. E. 890. The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where, in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public. It is not the interests of the parties alone which in the eye of the law are to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, will it be inimical to the public interest? If so, then, and in that event, the agreement must be held as hostile to public policy, and therefore void. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied. *Greenh. Pub. Pol.* pp. 2, 3. The law regards the good will of a particular trade or business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy that, where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and, when he sells or disposes of the good will incident thereto, the law will only sustain such

a restraint as to his future engagement in such business or pursuit as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine, under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see *Wiley v. Baumgarten*, 97 Ind. 66, and authorities there cited; *Lawrence v. Kidder*, 10 Barb. 641; *Hubbard v. Miller*, 27 Mich. 15; *Horne v. Graves*, 7 Bing. 735; *Navigation Co. v. Winsor*, 20 Wall. 64; *Taylor v. Blanchard*, 13 Allen, 370; *Dunlop v. Gregory*, 10 N. Y. 241; *Greenh. Pub. Pol.* c. 6, p. 683; 3 Am. & Eng. Enc. Law, 883, and authorities there cited; 22 Am. Law Rev. 873-889; *Malan v. May*, 11 Mees. & W. 652. In the case of *Dunlop v. Gregory*, supra, the court of appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of trade anywhere in the state, are void. Such contracts are injurious to the public, and operate oppressively upon one party, without being beneficial to the other. * * * The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenanter must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." In the case of *Taylor v. Blanchard*, supra, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoe cutters at any place within the commonwealth of Massachusetts was void. In the case of *More v. Bonnet*, 40 Cal. 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or state of California was held to be void. In *Lawrence v. Kidder*, supra, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the state of New York west of Albany was held to be invalid. In *Price v. Green*, 16 Mees. & W. 346, a contract not to carry on the perfume business within 600 miles of London was adjudged void. In *Horne v. Graves*, supra, an agreement not to practice dentistry within a district 200 miles in diameter was held to be void. In *Beal v. Chase*, 31 Mich. 490, where it appeared that the obligor sold a printing establishment, and the business thereof, which extended over the entire state, a covenant not to engage in the same business in that state so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid. In *Rousillon v. Rousillon*, reported in 14 Ch. Div. 351, the English court of chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract; and, where it appears that the broad restriction is reasonably necessary for the full protection of the

contractee, it will be sustained. In a recent English decision in the appeal of Nordenfelt v. Maxim Nordenfelt, etc., Co. [1894] App. Cas. 535, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of 25 years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made, confined mainly to governments of countries, the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest.

These decisions serve to illustrate the manner in which the courts, under varied circumstances, have been, and are, inclined to view such contracts. The rule in question, in its application by the courts in later decisions, to an extent, seems to have been modified, and is made to yield, in some respects, to the nature or character of the particular trade or business, and the territory over which it extends at the time of the sale of the good will. Cases do and will arise, as, for instance, in *Beal v. Chase*, supra, and *Nordenfelt v. Maxim Nordenfelt, etc., Co.*, supra, where the particular business has been built up so as to extend over an entire district or state, and sometimes beyond, or where, from its nature, the number of those who patronize it are comparatively of a limited number, and where, consequently, broad or enlarged restrictions are considered as reasonably necessary for the desired protection, and are therefore sustained.

Viewed, then, in the light of the authorities cited herein, how stands the case at bar? It appears, and is conceded by appellant, that the particular business or trade in which appellee was engaged at the time he sold out and executed the contract in controversy was confined to the limits of the city of Hammond. There is no contention that it extended to any other parts of the state, beyond these limits. Neither from the nature of the business, nor otherwise, does it appear that it was necessary for the protection of appellant that the appellee should be prohibited from engaging therein at any and all places in the state, other than the city of Indianapolis. It is a matter of general knowledge that there are numerous consumers of oil for fuel and illuminating purposes in this great and growing state, and it is manifestly to their interest that there should be competition in the selling of the same, at least, that the price thereof may be reasonable. The enlarged covenant of restraint as to territory, it is obvious, was unnecessary under the circumstances. It could serve no purpose, except as a tendency towards a monopoly of the business. If appellant could buy out appellee, and restrict him in this manner, it might proceed to do so to every other person in the whole state engaged in a similar business; and, eventually, reduce the sale of oils in the state to comparatively few hands, or, possibly, to its own absolute control, and thus virtually

stifle legitimate competition. The law has always been hostile to the creation of monopolies, when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance prices, to the injury of the public in general. *Salt Co. v. Guthrie*, 35 Ohio St. 666; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798.

Appellant apparently insists that the contract may at least be held enforceable against appellee in the city of Hammond, and cites *Peltz v. Elchele*, 62 Mo. 171. In that case the agreement was not to enter into the manufacture of matches in the city of St. Louis, or any other place, for five years. The stipulation as to St. Louis was sustained, upon the ground that it was reasonable, and could be separated from the other clause. It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced, and the transaction pro tanto sustained. But it is otherwise where the contract in its nature is not divisible. *Beard v. Dennis*, supra; *Wiley v. Baumgarten*, supra. The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety. The restraint of the trade or business, as therein stipulated as to territory, under the circumstances, was manifestly too large, and is therefore in violation of the principles of public policy to which we have referred, and consequently void, and cannot, in any respect, be enforced. Judgment affirmed.

(13 Ind. App. 485)

CLEVELAND, C. C. & ST. L. RY. CO. v. MARTIN.

(Appellate Court of Indiana. Nov. 6, 1895.)

SPECIAL VERDICT — SUFFICIENCY — SUPPLYING OMISSIONS — MASTER AND SERVANT — CONTINUATION OF RELATION DURING DINNER INTERVAL.

1. A jury found by special verdict that deceased was a section hand employed on defendant's tracks; that as the time given for dinner was short he and his coemployes had long been in the habit of eating their dinners in a pump house in the vicinity, belonging to defendant; that they so used the pump house by authority of their foreman, on the invitation of the person in charge of the house, and without objection on defendant's part; that deceased, while so eating his dinner, was killed by the explosion of a defective boiler. Held, that such verdict does not sustain a judgment against defendant, because of failure to find that deceased was in the house in the line of his duty, by the invitation of defendant.

2. Though the shortness of the time allowed for dinner, the inclemency of the weather, the convenience of the pump house, and its long use by the section hands as a place of eating, might authorize the inference that decedent was there

by implied invitation of defendant, these facts would not, in the absence of such finding, warrant the court in supplying the omission by intentment.

3. Where so brief an interval is allowed a railroad section hand, in which to eat his dinner, that he cannot leave the premises for that purpose, the act of eating at the place where he is working is incidental to the service, and the relation of master and servant continues during the interval.

4. But where, in such case, the servant goes to another part of the premises for the purpose of eating his dinner, he must show an invitation by the master, express or implied, without which he is a mere licensee.

On rehearing. Former decision (39 N. E. 759) reversed.

DAVIS, J. Since the rehearing was granted the case has been fully and ably presented to the court on oral argument. Great diligence and research have also been shown by the learned counsel in the exhaustive briefs filed for our consideration. We have given the many questions discussed careful consideration, and are of the opinion that the decision of the case turns on the question whether the special verdict shows that the decedent was in the pump house in the line of his duty, by implied invitation of the appellant, at the time he was injured. It is alleged in the complaint in substance that the decedent was in the employ of the appellant as a section hand engaged in the repair of the roadbed and tracks, and that while engaged in that service and in the line of his duty he was, by invitation of the appellant, eating his dinner in the pump house, when he was injured through the negligence of the appellant, by reason of the explosion of a defective boiler. The complaint clearly proceeds upon the theory that he was injured while eating his dinner in the pump house. It clearly appears that he was not engaged in the actual work of repairing the roadbed and tracks at the time he was injured. The controlling question the court is required to determine is whether, under the circumstances, eating his dinner on the premises where he was at work is shown to have been an incident to the service of the decedent, and whether there was an invitation, express or implied, by appellant to him to go into the pump house on the line of its railway, near the place where he was engaged in such work, for the purpose of eating his dinner therein. With these preliminary observations we will proceed to the consideration of the special verdict and the questions arising thereon under the issues.

The first specification of the special verdict states that the appellant owned and operated a line of railway through the town of Covington on the 17th day of February, 1893, and that it is the owner of a pump house on the line of its railway. The other specifications of the special verdict, omitting the formal parts and the conclusion, read as follows: "(2) That at and for a long time

prior to said date the defendant pumped water at said pump house into its water tank, and kept in said pump house a steam engine and boiler, whereby it furnished the power for pumping said water. (3) That said pump house was a small building situated about thirty (30) feet south of the main track of defendant's road, and about thirty (30) feet distant from the west end of defendant's depot, at said city, and was in plain sight at all times of said main track and of the trains passing thereon, and in plain sight of the platform at the west end of said depot. (4) That said boiler was an upright boiler, about three feet in diameter, and consisted of an inclosed cylinder of boiler iron, with a perpendicular cylinder inside thereof, said boiler being heated by fire and kept and maintained in said inside cylinder; that said boiler was kept about the center of said building, so as to leave a considerable space on all sides of it, and there was in said building also a vacuum pump, and there was also kept in said building a bench. (5) That the intestate, William Manifee, entered into the employ of the defendant in the fall of 1892 as a section hand on the defendant's line of railway, upon a section thereof known as 'Section Thirteen' (13), extending from a point four miles east of said city of Covington to a point about two miles west of said city, and was placed by the defendant, along with three or four other men similarly employed, under the charge and control of the section boss or foreman, and subject to his orders and directions, and it became his duty to work, at the times and places indicated by such section boss or foreman, upon and along the line of said section 13, and upon the side tracks and yards of said defendant at said city of Covington, and to unload coal for the supply of the depot and pump house at said city, and to unload sand to be dried in said pump house, and continued in such labor and employment until the time of receiving the fatal injury hereinafter stated. (6) That in the winter of 1889 and ever since, up to and including the 17th day of February, 1893, the defendant has permitted its section men working on said section to eat their dinner in said pump house whenever the weather was inclement, and during all such times it has been the habit and custom of such section men to use said pump house for said purpose whenever they worked near enough thereto to avail themselves of its warmth and comfort, provided that the condition of the weather required them to retreat to a warm and sheltered place for such purpose, all of which was done with the consent of the defendant, and without any objection whatever on the part of the defendant, and by authority of their section foreman, and with the express consent, license, and invitation of the person placed by the defendant in charge of said pump house, and that during all said time the sec-

tion foreman on said section had authority to and did employ and discharge the section hands upon said section of said railroad for and on behalf of the defendant. (7) That at the time aforesaid it was necessary for the section hands upon said section to devote a considerable portion of their time at work upon the side tracks at said city of Covington, and upon the main track at and near to said city, and it was convenient for said section hands during a large portion of the time to eat their dinner on defendant's premises at said city. (8) That said railroad during said time was so located with reference to the city of Covington, and with reference to the homes of the employes upon said section, that said section hands could not go to their homes to eat their dinners during the time that was allowed them for the purpose of eating dinner, and that in the winter time the defendant only allowed the section hands an interval of half an hour in their labor for dinner, which time so allowed was too short to enable such section hands to leave the defendant's premises for warmth or shelter and to eat their dinners; and on account of the shortness of the time so allowed such employes were compelled to eat their dinners upon the defendant's premises, and it was necessary for such employes to bring their dinners with them when they came to work in the morning, and it was their custom so to do. (9) That there was not during any of said times, on or convenient to the defendant's premises, any place sufficiently comfortable, and at the same time suitable, in which the said section hands could eat their dinner in cold or inclement weather, except the said pump house, the only other comfortable place for such purpose being the waiting room of the defendant's depot, which was unsuitable for the reason that there was but one waiting room belonging to such depot, and because a passenger train stopped at said station a few minutes after noon, and that said pump house was a suitable, comfortable, and appropriate place for the purpose aforesaid; that said February 17, 1893, was a cold, blustery, and stormy day, and was a day unfit for persons to eat dinner away from fire and shelter. (10) That on the 17th day of February, 1893, the said William Manifee, being engaged as section hand in the employment and service of said defendant, and upon said section 13, at about the hour of twelve o'clock noon, went with the section boss of said section, and with the other hands working on said section, into the said pump house of the defendant, according to the custom aforesaid, and upon the express invitation of the person whom the defendant then had in charge and control of said pump house, for the purpose of eating dinner, which dinner he and said other section hands and said section foreman had brought with them from their several homes; and while the said William

Manifee was eating his dinner in said pump house upon said bench, and while said boiler was being operated at a high pressure of steam, a metal plug was suddenly blown out of said boiler, and an enormous amount of steam immediately filled said pump house, and scalded the said William Manifee so that the flesh of the upper part of his body was cooked, and the said William Manifee was thereby fatally injured, and all without fault or negligence upon his part, and without chance, time, or opportunity for him to escape therefrom, from which injury the said William Manifee died within the space of four hours thereafter. (11) That the injury aforesaid, and the death of the said William Manifee so resulting therefrom, was caused solely by the carelessness and negligence of the defendant, in this: that at the time of said injury the defendant used and had in operation in said pump house the upright boiler aforesaid, which was then and for a long time prior thereto had been defective, weak, and dangerous, the said boiler having been constructed with four holes near the bottom thereof, said holes being about two inches in diameter, and made through the outside wall of said boiler, which outside wall was about three-eighths of an inch in thickness, which holes had been stopped by screwing metal plugs into said holes, and into threads that were cut into the boiler iron through which said holes were made, said plugs not being in any other wise secured, said boiler having been in use for a long time, and said holes having been frequently opened by unscrewing said plugs therefrom, and closed again by rescrewing said plugs back into said holes, such threads being too fine to hold said plugs securely against the pressure of steam generated upon the inside of said boiler, and the thickness of the iron around said holes being insufficient to allow a sufficient number and amount of threads to hold said plugs securely; and the said threads upon the said plug which was blown out aforesaid, and the threads in the hole into which said plug was screwed, having become worn out by the frequent opening and unscrewing thereof, and screwing the same back, and by the rust and decay, until said plug and said hole in said boiler had been a long time prior to said explosion and accident insufficient, insecure, and unsafe, and extremely dangerous, of which unsafe, insecure, and dangerous condition of said boiler and said hole and plug the defendant received actual notice and had actual knowledge, which notice was received by and through Calvin Gingrich, who for several months prior to the injury was the pump repairer of the defendant, and it was part of his duty to inspect boilers in the pump houses on the defendant's road, and to keep the same in repair, which notice and knowledge was received at least two weeks prior to said injury; but notwithstanding said knowledge

so received by the defendant it negligently continued to use the said boiler, and to run the same in the usual manner, and negligently failed to replace said boiler with a good and sufficient boiler, and negligently failed to replace said plug, or to repair said plug, hole, or boiler in any manner, except by wrapping said plug with hemp and white lead, which repair was wholly ineffectual and insufficient, and was not calculated to render said plug, hole, and boiler safe or secure, nor to add in any way to the security thereof. That such repairs, so made by the defendant, were carelessly and negligently done. That said defendant was guilty of carelessness and negligence in causing said boiler to be used and operated in said pump house during the two weeks prior to the death of the said William Manifee, and knew of its insufficiency as aforesaid, and of the insufficiency of said attempt to repair the same, and knew during said two weeks that said boiler was unsafe, dangerous, and liable to explode at any time while being used and operated. That the negligent acts, omissions, and conduct of the defendant hereinbefore set out caused the injury and death of the said William Manifee, and that the said William Manifee at and prior to the said injury was ignorant of the dangerous and defective condition of said boiler, and had no warning thereof." There are five other findings, which it is not necessary to set out.

Counsel for appellant insist that it was entitled to judgment for the following reasons: (1) That said William Manifee was a mere licensee, to whom appellant owed no other duty than that of doing him no willful injury; that he was in the pump house, not in the discharge of the duties of his service, but for his own convenience. (2) That appellant was under no legal duty to the intestate at the time he was injured; that he was not in his working place; that at the time the relation of master and servant did not exist. (3) That the conclusions in the special verdict add no force to it, and must be disregarded. (4) That the special verdict does not support the theory of the complaint, because there is no finding that the decedent was in the pump house by the direction or invitation of the appellant; that the section boss did not stand in the master's place, nor did the man in charge of the pump house, and they could not impose upon the appellant any duty, so that, even if they did invite the decedent into the pump house, they did no more than make him a licensee.

It may be conceded that the general rule is that after work hours the relation of master and servant does not exist, and the employé occupies the position of a stranger to the employer, and also that ordinarily, during the intervals of work for rest and refreshment, the employer owes no duty to the employé; but the question is whether these rules are

applicable in cases where so brief an interval is allowed the employé in which to eat his dinner that he is required, of necessity, in compliance with the rules and regulations of the employer, to remain on the premises for that purpose. It is also true that a person upon the premises of another by consent, permission, or acquiescence is not necessarily there by invitation, either express or implied. If a person is on the premises of another by mere permissive privilege, he is a mere volunteer or bare licensee, and the owner owes him no duty to make the place safe, and the licensee in going on there assumes all the risks. It is the duty of the master to have the premises reasonably safe, in all parts thereof where the employé is likely to go in the performance of the service and matters incident thereto. As to such places the servant is on the premises by invitation, either express or implied. In this case it is clear that the decedent was on the day in question rightfully on the premises of appellant while he was engaged in the performance of the work assigned to him as a section hand. At the noon hour he was given, with other employés, a recess or intermission of 30 minutes for rest and refreshments. There was not sufficient time to go home for the purpose of eating his dinner. During the half hour allowed by appellant in which to eat his dinner, he rightfully remained on the premises. Ordinarily, eating dinner by an employé is not an incident to the service in which he is engaged for the employer, but in this case he was not given time to leave the premises for such purpose, and eating his dinner was a matter of necessity. In this connection it should be remembered the finding shows that the interval of 30 minutes was allowed the employés for dinner. It is also found that the time so allowed the employés for that purpose was too short to enable them to leave the premises. There was therefore an implied invitation to said decedent by the appellant, under the circumstances, to eat his dinner on the premises. When, as in this case, so brief an interval is allowed the employé in which to eat his dinner that he cannot leave the premises of his employer for that purpose, his act in eating his dinner on the premises is an incident to the service. The mere fact that William Manifee was not under the circumstances at work as a section hand on the track of the railroad at the moment he was injured is not conclusive that the relation of master and servant did not exist at the time. In this connection we quote from the opinion of Judge Dailey in *Pennsylvania Co. v. McCaffery* (Ind. Sup.) 38 N. E. 67, as follows: "The law of nature is inexorable in its demands. The cravings of hunger must be appeased. The laws of humanity declare that every man fit to be a member of a train crew must have three meals, some rest, and eight hours' sleep, a day. The appellee well says: 'Deprived of these requisites of intelligent life, a soldier

becomes a coward; a working man, a drone. * * * Every statute and employer's rule is "made in the presence of and subject to the laws of nature." Hunger, thirst, and sleep are imperative," etc. In this case it was understood that the employé must of necessity eat the dinner they brought with them on the premises, during the brief interval allowed for that purpose. It would be unreasonable and unconscionable to hold that section hands on railroads, who of necessity and by universal custom, in this country, carry their dinners with them when they go to work in the morning, in "tin buckets," are not on the premises, where they are engaged at work, during the brief time they are allowed at noon in which to eat their dinner, by invitation implied, if not expressed, of the employer. It cannot be said, we think, that an employé is not in the line of his duty when under such circumstances he remains on the premises of the master, where he is engaged in his work, during the brief interval allowed the employé by the employer for the purpose of enabling him to eat his dinner. *Sugar Co. v. Riley* (Kan. Sup.) 81 Pac. 1090; *Railroad Co. v. Maddux*, 184 Ind. 571, 33 N. E. 345, and 84 N. E. 511. See *Bennett v. Railroad Co.*, 102 U. S. 577; *McKone v. Railroad Co.*, 51 Mich. 601, 17 N. W. 74; *Railroad Co. v. Riley*, 39 Ind. 568; *Railway Co. v. Adair* (Ind. App.) 39 N. E. 672, and authorities there cited; *Pennsylvania Co. v. McCaffery* (Ind. Sup.) 38 N. E. 67; *Railway Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121. In the last case cited, Judge Niblack says: "Where a person has a license to go upon the grounds or inclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's lands by another is not sufficient. Such an implied invitation may be inferred from some act or line of conduct or from some designation or dedication." There may be permission by the owner, with "circumstances showing an invitation extended or an inducement, or, in the language of some of the cases, an allurement held out to him." *Bennett v. Railroad Co.*, supra. In connection with the permissive use by appellant, do the circumstances of the case—the line of conduct of appellant—show such implied invitation? In our opinion the general rule applicable in such case is that it is the duty of the master to keep in a reason-

ably safe condition, having in view the nature and character of the business, all the machinery and appliances used in and about the premises where the employé, in the performance of their services and matters incident thereto, would naturally and ordinarily be likely to go. An employé's eating his dinner on the premises of the master, where he is engaged in his work, under the circumstances of this case, is an act incident to his service. In the *Maddux Case*, supra, the supreme court of this state recently held that the servant was not out of the line of his duty because he remained on the premises of the master during the noon hour. In this case it appears that it was necessary for the decedent to remain on the premises in order to be ready for duty when the 30-minutes intermission should expire. In the *Riley Case*, supra, decided by the supreme court of Kansas, it appears that Riley, an employé of the sugar company, was required to carry stalks of cane from a pile and put them into the carrier. While discharging that duty at 4 a. m., in October, he became cold and asked permission of the foreman in charge to go into the factory and warm himself. Permission was granted by the foreman, and while attempting to go into the door on the south side of the building he fell into the uncovered cistern containing the waste boiling water, and was scalded. The jury specially found that young Riley at the time of his injury was engaged in the line of his duty to his employer. The court, by Chief Justice Horton, says: "We think the evidence fully sustains the finding of the jury in this matter, because he was permitted by the foreman of the works to go into the factory for the purpose of warming himself. It was about four o'clock in the morning. Young Riley was cold. He was as much in the line of his employment when going to warm himself as he was going to the building to take his midnight meal, which he was accustomed to do, or if he had gone upon a call of nature to a water closet in the building."

As we have before observed, the act of the employé in eating their dinner on the premises of the master, where they are engaged at work, under such circumstances as are shown to have existed in this case, is an incident to the service. The relation of master and servant, and the duties incident to such relation, continue during such interval. Where under such circumstances the employé eats his dinner at the place where he is engaged in his work, it is not necessary to show that he remains there by invitation of the master, for the reason that the right to remain grows out of the relation of master and servant, which continues during such cessation from actual labor. But where the servant goes to another part of the premises, under such circumstances, for the purpose of eating his dinner, it is incumbent on him to show an invitation, express or implied, by the master to go to such other place. In this case the jury has not found the

ultimate fact that said Manifee was in the pump house on this occasion by invitation, express or implied, of the master. While it is true that the necessary and inevitable inference under the circumstances is that there was an implied invitation to him to eat his dinner on the premises where he was engaged in his work, or rather that eating his dinner at such place was an incident to his services, the conclusion does not necessarily follow that he was eating his dinner by implied invitation of the appellant, in the pump house. It was not necessarily an incident to his service as section hand in repairing the track of the railroad that he should eat his dinner in the pump house in that vicinity. It may be true that the natural and reasonable inference is that the employé will likely go to the most convenient and suitable place on the premises to eat his dinner, but whether, under the line of conduct of appellant in connection with the long-established custom of the employés in eating their dinner in the pump house, and all the other facts and circumstances set out in the verdict, there was an implied invitation by appellant to said decedent to eat his dinner in the pump house on this occasion, was a question for the jury. Assuming that the brief interval allowed the employé in which to eat his dinner was too short to enable him to leave the premises for that purpose, when considered in connection with the inclement weather, the convenience of the pump house, the long use of the house for that purpose, and all the other surrounding circumstances, are sufficient to authorize the inference by the jury that the decedent was there in the line of his duty, by implied invitation of appellant, would not warrant the court in supplying such omission by intendment or inference. In brief, the conclusion of the court is that the finding is not sufficient to sustain the judgment in behalf of appellee, for the reason, if for no other, that the jury failed to find the essential ultimate fact that the decedent was in the pump house in the line of his duty, by implied invitation of appellant. *Noblesville v. Loehr*, 124 Ind. 79, 83, 24 N. E. 579; *Railway Co. v. Costello*, 9 Ind. App. 462, 467, 36 N. E. 299. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ROSS, J. (concurring). The learned counsel for appellant earnestly insist that the complaint in this case proceeds upon the theory that the decedent, Manifee, was in the pump house, at the time of receiving the injuries which resulted in his death, by the invitation of appellant, and that the motion to make the complaint more specific by setting out in detail what constituted the invitation relied on should have been sustained. As to whether or not the decedent was at the time he was injured in the pump house by the invitation of appellant is, I think, an inference of law to be drawn by the court from stated facts, and not an inference of fact to be drawn by a jury from the evidence. It is the law that deter-

mines what amounts to an invitation; hence to aver that the decedent was in the pump house by the invitation of appellant amounts to nothing more than the statement of the pleader's conclusion. When the facts relied upon as constituting an invitation have been pleaded, the court then determines whether or not in law they constitute an invitation. Without further elaboration upon this question, it is sufficient, as I view the allegations of the complaint, to say that it proceeds upon the theory that the decedent, at the time he was in the pump house and was injured, was, as appellee alleges, "engaged in the repair of the roadbed and tracks of said defendant [appellant], and in the line and discharge of his duty." If the pump house was the place where his contract of employment required him to perform his duties, then appellant was bound to see that it was reasonably safe for that purpose. The rules of pleading, however, require that one suing to recover for an injury received must allege such facts as show a duty owing from the wrongdoer to the wronged. If the relation of master and servant existed between them, it arose by reason of a contract having been entered into, for the relation of master and servant can arise only out of a contract, express or implied, between the master, on one hand, and the servant, on the other. "The relation of master and servant is one of contract." *Cooley, Torts*, 42. And that contract determines the duty owing. A duty must be shown, for to merely allege that the relationship of master and servant exists does not show either what the servant has contracted to do for the master, or what duty the master owes to the servant. The master is not bound to do anything except that which he contracts to do for the protection of his servant, and unless the master has imposed on himself or assumed special duties, for the benefit of the servant, by the contract of employment, the law says his duty is fulfilled when he has furnished the servant with a reasonably safe place in which, and reasonably safe machinery with which, to work. This is the duty implied by the law as having entered into the contract of employment. If more onerous duties are imposed it is because the contract of employment specially exacts them. The vital question to be considered therefore is, was the decedent rightfully in the pump house? It must be conceded that if he was rightfully in the pump house it was because, under his contract of employment, the appellant agreed to and did provide that as a place where he should go to perform the duties which he undertook to perform. Upon no other hypothesis could he have been there rightfully. A part of the duties which he was required to perform under his contract of employment "was to unload coal for the pump house and to unload sand to be dried in the pump house." None of his duties, so far as the verdict shows, required him to go into the pump house at all. If he went there it was not because his duties required him to do so. It also appears that at noon time each

day, for 30 minutes, the employment ceased, and the decedent used the interval to eat his dinner, but did the appellant contract to furnish him a place in which to eat his dinner, where he should be sheltered from the storm and where he could make himself comfortable while eating? If it did, and the pump house was the place which it provided, then it owed the deceased the duty of seeing that the place so provided was reasonably safe for the purpose intended.

I am unable to clearly understand what my colleague who wrote the main opinion means when he says, "When, as in this case, so brief an interval is allowed the employé in which to eat his dinner that he cannot leave the premises of his employer for that purpose, his act in eating his dinner on the premises is an incident to the service." Is the language quoted intended as implying that during the 30 minutes allowed at midday the decedent was performing his duty to appellant, which he agreed to perform under his contract of employment? If that is the meaning to be attached to the language used, I must at once dissent from the proposition, for it is evident that when the noon hour arrived the decedent's duty to appellant ceased, and appellant's duty to the decedent, except the duty to permit him to depart in safety, ended. Is it meant to imply that because the time allowed was too short to permit the deceased to go to his home, several miles distant, eat his dinner, and return in time to begin work at the usual hour designated for that purpose, therefore his employment continued, whether he was in the discharge of his duties or not? If the duty of a master to his servant is not to depend upon the contract of employment entered into between them, but upon what a jury shall determine they should have contracted for, then it is right to say that, because the jury find that the deceased could not go home to eat his dinner in the limited time allowed him, "his act in eating his dinner on the premises is an incident to the service." The law does not infer that by the contract of employment the master agrees to allow the servant time to eat his dinner. If it did it must also infer that the master must give the servant time enough to go to his home for that purpose and return to his work. Does the law assume to say that parties shall enter into such contracts only as will admit of the eating of a meal at midday by the servant? I take it that parties may contract that the servant shall work from 7 o'clock in the morning until 5 o'clock in the evening, without any intermission, and that the law will uphold and enforce the contract. If that be true, then the fact that an intermission of 30 minutes in the middle of the day is allowed the servant by his contract does not impose upon the master the duty of furnishing the servant a place in which to eat. Suppose the jury had found that the place where the deceased was compelled to work was so far from his home

that the time allowed between the quitting hour at night and the hour for resumption of work in the morning was so short that the deceased could not go home and get the sleep which nature required he should have, and that for that reason he slept in the pump house; as well might this court say that "so brief an interval was allowed the employé in which to sleep that he could not go to his home and get his needed rest; hence his act in remaining on the premises and sleeping in the pump house was an act incident to the service." Of course, if the contract of the parties does not control, and we are to hold that it is the province of the jury to make such a contract as they may conclude the parties should have made, then it is proper for them to decide, as a question of fact, that because the interval of 30 minutes was too short to permit him to go to his home, eat his dinner, and return in time to resume his work at the regular hour, his act in eating his dinner on the premises was an incident to the service. If this is within the province of the jury, then it is also their right to determine whether or not it was the duty of appellant to furnish the decedent with a comfortable place in which to eat, and, if need be, a place to sleep. Incidents to service are such only as are embraced within the contract of employment, and, if not expressly defined therein, are such as the law implies, and not what a jury may infer. In this instance to say that his act in eating his dinner on the premises was an incident to the services is to say that the contract of employment was that he should eat his dinner there, and if the jury are to be allowed to determine whether, because the time for eating was too short to permit him to go to his home, where he could eat in comfort, sheltered from the storm, and beside a warm fire, his going into the pump house "was an incident to his service," or "an implied invitation to go there," then it is because appellant undertook and agreed to furnish him a place where he could eat his dinner. I am unable to see what the length of the interval allowed for the noonday meal has to do with the question of appellant's duty to the deceased. To my mind it can make no difference, in determining the legal duty owing from appellant to the deceased, whether the time allowed was 30 minutes or 2 hours, or whether he lived 10 rods away from the railroad, or 10 miles. If the duty depends upon the distance the employé lives away from his place of work, and the time allowed him to go there to eat, the same duty would not be owing to all employed in the same work, for some, living but 10 or 15 rods from the railroad, would have ample time to go home and eat their dinners in 30 minutes, while others, living 10 miles away, could not do so in 2 hours. The question of time, whether long or short, has nothing to do with determining appellant's duty. The only question is, what was the contract between the parties, and

was it appellant's legal duty, under that contract, to furnish him a place to eat his dinner, or even to permit him to go into the pump house for that purpose? Unless a duty was owing from appellant to appellee, the neglect of which resulted in his injury, there is no right of recovery. "It is essential to the successful maintenance of an action of negligence to show the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty." *Rob. Employers*, 22. There can be no case of the negligent injury of one person by another in the absence of a legal duty due from the person inflicting the injury to the person on whom it is inflicted. "The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed." *Cooley, Torts*, § 659. The relation of master and servant being contractual, the liability of the master to the servant is coextensive with the contract of employment, and does not extend beyond it. In *Wright v. Rawson*, 52 Iowa, 329, 3 N. W. 106, which was an action by the servant against the master to recover damages for personal injuries received after leaving his usual place of work and while visiting the other workmen, which was customary, the court says: "In order to establish liability of defendant it must be made to appear that the intestate was in the defendant's employment and in the proper discharge of duty, and that he did not voluntarily seek a place of danger. It cannot be claimed that the defendant would be liable if the intestate had been a visitor to the mines, or had left his proper place and sought the dangerous room without thereby serving defendant or discharging any duty of his employment. When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured, but on the contrary he was a visitor there, for his own pleasure or amusement. The intestate, not being engaged in his employment, was in the same position of a visitor to the mine. An employé having voluntarily put himself in danger, he cannot recover. *Doggett v. Railroad Co.*, 34 Iowa, 284. The custom of miners to visit their fellow workmen, and the acquiescence of the defendant in such custom, cannot be regarded as an invitation for the workmen to leave their proper places and frequent dangerous parts of the mine at the risk of defendant." The relation of master and servant exists only when the person sought to be charged as master has the right of control over the person whom it is sought to show was a servant, at the time when the injury happened. "He must at the time have had the right to direct the action of the servant and to accept or reject its rendition." *Woods, Mast. & S.* § 306. If the relation of master and servant did not exist at the time the decedent went into the pump

house and was injured,—and in this case it cannot well be contended that such relation did exist,—then he was a mere licensee and went there at his own risk, enjoying the license subject to its concomitant perils. The appellant was not bound to keep its pump house in a safe and suitable condition for those who might go in there solely for their own convenience or pleasure. The law imposes no such duty upon it. I deem it unnecessary to cite authorities to sustain this proposition, for it is so well settled that no court has attempted to controvert it. With these observations, I concur in the result reached in the opinion of Judge DAVIS, and would add that under the facts found by the jury the appellee would not be entitled to recover upon any theory.

(14 Ind. App. 328)

LAKE ERIE & W. R. CO. v. LEE et al.¹

(Appellate Court of Indiana. Nov. 19, 1895.)

RIGHT OF WAY—COVENANTS FOR CROSSINGS—DAMAGES FOR BREACH.

1. A deed of a right of way to a railroad company having provided for a private way on the grantor's farm under the railroad, and the grantor having, with the consent of the company, elected to accept such way over and on a public highway, the company cannot close it without liability for damages.

2. In an action for violation by a railroad company of covenants, in a deed of a right of way, to provide the grantor with private ways over and under the railroad, evidence of what his land was worth without the crossings and what it would have been worth with them is admissible.

Appeal from circuit court, Delaware county; O. J. Lotz, Judge.

Action by William H. Lee and others against the Lake Erie & Western Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Hackedorn & Cockrum and Gregory & Silverburg, for appellant. Ryan & Thompson, for appellees.

DAVIS, J. In June, 1871, appellees executed a right of way deed to the La Fayette, Muncie & Bloomington Railroad Company for the construction of a railroad through their farm, consisting of two adjoining tracts of land, in consideration that the company should fence the railroad, and that said appellees should have one crossing over and one under the railroad. It was then mutually agreed between the parties that the appellees should have the under crossing at the point where the railroad crossed a highway on appellees' real estate. The place was selected for the over crossing, but it was never constructed. The fence was built by the railroad company, but it was not properly maintained by the appellant. Appellant succeeded to the rights of the original company as shown in *Railroad Co. v. Griffin*, 107 Ind. 464, 8 N. E. 451, and at the same time came into possession of the right of

¹ Rehearing denied.

way deed executed by appellees. The appellant, in 1890, over objection of the appellees, filled and obstructed the highway under said railroad, which up to that time had been used by the appellees, under the agreement before mentioned, as the under crossing provided for in the right of way contract.

Many questions are properly presented by the record, which have been fully and ably argued by counsel. We have carefully read the entire lengthy record in the light of the exhaustive briefs of counsel; and, in the view we take of the case, the decision of a few propositions disposes of all the questions sought to be raised. The first question is whether, under the circumstances, the appellees can recover for the obstruction of a private passageway on their real estate, over and upon a public highway. Counsel for appellant contend that the railroad company had no authority to grant the appellees a private way under its road, dividing their farm, over and upon a public highway, and that the appellees did not acquire any rights by such an agreement. The company, however, did have authority to agree, in consideration of the grant of the right of way, that the appellees should have a private way on their real estate, as provided in the deed, under the railroad; and, the appellees, with the consent of the company, having elected to accept such right of way over and upon the public highway, the appellant is not in a position to say that it could close up such way under the railroad, to appellees' damage, without incurring any liability to them on account of such act. The parties having acted for many years on this construction of the contract, one of them cannot be allowed to repudiate it to the injury of the other without his consent. In addition to having the possession of the right of way deed, and the fact that appellees were constantly using the way as such private crossing, it appears that the agents and employees of the appellant in charge of the work were advised as to the rights of the appellees therein before the under crossing was obstructed, and therefore appellant is in no better position on this question than the original grantee in the right of way contract would have been had it closed the crossing. *Railroad Co. v. Burgan*, 9 Ind. App. 604, 37 N. E. 31; *Railway Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756; *Railway Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Kincaid v. Gas Co.*, 124 Ind. 577, 24 N. E. 1066.

It is next insisted that under the contract the duty of constructing the over crossing did not devolve upon the railroad company, and that it was not under any obligations to maintain the fence. In our opinion, the railroad company was under obligations to construct the crossing, and also to maintain the fence. These duties were continuing duties under the agreement. *Railroad Co. v. Burgan*, supra.

There was no error in permitting the appellees to prove what the land would have been worth with the crossings and what it was worth without the crossings. *Railway Co. v. Sparks* (Ind. App.) 40 N. E. 546; *Railway Co. v. Summer*, 106 Ind. 55, 5 N. E. 404. There was no error in permitting appellees to prove the circumstances under which the right of way deed was executed, or the consideration upon which it rested. *Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *Porter v. Waltz*, 108 Ind. 40, 8 N. E. 705; *Railway Co. v. Power*, supra. We find no reversible error in the record. Judgment affirmed.

(13 Ind. App. 558)

DEHORITY v. WHITCOMB.

(Appellate Court of Indiana. Nov. 19, 1895.)

MASTER AND SERVANT—COMPLAINT—INDEFINITENESS—BILL OF EXCEPTIONS.

1. One constructing a building by employing a contractor with his employees to do the carpenter work, paying the wages of such employees to the contractor, but keeping, himself, the control and management of it, becomes a master of such employees.

2. A complaint for personal injury, which alleges that the injury was caused by a heavy weight of slate being placed on a roof, causing it to fall, because defendant had failed to brace it sufficiently to bear the weight, sufficiently alleges the weight of the slate, and wherein the roof was defective.

3. A bill of exceptions, filed after the term at which the judgment is rendered, does not become a part of the record unless the record shows that the time for filing it was extended, notwithstanding the judge certifies that it was filed within the time allowed.

Appeal from circuit court, Madison county; A. Ellison, Judge.

Action by Willard P. Whitcomb against James H. Dehority for personal injury. From a judgment for plaintiff, defendant appeals. Affirmed.

Goodykoontz & Ballard, for appellant. Chipman & Walker, for appellee.

LOTZ, J. The appellee (plaintiff below) recovered a judgment against the appellant for personal injuries sustained on account of the alleged negligence of appellant. The first assignment of error calls in question the sufficiency of the complaint to withstand a demurrer for want of facts. The complaint avers that in November, 1892, the defendant was engaged in the erection and construction of a two-story brick business block in the city of Elwood, the property of the defendant; that in the erection and construction of the building the defendant employed one E. R. Coxen, a contractor of said city, with his workmen, to do the carpenter work on the building, the defendant paying Coxen for the men so employed; that in the erection and construction of said building the defendant had the management and control of the same, he employing the said Coxen and his force of

men to do the work, the said Coxen and his men being under the supervision and control of the defendant, and the defendant paying a certain amount per day for each workman so engaged thereon; that the plaintiff was in the employ of said Coxen, and under the direction of said Coxen and the defendant, and was at work on said building as a carpenter; that said building was being covered with slate; that the plaintiff was engaged at work in the second story of the building, and that, while so engaged, without the knowledge of the plaintiff, the defendant caused to be placed on the roof of said building, over the place where the plaintiff was at work, a large quantity of roofing slate; that in the erection and construction of the building the defendant had no plans or specifications therefor prepared by an architect, but had the building, and all parts thereof, constructed upon plans prepared by himself; that in the erection and construction of said building the defendant was negligent and careless in this: that he did not provide proper support for and brace the roof of said building so as to resist and bear the weight to be placed thereon, and by reason of the negligent, careless, improper, and insufficient plan and construction of said building, and by reason of the defendant's carelessness and negligence in placing and causing to be placed on the roof of the building, over the place where the plaintiff was at work, a large quantity of slate, the roof at said place gave way, and the roof and slate fell upon the plaintiff, and he was thereby crushed to the floor, his right leg broken, his ribs broken, and his skull fractured,—all without any fault or negligence on his part. Appellant's counsel insist that the averments do not show that the defendant owed the plaintiff any duty; that no relation of master and servant or of principal and agent is shown to exist between them; that Coxen, according to the averments, was an independent contractor, and that the appellee was his servant. It is well settled that where one lets a contract to another to do a particular lawful work, reserving to himself no control over such work except the right to require it to conform to the contract or a particular standard when completed, he is not liable for the negligence of the contractor. *Park v. Board*, 3 Ind. App. 536, 30 N. E. 147; *Ryan v. Curran*, 64 Ind. 345; *Railroad Co. v. Farver*, 111 Ind. 195, 12 N. E. 296; *New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294. But this rule does not apply where the work contracted to be done is unlawful, or a nuisance per se; nor where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed. *Park v. Board*, supra. The work described in the complaint is neither unlawful nor intrinsically dangerous. The complaint, however, will not bear the construction appellant contends for. The averments do not make Coxen an independent contractor as to any particular

piece of work. He is no more than a foreman of the builder or of the defendant. The acts of negligence are charged directly against the defendant. While the averments are not clear and certain, we are of the opinion that the fair import is that the plaintiff was the servant of the defendant.

The overruling of appellant's motion to make the complaint more specific is one of the errors assigned. This motion requested the court to require the plaintiff to make his complaint more specific, and to state definitely what portion of the roof of the building was defective, and what part gave way, and to state the amount of the weight placed thereon, and to state whether it was the brickwork or the framework that was defective. The complaint avers that the defendant did not provide proper support for and brace the roof of the building so as to resist and bear the weight placed thereon. This sufficiently shows wherein the building was defective, and apprised the defendant of what he was required to meet. There was no error in overruling this motion.

The overruling of appellant's motion for a new trial is the last error assigned. The only reasons for a new trial are that the verdict is contrary to the evidence and contrary to the law, and that the court erred in giving certain instructions to the jury. It requires a consideration of the evidence to determine the questions raised by the motion for a new trial. The appellee makes the point that the bill of exceptions containing the evidence is not properly a part of the record. The transcript shows that the judgment was rendered at the December term, 1893, and that on the 1st day of January, 1894, being the first day of the next term, the appellant filed his motion for a new trial. The motion was overruled on that day and the judgment rendered. The appellant did not ask for time in which to file a bill of exceptions, nor was any given. Afterwards, and at the next following term of the court, the appellant filed his bill of exceptions. The certificate of the presiding judge states that the bill of exceptions was presented and signed within the time allowed. It is settled by the adjudications that when a bill of exceptions is presented, signed, and filed at the term of court at which the rulings of the court complained of were made, it is sufficient, although the record is silent as to time being given. Under such circumstances, this court will presume that time within the term was given by parol, and that it was presented within the time so allowed. *Dodge v. Morrow* (Ind. App.) 41 N. E. 967; *Improvement Co. v. Teter*, 1 Ind. App. 322, 27 N. E. 635. It is also well settled that when the bill is filed after the term, and the record entries do not show that time was given in which to file it, a statement in the bill itself that time was given, and that it was filed within the time allowed, is not sufficient. *Applegate v. White*, 79 Ind. 413; *Jones v. Jones*, 91 Ind. 72; *Engleman v. Ar-*

noid, 118 Ind. 81, 20 N. E. 505. The bill of exceptions containing the evidence is no part of the record. Judgment affirmed.

(15 Ind. App. 643)

LOEB v. McALISTER.¹

(Appellate Court of Indiana. Nov. 19, 1895.)

PAROL MORTGAGE—CONFLICTING EVIDENCE—INSTRUCTIONS—RECORD.

1. An agreement whereby plaintiff conveyed certain land to defendant in consideration that defendant would assume the payment of certain indebtedness owed by plaintiff, and, upon repayment by plaintiff within 10 years of the amounts so paid, with interest, defendant was to reconvey the land, constitutes a mortgage, which may be shown by parol.

2. Where there is some evidence to sustain the verdict, the appellate court cannot determine upon which side it preponderates.

3. To determine whether a deed absolute is in fact a mortgage, all the circumstances surrounding its execution may be shown.

4. In order that instructions may be made part of the record without a bill of exceptions, the record must affirmatively show that they were filed.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

Action by Carshena McAlister against Louis Loeb to recover damages for the breach of a contract. Plaintiff had judgment, and defendant appeals. Affirmed.

Kittinger & Reardon and Diven & McMahan, for appellant. Bagot & Bagot and H. W. Taylor, for appellee.

ROSS, J. The appellee brought this action, alleging in his complaint that in the year 1890 he was the owner and in possession of a certain 120 acres of land in Madison county, Ind., which was of the value of \$6,000. That he was at that time indebted to divers persons in the aggregate sum of \$2,500. That appellant assumed to pay said indebtedness, and, in consideration thereof, and to secure the repayment, within 10 years, to appellant of said sum of \$2,500, with interest at 8 per cent., appellee transferred said land to him by deed of conveyance, and which land, it was understood and agreed by and between the parties, was to be reconveyed by appellant to appellee upon such repayment. The agreement to reconvey was in writing, and executed contemporaneously with the deed of conveyance. That afterwards, on the 20th day of April, 1892, appellee borrowed from appellant the further sum of \$1,000, which sum, it was agreed, should be secured by said conveyance aforesaid, and should be repaid, with interest at 8 per cent., before appellee was entitled to a reconveyance from appellant of said real estate. That when appellee borrowed this \$1,000, he delivered up to appellant the written agreement to reconvey, executed at the time the deed was made. That afterwards, and before the expiration of the time agreed upon for the payment of said money, to wit, November 27, 1892, appellant "fraudulently and designedly, for the pur-

pose of cheating, hindering, and defrauding" appellee, "sold and conveyed said real estate to one Thomas Windell, who was an innocent purchaser thereof, and who paid a valuable consideration therefor, and who had no notice or knowledge of the rights of the plaintiff in and to said real estate, as aforesaid." That said Windell thereupon instituted proceedings, and ousted appellee from the possession of said real estate, to his damage, etc. A demurrer for want of facts was filed to the complaint, and overruled by the court, and this is the first specification of error assigned.

The appellant insists that the complaint is insufficient for several reasons, namely—First, because the action is upon a parol contract with reference to real estate, which was not to be performed within one year, hence the contract was within the statute of frauds, and void; second, because it is not alleged that the purchaser, Windell, did not know of appellee's rights, or that appellee ever demanded of him a reconveyance of the property; third, because it is not alleged that appellee ever tendered to appellant the amount due him, and demanded a reconveyance, or that he ever demanded the difference between the amount owing to appellant and the value of the property.

We think the facts alleged show that, while the deed of conveyance from appellee to appellant was absolute on its face, as between the parties themselves it was in truth and fact nothing but a mortgage. *Parker v. Hubble*, 75 Ind. 580; *Beatty v. Brummett*, 94 Ind. 76; *Creighton v. Hopplis*, 99 Ind. 369; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Voss v. Eller*, 109 Ind. 280, 10 N. E. 74; *Wolfe v. McMillan*, 117 Ind. 587, 20 N. E. 509; *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374. As between appellant and appellee, the deed which appellee executed to appellant being in fact nothing but a mortgage, it always remained a mortgage, for here applies the maxim, "Once a mortgage, always a mortgage." If, then, appellant has conveyed away the property, so that appellee cannot have a reconveyance, he must answer to appellee for the difference, if there is any, between the value of the property and the amount due from appellee. Following the authorities above cited, the objections to the complaint are not well taken.

A new trial was asked, and 85 reasons were embraced in the motion therefor. The first and second reasons are that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. It is very earnestly insisted that there is no evidence to sustain several allegations of the complaint which were necessary to the statement of a cause of action. There is considerable conflict in the evidence, but, inasmuch as there is some evidence to sustain the verdict, this court cannot consider the evidence, for the purpose of determining upon which side it preponderates.

The damages assessed are not excessive.

¹ Rehearing denied, 44 N. E. 378.

In fact, under the evidence introduced, the jury would have been justified in assessing larger damages. We do not mean to say that a preponderance of the evidence would have justified a larger assessment, but simply that a larger assessment could have been made, under some of the evidence.

Reasons from 4 to 62, both inclusive, relate to the admission of evidence, and rulings on motions to strike out parts of the evidence admitted. In actions of this character, it is settled that all the facts and circumstances attending or surrounding the transaction may be shown, in order to determine whether or not a deed absolute on its face is in fact a mortgage. If, as counsel for appellant contends, no oral testimony can be given which tends to contradict the instrument itself, or to explain the purpose of its execution, no deed absolute on its face could ever be successfully attacked and shown to be a mortgage. The contrary is too well settled to require further discussion.

Without taking up and passing upon each of these objections separately, suffice it to say we have read the evidence with considerable care, and think the rulings of the court were, in the main, right. Trial courts must, of necessity, be allowed some latitude in the exercise of their discretionary powers in the trial of cases, and, if they commit errors which are not harmful, especially when a right result has been reached, their action will not be reviewed by this court.

The remaining reasons in the motion for a new trial relate to the giving and refusal to give instructions. The instructions, while copied into the record, are not properly a part thereof. They are not brought into the record by bill of exceptions, neither are they made part of the record by order of court, nor does the record show that they were ever filed with the clerk as a part of the papers in the cause. *Steeg v. Walls*, 4 Ind. App. 18, 30 N. E. 312; *Lockwood v. Beard*, 4 Ind. App. 505, 30 N. E. 15; *Railroad Co. v. Welkle*, 6 Ind. App. 340, 33 N. E. 639. "In order that instructions may be made part of the record without a bill of exceptions, the record must affirmatively show that they were filed." *Railroad Co. v. Beyerle*, 110 Ind. 100, 11 N. E. 6, and cases cited. Judgment affirmed.

(13 Ind. App. 563)

TOWN OF SALEM v. HENDERSON.

(Appellate Court of Indiana. Nov. 19, 1895.)

STREET IMPROVEMENTS—ASSESSMENTS—ABUTTING PROPERTY.

Under Rev. St. 1894, § 4293, requiring the engineer to report the average cost per running front foot of the whole length of that part of the street which has been improved, etc., land abutting on a bridge connecting the portions of the street so improved is not liable for any part of the assessment, particularly as the engineer excepted from his estimate the length of the bridge, which was not improved.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by the town of Salem against Harvey, D. Henderson to enforce the collection of an assessment for a street improvement. Demurrers to the answer were overruled, and plaintiff appeals. Affirmed.

Mitchell & Mitchell, for appellant. Alsbaugh & Lawler, for appellee.

REINHARD, C. J. This action was brought by the appellant against the appellee to enforce the collection of an assessment for a street improvement. The amended complaint is in one paragraph. The appellee answered in three paragraphs, the first of which was the general denial. Separate demurrers were filed to the second and third paragraphs, and overruled. This ruling is assigned as error. The substance of the second paragraph of the answer is that the appellee admits the contract between the town and the contractor for the improvement of West Market street in said town, and that he is the owner of lots 13 and 140 in said town, fronting on said street; but he avers that only 134 feet of said lots abut and front on the part of said street improved under the said contract between said town and said contractor, and he further alleges that on the 15th day of October, 1894, and before the same became due, and before the beginning of this suit, he tendered to said appellant, in lawful money of the United States, the sum of \$187.44, in full payment of the money due from said appellee on account of the improvement of said West Market street under the said contract between said town and said contractor, and he brings said sum of \$187.44 so tendered into the court for appellant's use; and, as to the sum of \$34.97 claimed by appellant in excess of the above tender, he denies that he owes the same, or any part thereof, because the west 25 feet of his said lots fronting on said West Market street do not front or abut upon a part of said street improved under the contract mentioned in the amended complaint, but do abut on the bridge over Brock creek, wherefore he demands judgment for costs.

The statute under which such improvements are made provides that, when the improvement has been made and completed according to the terms of the contract, the board of trustees shall cause a final estimate to be made of the total cost thereof by the proper engineer, and such board of trustees shall require such engineer to report to them the following facts: (1) The total cost of the improvement. (2) The average cost per running front foot of the whole length of that part of the street so improved. (3) The name of each property owner on that part of the street so improved. (4) The number of front feet owned by the respective property owners on that part of the street so improved. (5) The amount of such cost for improvement due upon each lot or parcel of ground bordering on such

street, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot of the several lots or parcels of ground respectively. (6) The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. (7) In case of the construction of a sewer, a description of the property benefited thereby, etc. Rev. St. 1894, § 4293. We think that it is plain from the reading of the section cited that it was intended that only that part of the abutting property should be assessed which fronts on the portion of the street actually improved. Statutes authorizing the assessment of property for public improvements are to be strictly construed. The statute cannot be extended or added to in order to make the liability greater than is authorized by the plain letter thereof. Hence when it requires the engineer to estimate only the cost per running front foot of "that part of the street so improved," etc., it would be enlarging both the letter and spirit of the statute beyond its original scope to include in such estimate, and consequently in the assessment, property abutting on any part of the street not improved. Besides, if we look to the complaint and exhibits therewith filed, which it is proper to do in considering the sufficiency of an answer addressed to it, we find that the engineer's final estimates expressly except from the total length of the improvement 60 feet, "length of bridge over Brock creek." If, then, the length of the bridge is not included in the total estimate, it would seem to be highly inequitable and unjust that the entire part of the bridge abutting on appellee's property should be included in his assessment. Possibly, if the bridge were a portion of the improvement made, there might be some reason for including it in the assessment, but the pleading under consideration does not so aver, but expressly excludes it from that portion of the street which was improved. If the appellant's construction were to prevail, the town could improve a street in front of a person's property in piecemeal, and compel such person to pay the same as if the entire street in front of such property had been improved, although in reality not more than a small fraction thereof may have been so improved. This is not a case where a property owner claims a credit or allowance for a portion of the improvement made by himself in front of his property under Rev. St. 1894, § 4291. The appellee is not claiming a credit here for the work done by himself or any one else, but he is objecting to paying for an improvement which never was made, and of which he received no benefit.

Appellant's counsel concede that the appellee's position would be tenable if the street improved only extended 134 feet in front of his property and then stopped, but they insist that the rule is different when

the street improved extends beyond the lots sought to be charged. We confess our inability to perceive the distinction. If the appellant had improved 100 feet of the street in front of appellee's lots, beginning on the east end, and had then left a space of 25 feet unimproved, continuing the improvement again at the end of such 25 feet, and extending it on to the west, beyond the appellee's lots, the case would be precisely analogous to the one in hand. But in that case, we apprehend, the appellant's counsel would hardly claim a liability on the part of appellee for the entire improvement. The simple fact that the appellee's lots Nos. 13 and 140 abut on the street which was in part improved by the proceeding would not render the appellee liable for any more improvement than that actually made in front of his property. We think that the court correctly overruled the demurrer to the second paragraph of the answer. The third paragraph is also good. It is an admission of a liability for \$187.44, and a denial of the remainder, and avers a tender of the amount due.

These are all the questions arising in the record. Judgment affirmed.

(13 Ind. App. 697)

TOWN OF SALEM v. REID et al.

(Appellate Court of Indiana. Nov. 19, 1895.)

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by the town of Salem against Volney T. Reid and others to enforce the payment of an assessment for a street improvement. A demurrer to the answer was overruled, and plaintiff appeals. Affirmed.

Mitchell & Mitchell, for appellant. Alsbaugh & Lawler, for appellees.

REINHARD, C. J. The questions presented by the record in this case are identical with those decided by this court in *Town of Salem v. Henderson* (at present term) 41 N. E. 1062. Upon the authority of that case the judgment of the lower court in the present case must be affirmed. Judgment affirmed.

(13 Ind. App. 576)

ELWOOD NATURAL GAS & OIL CO. v. BAKER et al.

(Appellate Court of Indiana. Nov. 21, 1895.)

CONTRACT—FAILURE TO PERFORM—WAIVER OF OBJECTIONS—APPEAL—REVIEW.

1. One who accepts a well as completed according to the contract for drilling it cannot, in an action for the contract price, claim that the contract was not performed.

2. Objections to instructions not properly in the record, because not made so by bill of exceptions, or filed with the clerk as a part of the papers in the case, will not be considered.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

Action by Frank Baker against the Elwood Natural Gas & Oil Company to recover a balance alleged to be due for drilling a gas well. From a judgment for plaintiffs, defendant appeals. Affirmed.

Goodykoontz & Ballard, for appellant.
Blisshop & Scanlan, for appellees.

ROSS, J. This action was brought by the appellees to recover a balance due them from appellant for drilling a gas well under the terms of a written contract. No copy of the contract was filed with the complaint, for the reason, as alleged, that the appellant was in the possession thereof, and, although requested, refused to give, or permit appellee to take, a copy thereof. Then follows a summary of the material parts of the contract, as appellees remembered them. A demurrer for want of facts was filed to the complaint, and overruled. Thereupon the appellant filed an answer in two paragraphs, the first being a general denial, and the second setting forth the terms of the contract under which the work was done, and alleging noncompliance therewith on the part of the appellees. A copy of the contract was filed with this paragraph of the answer. To the second paragraph of the answer the appellees filed a reply of general denial. Upon the issues thus formed, the cause was submitted to a jury for trial, and a verdict returned in favor of the appellees, assessing their damages at \$165.

The contention of appellant, when attacking the sufficiency of the complaint, that appellees cannot allege that the contract provided for a well three inches in diameter, and then recover, when in truth and fact the contract was that the well should be eight inches in diameter, can have no force at this time, as the facts alleged in the complaint are that, by the terms of the contract, the well was to be three inches in diameter, and it nowhere appears in the complaint that it was to be otherwise or different. In determining the sufficiency of the facts alleged in the complaint to state a cause of action, we can look to nothing except the complaint itself. Other pleadings filed, or the evidence, neither strengthen nor weaken the facts alleged in the complaint, when the sufficiency of the facts alleged to state a cause of action is being considered. So far as any objection has been pointed out, we think the complaint sufficient.

Again, it is urged that the court erred in overruling the motion for a new trial. There is ample evidence to sustain the verdict. The contention that there is no evidence showing "that the water was entirely cased off, or that the well was packed, so it would not leak gas and water," is untenable. The testimony of the appellees, and of a number of the witnesses both for appellant and appellees, refutes the appellant's contention, and shows the well to be dry, and free from leaks. It also appears that the appellant accepted the well as completed, connected it with its mains, and used it. If the well was not completed or was not constructed in the manner provided in the contract, appellant should have refused to accept it.

We have examined the evidence upon the assumption that it is properly in the record, but, under the decisions of this court and of the supreme court, we doubt whether the evidence is properly before us. *Morgan v. East*, 4 Ind. App. 507, 30 N. E. 946; *Prather v. Prather*, 139 Ind. 570, 39 N. E. 310, and cases cited.

It is next insisted that the court erred in giving to the jury instruction No. 5. The instructions are not properly in the record, because not made so by bill of exceptions, or filed with the clerk as a part of the papers in the case, and for that reason we need not, and do not, consider anything with reference to them. *Railroad Co. v. Weikle*, 6 Ind. App. 340, 33 N. E. 639. Judgment affirmed.

(13 Ind. App. 567)

SWEITZER v. HEASLEY.

(Appellate Court of Indiana. Nov. 20, 1895.)

COMPROMISE — CONSIDERATION — REVIEW ON APPEAL.

1. A promise made in consideration of the compromise of an unenforceable claim, which both parties believed at the time was enforceable, is based on sufficient consideration.

2. Objections to conclusions of law must be made by exceptions, and cannot be made by a motion to modify.

3. A joint exception to two conclusions of law is insufficient for the separate review of each.

Appeal from circuit court, Elkhart county; J. M. Van Fleet, Judge.

Action by Oliver H. Sweitzer against Jacob P. Heasley on promissory notes. Judgment for defendant, and plaintiff appeals. Affirmed.

Stephens & Stephens and Chamberlain & Turner, for appellant. Johnson, Osborne & Zook and R. M. Johnson, for appellee.

GAVIN, J. Appellant's position is that a certain contract of compromise was ineffective and without consideration because "it is established by a long line of authorities that the compromise of an unenforceable claim can form no consideration for a promise." We do not regard this as a correct statement of the law in Indiana, even if it be such in some jurisdictions. If the language used by the court in *Jarvis v. Sutton*, 3 Ind. 289, is to be given such a construction, which we very much doubt, it has been discredited by subsequent decisions. In *Thompson v. Nelson*, 28 Ind. 431, there was in reality no legal claim, yet the party believed, and had good reason to believe, that there was. The compromise of the suit thereon was held a sufficient consideration for a note. The court says: "The most that can be claimed by the plaintiff is that it was a doubtful one, and the compromise of a pending suit upon a doubtful claim is a good consideration for a promise." In *Harris v. Cassidy*, 107 Ind. 158, 8 N. E. 29, the court says, "It is not necessary that the claim asserted should be a legal one, but it is necessary that it must have some foundation in law or equity." "If the claim asserted by the appellants appeared to have any foundation, the

cases of *Henry v. Ritenour*, 31 Ind. 136; *Crunkhite v. White*, 25 Ind. 418; *Thompson v. Nelson*, 28 Ind. 431; and *Harter v. Johnson*, 18 Ind. 271,—would exert an important influence upon the case; but for the reason that the claim, as stated in the special finding, appears on its face to be foundationless, these and kindred cases can have here no controlling influence." As expressed in *Smith v. Boruff*, 75 Ind. 412, "There must at least be a colorable ground of a claim, in law or in fact, to sustain an executory contract given as a compromise of it." In *Emery v. Royal*, 117 Ind. 305, 20 N. E. 150, it is thus stated: "The claim or demand must be one the enforcement of which in the courts is doubtful." In *Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88, the supreme court, upon a consideration of the authorities, says: "The claim compromised must have been at least doubtful, and there must have been some colorable ground of dispute, and some legal or equitable foundation for the claim. * * * In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual, bona fide claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute." As held in that case and in *Warey v. Forst*, 102 Ind. 205, 26 N. E. 87, and *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711, the mere belief of the claimant in his cause of action is not sufficient. If, however, to sustain a contract of compromise, the party must show he had a valid and enforceable cause of action, there would be no inducement to compromise the matters in dispute. In the recent case of *Bement v. May*, 135 Ind. 664, 34 N. E. 327, and 35 N. E. 387, the supreme court, by McCabe, J., decides the proposition adversely to appellant's contention. We think it clear from the facts that at the time of the making of the compromise contract each of the parties thereto believed in good faith, and with good reason, that appellee had, against appellant, a valid claim for damages upon his covenants of warranty. In that event the contract was rightly upheld. Were we, however, in error in this view of the facts, appellant is in no situation to obtain relief. A motion to modify conclusions of law raised no question thereon. They can only be questioned by exceptions thereto. *Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694. The exceptions to the two conclusions, even if made at the proper time, do not present for review the correctness of each of such conclusions severally under the ruling in the case of *Saunders v. Montgomery* (Ind. Sup.) 41 N. E. 453. Judgment affirmed.

(13 Ind. App. 570)

KEMPF et al. v. UNION SAVINGS & LOAN ASS'N NO. 2.

(Appellate Court of Indiana. Nov. 20, 1895.)

APPEAL—AFFIRMANCE.

Where several parties unite in a joint assignment of error, the judgment will be affirmed on appeal unless the assignment is good as to all.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by the Union Savings & Loan Association No. 2 against Robert Kempf and others on a bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Cropley and E. Marshall, for appellants. McCullough & Spaan, for appellee.

DAVIS, J. The judgment from which this appeal is prosecuted was rendered upon a bond in which Kempf was principal and the other appellants were sureties. The appellants, Hess, Erbrich, and Meyer, answered separately each from the others. The only error discussed by counsel for appellants is the following: "Come now the appellants in the above-entitled cause, Robert Kempf, Casper Hess, August Erbrich, and Frederick A. Meyer, and assign for error herein the following, to wit: First. The court at special term erred in sustaining the demurrer of the plaintiff to the fourth and sixth paragraphs of the separate answer of the defendants Hess, Erbrich, and Meyer." The rule is well settled that when several parties unite in a joint assignment of error they will encounter defeat unless the assignment is good as to all. *Elliott*, App. Proc. § 318; *Arbuckle v. Swim*, 123 Ind. 208, 24 N. E. 105; *Bower v. Bowen*, 139 Ind. 31, 35, 38 N. E. 326; *Town of Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159; *Wall v. Bagby*, 126 Ind. 372, 26 N. E. 60. Therefore no question is presented for our consideration. Judgment affirmed.

(13 Ind. App. 575)

HARNESSE v. ROSS.

(Appellate Court of Indiana. Nov. 21, 1895.)

PLEADINGS—DEFENSES—RECORD ON APPEAL.

1. Since matters of defense, excepting pleas in abatement, or of set-off, or the statute of limitations, may be given in evidence without plea, under Rev. St. 1894, § 1528 (Rev. St. 1881, § 1460), a defendant is not prejudiced by the striking out of a paragraph in his answer which contains neither of such pleas.

2. The act of the clerk in copying into the transcript a paragraph of an answer which has been stricken out by the trial court does not make such paragraph a part of the record, without an order of the court or a bill of exceptions.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Marton B. Ross against Lewis Harness. From a judgment for plaintiff, defendant appeals. Affirmed.

Jos. C. Herron and B. F. Harness, for appellant. Blacklidge & Shirley, for appellee.

DAVIS, J. This action was instituted by the appellee against the appellant before a justice of the peace. From the judgment rendered by the justice, an appeal was prosecuted to the circuit court. In the circuit court the appellee filed an amended complaint. The appellant answered in four paragraphs. On motion of the appellee, the fourth paragraph

of the answer was stricken out. A trial by a jury resulted in a verdict and judgment against the appellant, from which this appeal is prosecuted.

The only error assigned in this court is that the court erred in sustaining the motion to strike out the fourth paragraph of the answer to the amended complaint. It is conceded by counsel for the appellant that the fourth paragraph of the answer was not a plea in abatement. If the answer is properly in the record, it is apparent that it does not attempt to plead as a defense either set-off or the statute of limitations. Therefore, the matter of defense therein pleaded might have been given in evidence without plea. Rev. St. 1894, § 1528 (Rev. St. 1881, § 1460).

Counsel for appellee contend that no question is presented by the record for our consideration. The fourth paragraph of the answer has not been made a part of the record by bill of exceptions or an order of court. Counsel therefore insist that, when the answer was stricken out by the court, it no longer formed a part of the record of the case, and that the act of the clerk in copying the stricken-out paragraph into the transcript does not make it a part of the record. This position is supported by the authorities. *Carrothers v. Carrothers*, 107 Ind. 530, 8 N. E. 563. There is no error in the record. Judgment affirmed.

(14 Ind. App. 203)

**AMERICAN MUTUAL LIFE INS. CO. v.
STEWART. 1**

(Appellate Court of Indiana. Nov. 20, 1895.)

BILL OF EXCEPTIONS—TIME FOR FILING.

To have a ruling on a motion to strike out parts of a pleading reviewed on appeal, it is necessary that at the time of the ruling the question be saved by proper bill of exceptions, or that leave be obtained to do so within a stated time, and an affidavit of appellee reciting that the parties are given a certain time in which to file a bill of exceptions cannot be considered as the order of the court in that respect.

Appeal from Circuit court, Elkhart county; J. M. Van Fleet, Judge.

Action by Richard W. Stewart against American Mutual Life Insurance Company on a judgment. Plaintiff had judgment, and defendant appeals. Affirmed.

H. C. Dodge, for appellant. O. Z. Hubbell and O. M. Conley, for appellee.

ROSS, J. This action was based upon a judgment rendered in the superior court of Carteret county, N. C., in favor of appellee and against the appellant. The appellant assigns three specifications of error, for which he asks a reversal of the judgment of the court below, namely: First, "The court erred in sustaining appellee's motion to strike out a

part of the 'second answer of appellant;' second, "The court erred in overruling appellant's motion for a new trial;" and, third, "The court erred in refusing to direct a verdict for the defendant after the plaintiff had rested."

The motion to strike out a part of the appellant's second paragraph of answer was filed on the 6th day of March, 1894, the same being the second judicial day of the March term of said court, and on the succeeding day the motion was sustained, and an exception noted, but no time asked or given in which to file a bill of exceptions. The cause was tried at the May term, 1894, of said court, and on the 18th day of June a motion for a new trial filed, which was overruled on the 6th day of July, and an exception saved. On the 1st day of October, 1894, the same being the first day of the October term of said court, appellant filed its three separate bills of exceptions, containing those parts of the second paragraph of the answer which had been stricken out on the motion of appellee, a certain affidavit filed with and in support of the motion for a new trial, and the evidence introduced on the trial of the cause. It is well settled that rulings made in the formation of issues must be excepted to at the time they are made, and if they are such that they must be made part of the record by bill of exceptions they must be reduced to writing at the time and filed, or leave must be granted at that time to reduce them to writing and to file them at a subsequent time. *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. 301. No time was given by the court, so far as we have been able to find, in which to file bills of exceptions for the purpose of preserving and bringing into the record either the motion to strike out part of the answer, with the ruling thereon, or the evidence given on the trial of the cause. It is true that at a point in the record where the clerk has copied an affidavit filed by appellee in opposition to appellant's application for a new trial, following the signature to, but before the jurat of, the affidavit, we find the words and figures following: "And the parties are given 90 days to file bill of exceptions." But this must be regarded as a part of the affidavit, because embodied in it, and not as an order of the court. As heretofore stated, in order that appellant might avail itself of the ruling of the court on the motion to strike out parts of the answer, it was necessary either that it, at the time of the ruling, save the question by proper bill of exception, or obtain leave to do so within a stated time. This it did not do. The motion to strike out, together with the rulings thereon, are not, therefore, part of the record, hence cannot be considered. For the same reason the evidence is not properly in the record. Judgment affirmed.

1 Rehearing denied.

(13 Ind. App. 571)

WAGNER et al. v. BARDEN et al.

(Appellate Court of Indiana. Nov. 21, 1895.)

ATTACHMENT—SCHEDULE—WAIVER OF EXEMPTION
PRIVILEGE—JUDGMENT ON THE MERITS
—TECHNICAL ERRORS.

1. In attachment a schedule of the property seized, and claimed by defendant as exempt, filed with the answer as an exhibit, may be looked to for a description of the property, though not available in determining the sufficiency of the answer.

2. Failure to assert a right of exemption at the time and in the manner prescribed by the statute which confers such right is a waiver of the privilege.

3. In attachment the evidence showed that at the time defendant's property was levied on he presented to the sheriff a duly-verified inventory of all his property, containing all the requisites of the statute, and made the required affidavit, and that such property did not exceed in value the amount legally exempt. *Held*, that under Rev. St. 1894, § 348 (Rev. St. 1881, § 345), which provides that no objection taken by demurrer and overruled shall be sufficient to reverse a judgment if the merits of the cause have been fairly determined, a judgment for defendant would be affirmed though a demurrer to his answer was improperly overruled.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by Ann Wagner against James Barden and others on a note, writ of attachment being issued at the same time and levied on property of defendant Barden. Alfred H. Robbins was subsequently made a party to the proceedings, on filing complaint, affidavit, and undertaking. From a judgment for defendants as to the attachment proceedings, plaintiffs appeal. Affirmed.

Conner, Rowley & McMahan, for appellants. F. H. Terry and Enoch Myers, for appellees.

LOTZ, J. The appellant Ann Wagner brought suit against the appellees on a promissory note executed by them. At the time of filing the complaint an affidavit and undertaking in attachment were also filed, and a writ of attachment was thereupon issued and placed in the hands of the sheriff, and on the same day was levied upon certain personal property of the appellee James Barden. Subsequently the appellant Alfred H. Robbins filed his complaint, affidavit, and undertaking, and made himself a party to the action. His claim was founded upon a promissory note executed by James Barden. The court ordered the causes to be consolidated. James Barden answered separately in two paragraphs. The first was a general denial. The second only answered the attachment proceedings. The cause was tried by the court, and a finding made for the appellants as to the amounts due on their notes. But as to the attachment proceedings the court found for James Barden, and rendered judgment accordingly. The only questions in controversy in this appeal relate to the attachment proceedings. The second paragraph of the answer of James Barden is not limited to the

attachment proceedings, but is addressed to the whole complaint. But as no point is made against it in this respect this defect will be deemed waived. The paragraph is badly constructed, but we think it substantially avers that, on the day the writ of attachment was issued and placed in the hands of the sheriff, James Barden was a resident householder of Fulton county, Ind., and that he thereafter continued to be such householder up to the time of filing his answer; that on the day the writ of attachment was issued in this cause the sheriff levied the same upon certain personal property belonging to him; that this property is fully described in a schedule or exhibit filed with the pleading; that before and at the time of the levy and seizure he claimed the property as exempt from seizure under the writ, and offered to file his schedule showing that all his property, real and personal, money on hand or on deposit, in or out of the state, was worth less than \$600, but that the sheriff refused to permit him to do so; "that afterwards and on the same day, and while the property was in the possession of the sheriff, he made and duly verified a schedule of all of his property as required by law (this property was specifically described in an exhibit filed with the pleading); that the schedule contained a full, true, and complete statement of all property owned by him on the day and at the time of issuing the writ; that the property is worth less than \$600; that the action against him is founded upon a contract, and that he claimed and still claims the property as exempt from said writ; that he presented the schedule to the sheriff, and demanded that the sheriff return the property to him as exempt; that the sheriff refused to deliver the property to him upon his request and demand.

Appellants' demurrer for want of facts was overruled to this answer. It is contended that the schedule filed with the pleading as an exhibit cannot be looked to in construing or determining its sufficiency. In this appellants are correct, for the schedule is not the foundation of the defense. But the exhibit is a proper and convenient method of describing the property levied upon and sought to be exempted, and may be looked to for that purpose. Exemption laws should be liberally construed, but the right granted to the debtor is personal as to himself. He may waive it. If he wishes to avail himself of this privilege he must comply substantially with the requirements of the statute. When the statute which confers the right also prescribes the manner in which the right may be secured, the failure to assert the right at the time and in the manner prescribed will be deemed a waiver of the privilege. *Faulkner v. Jones* (decided at this term) 41 N. E. 830; *Graves v. Hinkle*, 120 Ind. 157, 21 N. E. 328; *Boesker v. Pickett*, 81 Ind. 554; *Haas v. Shaw*, 91

Ind. 334. The statute (section 726, Burns' Rev. St. 1894; section 714, Rev. St. 1881) requires the debtor to make out and deliver to the officer having the writ an inventory of all of his property, of whatever kind and description, both within and without the state, belonging to him, or in which he had any interest, at the time the writ was issued, and to make and subscribe an affidavit that it contains a full and true account of all property had or held by him at the time the writ was issued. Assuming, without deciding, that the provisions of this statute are applicable in attachment proceedings, and assuming, without deciding, that the answer is insufficient, still it does not necessarily follow that because a demurrer has been overruled to an insufficient pleading the erroneous ruling constitutes reversible error. It is expressly provided by statute that "no objection taken by demurrer and overruled, shall be sufficient to reverse a judgment if it appear from the whole record that the merits of the cause have been fairly determined." Burns' Rev. St. 1894, § 348 (Rev. St. 1881, § 345). The undisputed evidence in this case shows that James Barden did present to the sheriff a duly-verified inventory of all of his property, containing all the requisites of the statute, and made the affidavit required. It was also an undisputed fact that Barden was at the time of issuing the writ a resident householder of Fulton county, Ind., and that all of his property of every kind at that time did not exceed in value \$600. This property under these facts was not subject to attachment.

An examination of the whole record shows that the merits of the cause have been fairly tried and determined. Judgment affirmed.

(14 Ind. App. 662)

HOUK v. BOARD OF COM'RS OF MONTGOMERY COUNTY.¹

(Appellate Court of Indiana. Nov. 20, 1895.)

ATTORNEY AND CLIENT—DEFENDING POOR CRIMINAL—ACTION FOR SERVICES—LIABILITY OF COUNTY—JURISDICTION OF JUSTICE.

1. Where an attorney is appointed to defend a poor criminal, as provided in Rev. St. 1894, § 261 (Rev. St. 1881, § 260), the county is liable for his services.

2. The guaranty of Const. U. S. Amend. 6; that a person accused of crime shall be entitled to counsel, does not include a guaranty that such counsel shall be furnished at the expense of the public.

3. Rev. St. 1894, § 7990 (Rev. St. 1881, § 5912), provides that money can only be paid out of the county treasury on proper orders issued and attested by the county auditor. Rev. St. 1894, § 1480 (Rev. St. 1881, § 1414), provides that the auditor may draw a warrant on the treasurer "for a sum allowed or certified to be due by any court of record authorized to use a seal and having jurisdiction beyond that of a justice of the peace." *Held*, that a justice of the peace had no jurisdiction, under Rev. St. 1894, § 261 (Rev. St. 1881, § 260), to appoint an attorney for a poor criminal, for whose services the county will be liable.

¹ Rehearing denied.

Appeal from circuit court, Montgomery county; E. O. Snyder, Judge.

Action by Wilbur G. Houk against the board of commissioners of Montgomery county for services in defending a poor criminal. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Wilbur G. Houk, in pro. per. Finley P. Mount, for appellee.

LOTZ, J. It appears from the averments of appellant's complaint that he was duly appointed by a justice of the peace to defend a poor person charged with crime in the justice's court. He sought to recover the value of his services. A demurrer for want of facts was sustained to the complaint. This ruling is assigned as error. Appellant's contention is that a justice of the peace has the same power to appoint an attorney to defend a poor person charged with crime in his court as has a circuit or other court of superior jurisdiction. There is no doubt but that a county is liable to an attorney at law for services rendered in the defense of a poor person charged with crime in a proper case. *Webb v. Baird*, 6 Ind. 13; *Board v. Courtney*, 105 Ind. 311, 4 N. E. 896; *Hendryx v. State*, 130 Ind. 265, 29 N. E. 1131; Burns' Rev. St. 1894, § 261 (Rev. St. 1881, § 260); Const. art. 1, § 21. It is also true that it is the right of a person accused of a crime to be heard by counsel, and this right is guaranteed by the federal and state constitutions. Const. U. S. Amend. 6; Const. Ind. art. 1, § 21. But the accused has no right guaranteed to him by the constitution that his counsel shall be furnished at the expense of the public or of the county. If he has the right to be defended by counsel at the expense of the county, it is one given by statute. A court of a justice of the peace is one created by the constitution, but its powers and duties are prescribed by statute. Burns' Rev. St. 1894, § 174 (Rev. St. 1881, § 174). It is also a court of record. Burns' Rev. St. 1894, § 1504 (Rev. St. 1881, § 1437). But it is a court of inferior and limited powers and jurisdiction, having neither a clerk nor an official seal. The section of statute giving a court the power to appoint an attorney for a poor person is not in terms limited or confined to any particular court. But statutes should all be construed so as to form one complete and harmonious system of laws. Another section of the statute provides that money can only be paid out of the county treasury upon the proper orders, issued and attested by the county auditor. Burns' Rev. St. 1894, § 7990 (Rev. St. 1881, § 5912). In another section it is provided that the auditor may draw his warrant upon the treasurer for a sum allowed or certified to be due by any court of record authorized to use a seal, and having jurisdiction beyond that of a justice of the peace, or by the board of county commissioners. See Burns' Rev. St. 1894, §

1490 (Rev. St. 1881, § 1414). Under this section it is clear that circuit and superior courts may make allowances in proper cases under the seal of the court, upon which the county auditor may issue his warrant; but justices of the peace can make no such allowances. The statutes contemplate that the court making the appointment of an attorney to defend a poor person shall also make the allowance. It is true, if he fail to do so, the county may nevertheless be liable for the reasonable value of the services rendered in an action brought against the board of county commissioners. *Board v. Courtney*, supra. But it is none the less the duty of the court making the appointment to make the allowance. The general rule is that, where a power is granted to do a particular thing, the grant carries with it the power to do all the incidental matters necessary to attain the ends sought. The power to appoint carries with it the power to make the allowance. As a justice of the peace has no power to make the allowance, he ought not to have the power to make the appointment. If appellant's contention should prevail, we would have one rule for circuit and superior courts and another rule for justice courts, growing out of the construction of the same statutes. Such a result would destroy that harmony which it is the policy of the law to secure. An attorney, in the most general meaning of the term, is one who is set or placed in the turn or stead of another. *Milling Co. v. Zahn*, 9 Ind. App. 270, 36 N. E. 653. In a more limited sense, an attorney at law is one whose profession is to represent litigants in the management of their causes before the courts. An attorney is an officer of the court in which he practices his profession. He is required to take an oath of office, which oath must be entered upon the order book of the court. It is made the duty of the clerk of the court to furnish the court with a list of all the attorneys having business in the court at each term thereof, and a roll of the attorneys shall be kept in every court; but a justice's court has neither terms of court nor a clerk. In view of these provisions of the statute, it is doubtful whether the office of an attorney, in the professional sense of the term, applies to justice's courts. Judgment affirmed.

(13 Ind. App. 579)

KELLY v. JOHN et al.

(Appellate Court of Indiana. Nov. 22, 1895.)

APPEAL—ASSIGNMENT OF ERRORS—COMPLAINT—SUFFICIENCY—COMPUTATION OF TIME—EXCEPTIONS.

1. An assignment that a complaint fails to state facts sufficient to constitute a cause of action is not well taken where one of several paragraphs thereof is sufficient.

2. A time allowance of 90 days from June 18th to file a bill of exceptions expired September 18th.

3. Exceptions to the giving of instructions must be taken severally, and not collectively.

Appeal from circuit court, Huntington county; O. W. Whitelock, Judge.

Action by William John and others against Hannah Kelly. Plaintiffs had judgment, and defendant appeals. Affirmed.

B. M. Cobb, for appellant. France & Dunagan, for appellees.

REINHARD, C. J. One of the errors assigned is that the amended complaint fails to state facts sufficient to constitute a cause of action. The amended complaint appears to be in two paragraphs. The first of these is a declaration on an account for a piano sold and delivered to defendant by plaintiff, for which the former is indebted to the latter in the sum of \$285. The second paragraph is upon a written contract, filed as an exhibit with the complaint. The assignment tests the complaint as a whole. The first paragraph is clearly sufficient. The assignment must therefore fail. The remaining assignments discussed can only be considered with reference to the evidence given at the trial. The motion for a new trial was overruled on June 18th, and 90 days' time was given to file the bill of exceptions. The record shows that the bill containing the evidence was presented to the judge on September 17th, and signed by him on September 18th. The rule as to the computation of time requires that the first day be excluded and the last day included. Applying this rule to the case in hand, we find that the bill of exceptions was not presented to the judge until the 91st day after the overruling of the motion for a new trial and the rendition of the judgment. The bill of exceptions was not presented in time, and the evidence is not in the record. We may say, moreover, that the chief complaint made of the rulings of the court is upon the instructions to the jury. The exception to these was taken collectively, and not severally. The form of exception was as follows: "And to the giving of the 4th, 5th, 6th, and 10th instructions the defendant excepted at the time," etc. The exception must be taken to each instruction. *Elliott*, App. Proc. § 791. If the exception be taken to the instructions as a whole, or to any number (as the 4th, 5th, 6th, and 10th instructions) collectively or jointly, it only tests the sufficiency of such instructions when considered together; and, if any one of such instructions is good, the fact that the others are bad will not avail the party excepting. In the case at bar it could not, in any event, be held that all the instructions excepted to are bad, as some of them are clearly sufficient. Judgment affirmed.

(164 Mass. 514)

CLINTON v. BOSTON BEER CO.(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 18, 1895.)**CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

Where the only testimony tending to show defendant's negligence or the exercise of due care by plaintiff and his mother was that plaintiff, a bright boy, over five years old, was permitted by his mother to go to a store alone; that his mother, looking for his return, saw defendant's brewery wagon run over his foot while he was standing, the rest of his body being obscured by the load on the wagon; that she called to the driver, who was holding the reins as a driver ordinarily does, and looking at the horses; that she knew the street was frequently traversed by brewery teams,—a verdict was properly directed for defendant.

Exceptions from superior court, Suffolk county; Franklin G. Fessenden, Judge.

Action by John Clinton, by next friend, against Boston Beer Company, for personal injuries. A verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

It appeared by evidence introduced on behalf of the plaintiff that he, a boy five years and five months old, lived with his parents on the north side of Second street, South Boston, in the second house west from D street; that Second street was sometimes pretty busy, but more times there were not many teams passing; that the plaintiff was a smart, cheerful, healthy child, and was often sent by his parents to stores, where he got four or five articles many a time without the aid of written memoranda. The plaintiff's mother testified on behalf of the plaintiff that on the morning of March 28, 1893, she sent him to the grocery after three articles, and on his coming home with these she gave him a penny, and he left the house alone, with her permission, to buy candy; that there were two candy shops there,—one at the corner of Bolton street, and the other about the middle of the block on D street; that she could not say which candy store he went to; that she did not see where he went or what he did from the time he left the house till she saw his foot before the wheel; that he went out alone; that he was not in the care of anybody; that, when it was about time for him to get back, his mother went to a window on the second floor, to watch for his return; that the first thing she saw on reaching the window was a pair of horses and a long wagon belonging to the Boston Beer Company; that the team was facing on Second street, passing around the corner on D street by the window on the other side; that the next thing she saw was the plaintiff's left foot standing on the ground about a foot or a foot and a half in advance of the fur-

ther hind wheel,—the right hand rear wheel; that "almost in an instant the wheel was over it"; that she wrung her hands, and put up the window, and called to the driver, whom she recognized, asking him to pick up the child for her; that the driver was defendant's servant; that the horses were walking fast, the driver holding the reins as a driver ordinarily does, and looking straight ahead at the horses, and, when the mother called to him, "the horses were turning the corner on D street across the crossing"; that the driver "turned back on his team," and looked back; that she could not say whether he looked at the child or where he looked, but he looked towards where the child was; that he did not look up at her; that the mother rushed down the stairs, but, by the time she got to her door, the team was gone; that the wagon was very long, and loaded with bags or something,—the bags perhaps piled three high on one another; that the body of the wagon or cart was "high up," and the mother "could [sic] see anything on the other side of it"; that she saw one foot standing, and the black stocking covering one leg of the child, but, owing to the wagon and its load being between her and the child, she saw none of his body until she saw him knocked down; that he was standing when the wheel went over him; that, when she carried him to the house, he had the candy clasped in his hand; that defendant's team was the only one in sight at the time of the accident, which occurred about 9 o'clock in the forenoon; that she knew that Second street is frequently traversed by brewery teams; that she had lived there seven or eight months, but at the time of the accident they were not passing; she had seen heavy teams passing and repassing there continuously; and that, in consequence of the injury received, the plaintiff lost the whole of one and parts of two others of the middle three toes on his left foot. The plaintiff was in court. His foot was shown to the jury, but he did not testify. Upon the foregoing evidence, which was uncontradicted (the defendant offering no evidence), the presiding judge ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant, which was returned. The plaintiff alleged exceptions to said ruling and direction, and prayed that his exceptions may be allowed.

E. Everett and E. Glover, for plaintiff. J. A. Campbell, for defendant.

PER CURIAM. There was no evidence for the jury that the defendant was negligent, or that the plaintiff or his mother was in the exercise of due care. Exceptions overruled.

(188 ILL 505)

HARMS et al. v. JACOBS.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

EQUITY—JURISDICTION—PLEADING—INJUNCTION—QUIETING TITLE.

1. Where a bill for injunction against threatened trespasses to land alleges the defendant's insolvency as the reason why the remedy at law is inadequate, evidence of defendant's solvency deprives the court of jurisdiction.

2. A bill praying for an injunction against threatened trespass to land will not sustain a decree quieting title.

Appeal from superior court, Cook county; W. G. Ewing, Judge.

Bill by Charles F. Jacobs against Henry Harms, Edward J. Harms, Emil Harms, Henry Harms, Jr., Edward Lockhurst, and Philip Brazel. Complainant obtained a decree. Defendants appeal. Reversed.

On April 9, 1894, Charles F. Jacobs exhibited his bill in the superior court of Cook county for the purpose of restraining Henry Harms from interfering with the possession of the property in the bill mentioned and described, and from removing appellee from or preventing him from rebuilding thereon, and falsely clouding appellee's title. The grounds upon which this relief was sought were set out in the bill, and were, in substance, that appellee claimed to own the title to the property by deed from one Gelderman to him, dated in 1891, and a title to Gelderman by mesne conveyance from the United States government, and that he had obtained a decree of the circuit court of Cook county establishing his title in fee simple to said lands; that on March 31, 1894, Jacobs inclosed the property with a fence, and on April 4, 1894, Harms removed and destroyed it; that Jacobs restored the fence on April 7th, and on the same day Harms destroyed this fence, and moved a house upon the land, which, it is alleged, was burned April 8th; that Harms threatens to remove and destroy any fence which the complainant may build, and he threatens to take possession and exclude complainant from the possession, and he threatens to remove and destroy any house complainant may put upon the land, and complainant fears he will do so unless restrained; that Harms caused complainant's workmen to be arrested April 7, 1894, to prevent complainant from erecting a fence upon the land; that Harms is insolvent, and a judgment of law would be unavailing and uncollectible; that neither the Criminal Code nor the usual actions at law afford complainant any adequate remedy against Harms' trespasses; that Harms had no proper title to the land; that he falsely claims that he has a prescriptive title thereto by adverse possession; that Harms was litigious and quarrelsome, had terrorized the community in which he lives; that the ordinary peace powers afford no protection against him; that he pays no attention to fines and peace bonds or judg-

ment in trespass, and to obtain a final judgment in forcible detainer, trespass, or other legal action will take a long time, owing to the congested calendar of the court; and to compel the complainant to resort to such remedies would be a practical denial of justice during which the complainant would be deprived of the enjoyment of the land. Upon the filing of this bill, and without notice, an injunction was issued as prayed on April 9, 1894, and on May 7, 1894, Harms filed his answer denying the several allegations of the bill, and particularly denying that Jacobs had obtained any decree against Harms in the circuit court, but alleging that Jacobs had commenced suit under the burnt records act, in that court, to which he made Harms a defendant; and that he subsequently dismissed the suit as to Harms, and then took a decree in his own favor.

The answer expressly denies the jurisdiction of a court of equity in the case in three clauses thereof, the first denial being in the first paragraph of the answer, expressly denying that a court of equity has jurisdiction in the subject-matter of the bill of complaint; the second denial being that the complainant had an adequate remedy at law; and the third being at the conclusion of the bill, stating that defendants deny that a court of equity has any jurisdiction of the subject-matter of this cause, or that complainant is entitled to any equitable relief, and insisting that the claims of said complainant may be properly and fully adjudicated in a court of law, and praying the same benefit from this answer as if it was a special demurrer to said bill of complaint. The answer also denies the insolvency of Harms, denies that he has trespassed upon the property, denies that he is quarrelsome, or holds in defiance the writs of the courts, but alleges that he is the owner of the property, and has been in possession of the same for more than 25 years, claiming to be the owner under a conveyance of the same from the owner thereof, made prior to 1851.

Replication was filed to this answer, and upon the issues so joined the case was set for trial, and a motion was made by appellants for a continuance because their solicitor was sick, and absent from the city, and because Mr. Harms was also absent; the solicitor making the motion stating to the court that he knew nothing about the case. This motion was denied, and the complainant (appellee) introduced his evidence, and two witnesses were called on behalf of the defendant Harms on that day, which was the 13th day of June. After appellee's evidence was heard, appellants moved to dismiss the bill for want of equity, both upon its face and upon the evidence. The motion was denied. On the evening of that day an adjournment was had until the next morning, when Harms appeared, and testified in his own behalf, the court having already directed that no other evidence in his behalf should be heard. On the 14th day of June Mr. Harms was examined, and testified

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

in the case, after which the complainant called in Mr. Harms' brother for the purpose of rebutting his testimony in certain regards, when the court ordered a decree. The decree was entered on the 15th day of June. Thereupon, and on the 29th day of June, Harms appeared before the court, and made a motion to vacate and set aside the decree that was entered, and to give him a new trial in the cause, and in support of that motion he filed numerous affidavits. By these affidavits it was sought to be shown that the appellee, Jacobs, was engaging in a multiplicity of suits against Harms in relation to the title to this land, and in suits growing out of such litigation, both civil and criminal; that Jacobs had commenced a suit in the circuit court under the burnt records act to establish title to this land, and had dismissed it on the last day of the month of March as to Harms, but had taken a decree in his own favor in relation to the land; that upon that decree as a basis of action he had gone to the land in the nighttime and torn down Harms' fence, and put a fence around the property; that Harms had resisted this act of trespass by restoring his own fence, and, in order to retain possession of the property, had built a dwelling house upon the land, and put his son and son's family in that dwelling house about the 7th of April; and that on the 8th of April, which was Sunday, in the afternoon of that day, Jacobs went to the property, and forced Harms' son and his son's wife to leave the house, and then burned the house; and that the next morning after so burning the house Jacobs filed his bill alleging his possession, and obtaining the injunction against Harms.

The affidavits state that appellee has no title to the land without it be a possible dower interest which was conveyed by Katherine O'Brien to William Lill by quitclaim deed dated June 6, 1851, but that before that date, Katherine O'Brien, administratrix of the estate of George O'Brien, deceased, had sold said land to Thomas Hogan, subject to her dower by deed dated May 21, 1850. It also appears from the records that Thomas Hogan died intestate about September 13, 1850, and that his estate was probated in Cook county. And it appears from said affidavits that Harms obtained a deed from the representatives of Hogan's estate, and took possession of the property in 1851 or 1852, and has been in possession ever since. To this effect were the affidavits. The affidavit of Mr. Gray, the absent solicitor, states how the cause came to be tried in his absence, and without notice to Harms; that he (Gray) was sick, and unable to attend to his business, and was out of the city, and did not return until after the case was disposed of; that he did not expect the cause to be reached for trial, and did not know that it was reached until after it was disposed of. The motion for a new trial was denied.

The decree, as entered, found the premises to be in the possession of appellee; that he

had paid all taxes thereon; that he had fenced the land, which fence was destroyed about April 4, 1894, by defendants, and was rebuilt by appellee, and on April 8, 1894, said Harms and said defendants destroyed it again, and the said defendants and said Harms threaten to destroy and move any fence that said Jacobs may erect around said premises, or any house he may put thereon, and that there is danger that they will do so; that said Jacobs bought said land in good faith, paying a good and legal consideration therefor; that said Jacobs has no adequate remedy at law; that none of said defendants have any title to said land, or any other title whatever; and that said Henry Harms, and each and all of said defendants, have no prescriptive title to the said premises, and have never been in possession of said land, except as trespassers; and that he, the said Henry Harms, nor any other of said defendants, has ever exercised any acts of ownership over said lands. "It is therefore ordered, adjudged, and decreed that said Henry Harms, and each and all of said defendants, and each and all of their grantees, heirs, devisees, assignees, transferees, representatives, and agents be perpetually enjoined, and restrained from interfering with the possession of said premises, or any part thereof, of the said Charles F. Jacobs, and from removing or destroying the fence erected by said Charles F. Jacobs around said premises, or any part thereof, and from clouding and libeling said Jacobs' title thereto, and from setting up and asserting a prescriptive title thereto. And it is further ordered, adjudged, and decreed that the said title in fee simple absolute to said premises is in said Charles F. Jacobs, and was so in said Charles F. Jacobs at the time of the filing of the bill of complainant herein." From which decree, defendants prayed an appeal to this court.

A. N. Gage, for appellants. Albion Cate, for appellee.

PHILLIPS, J. (after stating the facts). Two questions are presented on this record, the determination of which is conclusive of this case: First, do the facts as shown in the record and found in the decree give jurisdiction of the subject-matter of this bill to a court of chancery, and sanction a decree awarding a perpetual injunction? And, second, if injunction is conceded, do the averments of the bill authorize the decree as entered? Both must be determined adversely to appellee. The acts sought to be enjoined are threatened trespasses to real estate alleged to be owned by appellee, and the bill charges trespasses heretofore committed, which are found by the court. Courts of equity will interfere to restrain trespass, whether committed under the forms of law or otherwise, in but exceptional cases. These exceptions are included in two classes: First, to prevent irreparable injury, and, second, to avoid a multiplicity of suits. Where appli-

cation is made to a court of chancery under the first class, the facts and circumstances must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford no adequate relief. A mere allegation of such facts is not sufficient to warrant a decree for a perpetual injunction in such case, unless admitted by the pleadings. The question of the existence of an adequate remedy at law to defeat the jurisdiction of a court of chancery may be raised by a demurrer to a bill for failing to make the necessary averment, or it may be specially set up and relied upon in the answer. Where the jurisdiction is challenged, and an issue made by the answer to a bill with sufficient averments, on hearing, the evidence must sustain the averments of the bill, or jurisdiction is lost. The averments of the bill in this case as to irreparable injury are sufficiently specific to give jurisdiction. Trespasses committed and threatened and insolvency of defendants are alleged. The answer specifically denies the defendants are insolvent, and denies the jurisdiction of a court of equity averring the complainant had a complete remedy at law. There is no finding in the decree as to the insolvency of the defendants, and the evidence shows the principal defendant, Henry Harms, is worth over \$400,000, his property being chiefly in Cook county. The insolvency of the defendants is the specific fact, and only fact, averred that would give a court of equity jurisdiction to restrain trespasses because of irreparable injury. Under the evidence in this record on the issues as made, it is apparent that complainant had a complete remedy at law, and would sustain no damage that would not be satisfied by the judgment of a court of law. His injuries from trespasses could be compensated in damages. *Owens v. Crossett*, 105 Ill. 354; *Thornton v. Roll*, 118 Ill. 350, 8 N. E. 145; *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Exchange v. McClaghry*, 148 Ill. 373, 36 N. E. 88; *Commissioners v. Green*, 156 Ill. 504, 41 N. E. 154.

The entire scope of the bill was for an injunction to restrain threatened trespasses. Such being its extent and purpose, the decree as entered contained, as against the defendants, a finding that the title in fee simple absolute to said premises was in the complainant at the time of filing the bill of complaint. By the bill complainant alleged he was the owner and in possession of the premises, and defendants threatened to commit trespasses thereon. By the answer defendants denied that complainant was the owner of the premises, but averred the title and possession was in the defendants, and denied the threatened trespasses. The decree was broader than the averments of the bill sanctioned. No relief was asked as against a cloud on title to give jurisdiction. The complainant must stand or fall by the case made by his bill, and the decree must

conform to the allegations and prayer. *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30.

There is no averment of the bill which necessitates a discussion of the question of a resort to a court of chancery by injunction to prevent a multiplicity of suits. We do not deem it necessary to enter into a discussion of the question of title and possession, as, for the errors indicated, the decree must be reversed, and the cause remanded to the superior court of Cook county, with directions to dismiss the bill. Reversed and remanded.

(153 Ill. 353)

**DRAINAGE COM'RS OF DRAINAGE DIST.
NO. 8 v. ILLINOIS CENT. R. CO.¹**

(Supreme Court of Illinois. Oct. 11, 1895.)

DRAINAGE—SPECIAL ASSESSMENT—RAILROAD COMPANIES—INSTRUCTIONS.

1. In proceedings for a special assessment by a drainage district against railroad property, an instruction that "it does not follow as a matter of law that, because farm lands may be benefited by drainage work, therefore the right of way of a railway company is also benefited," is erroneous as drawing the attention of the jury to one particular fact, and tending to make them conclude that a railroad right of way would not be benefited by drainage that would carry off standing water.

2. An instruction that "it does not follow as a matter of law that, because the drainage district proposes to widen and deepen a creek across the right of way, the right of way will be thereby benefited," is also erroneous for the same reasons.

3. An instruction that the jury, "in determining the question of benefits to be conferred, if any, on the right of way in question, by the proposed ditches, have a right to take into consideration the object for which the right of way is used and required to be used under the law; also whether or not the right of way is sufficient to properly carry on the business of the defendant, regardless of the drains proposed to be constructed by the district; also whether or not the right of way is in need of any drainage, and whether or not the grade on which the track is situated will be benefited by additional drainage; and, from these and all of the other facts and circumstances in evidence, say whether or not the track and right of way will be benefited by the proposed drainage,"—is erroneous as diverting the jury's attention from the consideration of benefits derived from draining off standing water, and as submitting to the jury a question of law as to the purpose for which the right of way must be used, without informing them of the requirements of the law on that subject.

Craig, C. J., and Wilkin, J., dissenting.

Error to Iroquois county court; M. H. Evans, Judge.

Special assessment levied by the drainage commissioners of drainage district No. 3 of Danforth township, Iroquois county, Ill., upon the property of the Illinois Central Railroad Company. The county court rendered judgment annulling the assessment. The commissioners bring error. Reversed.

This is a writ of error, issued from this court, for the purpose of reviewing a judgment rendered by the county court of Iro-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

quois county based upon the verdict herein-after mentioned. Plaintiffs in error, drainage commissioners of drainage district No. 3 of Danforth township, Iroquois county, levied a special assessment upon the right of way of defendant in error, the Illinois Central Railroad Company, in section 19, township 27 N., range 14 W., in said county, for the sum of \$255.62, under the provisions of what is known as the "Farm Drainage Act," being the act of June 27, 1885, entitled "An act to provide for drainage for agricultural and sanitary purposes," etc. (3 Starr & C. Ann. St. p. 441). The defendant in error took an appeal to the county court under section 27 of the act (Id. p. 451). A trial was had before a jury, who returned a verdict finding that "the track and right of way" of said company in section 19, etc., would not be benefited by the proposed drainage work of said drainage district; and thereupon the county court, after overruling a motion for new trial made by the district, rendered judgment "that no tax be assessed against the track and right of way" of said company in said section 19, etc., and for costs against the district. The judgment so rendered is the judgment here sought to be reviewed.

The evidence shows that the right of way of defendant in error crosses the district from north to south in section 19, the northern and southern boundary lines of section 19 being the boundary lines of the district at that place; that the right of way is crossed almost at right angles in said section by a small stream called "Prairie Creek," over which the company had theretofore constructed a bridge or culvert with an opening; that this bridge and opening has been maintained for many years for the passage of the water from the west to the east; that a short grade furnishes the approach to the bridge from the north and the south; that the commissioners propose to construct an open drain or ditch beginning east of the right of way, thence following the general course of the creek in a westerly direction, crossing the right of way at the bridge, and thence proceeding to the west boundary of the district.

The court gave on behalf of the railroad company 13 instructions, of which those numbered 6, 8, 9, and 16 are as follows: (6) "The court instructs the jury that in determining the question of benefits to be conferred, if any, upon the right of way in section 19 in question, by the proposed ditches, you have a right to take into consideration the object and purpose for which the right of way is used and required to be used under the law; also, whether or not the right of way is sufficient to properly carry on the business of the defendant, regardless of the drains proposed to be constructed by the district; also, whether or not the right of way is in need of any drainage, and whether or not the grade of the defendant upon which the

track is situated will be benefited by additional drainage,—and, from these and all of the other facts and circumstances in evidence, say whether or not the track and right of way will be benefited by the proposed drainage." (8) "The court instructs the jury that it does not follow as a matter of law that because farm lands may be benefited by drainage work, that therefore the right of way of a railway company is also benefited. The nature and character of the soil, and situation of the ground and structures upon it, and the use to which it is put and required to be put, are proper to be considered with the other facts and circumstances in evidence in determining whether or not it will be benefited." (9) "The court instructs the jury that it is the duty of a railway company to provide sufficient openings in its grade or embankments for the passage of such waters as may be brought upon the right of way from lands above, so that the lands lying above will not be injured by reason of such water being unable to pass through the grade or embankment; and in this case you have a right to take this into consideration, with the evidence in the case, in determining how large an opening or bridge the defendant should maintain." (16) "The court instructs the jury that it does not follow as a matter of law that because the drainage district proposes to widen and deepen Prairie creek across the right of way of the defendant, that the right of way will be thereby benefited. The question as to whether or not the right of way will be benefited is one of fact for you to determine, under the evidence and the instructions of the court as to the law."

Kay & Kay, for plaintiffs in error. Morris & Hooper, for defendant in error.

MAGRUDER, J. (after stating the facts). It is strenuously contended in this case by counsel for plaintiffs in error that the verdict is against the weight of the evidence, and that there is not sufficient evidence to sustain it. If this were the only objection urged against the judgment of the county court, we should not be inclined to disturb it. Section 27 of the drainage act of June 27, 1885, provides that "the appeal shall be upon the ground only that such tax is a greater amount than the benefits to accrue to the land in question by the proposed drainage." 3 Starr & C. Ann. St. p. 451. Where a landowner appeals to the county court from an assessment under that section, he is entitled to a trial by jury on the question whether his land will be benefited by the proposed improvement, and, if benefited, to what extent, or in what amount. The same right of appeal exists, under section 40 (Id. p. 454), in favor of a railroad company, where the assessment is against the railroad or any part of the same; and, by consequence, the railroad company,

equally with the individual owner, is entitled to a trial by jury upon the question of benefits. Hence the question is one of fact, and within the province of the jury to determine. *Spear v. Commissioners*, 113 Ill. 632; *Mascall v. Commissioners*, 122 Ill. 620, 14 N. E. 47; *Commissioners of Highways of Town of Colfax v. Commissioners of East Lake Fork Special Drainage Dist.*, 127 Ill. 581, 21 N. E. 206. But, while it was for the jury to say whether or not the railroad right of way would be benefited by the proposed drainage, it was the right of both parties to insist that the jury should reach their conclusion under the guidance of proper instructions.

We think that instructions 6, 8, 9, and 16, when read together, were calculated to mislead the jury, and make a wrong impression upon their minds. The eighth instruction tells the jury that "it does not follow as a matter of law that because farm lands may be benefited by drainage work, that therefore the right of way of a railroad company is also benefited." This instruction was wrong both as to form and substance. The ordinary way in which farm lands are benefited by drainage is by carrying off the water which is apt to stand upon low and flat ground. This is the understanding which the average juror has upon the subject. The effect of this instruction was to lead him to conclude that a railroad right of way would not be benefited by drainage which should carry off the standing water from it. There was some evidence tending to show that at times the water stood in ponds and holes along the right of way. If the effect of the drainage was to carry off this water, it was for the jury to say whether the right of way was thereby benefited. Evidence of this character is proper for the consideration of the jury in determining whether a railroad right of way, or public highway, is benefited by drainage. *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255; *Commissioners of Highways of Town of Colfax v. Commissioners of East Lake Fork Special Drainage Dist.*, 127 Ill. 581, 21 N. E. 206.

An instruction should not draw the attention of the jury to particular facts. *Chapman v. Cawrey*, 50 Ill. 512. Nor is it proper to inject an argument into an instruction. *Railroad Co. v. Griffin*, 68 Ill. 499. An instruction should not single out for special comment particular portions of the evidence, nor should it be argumentative. *Homes v. Hale*, 71 Ill. 552; *Railroad Co. v. Griffin*, supra. Instructions 6, 8, and 16 are objectionable for both of these reasons; that is to say, as singling out and giving prominence to special facts, and as being argumentative. Where an instruction selects one item of evidence, or one fact disclosed by the evidence, and states that a certain conclusion does not follow as a matter of law from that fact, it is calculated to

mislead and confuse the jury. The ordinary juror is not able to distinguish between conclusions which follow as matter of law and conclusions which follow as matter of fact. If the evidence discloses to him that drainage which draws the standing water from land benefits the land, but he is instructed that it does not follow as matter of law that such is the case where the land is railroad right of way, he is apt to conclude that he is not to take into consideration the fact of the drawing off of the standing water from the right of way in determining whether such right of way is benefited by the proposed drainage or not.

The same observations apply to instruction 16, read in connection with instruction 9. Instruction 16 tells the jury that "it does not follow as a matter of law that because the drainage district proposes to widen and deepen Prairie creek across the right of way of the defendant, that the right of way will be thereby benefited." Whether the widening and deepening of the creek across the right of way would benefit the right of way or not was a question of fact to be determined by the jury. It was immaterial whether a benefit to the right of way from such widening and deepening of the creek followed as a matter of law or not. To tell the jury that it did not follow as a matter of law was virtually to tell them that such deepening and widening of the creek would be of no benefit to the right of way. This was an invasion of the right of the jury to pass on a question of fact. The rule laid down by this court in many decisions that an instruction is erroneous which singles out for special comment a particular portion of the evidence, and thereby gives it undue prominence, will be substantially abrogated if such instructions as those here numbered 8 and 16 are held to be proper. All that it will be necessary to do will be to preface the statement of a particular fact, or a particular portion of the evidence, with the words: "It does not follow as a matter of law." It is undoubtedly the duty of a railroad company, in constructing its road over a water course, to provide a suitable bridge or culvert to carry off the water accumulating in ordinary floods and in such extraordinary floods as may be anticipated by prudent men, and to carry it off effectually, and so as not to overflow the lands lying above such bridge or culvert. *Railway Co. v. Thillman*, 143 Ill. 127, 32 N. E. 529. By instructions 9 and 16 the jury were told in effect that, if the bridge maintained by the company over Prairie creek should be sufficient to carry off such waters, the widening and deepening of that creek across its right of way would be of no benefit to such right of way. It was for the jury to say whether such benefit would result or not, independently of the sufficiency of the bridge or opening maintained by the company to carry off the water so as not to

injure the lands above. If, as is claimed by counsel for plaintiffs in error, the construction of the drain would have the effect of reducing the volume of the water, so as to permit the company to maintain a smaller bridge and opening, the jury would have a right to take this into consideration in determining the question of benefits; but the peculiar phraseology of instruction 16 had a tendency to withdraw the subject from their notice. Where an owner's land is assessed for benefits to be derived from the drainage of the same, it is proper for the jury to consider such benefit, if any, as may result from the drainage of a slough, separating the land assessed from the other land of the owner, and thereby obviating the necessity of bridging the slough to reach such other land. *Commissioners of Highways of Town of Colfax v. Commissioners of East Lake Fork Special Drainage Dist.*, supra.

A bare reading of instruction No. 6 will show that it is obnoxious to the charge of singling out certain phases of the testimony, and ignoring other evidence of equal importance. *Logg v. People*, 92 Ill. 598. It tends to divert the attention of the jury from the consideration of the question whether or not the right of way will be benefited by the drawing off of standing water therefrom, or by the widening and deepening of the creek across the same. This instruction assumes that there is evidence of the matters therein enumerated, without leaving it to the jury to believe from the evidence in regard to such matters. It submits to the jury a question of law by directing them to take into consideration the object and purpose for which the right of way is "required to be used under the law," without informing them what the requirements of the law are upon that subject. It begins by telling the jury that, in determining whether the right of way will be benefited, it shall consider certain specified matters, and closes by telling them that they have a right to say from these and all of the other facts and circumstances in evidence whether or not the track and right of way will be benefited. In all these respects we think that the sixth instruction was erroneous and misleading.

The word "track," as here used, does not mean right of way in the sense in which it is used for the purposes of taxation under section 42 of the revenue act (2 Starr & O. Ann. St. p. 2042). It is merely a part of the right of way,—that part on which the rails and ties are laid. It is manifest that the whole right of way, which in the present case was 200 feet wide, might be benefited without any special benefit to the track; but, by the sixth instruction, the jury are required to find that the track, as well as the right of way, is benefited. The case of *Illinois Cent. R. Co. v. Commissioners of East Lake Fork Special Drainage Dist.*, 129

Ill. 417, 21 N. E. 925, is quoted as authority for the use of this expression. It is true that in that case it was said that the judgment should be that the plaintiff have and recover of and against the "track and right of way * * * within * * * special drainage district." But it was not the intention to prescribe a particular form, where, in all cases, the words "track and right of way" should be used. In that case, where the action was under section 72 of the farm drainage act (3 Starr & O. Ann. St. p. 470) to recover a special assessment, the words in question were in the declaration, and the form of the judgment was made to conform thereto. The main point there decided was that, in such an action, the judgment, if for the plaintiff, must be in rem against the property specially assessed only, and not in personam.

For the errors thus pointed out in the instructions named, the judgment is reversed, and the cause is remanded to the county court. Reversed and remanded.

CRAIG, C. J., and WILKIN, J., dissent.

(128 Ill. 417)

CHICAGO TITLE & TRUST CO. v. SMITH.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

ASSIGNMENT OF CHOSE IN ACTION—RECEIVER—PREFERENCES BY INSOLVENT.

1. A corporation assigned certain accounts payable, being only a small portion of its assets, to a trustee, to secure certain creditors. The trustee immediately accepted the trust, and notified the secured creditors and also the parties owing the accounts. Afterwards, but on the same day, a receiver was appointed in a suit brought by a creditor to wind up the corporation. *Held*, that the secured creditors should be first paid out of the proceeds of the assigned accounts collected by the receiver, since such an assignment is enforceable in equity.

2. Such an assignment does not violate the provision of section 13 of the assignment act, forbidding preferences in voluntary assignments.

Appeal from appellate court, First district.

Bill by the A. D. Juilliard, John B. Claffin Company, a corporation, the copartnership of Bliss, Fabian & Co., and Columbus R. Cummings, William B. Howard, Irving T. Hartz, and E. Noa against James H. Walker, James H. Walker, Jr., and the James H. Walker Company. In this suit the Chicago Title & Trust Company was appointed receiver. L. A. Carton also filed a bill against the same defendants. The causes were consolidated. Thomas H. Smith filed a petition in the suit praying that certain funds in the receiver's hands be paid to him. The circuit court dismissed this petition, but the appellate court (54 Ill. App. 517) reversed the order of dismissal. The receiver appeals. Affirmed.

Early in 1893 the James H. Walker Company, a corporation organized in 1892, was engaged in the wholesale and retail dry-goods

¹ Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

trade in the city of Chicago. Prior to the organization of the company business had been transacted by a partnership under the same name, and composed of Columbus R. Cummings, William B. Howard, and James H. Walker. The stockholders of the corporation were James H. Walker, 8,107 shares, \$310,700; C. R. Cummings, 6,805 shares, \$860,500; William B. Howard, 4,751 shares, \$475,100; James H. Walker, Jr., 535 shares, \$53,500; George S. Willits, 2 shares, \$200; total, 15,000 shares, \$1,500,000. James H. Walker was president, and looked after the merchandising, while William A. Mason was its vice president until March, 1893, and at all times its treasurer, and looked after the finances. In March C. O. Lay became the vice president, and as Walker testifies was practically the head over all. Walker, Lay, Hartz (the secretary), Mason, and Cummings were the directors, and Cummings, Lay, and James H. Walker made up the executive committee. Its duties were as follows: "The executive committee shall exercise a general supervision of the entire business of the company, the management of every department, and all the property of the company shall be under their control, subject, however, to the direction of the board of directors. The several officers and employes of the company shall be responsible to the executive committee for a proper and faithful discharge of their several duties, and make such report to the executive committee touching the business coming under their charge as such committee from time to time may require, and between the meetings of the board of directors the executive committee shall have the power of the board. In the absence of any member of the committee such member may designate a proxy to act with the full powers of the member." About the middle of May, Cummings, by his guaranty, secured credit for the company at the Union National Bank, upon the promise of the company to give him an equal amount of accounts to secure him. July 25th the company assigned certain open accounts to Mason as a trustee for Cummings, to secure his guaranty, Mason drawing off a list thereof from the books, and seven or eight days thereafter the open accounts were turned into notes. Walker, the president, signed the company's name to this assignment. On August 3d a meeting of the board of directors of the company was held, and on motion of Mr. Willits (who had been a director until then), representing Mr. Howard's interest, the following resolution was adopted: "Whereas, efforts are being made in New York and elsewhere to raise money to help this company out of its existing difficulties; and whereas, certain of the creditors are becoming importunate and pressing in their demands for payment: Now, therefore, be it resolved that pending the arrival of the expected assistance from New York the treasurer of the company be and he is hereby authorized to indorse over or assign any drafts, bills, and accounts receivable of

the company which may be in his hands in payment of or security for any claim against or debts of this company; and he is also hereby authorized to assign and transfer any accounts due to the company, in the same manner, to such creditors, or to such other persons as they may designate, for their protection." The minutes of the corporation meeting show that at this same meeting Mr. Willits tendered his resignation as director of the company, which was accepted, and on motion Mr. Irving T. Hartz was elected in his place; also that Lay, the vice president, presided at the meeting, and that all the directors except Walker and Cummings were present, and that on the same day Cummings' written consent to and ratification of the meeting was received, as follows: "August 3rd, 1893. I hereby consent to the holding of the above meeting as aforesaid, and hereby ratify and confirm all acts and proceedings had at said meeting, and consent that they may have the same effect as if I had been personally present and voted therefor. [Signed] C. R. Cummings." On August 3d, immediately after the passage of this resolution, and in pursuance thereof, Mason, who generally signed all papers in connection with the paying out of money, told Smith, who was assistant credit man for the company, to make out a list of the cash deposits with the corporation by country customers, a list of the employes in the house who had money on deposit with the corporation, and select enough accounts to secure them. Smith did so, and Mason, in the name of the corporation, signed an assignment of both lists to Smith, as trustee for the creditors therein named, before 9 a. m. August 4th, and Smith at once accepted the assignment in writing. The customers named in the list were all residents of Illinois, but not of Cook county, and had money on deposit with the corporation aggregating \$33,210.62. Accounts were assigned on various parties to secure the above amounts, which assigned accounts amounted to the sum of \$34,284, and which assignment was made by the James H. Walker Company, by W. A. Mason, treasurer, on August 4, 1893, and accepted by the trustee, Smith. In addition to those assigned accounts for the benefit of depositors, there were assigned accounts aggregating \$7,626 to secure employes who had sums deposited, etc., whose claims amounted to \$6,121.23. For these deposits the corporation acted, in receiving the same, as bankers. The assignments were not consented to by Walker. Notices of these assignments were sent out by Smith and Mason to the debtors, and on the account books these accounts were marked as transferred to the trustee, and he was proceeding to collect the same. On the 4th day of August, 1893, the A. D. Juilliard, John B. Clafin Company, a corporation, with others, filed a bill making the James H. Walker Company defendant, by which an indebtedness of several hundred thousand dollars by the defendant was alleged, etc., and asking for the

appointment of a receiver for the James H. Walker Company; and on the same day, by an interlocutory order, the Chicago Title & Trust Company and William A. Mason were appointed receivers. On the next day Mason resigned as receiver. On August 22d Lawrence A. Carton exhibited his bill in chancery, setting forth a judgment, etc., and asking the appointment of a receiver and that the business of the corporation be wound up, etc. An order was entered consolidating this cause with the bill filed by the A. D. Julliard, John B. Clafin Company et al., and to the consolidated causes answers were filed, etc. The Chicago Title & Trust Company, receiver, filed on December 22, 1893, in the consolidated cause, its petition setting forth the assignment of accounts to Smith as trustee, the purpose for which the accounts were assigned, for whose benefit, and the amount thereof; that the receiver had collected of those accounts the sum of \$34,394.10; and prayed the instruction of the court as to its distribution. Answers were filed by James H. Walker and National Bank of Commerce of Providence, R. I., wherein they deny that the transfer by the James H. Walker Company was done by proper authority, and denying the validity and legality of the assignment, etc. Thomas H. Smith, the trustee, answered, setting up the accounts assigned, for whose benefit, and alleging they should be paid to him in trust, etc. Subsequently, on January 11, 1894, Thomas H. Smith, trustee, filed his petition, making the receiver and others defendants, which petition sets up substantially the same facts as set forth in his answer to the receiver's petition, and praying that the money collected on the assigned accounts by the receiver should be ordered paid to him, the trustee. By stipulation the answers of James H. Walker and the Bank of Commerce to the receiver's petition were to stand as answers to the trustee's petition. A hearing was had on the petition of the trustee, and it was held by the trial court that the assignment of the accounts to the trustee was invalid and of no effect, and the beneficiaries thereof could only share as general creditors of the James H. Walker Company, and it dismissed the petition of the trustee. The trustee prosecuted an appeal to the appellate court, where the decree of the circuit court was reversed and the cause remanded, with directions to the circuit court to grant the prayer of the petition. The receiver prosecutes this appeal, and assigns error in holding the assignments of the account valid and the beneficiaries entitled to a preference therein, and reversing the judgment dismissing the petition.

Partridge & Partridge and W. O. Niblack, for appellant. Hamline, Scott & Lord, for appellee.

PHILLIPS, J. (after stating the facts). The question presented in this record is whether the proceeds of certain accounts alleged to have been assigned by the James H.

Walker Company, a corporation, to appellant, in trust for certain creditors, shall be applied on the claims of those preferred creditors, or retained by the receiver, who was appointed on the same day, but subsequent to that assignment, and by him to be distributed as a part of the general fund, on all the debts. The distribution to be made by the receiver is under the supervision of the chancellor appointing him, and his duties and powers are referable to equitable rules and principles. The assignment of the accounts in this case, if valid, is an equitable assignment, the law affording a remedy for collection in the name of the original payee. The right to assign a chose in action, even though not a negotiable instrument, has long been recognized, the rigid rules of the common law having been generally relaxed in that respect. Such equitable assignments of choses in action in modern times have received a large protection in courts of law as in courts of equity. Where notice is given the debtor of the assignment, he is precluded from doing any act to prejudice the rights of the assignees. Payment by him to the nominal creditor after such notice of assignment, without the consent of the assignee, will be no defense to an action brought for the benefit of the assignee. Neither can the original parties after such notice make any compromise or adjustment of the cause of action as against the assignees. *Chapman v. Shattuck*, 3 Gilman, 49; *Carr v. Waugh*, 28 Ill. 418; *Morris v. Cheney*, 51 Ill. 451; *Littlefield v. Story*, 8 Johns. 426; *Andrews v. Beecker*, 1 Johns. 411; *Jones v. Witter*, 13 Mass. 304; *Legh v. Legh*, 1 Bos. & P. 477. While the assignee of a nonnegotiable chose in action takes the interest assigned subject to all legal and equitable defenses, it is essential that such defenses exist at the time of, or before notice of, such assignment. It is said in *Perry, Trusts*, 593: "If an assignment not fraudulent is made to trustees for the benefit of creditors, their assent is not necessary; or their assent will be presumed in all cases, if it is for their benefit, and contains no unusual clauses or restrictions." The author cites many authorities which sustain that proposition. It is said in *Burrill, Assignm.* (5th Ed.) § 484: "Where the assignment is to a trustee for the benefit of creditors not parties to the deed, it may be laid down as a general rule in American law that the assent of creditors is not necessary to its validity, and the legal estate or title will pass to the assignee without such assent, so as to prevent a judgment creditor from acquiring a lien, if real, by his judgment, or, if personal, by his execution, unless upon the ground of fraud. This rule is said to be founded on the established principle of the common law that it is necessary to the creation of a trust by deed in favor of different persons that the cestui que trust should either be a party or assent to it. If the trust be for his benefit the law presumes his assent

until the contrary is shown." In *Gibson v. Bees*, 50 Ill. 401, it was held: "While we might, in accordance with the rule adopted in some American courts, hold that when such a conveyance is executed and recorded we would presume the assent of the creditor, as it would appear to be for his benefit, yet we must hold that such a presumption is liable to be rebutted, and that it would be rebutted by proof that the creditors had refused, upon learning of the conveyance, to avail themselves of its provisions, or if they should delay for a length of time so long as to create a counter presumption to that of assent." The rule being in equity that the assignee will always be protected from any act of the parties after notice, the former owner and debtor can do nothing after notice to defeat the rights of the assignee. *Hughes v. Trahern*, 64 Ill. 48. The filing of the bill by the A. D. Juillard, John B. Clafin Company was for the purpose of winding up the affairs of the corporation and the appointment of a receiver. The bill filed by Lawrence A. Carton was for the same purpose. To both these bills the corporation is made a party defendant. The appellant in this case was the receiver under those bills, which were consolidated in one suit. A receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith. *Gere v. Dibble*, 17 How. Prac. 31. He cannot have the right to take possession of property and hold the same where the owner of the estate for which he is receiver would have no right to do so. A court of equity is bound to respect legal rights and preferences lawfully acquired, and make distribution accordingly. *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339. The meeting of the board of directors was called in proper form, and the resolution adopted by the board authorized all to be done which was done as to the transfer of the accounts to the trustee for the purpose for which they were so transferred. The assignment was made and noted on the books of the corporation, and the trustee in writing accepted the trust, and by telegraph or letter notified the parties whose accounts were assigned to him, and also notified the persons for whom he was acting as trustee. The receiver, when he entered on the discharge of his duties, subsequent to the assignment of these accounts, proceeded to collect the same, and by an arrangement between the receiver and trustee these accounts were, on the books of the receiver, carried on the suspense account. We hold the transfer of these accounts with notice shown, etc., vested the right to the money derived therefrom in the trustee.

It is urged by the appellant that by section 25 of chapter 82, Rev. St., provision is made for winding up the business of corporations by suits in equity brought within the provisions of the act by means of a receivership, and for the dissolution of the corporation. And it is urged that the maxim "Equality is equity" should be applied in the distribution to creditors of the assets of such estate. While equity requires equality in distribution to general creditors, courts of equity must also recognize another equitable maxim, which is, "Where there are equal equities the first in order of time must prevail," and where the assignment of these accounts is validly made an equity exists in those creditors to have the proceeds of those accounts applied to the satisfaction of their debts. We hold that the provisions of the chapter entitled "Corporations" do not defeat the preference made by this assignment of those accounts.

It is next contended that section 13 of the assignment act, which provides that preferences under that act shall be void where an assignment is made, etc., will govern the question here presented. It is not every assignment of property, even by way of preference to creditors, that will bring the estate of such assignor within the provisions of the general assignment act. In *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646, a voluntary assignment for the benefit of creditors had, it was said, "always been understood to be an instrument voluntarily executed by a failing debtor, by which he assigns to some third person, as assignee or trustee, the whole or sometimes the bulk of his property, to be by such trustee distributed among the assignor's creditors in satisfaction of their demands." In this case a small fraction of the estate of the corporation was assigned to a trustee. There was not at that time or since any disposition on the part of the corporation to make a general assignment under the insolvent debtors' act, and place the whole jurisdiction in the court, where the statute places the jurisdiction of that subject-matter. The general assignment law is not here involved, nor are its provisions applicable to or controlling on the questions here before the court. A court of chancery exercising general chancery jurisdiction, as at common law, does not have its power limited or practice controlled by an act applying to another forum, and by a subject-matter by that act largely removed from its jurisdiction. The effect of a partial voluntary assignment, as discussed in *Farwell v. Cohen*, 138 Ill. 216, 23 N. E. 35, and 32 N. E. 893, is not applicable to the questions presented on this record. The judgment of the appellate court of the First district is affirmed. Affirmed.

(158 Ill. 492)

LAW v. GROMMES et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

SERVICE OF PROCESS—APPEAL—PRESUMPTION.

1. In the absence of statutory direction to the contrary, service of process must be by reading, and not by delivery of a copy. *Ball v. Shattuck*, 16 Ill. 299, followed. 55 Ill. App. 312, reversed.

2. Where, on appeal from a judgment by default, the record shows that the service of process was insufficient, the error is not cured by a recital of due service in the judgment, on the presumption that there was another and different service from that shown in the record.

Error to appellate court, First district.

Action of debt by John B. Grommes and Michael Ullrich, copartners as Grommes & Ullrich, against Robert Law. Plaintiffs obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 312. Defendant brings error. Reversed.

Robert Mather, for plaintiff in error. W. O. Johnson, for defendants in error.

WILKIN, J. Appellants caused a summons against appellee to issue from the circuit court of Cook county, returnable to its April term, 1891. It was served, as shown by the return, by delivering a copy to the defendant April 10, 1891. The declaration, which counted upon a judgment of the county court of Douglas county, Neb., was not filed until April 11th, one day too late for the April term, and without any other summons, so far as the record shows. Judgment by default was taken at the next term, the judgment reciting, "Due service of summons issued in said cause has been had on the defendant for the last ten days before the first day of this term." The appellate court affirmed that judgment.

Two questions are raised on this appeal, which in their natural order are: First, is service by copy in a case of this kind sufficient to authorize a judgment by default? And, second, does the recital in the judgment as to service cure the defective service, on the presumption that another summons was issued and served?

As early as 1855 this court said: "The mode of service of summons, where not otherwise provided by statute, is by reading the same to the defendants and each of them, and the return should show the time when, upon whom, and how the service was made. The following form may be adopted in cases where the statute does not otherwise provide: 'I did on the — day of —, 18—, serve this writ by reading the same to the within-named A. B. Dated — day of —, 18—. C. D., Sheriff of H. C., Ill.'" *Ball v. Shattuck*, 16 Ill. 299. It is said it was not necessary to the decision of that case to decide how service should have been made, and hence the foregoing language is mere obiter dictum. The question there was whether the return upon the summons

was good. It was held bad, and in showing wherein it was defective the foregoing language is used. The statute being silent as to the mode of service in such cases, it was important that some rule should be laid down for the guidance of public officers in the performance of their duty in that regard. And we are unable to see why the decision that service should have been by reading was not properly involved in that case. "An expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if a dictum at all, is a judicial dictum, as distinguished from a mere obiter dictum, i. e. an expression originating alone with the judge who writes the opinion, as an argument or illustration." *And. Law Dict.* 355, citing authorities. We think what was said in *Ball v. Shattuck*, supra, has the force of judicial determination that in this state service of summons must be made by reading it to the defendant, unless a different mode is prescribed by the statute. It has certainly been so understood by the courts and the profession. The legislature also seems to have acted upon the understanding that generally service is not made by copy, it having expressly provided for that kind of service in particular cases. The language used in *Ball v. Shattuck* was quoted with approval in *Botsford v. O'Conner*, 57 Ill. 77. And it was again said in *McNab v. Bennett*, 66 Ill. 161, "'Service,' under our law, means to read the writ to the party." In the foregoing decisions this court did not attempt to state, as seems to be supposed, the common-law rule as to how summons should be served, but simply placed a construction upon our statute. There is no more authority in the common law for saying service of summons shall be by copy than it must by reading. The most that can be said is that it could have been properly held that in all cases not otherwise provided for by statute service should be by copy. Conceding the correctness of that proposition, we are unable to see why, after so many years of acquiescence in the other construction, it should be changed. It is certainly desirable that some definite and uniform method of service be prescribed, and we know of no hardship or inconvenience resulting from the present well-understood rule which would justify us in changing it. That the return on the summons appearing in this record is insufficient under this ruling to sustain the judgment below is conceded.

2. Is the defect cured by the recital of service in the judgment? It is insisted that inasmuch as the default was not taken until the term next after the one to which the summons appearing in the record was returnable, and the judgment recites due service upon the defendant, it should be presumed "that a new summons was issued, served and returned by the sheriff, and has been lost from the files." If the attempt here was to attack the judgment below collaterally, the proposition would have force.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

We think, however, with the appellate court, that even then, under the facts of the case, it could not prevail. But upon what principle it can be availed of in this direct proceeding we are at loss to perceive. Appellant here seeks a reversal of the judgment against him upon the ground that it was rendered without legal service of process. There is before us a transcript of the record of the circuit court, including the summons in the case, showing service by copy certified by the clerk "to be a true, perfect, and complete copy of a transcript of the record," and no objection whatever has been made thereto. It will not be denied that the summons and service is a proper part of the record. Rule 9 of this court (41 N. E. vi.) requires the clerk of the lower court to certify a copy of the process in his transcript of the record. The service, as we have seen, was not sufficient to authorize the judgment by default. There is therefore manifest and reversible error appearing upon the face of the record. "Before a court is authorized to render a judgment by default, it must appear clearly and affirmatively, by the return of the officer charged by law with the service of the process, that the defendant has been regularly served." *Belingall v. Gear*, 3 Scam. 576. And the decisions of this court reversing judgments and decrees for want of legal service are numerous. But against this manifest error we are asked to presume that there was no error; that is to say, instead of holding that the circuit court committed an error in holding service by copy "due personal service of summons," we must presume, without any evidence whatever of the fact, that another and different service was had, which the complete record fails to show. The statement of this proposition is sufficient to refute it. In our decisions on the question as to when and how far presumptions in support of recitals of service of process in judgments and decrees will be indulged, the distinction between direct and collateral proceedings has not always been strictly observed. We think, however, the true rule applicable to appeals and writs of error is that whenever it affirmatively appears from the record brought up that the service is illegal or insufficient, and nothing appears to the contrary, the error is not cured by a mere recital of "due service," on the presumption that there was another and different summons and return from that appearing in the record. It was said in *Vairin v. Edmonson*, 5 Gilman, 272, "To sustain a judgment by default the record ought affirmatively to show that the defendant was regularly served with process, or, in the case of an attachment, that he was duly notified of the pendency of the proceeding." And in *Randall v. Songer*, 16 Ill. 27, speaking of notice in chancery: "This advertisement is the act of the clerk, and it performs the same office as process. It is as much a part of the record of the case as

is the summons issued to the sheriff;" citing *Vairin v. Edmonson*, supra. "It is not enough for the decree to recite that the defendant has been duly served with process, or that he has been regularly notified of the pendency of the suit, but the summons or advertisement should appear in the record, so that this court may determine whether the statute has been complied with." In *Reddick v. President, etc.*, 27 Ill. 145, no summons against the defendants appeared in the record on which the case was submitted, nor did it show how they were served. The complainants in the decree sought to be reversed had purchased land under it. The decree recited, "It appearing to the satisfaction of the court that process has been fully served on defendants herein, it is ordered," etc. In the decision of the case, after referring to the ruling in the *Vairin* and *Randall* Cases, supra, it was said (page 147): "It is to be presumed no court would state of record the existence of facts which had no existence, or pass a decree or render a judgment unless proof of service or notice was actually produced. The record, therefore, stating such facts, and nothing to the contrary appearing, it should be received as evidence of their existence. We think the rule which has obtained should be thus modified." This case holds no more than that where the record is silent as to service the recital in the decree should prevail. In *Miller v. Handy*, 40 Ill. 448, the action was ejectment, the defendant claiming title under a *scire facias* proceeding to foreclose a mortgage. Two writs appeared in the record, both returned "Not found," but the first was held to be void, the last being returned to the March term, 1839. Judgment was rendered at the following, November, term, April and August terms having intervened, and the judgment recited, "And it appearing to the court that two writs of *scire facias* have been issued herein, and 'nihil' returned thereon, it is therefore considered," etc. The doctrine announced in the *Reddick* Case, supra, was approved, and it was then said: "The record, therefore, stating the fact of the return of two *nihilis*, and nothing to the contrary appearing, must be held to be *prima facie* evidence at least of the existence of that fact, and there is nothing in the case to show that the finding of the court was not in strict accordance with the fact. * * * The finding of the court ought to prevail unless there is evidence to impeach it. The presumption might be rebutted in this case if no terms of court had intervened the March and November terms, and in a direct proceeding to reverse the decree the rule would be different. This being a collateral proceeding, we are satisfied the presumption arising on the finding of the court that two *nihilis* were returned, independent of the return of the writ to the August term of 1838, must prevail, there being no evidence to re-

but it." But *Timmerman v. Phelps*, 27 Ill. 496; *Coursen v. Hixon*, 78 Ill. 339; *Turner v. Jenkins*, 79 Ill. 228; and *Haworth v. Huling*, 87 Ill. 23,—are cited and relied upon as holding that the presumption contended for obtains in direct as well as collateral proceedings. The first two cases are clearly not in point. No presumption was indulged in either of those cases against or inconsistent with the return, but in support thereof. Even in a collateral proceeding the presumption in support of the recital by the court as to jurisdiction is never indulged against the return of the sheriff. Thus *Lawrence, J.*, said in *Rivard v. Gardner*, 39 Ill. 127, "In indulging in presumptions in support of the recital by the court, it is to be observed that we presume nothing against the return of the sheriff, but consistent with it." *Clark v. Thompson*, 47 Ill. 25; *Botsford v. O'Conner*, 57 Ill. 72. If the decree in *Turner v. Jenkins* and *Haworth v. Huling*, *supra*, had been questioned in a collateral proceeding, the decisions announced would have been clearly right and consistent with the cases above cited; but they each improperly apply the rule of presumption to proceedings by writ of error and appeal, and should be in that regard overruled. For the manifest error appearing upon the face of this record, herein pointed out, the judgments of the circuit and appellate courts will be reversed. Reversed.

(158 Ill. 486)

STODDER et al. v. HOFFMAN et al.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

CONSTRUCTION OF WILL—TRUSTS—EVIDENCE—WITNESS.

1. A testator stated in his will that he intended to have all his land ultimately divided equally between his nine children, and that in part execution of this plan he had deeded one tract to his daughter and two tracts to two of his sons. The will contained no devise to the daughter, and did not expressly devise to any one the tract described as having been deeded to her. He had in fact deeded this tract to her, but she had afterwards reconveyed it to him, without consideration, at his request. *Held*, that said tract descended as intestate estate.

2. Proof that testator spoke of said tract of land as his daughter's, and said that she would have it at his death, is not sufficient to show that he held the title in trust for her.

3. In a suit by the other heirs against the daughter and her husband for partition of said tract, defendants are not competent witnesses, since complainants sue as heirs of a decedent.

Appeal from circuit court, La Salle county; Charles Blanchard, Judge.

Bill for partition by John R. Hoffman, Mary T. Hoffman, Mary E. Bradford, and Samuel S. Bradford against Maria L. Stodder, Levi L. Stodder, and Ida M. Stodder. There was a decree of partition, from which the defendants appeal. Affirmed.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Thornton & Chancellor, for appellants. A. E. Butters and Robt. Carr, for appellees.

CARTER, J. The appellees, John R. Hoffman and others, heirs at law and devisees of John Hoffman, deceased, filed their bill of complaint in the circuit court of La Salle county for the partition of certain real estate. It is alleged in the bill that said John Hoffman, late of the county of La Salle, was at the time of his death seised in fee simple and possessed of, among other lands, two certain tracts designated as "Lot 4" and "Lot 5," being parts of certain described real estate situated in said La Salle county, said lot 5 containing 93½ acres; that John Hoffman died on the 18th day of April, 1891, leaving his last will and testament, which was duly probated on the 4th day of May, 1891; that said lot 5 was not devised by said will, but is intestate estate. The bill then sets up the interests of the several heirs, and prays for partition. A copy of the will with four codicils is attached and made a part of the bill. The appellants Maria L. Stodder, Levi L. Stodder, and Ida M. Stodder answered, denying that said lot 5 was intestate estate, and alleging that it was by said will devised to said Maria. The answer also alleged that on or about the 30th day of December, 1868, said John Hoffman, by his deed of that date, conveyed said lot to his said daughter Maria, and that afterwards, desiring to offer it as security for a loan, he induced her to reconvey said lot to him, which she did, without receiving any consideration therefor; that said Levi L. and Mary L. Stodder by their quitclaim deed conveyed the undivided one-fourth part of said lot to said Ida M. Stodder. The answer also alleged that said John Hoffman held the title to said property in trust for her, the said Maria, and always spoke of the same and treated the same as her property, which she should have and come into possession of at his death; and that, by said will, whatever right and title was in decedent at the time of his death passed to and became vested in said Maria L. Stodder, except a one-fourth part which had been conveyed to Ida M. Stodder. Replications were filed, and the cause was referred to the master, who made his report to the court. The court found said lot 5 to be intestate estate, and ordered partition, and from that decree appellants prosecute this appeal.

The will of John Hoffman, made December 12, 1872, contains the following: "Statement. My landed estate did consist of eight hundred acres of land, more or less [describing it], in one body, in La Salle county. * * * The tract north of the railroad was, with my consent, divided into five lots nearly equal, and designated lots 1, 2, 3, 4, and 5. * * * I intend that ultimately said eight hundred acres shall have been divided into nine shares approximately equal, so that each of my children now living (being eight

(in number) shall have received one share, and that the children of my deceased daughter, Mrs. Phoebe Adeline Beardsley, shall have received one share, as their mother would have done had she lived. In the first place, however, my wife, the mother of my children, is to be provided for. In part execution of this plan of distribution, which I have long contemplated, I have heretofore conveyed to my son Asa M. Hoffman lot No. 2, as designated on that recorded plat of the subdivision of the land north of the railroad, which lot No. 2 contains about ninety-two and one-half acres. I have also conveyed in pursuance of this plan to my son John B. Hoffman lot No. 1 as shown on said recorded plat, being about ninety-two and one-half acres; and also to my daughter Maria L. Stodder I have conveyed lot No. 5 as shown on said recorded plat, containing about ninety-three and one-half acres. These three deeds were each made as advancements, and I consider that each of those children have received each their proper share of land, and for that reason I do not give them any more land by this will." One of the codicils contained this provision: "It being my present intention that all my property shall go to my own children according to the provisions of my will and the codicils thereto attached." The record shows it to be a fact that John Hoffman had conveyed said lot 5 to his daughter in the year 1868, and that on the 27th day of September, 1875, she reconveyed the same to him by warranty deed, without consideration, and that on October 12, 1875, Levi L. Stodder, her husband, conveyed to said Hoffman all of his interests in said lot by quitclaim deed for the nominal consideration of \$1; that at the time of the conveyance the land was worth about \$4,000. While the recital in the will that the testator had conveyed the land in dispute to Mrs. Stodder is true, yet, as she had reconveyed the same to him before his death, she then had no title by virtue of said conveyance. In determining the effect to be given to such a recital, the case of *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 570, is a controlling one. The doctrine is there stated to be that, where the recital in the will is to the effect that the testator has by some instrument other than the will given to a certain person named in the recital property when, in truth and fact, he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the deviser to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested. See, also, *Benson v. Hall*, 150 Ill. 60, 36 N. E. 947. Having conveyed the land back to her father in 1875, Maria Stodder cannot claim title under the deed to her made by her father in 1868, and under the rule announced in the cases above referred to she cannot claim under the will of her father. It is equally true that the

declaration in the will cannot be held to be evidence that a trust had been created. *Hunt v. Evans*, supra.

Appellants sought to establish the trust alleged by proof of declarations made by John Hoffman after the reconveyance to him. To do this they introduced their own testimony, and that of two children of Maria and Levi Stodder. The statute of frauds was not pleaded by the appellees, and the objection that the contract was not in writing was thus impliedly waived (*Finucan v. Kendig*, 109 Ill. 198), and the alleged trust could have been established by parol had the evidence been sufficient. *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455. But Maria L. Stodder was an incompetent witness. Her testimony was to the effect that she reconveyed said lot 5 to her father, John Hoffman, at his request, and without receiving any consideration for such conveyance; and that the deed was made to enable him to raise money on the land by way of mortgage; and that he repeatedly stated to her that the land belonged to her. Levi Stodder, her husband, gave similar testimony, and stated that, when he executed the quitclaim deed to John Hoffman, he (said Hoffman) said that it was only temporary; that the farm was Mida's (meaning Mrs. Stodder), and that she would have it eventually; that he would not live much longer, and that it would not be a great while before Mida would have her farm. He further testified that, after the reconveyance, Mr. Hoffman spoke to him about having made a will, and about a provision in it for Mrs. Stodder, and said that he had divided the land in lots for his children, and that witness' wife was to have lot 5. This testimony had no bearing on the case, except as tending to support the allegation in the answer that John Hoffman held the land in trust for Mrs. Stodder. The complainants were suing as heirs at law of said Hoffman, from whom they were claiming the land by descent, as intestate estate, and she, being a party defendant directly interested in the event of the suit, was not competent to give testimony in her own behalf as to what occurred between herself and her father tending to defeat the descent of the property to such heirs. And, she being incompetent, her husband was also incompetent. *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189; *Way v. Harriman*, 126 Ill. 132, 18 N. E. 206; *Shaw v. Schoonover*, 130 Ill. 443, 22 N. E. 580. Ida M. Stodder being a party, and directly interested in the event of the suit, was also incompetent. Excluding this incompetent testimony, the only testimony remaining is that of two children of Mr. and Mrs. Stodder, which, in substance, was that they had heard their grandfather, John Hoffman, speak of the land in question repeatedly as their mother's, and say that she would have it at his death. It is doubtless true that it was his intention to give this land to Mrs. Stodder, and that

he thought he had done so by his will, but the will fails to devise it, and there is not sufficient competent evidence in the record to establish the trust contended for. The decree of the circuit court must be affirmed. Affirmed.

(158 Ill. 362)

ALLEN et ux. v. HICKEY.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

REVIEW ON APPEAL—EQUIT.

Where the only issue in a chancery case is one of fact, a decision of the chancellor based on conflicting evidence heard in open court will not be disturbed on appeal.

Appeal from appellate court, Second district.

Bill by John Hickey against Frank S. Allen and Mary E. Allen, his wife, to subject certain land to satisfaction of a judgment against Frank S. Allen. Complainant obtained a decree, which was affirmed by the appellate court, 53 Ill. App. 437. Defendants appeal. Affirmed.

John Hickey, a resident of Chenoa, McLean county, employed Frank S. Allen, residing and doing business at Joliet, Will county, to prepare plans and specifications for a building at Chenoa, and to superintend its erection. A difference arose as to the cost of the construction, and on the 19th day of December, 1889, he began suit against Allen in the circuit court of McLean county. By some mistake the suit was instituted against F. C. Allen, and the summons directed to the sheriff to summon F. C. Allen, but the return on the writ shows that it was served on F. S. Allen. Judgment by default was entered at the April term, 1890, for \$2,386, against F. C. Allen. Subsequently Hickey filed a bill in aid of execution in the circuit court of Will county, for the purpose of subjecting to sale certain real estate, the legal title to which it was averred was fraudulently put in Allen's wife for the purpose of hindering and delaying creditors. Allen and his wife answered, denying all the material allegations in the bill. At the September term, 1891, Allen filed a cross bill charging that on the 23th day of May, 1891, subsequent to the filing of the original bill, Hickey commenced an action of debt in the circuit court of Will county against him, upon the judgment recovered at the April term, 1890, of the circuit court of McLean county, averring in his declaration that while judgment was originally against F. C. Allen a scire facias had issued against Frank S. Allen, by which it was so amended as to read against "Frank S. Allen" instead of "F. C. Allen"; that the suit at law was still pending in the circuit court of Will county; that Hickey had caused a transcript of the judgment aforesaid to be filed in the office

of the clerk and ex officio recorder of Will county, and an execution to issue therefrom, to be levied upon the real estate described in the original bill; that he is in no wise indebted to Hickey; that he was never served with process in the suit in which the original judgment was entered, and that it was entered without his knowledge; that the issuance of the scire facias and pretended service upon him were void for the reason that he had never been a resident of McLean county; the writ was served upon him in Will county; and that no valid judgment had ever before that time been entered against him at the suit of Hickey. The cross bill prayed for an injunction restraining Hickey from collecting or attempting to collect the judgment. Allen subsequently petitioned the court for an order requiring Hickey to elect whether he would proceed at law or in chancery for the satisfaction of his judgment. There was a hearing of that motion by the court, and the same was allowed upon condition that Allen enter into a certain stipulation, which was agreed to by Allen and was entered of record, as follows: "And now comes the said Frank S. Allen, defendant herein, and stipulates and agrees that the question as to whether the judgment entered in the circuit court of McLean county, Illinois, on the 2d day of May, 1890, in favor of the said plaintiff, John Hickey, and against F. C. Allen, for the sum of \$2,386 damages and costs of suit, was and is a legal and binding judgment upon this defendant, Frank S. Allen, may be and shall be litigated on the chancery side of this court, in Genl. No. 13,832, wherein John Hickey is complainant and Frank S. Allen and Mary E. Allen are defendants, and that, in case the court shall find that issue or question in said chancery cause in favor of the complainant herein, that then judgment shall be entered in the cause at law for the amount due upon the judgment of the said McLean circuit court, with interest and cost of suit, as in case of default and without plea pleaded; and this defendant hereby submits said issue and question to the hearing and determination of the court in said chancery cause, subject to the right of appeal and of writ of error as in other cases. If, however, under this cross bill, the court in said chancery cause shall have jurisdiction to inquire into the alleged equities of the defendant to said judgment, and shall grant a final decree perpetually enjoining the enforcement of said judgment, then this stipulation shall not authorize the entry of a judgment in this cause against defendant. And it is further ordered that upon the said defendant, Frank S. Allen, entering and filing said stipulation in said cause No. 13,427, that said cause be stayed and continued from term to term until the determination of said issue and question in this cause; and it is further ordered that this cause on bill and cross bill be and is

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

hereby referred to the master in chancery of this court to take and report proofs." Thereafter the cause was submitted to the court for trial upon pleadings and proof upon the issue whether or not there was service of summons from the McLean county circuit court. The court after hearing the proofs entered a decree in substance finding that there was service of process upon Frank S. Allen, and that the judgment was a valid judgment against him, and refused to hear any evidence on the question as to whether or not Frank S. Allen was in any manner indebted to the said Hickey, and thereupon dismissed the cross bill. An appeal was taken to the appellate court of the Second district, where on hearing the decree of the circuit court of Will county was affirmed. From the judgment of the appellate court affirming this decree an appeal is prosecuted to this court.

Haley & O'Donnell, for appellants. Hill, Haven & Hill, for appellee.

PHILLIPS, J. (after stating the facts). As appears from the record in this case, the question presented for the consideration of this court is one of fact. At the April term, 1890, of the McLean county circuit court, judgment was rendered against F. C. Allen for the sum of \$2,386. The return on the summons shows that it was served on F. S. Allen January 2, 1890, by George W. Jewell, special deputy. Appellant contends that he was never served with such summons. The bill filed in the circuit court of Will county seeks the collection of that judgment, and by agreement of the parties the issue was submitted as to whether there was service of such summons. Without entering into a full discussion of the evidence on this issue, it is sufficient to say that it is impossible to reconcile the testimony. The return on the summons of the special deputy, verified by his affidavit, shows service on appellant. On the trial of this issue in the court below, Jewell testified in open court as to the details of this service, and related such facts and circumstances as indicated very strongly that they are true. The appellee, Hickey, testifies to the service by Jewell; and two disinterested witnesses, about the hour that the summons is said to have been served, saw Jewell standing with a paper in his hand, talking with appellant. On the contrary, appellant denies positively that any such summons was served upon him. His testimony is corroborated by that of two witnesses, Smith and Watson, who allege their presence with appellant in Chicago at the time when service is said to have occurred, and deny the fact of service. These witnesses were all examined in open court before the chancellor. The testimony is directly contradictory. The court must accept and believe one state of facts and disbelieve the other. The trial judge saw the wit-

nesses and heard them testify, with opportunities of determining the weight and credit to be given their testimony which we do not possess. To authorize a reversal in a case of this character it must appear that there was error in the finding of facts by the chancellor, and such error must be clear and palpable. *Coarl v. Olsen*, 91 Ill. 273; *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Voss v. Venn*, 132 Ill. 14, 23 N. E. 397; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Kusch v. Kusch*, 143 Ill. 356, 32 N. E. 267. There is no clear and palpable error in this regard in this record. On the contrary, we think the preponderance of testimony supports the finding of the trial court on this issue, and the judgment of the appellate court is therefore affirmed. Affirmed.

(158 Ill. 402)

NORTON et al. v. VOLZKE.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

NEGLIGENCE OF INFANTS — INSTRUCTIONS — SPECIAL VERDICT.

1. In an action by a minor for personal injuries, it is proper to charge that the age and discretion of the person injured are proper subjects for inquiry, that the law does not require one of tender years to exercise the same degree of care and caution as a person of mature years; and that a child is only required to exercise that degree of care which one of that age would naturally and reasonably use in the same situation and under like circumstances. 54 Ill. App. 545, affirmed.

2. Where the court, at the request of the parties, submits to the jury requests for special findings, he may also submit other requests of his own motion.

3. In an action for damages alleged to be caused by defendant's negligence, it is proper to refuse to submit to the jury the question, "Did the defendant omit to do anything that ordinarily prudent and careful persons would have done under the circumstances?" where the jury have substantially answered such question in the affirmative in reply to another question.

4. It is proper to refuse to submit to the jury the question, "Did the defendant do anything that ordinarily prudent and careful persons would have done under the circumstances?" since an answer thereto would not tend to decide the case.

Appeal from appellate court, First district.

Action on the case by John Volzke against Oliver W. Norton and Edwin Norton. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 545. Defendants appeal. Affirmed.

This was an action for damages for personal injuries sustained by appellee while employed in appellants' factory at Maywood. At the time of his employment, and at the date of his injury, in September, 1888, he was not 11 years of age. The declaration charges that he was employed by defendants around machinery dangerous to life and limb of any child under 14 years of age, and while

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

so employed, and exercising due care and diligence, etc., he lost the fingers of his right hand, etc.; that the machinery on which he was set to work used divers cog wheels, which were negligently left in an unprotected and unguarded condition, by reason of which the injury occurred. The case was tried before a jury in the circuit court of Cook county, resulting in a verdict and judgment for plaintiff of \$1,700, and, on appeal to the appellate court, this judgment was affirmed.

On the trial of the cause in the circuit court, four instructions were given by the court to the jury on behalf of plaintiff, and seven for defendants. Error is assigned to the giving by the lower court of each and all of the four instructions for plaintiff. These instructions are as follows: "No. 1. The jury are instructed that, in determining the relative degree of care or want of care manifest by the parties at the time of the injury, the age and discretion of the party injured are proper subjects for the jury. The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of his age and discretion would naturally and ordinarily use." No. 2. The jury are instructed that the rule as to contributory negligence of a child is that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use in the same situation and under the same circumstances. No. 3. The court instructs the jury, as a matter of law, that if a person receives an injury as a combined result of an accident and of negligence on the part of another, and the accident would not have occurred but for such negligence, and the danger would not have been foreseen or avoided by the exercise of reasonable care and prudence on the part of the person injured, taking into consideration all the facts and circumstances of the case, then the person guilty of the negligence will be liable for the injury received. No. 4. If, from the evidence in the case, and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life."

Certain special findings were at the request of defendants' counsel submitted to the jury, and were as follows: "(1) Was the plaintiff at the time of the injury of sufficient age and intelligence to know the danger of placing his fingers between the cog wheels where the injury occurred, while said cog wheels were in motion, as shown by the

evidence? (2) Was the machinery where the plaintiff was injured out of repair? (3) Was there anything in the employment of plaintiff that required him to place himself in the position he occupied at the time of the injury? (4) Was the plaintiff directed by any person authorized to give him directions to do what he was doing at the time of the injury?" The circuit court also, of its own motion, and without the request of either party, submitted the following two findings to the jury: "(5) Was it the duty of Norton Bros. to have placed a guard or cover about the cog wheels? (6) Was the plaintiff of sufficient age to know the danger of his employment?" The submission of these two questions is assigned as error, and it is urged that the court of its own motion had no power to submit special findings to the jury. The court was also asked to instruct the jury to return answers to the two following questions submitted by defendants' counsel: "Did the defendants omit to do anything that ordinarily prudent and careful persons would have done under the circumstances? Did the defendants do anything that ordinarily prudent and careful persons would have done under the circumstances?" This the circuit court refused to do, and it is said that therein it erred.

R. S. Thompson, for appellants. Pease & McEwen, for appellee.

PHILLIPS, J. (after stating the facts). It is not the province of this court to consider any questions of fact involved in this record. The case was tried in the circuit court before a jury, with a verdict for plaintiff; and the appellate court, by its judgment of affirmance, has settled all questions of fact, carrying with it also a finding of the negligence of appellants. By these facts we are bound, and a discussion of them is unnecessary. It is only necessary, therefore, to consider whether the jury were properly instructed by the trial court, or whether there was error in the giving or refusing special findings asked to be submitted to the jury.

All the instructions may be considered together. These instructions inform the jury that the age and discretion of the party injured are proper subjects for inquiry; that the law does not require one of tender years to exercise the same degree of care and caution as a person of mature years; and that a child is only required to exercise that degree of care which one of that age would naturally and reasonably use in the same situation and under like circumstances. In *Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944, a case similar in many respects to this, this court said: "If plaintiff had been an adult with unimpaired natural faculties, he would unquestionably, on the case made, be held to have assumed the risk of his employment, with the machinery uncovered as it was when he entered the service of the appellant. It is not claimed that

the danger to which he was exposed by reason of the gear being left uncovered was not patent to every one of ordinary intelligence and experience. It is alleged in the declaration that, for a year prior to the injury, plaintiff had been in the same employment, the machinery remaining in the same condition. * * * That, as between employer and employé, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after his employment, he knows of the defects, but voluntarily continues in the employment without objection, are familiar rules of law, often recognized by the decisions of this and other courts. That this general rule does not apply to employes who, from youth or want of mature faculties, are unable to appreciate the danger incident to the employment, or which may result from the continued use of defective machinery or tools, is equally well settled. Such employes are entitled at the hands of their employers to instructions as to the danger, and how to avoid it. In other words, they are entitled to be put in possession of that knowledge which to adults comes from experience and mature judgment. 2 Thomp. Neg. 987; Deer. Neg. 187; Wood, Mast. & S. § 350." *Jones v. Mining Co.*, 68 Wis. 268, 28 N. W. 207; *Railway Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034.

It is urged that these instructions assume to prove matters which are in controversy; that they do not direct the minds of jurors to the evidence in the case; and that they fail to introduce any comparison between the negligence of plaintiff and that of defendants. We are not able to see that these instructions are subject to the objections urged against them. While it is true, perhaps, that both of these instructions, and the third and fourth instructions, to which objections are made, might have been more skillfully drawn, they correctly state the law in this state, and the jury could not be deceived or misled by them. The jury, in answering the special finding propounded to them under the direction of the court, find as a question of fact that the plaintiff was not of sufficient age to know the danger of his employment.

The instructions on behalf of the defendants fully instruct the jury as to all the phases, and we are unable to perceive from the instructions as a whole, and from the answers returned by the jury to the special findings, that the jury were in any manner misled, or that the interests of the defendants were in any way prejudiced, by the instructions given on behalf of the plaintiff. They find negligence on the part of the defendants. We have heretofore held that there are certain duties of the master that are nonassignable. Among said duties are that he shall exercise reasonable care to see that tools, appliances, and machinery are reasonably safe, and must use reasonable care that the place where the servant works is reasonably safe, to inform

the servant of special danger of his situation, and of the machinery and appliances with and about which he is employed, where he is not informed. *Railway Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590.

It is also urged as error that the court on its own motion submitted two special findings to the jury. We are unable to see the impropriety, where special findings are requested to be submitted to the jury by either party of the court, of adding or submitting such other special findings to the jury as in its judicial discretion may seem proper. The main object to be attained in all such cases is that substantial justice may be done between the litigating parties; and if the submission of such special findings, proper in form, and pertinent to the case, by the court on his own motion, may tend to this, there is no error. The two special findings submitted by the court in this case were entirely proper and pertinent, and there was no error in the court submitting them to the jury on its own motion. The court has the same right of its own motion to submit to a jury special propositions on which to find as to give instructions.

The two interrogatories submitted by defendant and refused by the court were as follows: "Did defendant omit to do anything that ordinarily prudent and careful persons would have done under the circumstances? Did the defendant do anything that ordinarily prudent and careful persons would have done under the circumstances?" The jury, by their answer to special finding 5, have answered that appellant should have placed a guard or cover about the cog wheel, which is equivalent to answering "Yes" to the first question. Whether the jury had answered "Yes," or not, to the second question would not have tended to anything decisive in the case. If the answer had been "No," it still would have remained undetermined as to what had been done by defendants that ordinarily prudent and careful persons would not have done. We find no error in the trial court refusing to submit these two findings.

Perceiving no error in the instructions or in the special findings submitted and refused by the court, we do not find that there is any sufficient reason on this record why this cause should again be submitted to another jury, and the judgment of the appellate court is therefore affirmed. Affirmed.

(158 Ill. 30)

CASSEM v. GALVIN.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

SERVICE OF PROCESS—TRIAL—PLEADING—VARIANCE—CONTINUANCE—AMENDMENT—SLANDER.

1. Under Rev. St. 1893, c. 110, § 2, which declares that it shall not be lawful, except in local actions, to sue any defendant out of the county where he "resides or may be found," one who is present in a county other than that of his residence, pursuant to a notice to take deposi-

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

tions in a case in which he is interested, may be served with process while taking such depositions, in the absence of any fraud or artifice whereby he was induced to come there. *Greer v. Young*, 11 N. E. 167, 120 Ill. 184, followed.

2. Under Rev. St. 1893, c. 110, § 26, which provides that affidavits for continuance on the ground of absent witnesses should set forth what is expected to be proved by such witnesses, an amendment to the declaration at the trial is no cause for continuance on the ground of surprise, where the affidavit does not show what could be proved if a continuance were granted.

3. An unwilling and evasive witness may, in the discretion of the court, be examined with leading questions. 53 Ill. App. 419, affirmed.

4. An allegation that slanderous words were uttered in the county where the action is brought may be sustained by proof of their utterance in another county, since the action is transitory. 53 Ill. App. 419, affirmed.

Appeal from appellate court, Second district.

Action on the case by James F. Galvin against Randall Cassem. Plaintiff obtained judgment, which was affirmed by the appellate court. 53 Ill. App. 419. Defendant appeals. Affirmed.

This was an action on the case begun in the circuit court of La Salle county to recover damages for alleged slanderous words uttered by appellant against and concerning appellee. Both parties to the action are residents of Kane county. Appellant was served with summons while he was temporarily present in Ottawa, in La Salle county, engaged in the taking of depositions in a chancery cause then pending in the circuit court of Kane county. Appellant was defendant in the chancery case, and also acting as solicitor for himself, and appeared in Ottawa to take the depositions in pursuance of notice served on him by appellee, who was solicitor for complainant in the chancery cause. To this action appellant pleaded in abatement, setting forth the above facts; that he was an actual resident of Kane county, and was only temporarily present in La Salle county, in pursuance of notice to be present at the taking of such depositions; that his presence there was necessary to preserve his legal rights; and that while actually engaged in the taking of such depositions he was served with the summons in this case. By this plea he claims immunity from service of process while in La Salle county for such purpose. Demurrer was entered to this plea in abatement, which demurrer was sustained by the trial court. The general issue was then filed and the trial entered upon. After the jury was impaneled the court permitted the declaration to be amended by filing an additional count, which was amended after a demurrer had been sustained to it. Appellant then presented a motion for continuance, alleging that he was taken by surprise by the amendment filed, and also setting up the rules of court of that county, under and by which he alleged that he had not expected such cause would be reached for trial until a later date. This motion was by the court overruled, and the trial resulted in a verdict for appellee of \$5,000. On a motion for new trial the circuit court ordered a remittitur of \$4,000; and on such being made the

court overruled the motion for a new trial and rendered judgment on the verdict for \$1,000. An appeal was prosecuted to the appellate court of the Second district, where this judgment was affirmed, and from that judgment of affirmance this appeal comes to this court.

McDougall & Chapman, for appellant. S. Richolson, for appellee.

PHILLIPS, J. (after stating the facts). The errors assigned on the record in this court are that the appellate court erred in not reversing the judgment of the circuit court, and that it erred in affirming the judgment of the circuit court sustaining the demurrer to the plea in abatement. In support of his position that the court should have overruled the demurrer to the plea in abatement, appellant cites section 2, c. 110, Rev. St. Ill., which provides that "it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions," etc. Appellant contends that under the facts stated in his plea of abatement he was not legally or lawfully found in the county of La Salle, and that such service and the bringing of suit in that county violated his privilege as a suitor, where he was entitled to immunity from such service of process. Notwithstanding the authorities in some other states support the doctrine that a party, under the state of facts set forth in this plea, is exempt from service of civil process, the rule is different in this state. It does not appear from this record that the presence of appellant in a foreign county was induced by any fraud, artifice, or trick on the part of appellee or any one acting for him. He was present in a county foreign to the one in which he resided in pursuance of a notice to take depositions before a notary public in a case in which he was interested, and the fact that he was served with process while thus engaged imposed no greater hardship or difficulty in making a proper defense in his case than if he was served while there giving attention to any other business. The facts stated in this plea come clearly within the rule laid down in *Greer v. Young*, 120 Ill. 184, 11 N. E. 167, in which service of process under such circumstances was held to bring the defendant under the jurisdiction of the court from which process issued, and we see no good reason to depart from that rule. The demurrer to the plea in abatement was properly sustained.

Under the assignment of error in this court, that the appellate court erred in not reversing the judgment of the circuit court, one of the errors assigned in the appellate court is that the trial court erred in overruling the motion of appellant for a continuance. Following an amendment to the declaration permitted by the court after the jury was impaneled, appellant filed his motion for a continuance, which, after setting forth certain rules of court, under which appellant alleged he had reason to believe said cause would not be reached for trial until a later date, then shows that he is taken

by surprise by such amendment, that he is not prepared to go to trial, that he has a good defense on the merits, and if the cause is continued until next term of court he will be able to present a good defense on the merits, etc. Section 26, c. 110, Rev. St., which is the only section under which this affidavit could have been presented, provides that in such case the party shall set forth in his affidavit the particular facts he expects to prove, etc. This affidavit is not in compliance with that section of the statute, and did not present a sufficient ground for continuance, and it was therefore not error for the court to overrule it and refuse to grant the continuance.

The circuit court allowed a wide latitude in the examination of the witness Little for plaintiff in this case, but such matters are largely in the discretion of the trial court, and we are not prepared to say that there was an abuse of this discretion. An examination of this record evidences that the witness was unwilling and evasive, and in such cases leading questions are permissible, in the discretion of the court.

Complaint is also made that proof of the uttering of the slanderous words in Kane county should not have been permitted when the declaration alleged that they were uttered "in the county aforesaid," the venue being in La Salle county. To admit such proof it is not necessary that the place of uttering be stated under a *videlicet*. The action is transitory and the place not material, and it may be proved differently from that alleged in the declaration. *Hurley v. Marsh*, 1 Scam. 329; *Owen v. McKean*, 14 Ill. 459; 3 Smith, Lead. Cas. 1076.

On the trial of this cause a large number of instructions were asked on behalf of both parties,—9 for plaintiff and 27 for defendant,—of which latter number 16 were given after the modification of 7 of them by the court. We have carefully examined all the objections made by counsel to the giving and refusing of these instructions and the modifications made by the court. A detailed discussion of all these would necessarily involve much space, and no good purpose would be served thereby. It is sufficient to say that the jury were fully instructed on the case as presented to them, and that it was proper for the court to modify the instructions which he did. The judgment of the appellate court of the Second district is affirmed. Affirmed.

(158 Ill. 45)

BELL et al. v. CASSEM.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

JUDGMENT LIEN—DRAMSHOP ACT—MORTGAGE.

Under Rev. St. 1893, c. 43, § 10, which declares that for the payment of any judgment that may be recovered against any person in consequence of the sale of intoxicating liquors the property of such person, of every kind, except such as may be exempt, shall be liable, such a

judgment is not a paramount lien to a mortgage upon the building in which the liquor was sold, where the mortgage was executed and recorded before rendition of the judgment. 56 Ill. App. 260, affirmed.

Error to appellate court, Second district.

Bill for foreclosure of mortgage by Nels O. Cassem against Albertina Helmuth, Jacob Helmuth, Sarah Bell, Lucinda E. Bell, Hugh Bell, Mary Bell, Sarah Bell, and Jane A. Bell. Complainant obtained a decree, which was affirmed by the appellate court, 56 Ill. App. 260. Defendants Bell bring error. Affirmed.

At the October term, 1892, of the circuit court of Kendall county a bill was filed by defendant to foreclose a certain mortgage dated December 21, 1889, executed by Albertina Helmuth and Jacob, her husband, on certain real estate in Yorkville, Ill., and given to secure a note of \$2,000. To this bill, plaintiffs in error, consisting of Sarah Bell and her five children, were made parties defendant, for the reason, as it appears, that on December 22, 1891, they had recovered a judgment against Jacob Helmuth and Albertina Helmuth for damages suffered by reason of the death of the husband of Sarah Bell, caused by the sale to him of intoxicating liquors by Jacob Helmuth, who occupied and used the mortgaged premises as a saloon. Plaintiffs in error filed their answer to the bill in foreclosure, and also their cross bill, by which they sought to subject the mortgaged premises to the lien of their judgment rendered in 1891, and declared superior to the mortgage of Cassem, given in 1889. The answer and cross bill in substance set forth that the premises in question known as the "City Hotel," in Yorkville, were owned and occupied by Albertina and Jacob Helmuth, who were engaged in the business of selling intoxicating liquors, and that at the time of taking the mortgage in question, and all times thereafter, the defendant in error, Cassem, had knowledge of this fact, and knowingly permitted the same to be used; that by reason of the sale by the Helmuths to the husband of plaintiff in error, Sarah Bell, he became intoxicated, and lost his life by drowning, on account of which they had recovered judgment for \$5,000, as above stated; that execution had been issued thereon March 4, 1892, and a levy made on the mortgaged premises, and asks that the mortgage be declared subordinate thereto. Exceptions were filed in the trial court to the answer and to the answer of the guardian ad litem, which was in substance the same, and demurrer to the cross bill, both of which were sustained by the court, and the cross bill dismissed for want of equity. Decree of foreclosure was entered on the original bill finding amount due defendant in error, ordering sale of premises, and finding that the interest of the plaintiffs in error accrued since the mortgage lien of Cassem. On appeal to the appellate court of the Second district this decree was affirmed, and from this judgment this writ of error is prosecuted to this court,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

B. F. Herrington, for plaintiffs in error.
McDougall & Chapman, for defendant in error.

PHILLIPS, J. (after stating the facts). The question presented in this court requires a construction of section 10 of the dramshop act, which is as follows: "For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises." Rev. St. 1893, c. 43, § 10. It is contended that from the fact that this act makes the building and premises liable where the owner permits their use for the sale of intoxicating liquors, and provides that the judgment thus recovered shall be a lien, and the premises shall be held liable for, and may be sold to pay, such judgment, that therefore a judgment recovered under this act is a paramount lien to a mortgage upon the building where the liquors were sold, notwithstanding the mortgage bears a prior date of execution and recording to the rendition of the judgment. This statute will not bear the construction attempted to be deduced from it,—that, if one loans or advances money on property which is or afterwards may be used and occupied for dealing in intoxicating liquors, his mortgage lien shall be subordinated to that of a judgment which may at some later date be recovered against the owner of such property. There can be no doubt, from a consideration of this section, that it was the evident intention of the legislature to make only owners of property and those having rentable interests amenable to the provisions of the act. A mortgagee, by virtue of his mortgage only, and before any condition broken, has no legal right to rent or lease the incumbered premises to any person or for any purpose. Having no such control over it, he cannot be said to permit the premises to be occupied for any purpose. If premises on which money had been loaned and a mortgage executed should at some time thereafter be leased or rented by the mortgagor for dealing in intoxicating liquors, the law does not recognize the right of the mortgagee to compel the vacation of such premises without some clause in the mortgage giving such power. Until some condition of the mortgage is broken, the control of the mortgagor

is as absolute, except in the permitting or committing of waste, as if no mortgage lien existed. At the time the mortgage in this case was executed, the cause of action of plaintiffs in error had not accrued, and it could not be anticipated that it ever would. To hold that a judgment recovered on such a subsequently accrued cause of action should precede a former mortgage lien would have the effect in many cases—as in this—to absolutely nullify the mortgage, as the premises would be absorbed in the satisfaction of a large judgment. The large commercial transactions and interests of the country and the interchange of capital demand the borrowing of money and securing of the same by real-estate mortgage, and a mortgagee is compelled to rely upon the condition of the title as shown by the records at the time of the advancement. It would be entirely against public policy to hold that a judgment on a subsequently accrued cause of action should defeat a lien otherwise valid. No investor could safely advance capital if such were the law. Until the commencement of a suit in some cases and the rendition of a judgment in most others, the judgment creditor acquires no interest in the property; and if, before the suit is brought, it has been sold and conveyed, it cannot be subjected to the payment of such judgment. *Bellinger v. Griffith*, 23 Ohio St. 619. In the case last cited a judgment was recovered under a statute similar to our own, against a tenant who occupied the premises and used them for the purpose of selling intoxicating liquors. After the recovery of the judgment a suit was instituted against the owners of the property at the time of the unlawful sale of the liquor to subject the real estate to the payment of the judgment. Meanwhile, after the recovery of the judgment against the tenant, but before this proceeding was instituted, the premises had been sold in apparent good faith to a third party, and it was held by the court that the title passed free from any lien of the judgment. It was contended by the plaintiff that the judgment against the tenant who unlawfully sold the liquor became a lien on the property from the time the cause of action accrued. The court said: "It is true the statute declares that the property shall be held liable for the damages assessed against the occupier. But this liability is not spoken of in the sense of creating a lien. * * * To give the statute the construction contended for would go far towards rendering titles insecure. No one could safely purchase real estate on the faith of its appearing from the public records to be clear of liens and incumbrances. A purchaser would be compelled to take the risk of ascertaining who had been the previous occupiers of the premises, and whether any judgments or causes of action existed against them for the unlawful use of the property while in possession. Surely, no such innovation upon the policy of the state in regard to requiring

liens upon real property to appear of record could have been intended without an explicit legislative declaration to that effect." If it should be held that one holding a judgment rendered on a cause of action similar to that of plaintiffs in error was entitled to a superior lien to that of a prior mortgage on the premises in which the liquor was sold, then, by the same reasoning, it must be held that such judgment would be a valid lien as against a purchaser of the same property, although the conveyance was made before the rendition of the judgment. The adoption of such a rule would not be the legitimate result of the construction of the statute under consideration, but would be judicial legislation, by which a priority of liens would be declared and determined without legislative action on which to base the same, and would permit conspiring and fraudulent owners of property to defeat a mortgage lien or valid conveyance of their property by collusion with other parties claiming a cause of action under the statute. We hold, therefore, that the true construction of this section of the statute is that it applies only to owners, or those having a rentable interest in the property, and not a contingent interest, such as is that of a mortgagee. It was error, therefore, for the appellate court to affirm the decree of the circuit court, and the judgment of the appellate court of the Second district is affirmed. Affirmed.

(158 Ill. 142)

STRODE et al. v. McCORMICK et al.¹
(Supreme Court of Illinois. Oct. 11, 1895.)

ESTATES—TRUSTS—CONTINGENT REMAINDER.

A man conveyed land to trustees in trust to collect the rents, and pay same to his wife, and directed that at her death the trustees should sell the land, "and divide the proceeds equally among the children" of said grantor and his said wife. Held, that the children took no interest in the land, and that their interest in its proceeds was contingent on their surviving their mother.

Appeal from circuit court, Cook county; R. S. Tuthill, Judge.

Bill by Charles E. Strode, Thomas F. Strode, Fannie C. Strode, Bessie E. Strode, and Sallie M. Pennabaker against Leander J. McCormick and others. Defendants obtained a decree. Complainants appeal. Affirmed.

Monroe & Thornton, for appellants. Pence & Carpenter, for appellees.

BAKER, J. In 1846, James M. Strode was the owner in fee of a lot in the city of Chicago that is now commonly known as "Nos. 84 and 86 Randolph Street." His wife, Mary B. Strode, had applied for a divorce from him, and the court had determined to grant the divorce, but as yet no decree had been entered. There were then living six children, the issue of their marriage; i. e. Eugene Strode, George W. Strode, James H. Strode, Fanny E. Strode,

Mary E. Strode, and Edward Strode. The husband and wife made an agreement and settlement in respect to their respective property rights. Among other things, said James M. Strode executed and delivered to Elias Bayliss and Eugene Strode a deed conveying to them, in trust, the lot above mentioned, and the buildings and improvements thereon. The habendum clause of the deed is as follows: "To have and to hold the same, with all the appurtenances thereunto belonging, unto the said Elias Bayliss and Eugene Strode; their heirs and assigns, forever, in trust, nevertheless, that said Elias Bayliss and Eugene Strode, or their executors or administrators, shall at all times during the lifetime of said Mary B. Strode collect, take, and receive the rents, issues, and profits which may accrue from said lot and its appurtenances for the sole use and benefit of said Mary B. Strode, free and discharged from any claim or demand of said James M. Strode, or any person claiming under him; and at her death the said Elias Bayliss and Eugene Strode, trustees as aforesaid, and the survivor of them, or his executors or administrators, shall sell and dispose of said lot and its appurtenances, and divide the proceeds equally among the children of said James M. Strode, the issue of his marriage with said Mary B. Strode, share and share alike; and upon making sale as aforesaid the said Elias Bayliss and Eugene Strode, and the survivor of them, or the executor or administrator of said survivor, are authorized to make and execute a deed or deeds of conveyance in due form of law for said premises." Elias Bayliss and Eugene Strode entered into possession of the premises, and assumed the execution of the trust. Edward Strode died in 1850, unmarried, and leaving no children. Mary E. Strode, afterwards Barker, died in 1854 or 1855. Eugene Strode died in September, 1871, leaving him surviving, his widow and five children. And upon a bill filed in the circuit court of Cook county on June 6, 1873, a decree was entered on February 18, 1874, by which, among other things, Bayliss was removed as trustee, and George W. Strode and William Hausbrough appointed trustees, with the same powers and rights that had originally been given to Elias Bayliss and Eugene Strode by the deed from James M. Strode. On May 8, 1874, Mary B. Strode, widow of James M. Strode, then deceased, Sally J. Strode, widow and devisee of Eugene Strode, deceased, George W. Strode and his wife, Fanny Strode Charles and her husband, James H. Strode and his wife, and William Hausbrough and George W. Strode, trustees, mortgaged the lot to Robert C. Waterston to secure the sum of \$28,000, with interest at 9 per cent. per annum. The moneys arising from the mortgage were in part used in paying off prior mortgages given for money borrowed for making repairs on the premises and for rebuilding after the great fire, and in part used for making further improvements on the lot. This Waterston mortgage was foreclosed in the circuit court in 1878, and the lot

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

struck off and sold by the master in chancery to the mortgagee; and in 1879, the property not being redeemed, a deed was executed to Waterston. On February 20, 1891, Waterston and wife conveyed the premises in question to Leander J. McCormick for and in consideration of the sum of \$85,000. Waterston had gone into possession of the property at the date of the deed from the master; and he held possession by his tenants until he sold to McCormick, and delivered possession to him. Mary B. Strode, the wife and widow of James M. Strode, had died on November 27, 1878; and Sally J. Strode, widow and devisee of Eugene Strode, departed this life June 11, 1880. After the sale and conveyance of the lot by Waterston to McCormick, and on October 17, 1891, Charles E. Strode, Thomas F. Strode, Fannie C. Strode, Bessie E. Strode, and Sallie M. Pennebaker, the five children of Eugene Strode and Sally J. Strode, both deceased, filed in the superior court of Cook county this bill now before us. They claim to be the equitable owners of an undivided one-fifth interest in the lot, and the prayer of the bill is for a deed for said one-fifth of the lot from Hausbrough and George W. Strode, the trustees, and for a partition, if one can be had, and, if not, then for a sale of the premises; and also for an account of profits and for general relief. The cause was heard in the superior court upon the pleadings and proofs and the report of the master and the exceptions thereto. The court found that the title, both legal and equitable, to said premises, is in Leander J. McCormick, one of the defendants, and that the complainants have no interest therein; and it dismissed the bill for want of equity. Thereupon this appeal was taken.

The lot on Randolph street was conveyed by James M. Strode to the trustees in trust that they should, during the lifetime of Mary B. Strode, collect, take, and receive all rents, issues, and profits which might accrue from the lot and its appurtenances for the sole use and benefit of said Mary B. Strode, and that at her death they should sell and dispose of said lot and its appurtenances, and divide the proceeds equally among the children of said James M. Strode, the issue of his marriage with Mary B. Strode, share and share alike. It is to be noted that by this deed of July 11, 1846, neither the lot nor any interest therein, either vested or contingent, was conveyed to the children of the grantor. The direction was that the trustees should sell and dispose of the lot, and divide the proceeds among the children. Equity regards that as actually done which ought to be done, and in accordance with this principle money is sometimes regarded as land and land as money. The doctrine is that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property. Baker

v. Copenbarger, 15 Ill. 103; Jennings v. Smith, 29 Ill. 116; Rankin v. Rankin, 36 Ill. 293; Germain v. Baltes, 113 Ill. 29; In re Corrington, 124 Ill. 363, 16 N. E. 252; Ebey v. Adams, 135 Ill. 80, 25 N. E. 1013. It is true that, where land is directed to be sold, and the proceeds distributed, the beneficiaries of the fund thus to be raised may elect to take the land itself; but such election, to avail, must be the act of all the beneficiaries. Baker v. Copenbarger, supra; Ebey v. Adams, supra. And here there is no claim that all the children who became entitled to share in the distribution on the death of Mary B. Strode ever attempted to make such an election. The conclusion must therefore be that Eugene Strode, the ancestor and deviser of appellants, never took any interest, either vested or contingent, in the lot and its appurtenances.

And the further conclusion must be that Eugene Strode not only took no interest in the lot, but never took a vested interest, under and by virtue of the deed made by his father, in the proceeds of the sale of such lot and its appurtenances. It was provided in the deed that at the death of Mary B. Strode the trustees should sell and dispose of the lot and its appurtenances, and divide the proceeds equally among the children of said James M. Strode who were the issue of his marriage with said Mary B. Strode, share and share alike. As we have already seen, Mary B. Strode did not die until November 27, 1878; and, as we have also seen, three of the six children of the marriage of James M. and Mary B. Strode departed this life prior to that date. Edward Strode died in 1850, Mary E. Strode, afterwards Barker, in 1854 or 1855, and Eugene Strode in 1871. There is to be found in the deed no direct gift or grant to the children of the grantor. The deed simply directs the trustees that at the death of Mary B. Strode they shall sell the lot, and divide its proceeds equally among the children of the grantor. When the time appointed for the sale and distribution arrived, in 1878, there were only three children surviving,—i. e. George W. Strode, James H. Strode, and Fanny E. Charles,—and these three children, and they only, were within the description of those among whom the division was to be made. No one other than a person who could at the time of the death of Mary B. Strode predicate of himself or herself that he or she was one of the children of James M. Strode, and issue of his marriage with Mary B. Strode, could rightfully claim anything under and by virtue of the deed. It appears from the record that the grantor in the deed was a lawyer, and therefore all the stronger is the presumption that would prevail without this circumstance,—that he knew full well the names of the children born of his marriage, and that when he did not name them, or make any direct gift or grant to them, or either of them, either antecedent or subsequent to the direc-

tions to the trustees, but simply directed the trustees, at the death of his wife, to make division of a designated fund among his "children," the issue of his marriage, he contemplated the contingency of a death or deaths before the time of distribution. An estate is vested in interest when there is a present fixed right of future enjoyment; and an estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain. That which Eugene Strode, the father of these appellants, took under the deed of July 11, 1846, was a contingent remainder in the proceeds of the sale and disposition of the lot and its appurtenances, and his right was contingent upon his surviving the date of the death of his mother, Mary B. Strode, at which time the property was to be sold by the trustees, and the proceeds divided among "the children" of the grantor. If he had survived the event of his mother's death, then his right to share in the division of the proceeds of the lot would have vested and taken effect both in interest and in possession; but, as that contingency did not happen, his contingent remainder was defeated by his dying seven years prior to the death of his mother. The conclusion must therefore be that the adjudication of the superior court that the heirs and devisees of Eugene Strode, deceased, complainants in that court and appellants here, have no right or interest whatever either in the lot or in the proceeds to be derived from its sale, is correct, and free from error. Among the numerous cases that sustain the view we have taken of this controversy are the following: *Leake v. Robinson*, 2 Mer. 363; *Batsford v. Kebbell*, 3 Ves. 383; *Nicoll v. Scott*, 99 Ill. 529; *Howe v. Hodge*, 152 Ill. 252, 33 N. E. 1063; *Kingman v. Harmon*, 181 Ill. 171, 23 N. E. 430; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Blatchford v. Newberry*, 99 Ill. 11. Putting our decision upon the ground we do,—that under the deed of trust Eugene Strode took no vested interest either in the lot or in the proceeds of the sale of the lot,—all occasion is obviated for examining either as to the power of the trustees under the deed of trust to execute the mortgage to Waterston, or as to the power of Sally J. Strode, under the will of Eugene Strode, her deceased husband, to bind the interests of her children, the appellants, by joining in the execution of that mortgage, or as to the bar of the statutes of limitation. For the reasons stated herein the decree below is affirmed. Affirmed.

(158 Ill. 660)

DOSS v. PEOPLE.¹

(Supreme Court of Illinois. Nov. 4, 1895.)

LARCENY—CRIMINAL LAW—VERDICT.

1. One who obtains money from another on the pretense that he will bet it for him on a race,

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

which he pretends to do, and converts the money to his own use, is guilty of larceny.

2. Where there is no evidence tending to show that a defendant is under age, the jury need not find his age in their verdict. *Sullivan v. People*, 40 N. E. 288, 156 Ill. 94, followed.

Error to circuit court, Jackson county; Oliver A. Harker, Judge.

Indictment of Samuel Doss for grand larceny. Defendant was convicted, and he brings error. Affirmed.

A. B. Garrett and W. A. Schwartz, for plaintiff in error. Maurice T. Maloney, Atty. Gen., and John M. Herbert, State's Atty. (T. J. Scofield, and M. L. Newell, of counsel), for the People.

CARTER, J. The plaintiff in error was convicted at the January term, 1895, of the circuit court of Jackson county, of the larceny of \$530, the money of one John Devine, and sentenced to imprisonment in the penitentiary for the term of five years. The evidence showed that he went to Chester some time in November, 1894, when he got acquainted with Devine, a saloon keeper, and that, after an acquaintance of about two weeks, Devine put \$50 in his hands to bet on a foot race which Doss said was to come off at Pinckneyville, but which for some reason was put off, and run at Murphysboro, on December 4th. Devine went with Doss to Murphysboro, and on Doss' representations that they would bet the money on one Langdon, who Doss said was a very fast runner, and would be sure to win, Devine placed \$480 more in the hands of Doss to put up on the race. Doss said he would have to put up \$600, but that they would so fold the \$530 as to count \$600. They did so, and pinned it together. At Murphysboro they met Langdon and Simpson, who were the runners, and one Kiplinger, who acted as stakeholder, and one Walker or Hughes. The whole party proceeded to the place where the race was to be run, and some envelopes were placed in Kiplinger's hands, which he testified he did not open, but that Doss put only \$20 in his hands, and the evidence fails to show that any money was put up against the money of Devine. The race came off, and Simpson, not Langdon, won. Kiplinger turned over the envelopes to Simpson, and the parties separated, Doss professing to be very angry with Langdon for losing the race. Doss and Kiplinger met outside of town, where the latter was arrested, but Doss ran away, and escaped. Henry Lipe testified that he was driving along the road about two miles southwest of Murphysboro when the defendant and another man came up; that the defendant had been running, and had a handkerchief with considerable money tied up in it, and said to witness, "We have skinned a couple of ducks;" that defendant gave the other man a couple of bills from the roll, and told him to go back, and then got in the wagon with witness, and rode with him about three miles, and told him he was making his way to the river, where he wanted the witness to take him. Witness

declined, but gave him the names of others on the road. He found a man who took him to the river, for which he paid \$5, and to whom he made statements similar to those made to Lipe. Kiplinger testified that he got \$40 of the money, and that Doss told him he had given Langdon \$85, and Simpson \$25. Kiplinger was in jail for the same offense, and had previously testified to a contrary state of facts. Plaintiff in error testified that he bet Devine's money in good faith, and lost it, together with \$200 of his own money, and other evidence was given tending in some degree to exculpate him; but the jury were doubtless satisfied from the evidence, and in this, we think, they were fully justified, that the foot race and pretended wager were a mere sham, gotten up and manipulated to swindle Devine out of his money, and that plaintiff in error obtained the money in question from Devine, not for the purpose of really wagering it on the result of the race, for Devine, but to feloniously convert it to his own use,—to steal it. The jury were warranted in finding that possession of the money was fraudulently obtained by plaintiff in error, with the felonious intent on his part, when he received it, to convert it to his own use, and that Devine, when he gave him the money, intended to part with his possession merely, and not with his title, relying on plaintiff in error to dispose of it as agreed upon for his (Devine's) benefit. It is the settled law of this state that this offense is larceny. *Murphy v. People*, 104 Ill. 528; *Kilbs v. People*, 81 Ill. 599; *Stinson v. People*, 43 Ill. 397; *Welsh v. People*, 17 Ill. 339; *Johnson v. People*, 113 Ill. 99; *Moore, Cr. Law*, § 496. Analogous rulings elsewhere may be found in the cases referred to in *Murphy v. People*, supra.

The jury were fairly instructed as to the law of the case, and plaintiff in error has no just cause to complain that his rights were not fully protected by the court. It is now insisted that the conviction was erroneous because the jury did not find in the verdict the age of the accused. No proof was introduced on the trial to show that he was under 21 years of age, but the evidence all tended to prove that he was considerably over that age. It was not necessary for the jury to find his age in their verdict. *Sullivan v. People*, 156 Ill. 94, 40 N. E. 288. The judgment of the circuit court will be affirmed. Judgment affirmed.

(158 Ill. 55)

McDEARMON et al. v. BURNHAM.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

STATUTE OF FRAUDS—TRUSTS—LACHES.

1. A verbal statement by a purchaser of land at foreclosure sale, that he buys it for the benefit of another, is ineffective, under the statute of frauds, to create a trust in favor of the latter.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

2. An unexplained delay of 14 years in asserting an equitable title to land constitutes laches.

Error to circuit court, Cook county; O. H. Horton, Judge.

Bill by Dyer N. Burnham against Samuel H. McDearmon and others to quiet title. Complainant obtained a decree. Defendants bring error. Affirmed.

A bill in chancery under the burnt records act was filed in this case in December, 1890, by Dyer N. Burnham, alleging that he was the owner of the N. E. ¼ section 13, township 42 N., range 12 E., third P. M., in Cook county. A large number of defendants were made parties to this bill, among them Samuel H. McDearmon, ancestor of plaintiffs in error. The bill alleged destruction by fire of the records, that about 75 deeds and mortgages described are clouds upon complainant's title, and that they be set aside, and be declared null and void, and that title be confirmed and established in the complainant. McDearmon filed an answer, setting up title in himself. Subsequently he filed a cross petition, asking affirmative relief. The facts, as they are deduced from the pleadings and the preponderance of the evidence, show that in 1872 the legal title to this quarter section, which was called the "Skokie Lot," was held by Oscar B. Blake in trust for Samuel H. McDearmon. In June, 1872, Blake and McDearmon secured from Burnham a \$4,000 loan for three years, executing their notes and a mortgage on the Skokie lot. The amount of this mortgage was about the full value of the land at that time. About half the proceeds of this loan went to Blake, on account of some indebtedness due him, and the balance to McDearmon. In May, 1874, Blake secured an individual loan from Burnham of \$4,000, executing his note, due in two years, with a mortgage on 50 feet on South Park avenue, known as the "Cottage Property," and which belonged to Blake. About January, 1875, Burnham, believing that the Skokie property was not so valuable as he had supposed, requested Blake to write to McDearmon, who had removed to Michigan. Shortly afterwards he came to Chicago, and arranged to sell to one Ward and Ruth R. Eddy 140 acres of the land, at \$150 per acre, or \$21,000. The purchasers paid no part in cash, however, but the entire purchase money was evidenced by notes. At the request of McDearmon, Blake executed deed to Ward and Eddy, and they executed notes, payable to Blake, and secured by deed of trust on the 140 acres, to L. Barber, trustee. Burnham executed releases for the 140 acres sold, releasing it from any lien of his \$4,000 trust deed. Burnham also purchased \$4,500 of the Ward and Eddy purchase money notes, and payment of them was guaranteed by Blake and McDearmon. The balance of \$16,500 of these notes were assigned to Burnham as collateral security for the original \$4,000 loan on the Skokie property, and

to indemnify him for releasing the 140 acres. Ward and Eddy subdivided part of this land into Hiltabidle's addition, Glencoe, and made conveyances to about 100 grantees, who constituted most of the defendants in the original bill filed in this case. Neither Ward nor Eddy paid any part of the notes given for their purchase money, and on August 2, 1876, the trust deeds were foreclosed by Barber, the trustee, on the 140 acres. Burnham, McDearmon, and Blake were present at the sale, and this 140 acres of the Skokie lot were sold to Burnham for \$4,200. At this time the total indebtedness of Blake and McDearmon to Burnham on account of the original \$4,000 and accumulated interest, the three Ward and Eddy notes, indorsed and sold by them, with interest, amounted to nearly \$10,000. McDearmon, then a resident of Michigan, was in Chicago on this day, attending the sale, and Burnham presented an itemized statement of amount due to him. On this same day Blake and wife executed a warranty deed to Burnham for the remaining 20 acres of the Skokie lot, on which Burnham's \$4,000 trust deed was still a lien. Burnham on that day, by virtue of the Blake deed last mentioned, and the trustee's deed from Barber, held title to 160 acres of the Skokie lot. By deed dated August 3, 1876, recorded October, 1876, Burnham conveyed the 160 acres to Blake for a consideration of \$6,000, taking Blake's note, dated August 3d, for the entire amount secured by trust deed on the Skokie lot to J. F. Goddard, trustee. Blake also executed another note for \$4,000, bearing same date, and secured by deed of trust of 56 lots, his individual property, known as the "Semple Property." Burnham turned over to Blake the 18 Ward and Eddy notes at the time, taking his receipt therefor. This left Burnham holding of Blake's paper \$6,000 on the Skokie lot, \$4,000 on the Cottage property, and \$4,000 on the Semple property. Blake appears to have been unable to meet his obligations, and in June, 1878, for an expressed consideration of \$7,750, he and his wife, by warranty deed, conveyed to Burnham the Cottage property. On August 5, 1879, there being default in the payment of the \$6,000 Skokie loan and \$4,000 loan on Semple property, Blake and wife executed warranty deed to Burnham for both the Skokie and Semple property, and received back his \$6,000 and \$4,000 notes and trust deeds.

It is not entirely clear from the record what, if any, conversations or dealings passed between McDearmon and Burnham for the 14 years following the Barber trust sale in 1876, or whether they ever had any conversation. Following 1879, Burnham received no interest from any source on his money invested in the Skokie property, paid the annual taxes, executed leases to tenants, and collected some small sums as rents each year. The land was mostly a marsh or swamp, covered a portion of each year with

water. In 1880 McDearmon made several calls on Burnham, in the course of a few days, and, without claiming any interest in, or right of redemption in, the land, proposed to purchase it, and, failing, made some threats of litigation. In the summer of 1890 McDearmon procured a deed from Blake for the Skokie lot and Semple and Cottage properties, and, by his cross petition filed in this cause, alleged that Blake held title to the Skokie lot as a trustee for cross petitioner, of which Burnham had notice; that at the sale by Barber, trustee, his property was bid in by Burnham with the understanding that he should convey it to Blake, who should hold it as trustee for McDearmon, as before; that from 1874 to 1890 he had frequent conversations with Burnham, and was assured by him that all rights of redemption in the Skokie lot were continued, and that he had no knowledge of the conveyance from Blake to Burnham of August 5, 1879, until some time in the year 1890; and that such deed was obtained by misrepresentation, oppression, etc. It further alleges that at the time of the conveyance of the Cottage and Semple properties by Blake the value thereof was largely in excess of the consideration expressed, and that Burnham had made various promises of the right to redeem. Petitioner McDearmon in cross petition offers to pay Burnham any amount that may be found due to effect a redemption, and asks that Burnham reconvey to him. An amended cross petition was subsequently filed, and, on the issues being made up, the cause was referred to Walter Butler, master in chancery, to take proof and report conclusions. The master reported adversely to McDearmon on the cross petition, finding that on August 2, 1876, McDearmon had no equity of redemption in the premises which was capable of being indefinitely extended, the equity of redemption, except as to the 20 acres, being in Ward and Eddy, and that, as against McDearmon, Burnham is seized in fee simple absolute of said N. E. $\frac{1}{4}$ section; that as to settlements and deeds made between Blake and Burnham as to Blake's individual property, described as "Cottage and Semple Property," they are not material in the case. The circuit court on hearing overruled all exceptions to the master's report, and rendered a decree based on the substantial facts therein found, dismissed the cross petition and amended cross petition of McDearmon, and confirmed and established the title to N. E. $\frac{1}{4}$ section 13, etc., in Dyer N. Burnham, in fee simple, as prayed for in the original bill. From this decree of the circuit court of Cook county the writ of error is prosecuted to this court.

C. M. Hardy, for plaintiffs in error. Burnham & Baldwin, for defendants in error.

PHILLIPS, J. (after stating the facts). It is clear from this record that about 1872 Blake had the title to the Skokie lot in ques-

tion as trustee for Samuel H. McDearmon, and it is also apparent that Dyer N. Burnham had knowledge of the fact that McDearmon had an interest of some character in the land. One of the questions suggested, therefore, is whether or not, under the settlements and conveyances of August 2, 1876, and August 5, 1879, Burnham became seised of the title to this 160 acres in trust for McDearmon, and the latter had the right of redemption. The original loan of \$4,000 procured by these parties was, according to the evidence, about as much as this land was worth. McDearmon says that when he wanted title transferred, he simply directed Blake to make deeds. By this arrangement Ward and Eddy obtained absolute title to the 140 acres, and Burnham invested additional money by the purchase of three of these purchase-money notes. At the time of the foreclosure of the Ward and Eddy trust deeds, Burnham held all the notes belonging thereto. At this sale he had the same right, if he was in any way dissatisfied with his securities, to become an absolute purchaser, and acquire title to this 140 acres, as he would have to foreclose his own trust deed in case of default, and become a purchaser. The consideration paid was adequate, as Burnham's indebtedness at the time was nearly \$10,000, and the preponderance of the evidence is that the land was only worth \$25 to \$30 per acre. Under the Barber foreclosure, therefore, Burnham became the purchaser, and received trustee's deed from Barber. By this conveyance, which was a sale of equity of redemption by Ward and Eddy only, Burnham became seised in fee of the title to 140 acres of the Skokie. It is urged that in buying he was acting for McDearmon, and agreed that he would buy it for McDearmon's benefit. The latter says that this verbal statement was made by Burnham at the time and place of the Barber sale, in the presence of himself and Blake. Blake does not testify to it, and Burnham denies it. Irrespective of that, however, the plea of the statute of frauds is interposed in the cross petition. It is not alleged that such promise or agreement was evidenced by any memorandum in writing. The statute of frauds was therefore a bar to any relief as to the 140 acres. *Lawson v. Lawson*, 117 Ill. 100, 7 N. E. 84; *Rogers v. Simmons*, 55 Ill. 76; *Lantry v. Lantry*, 51 Ill. 458; *Hovey v. Holcombe*, 11 Ill. 660. Burnham, therefore, took title, under the Barber conveyance, to the 140 acres free and clear of any equitable claim on the part of McDearmon.

On the same day as the Barber sale, Blake and wife conveyed the remaining 20 acres to Burnham, and it is alleged by McDearmon that it was done secretly, and without his knowledge or consent. There is not anything in this record that casts any suspicion on the good faith, honesty, and integrity of Blake during the years of his

management and control of this transaction. On the day the deed to this 20 acres was executed by Blake, McDearmon had come down from Michigan, and was stopping as a guest at Blake's house. Burnham had presented a statement, showing the amount of the indebtedness to be in excess of the value of the land. If Blake had desired to keep secret from his friend McDearmon the fact that he and his wife were conveying away this 20 acres, he would hardly have selected this particular day to execute it. The only reasonable presumption to be decided from the facts and circumstances is that, in making the settlement with Burnham, Blake executed this deed under the verbal direction of McDearmon, as he had on occasions before this executed the Ward and Eddy deeds. Burnham, however, after acquiring title, reconveyed the Skokie 160 acres back to Blake, and gave every opportunity for payment, as he accepted Blake's notes and trust deed for \$6,000, due in three years, and the payment of that amount would have left Skokie free and clear of incumbrance. In 1879 Blake was involved to such an extent that he could not meet his obligations. By an agreement which Blake says was satisfactory to him his indebtedness to Burnham was parceled out on the respective properties, and he executed to Burnham warranty deed, first to the Cottage property, and later to the Semple and Skokie properties, on which latter tract Burnham still held the trust deed for \$6,000 and accumulated interest. The record shows that the consideration thus paid was adequate, and was about what the properties were actually worth at that time. Burnham took possession under his deeds, and control of the property. During the period of time from 1876 no interest was paid by McDearmon, no payments on account of his principal indebtedness, no taxes were paid by him, and no accounting at any time demanded or requested of Burnham. While he alleged that Burnham told him he might have the right of redemption at any time, even in 50 years, if he paid the interest, such is highly improbable, from the fact that Burnham already had about as much money invested in the property as it was worth. But, even if it be conceded that McDearmon had the right of redemption in the Skokie, he slept on his rights for a period of about 14 years, from 1876 to 1890. He permitted interest and taxes to accumulate in large amounts on property the rental value of which is shown to have been only slightly in excess of \$100 per year. He took no steps to assert his rights during these years, although he had no written evidence, and nothing but a verbal agreement, within the knowledge of witnesses who, like himself, had passed their three score and ten years.

In *Showers v. Warrick*, 152 Ill. 855, 33 N. E. 792, this court has said: "After a long period has elapsed, courts of equity

will be cautious in enforcing the specific performance of a contract, when there is any real doubt about its existence and terms." When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and weighty reasons presented why it had been permitted to become so. Good faith, conscience, and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity. In the absence of these elements, the court remains passive, and declines to extend its relief or aid. It has always been the policy to discountenance laches and neglect. *Carpenter v. Carpenter*, 70 Ill. 457; *Beach v. Shaw*, 57 Ill. 25; *Owen v. Peacock*, 38 Ill. 33; *Beckford v. Wade*, 17 Ves. 87; *Smith v. Clay*, 3 Brown, Ch. 639; *Platt v. Vattier*, 9 Pet. 416; *Prevost v. Gratz*, 6 Wheat. 481; *Bowman v. Wathen*, 1 How. 194. The general rule on this question is expressed in the foregoing and a long line of other cases. This rule, when applied to the particular facts of this case, shows such laches and neglect on the part of the cross petitioner as would bar any right of action, and cause a court of equity to refuse him any relief, even though the right of redemption in this land had at one time existed. If cross petitioner had any equitable rights after the transfers of 1876 and 1879, he suffered his demand to become stale, and no sufficient weighty reasons are presented to this court why it has so become. The Cottage and Semple properties were the individual properties of Blake. They were conveyed in 1879 to Dyer N. Burnham by Blake, in settlement of indebtedness then owing by Blake to Burnham. The consideration was adequate, and Blake had no right of redemption. McDearmon took a deed from Blake in 1890, but acquired no title. A consideration of these two contracts is not material to the discussion of the Skokie tract.

We find no error in the admission of improper, or the rejection of proper, evidence by the trial court. It was not error for the circuit court to confirm the master's report, and enter the decree dismissing the cross petition and amended cross petition, and establishing and confirming the title in fee simple in this 160 acres of land in Dyer N. Burnham. In the absence of any error in the record, the decree of the circuit court of Cook county is affirmed. Affirmed.

(158 Ill. 122)

BELFORD v. WOODWARD.*

(Supreme Court of Illinois. Oct. 11, 1895.)

JUDGMENT—PAYMENT IN GOLD COIN—PLEADING—VARIANCE—APPELLATE PRACTICE—REMITTITUR—CORRECTION OF JUDGMENT.

1. Where a judgment rendered by default in another state recites that it is payable in

* Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

gold, when there is nothing in the pleadings showing any contract to pay in gold, such judgment is valid only for the amount it finds due payable in any legal tender.

2. In an action on such judgment, a declaration counting on the judgment, but omitting the clause in regard to payment in gold, does not render the judgment record inadmissible on the ground of variance, since such clause may be rejected as surplusage.

3. The provision in such judgment providing for payment in gold does not prevent the rendition of judgment thereon payable in legal tender, since a contract to pay gold may be liquidated by payment in legal tender, when the creditor agrees thereto.

4. Where, on appeal from the appellate to the supreme court, the record shows that in the appellate court the appellee remitted \$6 from the judgment, and that that court thereupon affirmed the judgment for the original amount, less \$5, the error, being clearly clerical, may be corrected in the supreme court.

Error to appellate court, First district.

Action of debt by Melinde Woodward against Alexander Belford. Plaintiff obtained judgment, which was affirmed by the appellate court. 55 Ill. App. 307. Defendant brings error. Affirmed.

This is an action of debt begun on June 6, 1893, by defendant in error against plaintiff in error upon a foreign judgment, rendered on April 29, 1893, in favor of defendant in error and against plaintiff in error in the superior court of the city and county of San Francisco, Cal., for \$3,903.46, with interest thereon at the rate of 7 per cent. per annum debt, and \$13.50 costs. A number of pleas were filed to the declaration, to wit: (1) Nul tiel record; (2) nil debet; (3) that there was no such court as the one set forth in the declaration; (4) that the superior court of San Francisco had no jurisdiction to render the judgment; (5) that the defendant was never served, etc. Replications were filed to the pleas, and rejoinder to the replications. The cause was tried before a jury, who returned a verdict finding "the issues in debt in favor of the plaintiff and against the defendant for the sum of thirty-nine hundred and sixteen and 99/100 dollars (\$3,916.96), and damages in the sum of two hundred and eighty (\$280) dollars." After overruling motions for new trial and in arrest of judgment, the court below rendered judgment upon the verdict, "That the said Melinde Woodward do have and recover of and from the said Alexander Belford the sum of three thousand nine hundred and sixteen dollars and ninety-six cents (\$3,916.96), her debt aforesaid, and two hundred and eighty dollars (\$280); her damages aforesaid, and also her costs to be taxed by the clerk of this court, and that said Melinde Woodward have execution against the said Alexander Belford for her said debt, damages, and costs." This judgment has been affirmed by the appellate court, and is brought here for review by writ of error.

The judgment roll from the California court, introduced in evidence, showed service upon Belford; that he appeared, and filed a demurrer to the complaint; that the demurrer was overruled; that he filed no answer, and

that default was entered against him. The judgment roll also sets forth in full the complaint, which describes the cause of action. The liability charged in the complaint against Belford was that of indorser upon two notes executed by one Cogan to the plaintiff, Woodward. The complaint avers that Cogan made one of these notes, "whereby he agreed and promised to pay to plaintiff the sum of \$1,443.75 in eight months from date," and the other of said notes, "whereby he agreed and promised to pay to plaintiff the sum of \$1,512.50 in fourteen months from date." The complaint prays for "judgment for the sum of \$2,956.25, together with interest thereon from the time the said promissory notes matured, and for costs of suit." The judgment rendered by the superior court of San Francisco, as the same is set out in the judgment roll, concludes as follows: "It is hereby ordered, adjudged, and decreed that the plaintiff, M. Woodward, in the above-entitled cause, do have and recover of and from the defendant, Alexander Belford, in said cause, the sum of \$3,903.46, with interest thereon at the rate of seven per cent. per annum from date hereof until paid, together with plaintiff's costs and disbursements incurred in said action, amounting to the sum of \$13.50, and that said sum of \$3,916.96 and said interest be paid in United States gold coin."

Newman & Northrup, for plaintiff in error.
Prentiss, Montgomery & Hall, for defendant in error.

MAGRUDER, J. (after stating the facts). When the judgment roll was introduced in evidence by the plaintiff below, the defendant objected to it, upon the alleged ground that there was a variance between the judgment set forth in the declaration and the judgment described in the judgment roll so offered in evidence, in this: that the judgment set forth in the declaration was therein described as a judgment for a certain number of dollars, or for money simply, whereas, as it is insisted, the judgment described in the judgment roll was a judgment for a certain number of dollars to be paid or payable "in United States gold coin." This objection was overruled, and exception was taken.

Counsel for plaintiff in error contend that a judgment calling for a certain amount of dollars payable "in United States gold coin" is in no respect different from a judgment calling for a certain amount of gold bullion; that, without evidence showing the mercantile value of the quantity of gold coin called for, it was impossible for the court or jury to determine what in fact was the obligation fixed by the judgment in question, as gold coin is constantly fluctuating in value; and that, as the plaintiff offered no such evidence, she failed to make out a case showing the amount of principal debt or interest, if any, due to her from the defendant.

The simple question involved in the objec-

tion is whether there was such a variance between the declaration and the record of the California judgment as required the trial court to exclude the latter when it was offered in evidence. The declaration alleges that the plaintiff did, by the consideration and judgment of the superior court, etc., of San Francisco, recover against the defendant, in a certain action for the recovery of money, the sum of \$3,903.46, with interest, etc., for her debt, and also the costs, taxed at \$13.50. The judgment, shown by the offered roll, is a judgment ordering and adjudging that plaintiff recover against the defendant the same number of dollars, with interest for her debt, which are mentioned in the declaration, and the same number of dollars for costs which are mentioned in the declaration. So far there is an exact correspondence between the allegation and the proof. Does the fact that the judgment set out in the roll contains at the end of it the words, "and that said sum of \$3,916.96, and said interest, be paid in United States gold coin," create a fatal variance? The declaration sets forth the recovery of a judgment for so many dollars; the judgment roll shows a judgment for the recovery of the same number of dollars. The only difference between the two is that the latter directs that such number of dollars be paid in a specified kind of money. We are inclined to think that there was no variance, and that the direction as to the payment "in United States gold coin" was mere surplusage.

Before the decision in *McGoon v. Shirk*, 54 Ill. 408, this court had held that, under the acts of congress of February 25, 1862, and July 11, 1862, known as the "Legal Tender Acts," a note or contract for the payment of a sum of money specifically in gold could be discharged by the payment of the same sum in legal tender notes, and that, in a suit upon such a note or contract, judgment could be entered up for the amount due upon the face of the instrument, and that the value of gold over legal tender notes was not a subject for consideration in an action brought on such a note or contract. But these prior decisions were overruled in *McGoon v. Shirk*, *supra*, because, after their rendition, the supreme court of the United States decided the cases of *Bronson v. Rodes*, 7 Wall. 229, and *Butler v. Horwitz*, Id. 258, taking a contrary view; and the construction given by that court to an act of congress was, of course, binding upon this court. Accordingly, the *Bronson Case* and the *Butler Case* were followed in the *McGoon Case*. In the latter the question was whether a note payable, in terms, in American gold, and executed after the passage of the legal tender act of February 25, 1862, could be discharged by a tender of United States treasury notes, and the *Bronson Case* was there construed as holding that an express contract to pay coined dollars could only be satisfied by the payment of coined dollars, and the *Butler Case* was construed as holding that, when it

appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly; and, after thus construing the two federal decisions, we said in the *McGoon Case*: "The note was payable in American gold, and in that medium alone, without the consent of the payee, could it be paid and satisfied. The court erred in holding the tender of treasury notes sufficient, and a compliance with the contract, and for this error the decree must be reversed." In *Hepburn v. Griswold*, 8 Wall. 603, the supreme court of the United States held that the legal tender acts of 1862 and 1863, making United States notes a legal tender in payment of all debts, public and private, was unconstitutional, so far as it applied to debts contracted before the passage of those acts; that before February 25, 1862, all contracts, not expressly stipulating otherwise, were, in legal effect, contracts for the payment of coin; and that, under the constitution, the parties thereto were respectively entitled to demand, and bound to pay, the sums due, according to their terms, in coin, notwithstanding the provision in the legal tender acts making United States notes a legal tender in payment of such debts. Following the *Hepburn Case*, this court held in *Morrow v. Rainey*, 58 Ill. 357, and *Chamblin v. Blair*, Id. 385, that contracts for the payment of money, made before the passage of the legal tender acts, had reference to coined money, "and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin." Subsequently, the *Legal Tender Cases* (*Knox v. Lee* and *Parker v. Davis*), 12 Wall. 457, overruled the case of *Hepburn v. Griswold*, supra, so far as it held the legal tender acts to be unconstitutional as applied to contracts made before the passage of those acts; and, by consequence, the decisions in 58 Ill., also so holding, were rendered nugatory as authorities upon that point. The *Legal Tender Cases*, 12 Wall. 457, held that the legal tender acts were constitutional as applied to contracts made before, as well as to contracts made after, the passage of those acts; but we do not understand that the decision in the *Legal Tender Cases*, so called, overruled the cases of *Bronson v. Rodas* and *Butler v. Horwitz*. The *Legal Tender Cases* decided that contracts payable in money, whether made before or after the passage of the legal tender acts, could be discharged by the tender of United States treasury notes, popularly known as "greenbacks"; but they did not decide that contracts specifically payable in gold and silver coin could not be enforced as such. It was only contracts payable in money generally, without specifying gold and silver coin, which were therein referred to. The decision in those cases recognizes two kinds of money as legal tender in the payment of debts—First, gold and silver coin; second, treasury notes made legal tender by act of congress. It was therein held that all debts which the contracts of the parties did not make payable in coin could be discharged in

legal tender notes, but the right to make and enforce contracts for payment in coin was not denied. Mr. Justice Strong, who wrote the opinion in the *Legal Tender Cases*, expressly says: "We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money."

The case of *Bronson v. Rodas*, supra, is recognized as authority in *Trebilcock v. Wilson*, 12 Wall. 687, decided a year after the *Legal Tender Cases* were decided. In *Trebilcock v. Wilson* the question arose whether a note payable by its terms in specie could be satisfied; against the will of the holder, by the tender of notes of the United States, declared by the act of February 25, 1862, to be a legal tender in payment of debts, and it was there held that the use of the term "in specie" did not assimilate the note to a note payable in chattels, but that those words were descriptive of the kind of dollars in which the note was payable, "there being different kinds in circulation recognized by law"; and, after stating the meaning of the words "in specie" to be "that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States," the court says: "This being the meaning of the term 'in specie,' the case is brought directly within the decision of *Bronson v. Rodas*, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in the payment of debts. The several coinage acts of congress make the gold and silver coins of the United States a legal tender in all payments according to their nominal or declared values. As the act of 1862 * * * has been sustained by the recent decision of this court (*Legal Tender Cases*, 12 Wall. 457) as valid and constitutional, we have, according to that decision, two kinds of money, essentially different in their nature, but equally lawful. It follows, from that decision, that contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement. * * * We shall find little difficulty in holding that it [the act of 1862] was not intended to interfere in any respect with existing or subsequent contracts, payable by their express terms in specie; and that, when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally. * * * The twentieth section of the act of 1792 * * * has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money, expressed by similar designation, was sanctioned by law, and made a tender in payment of debts, it was necessary, as stated in *Bronson v. Rodas*, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered

for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought." Accordingly, in the Trebilcock Case, the judgment of the supreme court of Iowa, holding that a tender of greenbacks or United States legal tender notes in payment of the note payable in specie was legal and sufficient, was reversed. Still later, in Gregory v. Morris, 96 U. S. 619, the supreme court of the United States again recognize the case of Bronson v. Rodes, and refer to it as holding that a contract for the payment of gold coin is "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight," and that judgment may be rendered upon such a contract payable in coined dollars; and it was held in the Gregory Case that an instruction telling the jury that "no agreement or contract to pay a certain number of dollars in gold can be enforced" was properly refused, as being in conflict with Bronson v. Rodes. Hence, any language used in Reinback v. Crabtree, 77 Ill. 182, which can be construed as holding that a contract payable in gold may be paid, at the option of the debtor, and against the will of the creditor, in any currency which the general government has declared to be a legal tender in the payment of debts, must be regarded as being in conflict with the federal decisions, and is not binding as authority. Such language was used inadvertently, and was in conflict with the case of McGoon v. Shirk, supra, which was evidently overlooked. We conclude that "express contracts to pay coined dollars," where creditors insist upon their enforcement, "can be satisfied only by the tender of payment of coined dollars, and judgments in suits brought on such contracts may be entered for coined dollars, and parts of coined dollars, such contracts not being within the legal tender acts." 15 Am. & Eng. Enc. Law, p. 705, and cases in notes; 1 Freeman. Judgm. (4th Ed.) § 3, and cases in notes.

But it is only where the contract calls for the payment of the debt in gold coin that the judgment should be rendered for coined dollars. In the case at bar it appears, from a reference to the judgment roll of the California court, where the complaint in the action is set out in full, that the notes upon which the suit was brought in the California court are described as notes for the payment of so many dollars, and not as notes for the payment of so many dollars in "United States gold coin." The judgment, by the use of the words, "and that said sum of \$3,916.93, and said interest, be paid in United States gold coin," goes beyond, and is not authorized by, the allegations of the complaint in regard to the terms of the note. The judgment is complete in itself without the added words as to the mode of payment, because it is therein adjudged that plaintiff do have and

recover of and from the defendant the sum of \$3,903.46, with interest, etc., together with costs, etc., amounting to the sum of \$13.50, before the added words are reached. Their omission would detract nothing from the sufficiency of the judgment. In Watson v. Railroad Co., 50 Cal. 523, the verdict and judgment were for gold coin. There was no allegation in the complaint warranting a recovery in gold coin. The Code of Civil Procedure in California requires the judgment to conform to the verdict, and the supreme court of California there held that, "if the verdict goes beyond the issues raised by the pleadings, and passes upon an extraneous fact, not embraced therein, it is void pro tanto, and the surplus matter may be disregarded in entering the judgment." The court in that case proceeds to say: "In this case there was no issue as to whether plaintiff's demand was payable in gold coin, and the complaint contains no averment on that point. The words 'gold coin' in the verdict are therefore mere surplusage, and should have been disregarded in entering the judgment." To the same effect is Chamberlin v. Vance, 51 Cal. 75.

This ruling is applicable here, as the judgment sued upon was rendered in California. It is manifest that the judgment sued upon, being a judgment by default, went beyond the issue raised by the complaint in ordering the judgment to be paid in gold coin, and to that extent is void. The defendant below made this very objection to the admission of the judgment roll. The record shows that he objected to its admission upon the following ground, among others: "That the said judgment roll shows a void judgment, in this: that the judgment therein shown appears to have been rendered by default in an action where the complaint of the plaintiff showed no promise or undertaking of the defendant to pay any sum in gold coin, but, notwithstanding this fact, judgment was entered therein for a sum of money payable in gold coin." We think that the objection was valid as to that part of the judgment which directs payment to be made in gold coin, but not as to the whole judgment. A judgment of a court of another state, adjudicating a matter not presented by the pleadings, or within the issue, is void even in a collateral proceeding. Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385. If the whole judgment is void when all the matters adjudicated by it are outside of the issue, then, when two matters adjudicated upon by judgment are shown upon the face of the judgment record to be easily and naturally separable, and one of them to be within the jurisdiction of the court, and the other to be beyond its jurisdiction, the judgment may be held to be valid as to the former matter, and void as to the latter. In such case the judgment will be sustained so far as it adjudges what the court has the power to adjudge as being within the issue, and will be void so far as it attempts

to adjudicate upon what is beyond its power, as being outside of the issue. This principle was applied in the late case of *People v. Seelye*, 146 Ill. 189, 32 N. E. 458, where the judgment of a probate court, approving the account of a guardian, which appeared in the record to be a part of the judgment itself, was sustained in a collateral proceeding as to a part of the items of the account which the court had the power to pass upon, but was held to be void as to the items which were beyond the jurisdiction of the court. The judgment sued upon in the present action, being void only as to the last clause, which directs the mode of payment, and being valid as to that portion of it which adjudged that the plaintiff should recover the sum of so many dollars, generally, it follows that there was no such variance as is insisted upon, because the declaration correctly declares upon the valid portion of the judgment according to its legal effect.

It is difficult to see how the defendant below could have been injured by the action of the court in admitting the judgment roll from California. In this action of debt upon the California judgment the trial court rendered judgment against defendant for the sum of a certain number of dollars, without any direction that it be paid in any particular kind of money. The defendant has not been required to pay the judgment in United States gold coin. The judgment against him being a judgment for the payment of dollars generally, he can discharge it in either one of the two lawful kinds of money; that is to say, either by paying gold or silver coin, or by paying legal tender notes. The plaintiff, by taking a judgment payable in dollars generally, has waived his right to insist upon payment "in United States gold coin."

Counsel for plaintiff in error claim that a judgment is a contract. Some courts have held that a judgment is a contract, and others have held that it is not a contract. 1 *Freem. Judgm.* § 4; 1 *Black, Judgm.* §§ 7-11. The doctrine of this court is that a judgment is not a contract. *Williams v. Waldo*, 3 *Scam.* 264; *Rae v. Hulbert*, 17 Ill. 572; 1 *Black, Judgm.* § 10, and notes. But, even if the judgment here sued upon be a contract, we see no reason why the party seeking to enforce it may not waive the provision requiring payment to be made in gold coin, and give the debtor the privilege of paying in any kind of money which is legal tender under the acts of congress. The authorities hold that contracts payable in gold coin must be satisfied in that medium, unless another mode of satisfaction meets with the consent of the creditor. With his consent, they may be satisfied in legal tender notes. The prohibition against the satisfaction of a contract payable in gold coin by the payment of any other medium than gold coin only applies where the

satisfaction in another medium than that of gold coin is against the will of the creditor. If the creditor does not choose to take a judgment payable in coined dollars, the debtor is not injured, as then he may pay in either coined dollars or legal tender notes.

Counsel for plaintiff in error invokes the well-settled rule that debt will not lie on any obligation except one for the payment of a sum specifically certain, and insists that the clause as to payment in United States gold coin does not call for the payment of money or a sum certain, but for the payment of an unliquidated amount, to be determined according to the fluctuations of the gold market. Even if the clause in question be regarded as a valid part of the judgment, we are unable to agree with counsel upon this point. We regard an obligation to pay "in United States gold coin" as an obligation to pay in money, or an agreement to deliver a certain weight of standard gold, ascertainable by count of coins made legal tender by statute. A contract for the payment of so many dollars in gold and silver is a contract for the direct payment of money, and the judgment in a suit thereon should be entered for coined dollars and parts of dollars, when such is the will of the creditor. *Hart v. Flynn*, 8 *Dana*, 190; *Dewing v. Sears*, 11 *Wall.* 379. We do not regard the case of *Mix v. Nettleton*, 29 Ill. 245, where it was held that an action of debt would not lie upon a due bill for so many dollars payable in county orders, as having any application here.

It is claimed that the judgment here is for too large an amount. The judgment in the circuit court was for \$3,916.96 debt, and \$280 damages or interest. In the appellate court the defendant in error remitted \$6, and judgment there should have been entered for \$3,916.96 debt, and \$274 damages, but, as matter of fact, the clerk entered up judgment affirming the judgment of the circuit court for \$3,916.96 debt, and \$275 damages, the latter amount being too large by one dollar. There was here what was clearly a clerical mistake in putting the figures \$275, instead of \$274. As the judgment of the appellate court shows upon its face that the defendant "remitted the sum of six dollars from the judgment entered in the lower court," and as the record of the lower court is before us, showing that the judgment for damages there was \$280, there is that in the record and upon the face of the judgment itself by which the latter can be amended, and the mistake of the clerk rectified. We are inclined to think, therefore, that we have the power to correct the judgment of the appellate court in the respect thus indicated. It is accordingly so ordered.

The judgment of the appellate court will be affirmed for \$3,916.96 debt, and \$274 damages, and the costs. Affirmed.

(158 Ill. 8)

**PHILADELPHIA & R. COAL & IRON CO.
et al. v. CITY OF CHICAGO.¹**

(Supreme Court of Illinois. Oct. 11, 1895.)

**MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT
—APPEAL—FAILURE TO FILE MANDATE
—EVIDENCE—PRACTICE.**

1. A city obtained judgment of condemnation of land for a street. It then filed a supplemental petition for a special assessment, and obtained judgment confirming the assessment. This latter judgment was reversed on appeal, but no mandate was filed in the trial court within two years. Rev. St. 1893, c. 110, § 85, provides that if, on reversal of a cause, no mandate is filed in the trial court within two years, "the cause shall be considered as abandoned, and no further action shall be had thereon." *Held*, that the failure to file the mandate did not affect the judgment of condemnation, or prevent the city from filing a new supplemental petition for confirmation, since the only matter that was abandoned was the first special assessment proceeding.

2. Under Rev. St. 1893, c. 24, art. 9, § 46, which provides that, if any special assessment be annulled by the city council, a new assessment may be made, it is no objection to the making of such new assessment that some property owners have made payments under the former assessment before it was annulled, provided such payments are credited to them under the new assessment.

3. One who has testified as an expert witness upon the hearing of objections to an assessment is not thereby rendered incompetent to act as commissioner in making a second assessment as to persons who did not object to the first one.

4. The fact that a second assessment makes the cost of collection much higher than the first one did, which was abandoned, does not render the second assessment roll incompetent as evidence, since Rev. St. 1893, c. 24, art. 9, § 31, expressly makes such rolls competent evidence.

5. Where the extent to which the objector's property will be benefited by a proposed local improvement depends upon the question whether there is a bridge at a certain point, it is competent to show that the city has built such a bridge.

6. Where there are numerous objectors to a special assessment, allowing them to appeal jointly is a matter of discretion with the trial court.

Appeal from superior court, Cook county; Theodore Brentano, Judge.

Petition by the city of Chicago for confirmation of a special assessment. The Philadelphia & Reading Coal & Iron Company and the Lehigh Valley Coal Company filed objections, which were overruled, and they appeal. Affirmed.

Ullmann & Hacker, for appellants. Walter L. Fisher, for appellee.

BAKER, J. On April 9, 1886, the city of Chicago filed a petition in the superior court of Cook county to condemn certain property, therein described, for the purpose of operating, opening, and extending South Canal street, from Lumber street to Archer avenue, in pursuance of an ordinance passed by the council of said city March 15, 1886. The property was condemned, and a judgment for \$178,271.98 was entered. A supplemental petition was filed in said court February 9, 1887, asking for an assessment on the prop-

erty benefited, to raise the money necessary to pay the compensation awarded by the condemnation judgment. Commissioners were appointed. It was found that \$183,216.18 was the amount to be raised, and an assessment roll was returned into court. Various property owners, including one of the two appellants in this case (Lehigh Valley Coal Company), filed objections to this assessment; and after a trial, which resulted in confirming the assessment, they appealed to this court. The judgment of confirmation was reversed on March 29, 1890, and the cause remanded. The ground of reversal was that benefits were assessed on the theory of the construction of a bridge across the south branch of the Chicago river, on the line of the street extension, whereas, in fact, no bridge had been built, or ordered to be built, or provided for in the ordinance. *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010. In the meantime the property owners who had not appealed had paid their assessments. The city thereupon ordered the construction of the bridge, and it was finally built, and paid for by general taxation. No transcript of the remanding order or mandate of this court was filed in the trial court within the statutory period of two years. Rev. St. c. 110, § 85. After the completion of the bridge, the city council of Chicago annulled the old assessment, and ordered steps to be taken to have a new assessment made to raise the amount already awarded in the condemnation judgment; and on January 9, 1894, an order was entered in the superior court finding that the city council had annulled the first assessment, and directing the same to be set aside, and also setting aside and dismissing various subsequent proceedings, and giving leave to file a new supplemental petition. Thereupon a new supplemental petition was filed. The court estimated the costs of the original condemnation suit proper (not including those of the former special assessment) and of the new assessment, and appointed new commissioners to levy an assessment *de novo*, and directed them to assess upon the property benefited the amount of the condemnation award (\$178,271.98), together with the estimated costs of the proceedings. A new assessment was returned into court. Appellants interposed various objections to the confirmation of this new assessment upon their properties. These objections were all held untenable; and the result of the hearing of the questions of law before the court, and of the questions of fact before a jury, was that the new assessments were confirmed; and from the judgment of confirmation this appeal was taken. The two appellants, the Philadelphia & Reading Coal & Iron Company and the Lehigh Valley Coal Company, stand before the court in somewhat different attitudes. The former owners of the property now belonging to the first-mentioned corporation voluntarily paid

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

the first assessment made thereon, amounting to \$2,500. On the other hand, the other appellant, the Lehigh Valley Coal Company, was one of the numerous appellants in the old special assessment case of *Hutt v. City of Chicago*, supra, wherein the judgments for the assessments were reversed; and it has never paid any assessment on the property it owns. Therefore some of the questions at issue are raised by the first-named appellant; some, by the other; and some, by both.

Prior to the trial before the jury, the Lehigh Valley Coal Company made a motion, which was denied, that the proceedings be dismissed as to it, because judgment of confirmation was entered in 1889, which was reversed in 1890 by the supreme court, and no remanding order was filed within two years thereafter. The contention is that, by force of the premises, the cause stands abandoned under the statute, and a new suit is necessary, which must begin anew at the starting point, by the passage of a new ordinance authorizing a special assessment to raise the money necessary to pay for the property taken, to be followed by a new condemnation proceeding, and new award of compensation and damages for property taken or damaged, and culminating in a new assessment of special benefits. The statute is that, if neither party shall file a transcript of the remanding order within two years, "the cause shall be considered as abandoned, and no further action shall be had therein." Practice Act, § 85. In *Koon v. Nichols*, 85 Ill. 155, the court said: "The word 'cause' here means the particular suit in which the order is made; not that the cause of action shall be considered as abandoned, but only that such particular suit shall be considered as abandoned, and no further action shall be had therein." A suit is an action or process for the recovery of a right or claim. The particular suit that was abandoned was the claim made by the city to recover the benefits that had before that time been assessed against the property of the appellants in the *Hutt* Case. The pleading in that particular suit was the supplemental petition, and that, of course, was abandoned, so far as the then appellants were concerned, by the failure to file the mandate. It was a particular suit that was ancillary to the condemnation case or proceeding. But the condemnation case was not abandoned. It had not been appealed from. Presumably, both the city and those whose property was taken or damaged were satisfied with the awards made therein. It was not the particular suit in which the order of reversal was made. The right to levy an assessment for the extension of a street, as determined in the condemnation proceeding already had, unquestionably survived. That right was and is the cause of action; and, under the statute and the decision cited, the cause of action was not abandoned. As was said by us in *Goodwillie v. City of Lake View*, 137

Ill. 51, 27 N. E. 15: "Although a supplemental petition is filed in the condemnation proceeding, the relief sought thereby is supplemental and collateral to the proceeding in which the judgment of condemnation was rendered, and the questions arising in the original proceeding cannot be relitigated upon the supplemental petition. It is for a distinct, separate purpose; that is, to raise funds to pay the judgment already entered." It is true the supplemental petition is filed "in the same proceeding," but this is a mere matter of convenience, and is done only by virtue of a direct authority given by the statute. Rev. St. c. 24, art. 9, § 53. And although this court in *Gulld v. City of Chicago*, 82 Ill. 472, says, "This assessment was in the same proceeding," yet it also there speaks of the "original petition in the condemnation proceeding" and "the supplemental petition in the assessment proceeding." This was because there were two distinct and particular suits or proceedings, but joined or yoked together, as we have seen, simply for purposes of convenience. That, after the reversal and remandment and failure to file the mandate in the *Hutt* Case, the original ordinance was still in force when this new supplemental petition was filed, in January, 1894, and no new ordinance for the opening of the street was necessary, is clearly deducible from the decision of this court in *Partridge v. Village of Hyde Park*, 131 Ill. 537, 23 N. E. 345. There was no error in overruling the motion of the Lehigh Valley Coal Company to dismiss this proceeding as to it.

The superior court also denied the motion of the Philadelphia & Reading Coal & Iron Company to dismiss the proceeding as to it, upon the ground that the former owners of its property voluntarily paid \$2,500, the amount levied against said property for said improvement in the former assessment roll. In the new assessment roll the property is assessed at \$3,150. The contention of the company is that the payment already made discharged the land from any further burden, unless proper steps were taken to collect a deficiency, and that the old assessment, with the fact of its payment, is a bar to the new assessment. The city claims that the new supplemental petition, and the assessment based thereon, is a proceeding *de novo*, in which the commissioners act without reference to the original supplemental petition and first assessment. It concedes, however, that the \$2,500 paid must be applied on the new assessment to the credit of the particular property for which it was paid, and that the property will only have to pay the difference of \$650. Section 46 of article 9 of the city and village act provides as follows: "If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had as herein required in relation to the first, and all parties in interest shall have

the like rights, and the city council or board of trustees and the court shall perform like duties, and have like power in relation to any subsequent assessment as are hereby given in relation to the first assessment." This section makes provision for the annulment of an assessment by a city council or village board of trustees. There may be contingencies in which such an act is eminently and unquestionably advisable and proper. If there was an assessment of \$100,000 and \$5 had voluntarily been paid thereon, and it was definitely and certainly ascertained that the assessment was for some reason invalid, the exercise by the municipality of the power to annul would manifestly be authorized. And this section in substance provides that if any assessment is annulled by the city council, or set aside by any court, a new assessment may be made and returned under the general provisions in regard to special assessments, and just as if no prior assessments had ever been made. The section has no reference to a deficiency assessment, for special provision is made for that in section 47; and it has no reference to a new assessment against delinquents, for special provision is made for that in section 48. In *Union Building Ass'n v. City of Chicago*, 61 Ill. 439, there was involved a proceeding under a section of the special charter of the city, but the court there used language which is in point here. This court said: "The effect of the statute authorizing a new assessment is that the same shall be made as nearly as may be in the same manner as is prescribed for the first assessment. It must in all cases be a de novo proceeding. Its departure from the precise mode of making the first assessment can be justified only so far as may be required by the circumstances of each case. Where no payments have been made, and, from the circumstances of the work, the amount of the costs and expense rests upon estimates alone, then it must be made in all respects like a first assessment. But, when payments have been voluntarily made under the original in whole or in part, then, although such original assessment may be void, still the payments must be allowed to apply. If in full, they operate to discharge the land in respect to which they were made; if partial, they are a discharge pro tanto." See, also, *Bradford v. City of Chicago*, 25 Ill. 411. In *Falls v. City of Cairo*, 58 Ill. 403, *Falls* was not allowed to recover back special assessments voluntarily paid, but that was upon the ground that the improvement had been in part made, and it was considered that the plaintiff had received a full equivalent or compensation for the money paid, in the enhanced value which his property had derived from the improvement.

There was a further motion by the Philadelphia & Reading Coal & Iron Company; i. e. a motion to set aside the assessment roll, because Edward C. Huling, one of the commissioners, was examined as an opinion wit-

ness for the city at the trial upon the former assessment roll. We find no evidence or admission in the record that Edward C. Huling testified at that trial. Besides this, the property of the coal and iron company was not involved in that trial, for its then owners filed no objections, but voluntarily paid the assessment. Huling, therefore, was not a witness as to the effect of the improvement upon the property of said company. The statute required the court to appoint three competent persons as commissioners to make the assessment, and the presumption must be that the court performed its duty in that regard. *Hunt v. Chicago*, 60 Ill. 183, and *Shreve v. Town of Cicero*, 129 Ill. 226, 21 N. E. 815, are not here in point. In each of those cases the claim was that one of the commissioners owned property that was to be specially assessed, and had a pecuniary interest in making the assessment. Here it does not appear that Huling had any personal or pecuniary interest in the matter of this assessment. *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824. Nor can *Cole v. City of Peoria*, 18 Ill. 301, be regarded as an authority that is applicable here. That case arose under a statute where the commissioners were in effect arbitrators, and there was a right to appear before them with witnesses. The commissioners prejudged the case of the appellant, and one of them had announced to him and to others that it would be useless for him to bring any witnesses, and that no testimony offered would make any difference, as the commissioners had made up their minds. Here the worst that can be surmised is that Huling, at the hearing upon the old assessment, may have testified as to his opinion that the assessment then under consideration was just and fair so far as the property of certain designated persons other than appellants or their grantors was concerned. The statute (section 33, art. 9, c. 24) goes so far as to expressly authorize the court, when an assessment has been found not to be true and just, to cause it to be recast by the same commissioners who made the objectionable assessment.

We think there was no error in denying either of the two preliminary motions that were made by the Philadelphia & Reading Coal & Iron Company.

It is objected by the appellants that the ordinance upon which the assessment is based fails to show that the proposed improvement is within the limits of the city of Chicago. It will be presumed that it is so located. *Stanton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987; *Meadowcroft v. People*, 154 Ill. 416, 40 N. E. 442.

It is objected that there were two jury trials, and at least four separate final judgments, on the same assessment roll, and that the court had exhausted its powers by the entry of the first final judgment. This claim is decided adversely to the contention of appellants in *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. 535, and numerous other cases.

It is claimed that the assessment roll was not competent evidence against appellants, because the sum included as costs was largely in excess of the sum included as costs in making the original assessment. The statute expressly provides that, on the hearing, the report of the commissioners shall be competent evidence. Section 31, art. 9, c. 24. It is not suggested that the last estimate made is too large, or that it includes any items of cost that ought not to have been included.

It is claimed that the evidence of Mr. Roemheld was inadmissible, because the only issues before the jury were whether or not the property of the objectors was assessed more or less than it would be benefited, or more or less than the proportionate share of the cost of the improvement. The extent to which the property would be benefited would largely depend upon the fact whether or not there was a bridge across the south branch of the Chicago river, on the line of the street extension. It was competent, therefore, to show that the city had built a bridge there; and the matter of this evidence was so limited as that the jury would understand that the erection of the bridge itself was not the basis of any claim for benefits.

A claim is made that the evidence did not make out a case of special benefits, as a question of fact. The report of the commissioners was competent evidence, and made out for the city a *prima facie* case of the benefits; and, when the evidence is regarded as a whole, it amply sustains the assessments made against the properties of the appellants.

It is urged, finally, that the court erred in denying a joint appeal to all the objectors as prayed for. This was largely a matter of discretion with the trial court, and the presumption is that it was properly exercised. There seem to have been quite as many attorneys engaged in the trial of the objections as there were different property owners, and the defense of each property owner seems to have been made on his or its own theory of the law and fact that was applicable to him or it. At all events, these two defendants prayed for, obtained, and perfected this, their joint appeal, and thereby have had the benefit of a review of the record made below so far as it is applicable to their property.

We find no error. The judgment of confirmation is affirmed. Affirmed.

(158 Ill. 197)

PEOPLE *ex rel.* COREY v. COMMISSIONERS OF HIGHWAYS OF TOWN OF DOVER *et al.*¹

(Supreme Court of Illinois. Oct. 11, 1895.)

BRIDGES—REBUILDING—LIABILITY OF TOWNS—MANDAMUS.

1. Where two adjoining towns have by mutual agreement constructed a bridge on a road separating the towns, and the bridge has be-

come worn out, such towns are bound to rebuild such bridge, both at common law and by virtue of Rev. St. 1893, c. 121, § 21, which declares that bridges over streams on roads on town lines shall be built and repaired at the expense of such towns.

2. The duty of rebuilding such a bridge may be enforced by mandamus on the relation of an interested property holder.

Appeal from appellate court, Second district.

Petition for mandamus by the people of the state of Illinois on the relation of Hamilton Corey against the commissioners of highways of the town of Dover and the commissioners of highways of the town of Ohio. Defendants obtained judgment, which was affirmed by the appellate court. 53 Ill. App. 442. Petitioners appeal. Reversed.

Scott & Davis, for appellants. Geo. S. Skinner, for appellees.

BAKER, J. The relator, a resident of the town of Ohio, in Bureau county, and the owner of 640 acres of land lying in one body, —320 acres in said town and 320 acres in the town of Dover, a town lying directly south of the town of Ohio,—filed in the circuit court of said county his petition for a writ of mandamus to compel the commissioners of highways of said towns to hold a joint meeting, and take the proper and legal steps for entering into a joint contract for the erection of a bridge over a stream on an established town-line road between said towns. The commissioners of the town of Ohio filed an answer admitting all the material allegations of the petition. The commissioners of the town of Dover filed a demurrer to the petition. The circuit court sustained the demurrer, and dismissed the petition, and rendered judgment against the relator for costs. On an appeal to the appellate court the judgment was affirmed, and this further appeal was then taken.

Sections 21 and 22 of the road and bridge law are as follows:

"Sec. 21. Bridges over streams which divide towns and counties, and bridges over streams on roads on county or town lines, shall be built and repaired at the expense of such towns or counties: provided, that for the building and maintaining of bridges over streams near county or town lines in which both are interested, the expense of building and maintaining any such bridges shall be borne by both counties or towns in such proportion as shall be just and equitable between said towns or counties, taking in consideration the taxable property of each, the location of the bridge, and the advantage of each, to be determined by the commissioners in making contract for the same as provided for in section 22 of this act.

"Sec. 22. For the purpose of building or keeping in repair such bridge or bridges it shall be lawful for the commissioners of such adjoining towns, whether they be in the same or different counties, or county

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

boards of such adjoining counties, to enter into joint contract, and such contract may be enforced in law or equity against such commissioners jointly, the same as if entered into by individuals, and such commissioners or county boards may be proceeded against jointly, by any parties interested in such bridge or bridges, for any neglect of duty in reference to such bridge or bridges or for any damage growing out of such neglect."

Rev. St. 1893, c. 121.

Section 23 of the act makes provision for a case where one of the towns refuses to enter into a joint contract; and section 24 gives a remedy where there is such a contract to one town against the other; in the event such other refuses to comply with its contract. The proceeding at bar, however, is under section 22, *supra*, where a remedy is given to any party interested in the bridge to enforce a joint contract against adjoining towns jointly for any neglect of duty in reference to such bridge. If the case were that the commissioners of highways of the town of Dover and the commissioners of highways of the town of Ohio had never jointly constructed or agreed to construct a bridge over the stream called "Master's Fork" at the place where it is crossed by the public town-line road, then it would be governed by the case of *Commissioners of Highways of Town of Dimmick v. Commissioners of Highways of Town of Waltham*, 100 Ill. 631, where this court held that, in the absence of an agreement between the commissioners of highways of adjoining towns in regard to the erecting or repairing of a bridge on the town line, there was no liability on the part of the one to the other to contribute to the cost of building or repairing such bridge. But the case admitted by the demurrer to the petition for a writ of mandamus is this: That a public road was laid out prior to 1859 between said towns, running east and west, the same having been laid out partly by the county commissioners' court before the adoption of township organization and partly by the commissioners of highways of the towns of Ohio and Dover, acting jointly, after the adoption of township organization. That on January 5, 1859, the commissioners of highways of the towns of Dover and Ohio met for the purpose of perfecting said public highway, and divided said town-line road into districts, allotting to each town certain portions to be worked and kept in repair, thereby making the same a town-line road; and that said road is extensively traveled, and of great public utility. That a large stream of water, called "Master's Fork," flows southward, and crosses said town-line road near the southeast corner of section 2 in Dover township, and then flows south in Dover town. That said stream, where it crosses the said town-line road, is at times very deep, and quite wide, and often during the year the water is high and furious. That said stream is impassable

for carriages and wagons at any time of the year within the lines of the highway. That at the time said highway was perfected and made a town-line road, in the year 1859, it was conceded at a joint meeting of the commissioners of highways of said towns that a bridge spanning said stream was necessary for the public travel in order to make use of said road, and that under the law each town should contribute one-half to the erection of said bridge. That some time after establishing said road, on January 5, 1859, the commissioners of highways of the towns of Ohio and Dover acting jointly erected a large wooden bridge across said stream where it crosses said town-line road. That said bridge spanned said stream, and was used from about the year 1860 until the year 1884 or 1885, when it became absolutely unsafe for public travel, finally falling, and being washed away by the stream. That for the last eight or nine years said highway where said bridge crossed said stream has been wholly impassable for carriages and wagons at all times of the year, the eastern bank of said stream being very high. That there has been no way for the last eight or nine years said road could be traveled except by turning out of the highway to the northward, and crossing the stream some distance north of the old site of the bridge, in the relator's field. That for the last eight or nine years relator has been compelled to allow public travel to pass through his fields, and has been compelled to keep up gates to accommodate said travel. That even then they are unable to haul heavy loads along said highway, because of said bridge being gone. It is further admitted by the demurrer that the towns of Dover and Ohio are about equal in value as to the taxable property; that the cost of the bridge would not exceed \$1,000; that the town of Ohio has appropriated and raised by taxation sufficient money for road and bridge purposes to build its proportion of said bridge; and that the town of Dover is abundantly able to construct its proper proportion of said bridge, and now has sufficient money on hand, levied for road and bridge purposes, with which to do so.

The facts stated in the petition may not be very artificially pleaded, but they clearly show that in 1859, at a joint meeting of the highway commissioners of the two towns, a joint agreement or contract was made that the original bridge across Master's fork should be built, and that each town should pay one-half of the cost of the erection of such bridge, and that the two towns, acting jointly, constructed the bridge, about the year 1860; and also show that the public town-line road that passed over the bridge for some 25 years was extensively traveled, and of great public utility; that said road is still extensively traveled, but that, by reason of the bridge having fallen, public travel is forced to trespass upon private property, and heavy

loads cannot be hauled along the highway. The petition does not, in terms, state that the agreement also was to jointly repair or maintain; but, from the facts alleged of the joint agreement to jointly build the bridge, of the subsequent joint construction of the same, and of the use made of the road and the bridge for public travel, the duty to jointly repair follows as a legal conclusion. Lord Coke, in 2 Inst. 700, 701, says: "But admit that none at all were bounden to the reparation of the bridge, by whom should it be repaired by the common law? The answer is by the whole county," etc., "wherein the bridge is," etc., "because it is for the common good and ease of the whole county." In *Rex v. Inhabitants of West Riding of Yorkshire*, 2 East, 342, it was held that, by the common law, if a bridge be of public utility, and is used by the public, then the public must repair it, even though it was built by an individual. And the same rule was unanimously held in the case of *Rex v. Inhabitants of West Riding*, 5 Burrows, 2594, where the common-law doctrine was much considered. In *State v. Town of Campton*, 2 N. H. 513, it was held that a bridge, though erected by individuals, yet if dedicated to the public, and used by the public so long as to conceive its public usefulness, must be repaired by the public; and also held that, under the statute of that state, this public duty devolved altogether upon towns, and in no case upon counties. See, also, *State v. Demaree*, 80 Ind. 519, and *State v. Board of Com'rs of Gibson Co.*, Id. 478, which are cases of like tenor and effect. All of these authorities, with the exception of the two last cited, were approved of by this court in *Town of Rutland v. Town of Dayton*, 60 Ill. 58. It was there, however, held that, under the statute then in force, in order to enable a town to compel an adjoining town to contribute to the repairing or maintaining a bridge over a stream dividing them, which bridge had been originally built by private enterprise, there must be proof of the acceptance of such bridge as a public bridge. See, also, *Town of Dayton v. Town of Rutland*, 84 Ill. 279, where in the same suit this court held that where a bridge over a stream dividing two towns is recognized and accepted as a public bridge by the proper officers of each town, each will be liable to one-half of the expense of keeping the same in repair. Of course, no question of acceptance arises in the case now before us in regard to the original bridge across Master's fork, for it is conceded that it was built upon a public town-line road jointly by the lawful authorities of the towns of Dover and Ohio, in pursuance of a joint agreement or contract made between them.

The conclusion we deduce from that which we have said is this: That the repairing of a public bridge, when such repairs are not chargeable to designated persons, lands, tenements, or bodies politic, is, by the common law, a public charge; and whenever the public

authorities to whom is committed the matter of building, repairing, and maintaining public bridges either construct a bridge upon the line of a public road, or recognize and accept for public use a bridge built there by others, and such bridge is used by the public, then liability for the cost of keeping such bridge in repair is by law imposed upon the county, town, or adjoining towns, as the case may be, whose representatives such public authorities are. And it follows, as a corollary, that the repairing of the original bridge over Master's fork at the place where it is crossed by the public town-line road, it having been built by the towns of Dover and Ohio jointly, and under a joint agreement between such towns, is a duty and a burden that, by the combined effect of the common law and the statute, is obligatory upon said two towns.

The towns of Dover and Ohio being jointly liable for repairs, are they therefore legally bound to build a new bridge in place of the original bridge, which it is admitted became rotten and unsafe, and finally fell, and was washed away by the stream? To "restore" and to "renew" are given by lexicographers as synonyms of "repair." It has always been held at the common law that, under a covenant to repair, a tenant is obliged to rebuild, even in the case of the total destruction of the demised premises. In *Canal Navigation v. Pritchard*, 6 Term R. 750, it was held that a covenant binding a party to keep a bridge in repair bound him to replace it, although it was totally destroyed by a flood. In *People v. Hillsdale & C. Turnpike Road*, 23 Wend. 254, where the duty imposed was one to keep in repair, and the bridges were carried away by a sudden freshet, it was held that the company was required to rebuild within a reasonable time. In *Rex v. Inhabitants of West Riding*, supra, the indictment was for a failure to repair, and the proof was that the bridge had been taken away by a flood, and a verdict of guilty was rendered, subject to the opinion of the court on the question "whether the inhabitants of the West Riding are obliged to rebuild the said new bridge," and the court of king's bench unanimously answered the question in the affirmative. In *State v. Town of Campton*, supra, the bridge was wholly destroyed by an unusual rise of water in the river, and a verdict against the town was sustained. See, also, *Briggs v. Guilford*, 8 Vt. 264. In *State v. Board of Com'rs of Gibson Co.*, supra, it was held that mandamus would lie against county commissioners to keep public bridges in repair, and that the duty to repair extended to replacing or rebuilding where there was a substantial destruction of the original bridge; and in *Howe v. Commissioners*, etc., 47 Pa. St. 361, the words used in the statute were "to repair." The court said: "If we should set aside the act altogether, the duty of maintaining the bridge, once legally imposed upon the county, and never taken off, would still have to be enforced;" and further said: "We cannot graduate repairs, and say

slight ones shall be done, and large ones may be neglected. The legislature did not mean we should do this. They meant by repairs whatever was necessary to make bridges safe and passable."

The case now before us is essentially different from that presented to this court in *People v. Commissioners of Highways*, 118 Ill. 239, 8 N. E. 684. In that case it was attempted to compel the commissioners of highways to build certain bridges that were wholly within the limits of their own town, and the element of an agreement with the commissioners of an adjoining town was wholly absent. The sections of the statute that are here involved—i. e. sections 21, 22, 23, and 24 of the road and bridge law—did not enter into that case; and, moreover, it was there made to appear that the highway commissioners had exhausted their powers of taxation, and the funds so raised had been expended for other purposes. Here, on the contrary, the arrangement and agreement made in 1859 between the adjoining townships for the construction and repair of the bridge on the public town-line road is admitted, and the suit is based on a statute specially applicable to such a case, which provides that such contract or agreement may be enforced in law or equity, the same as if entered into by individuals, and that the commissioners of the adjoining towns may be proceeded against jointly, by any parties interested in the bridge, for any neglect of duty in reference to such bridge; and it is conceded that both towns are abundantly able to construct their proper proportions of the bridge, and that they now have on hand sufficient money levied for road and bridge purposes to enable them to do so. It is the law of this state that no town is legally liable, without its assent, to aid in the construction or repair of bridges over streams on town-line roads, or for bridges across a stream constituting a part of its boundary; but it is equally a part of the law that any town may voluntarily assume such liability by contract or agreement, express or implied. *People v. Supervisors of La Salle Co.*, 111 Ill. 527; *Town of Rutland v. Town of Dayton*, 60 Ill. 58; *Town of Dayton v. Town of Rutland*, 84 Ill. 279; *Commissioners of Highways of Town of Dimmick v. Commissioners of Highways of Town of Walham*, 100 Ill. 631.

We think that, under the circumstances of this case, as admitted to be true by the demurrer to the petition, there is an absolute duty imposed on the commissioners of highways of the town of Dover to join with the commissioners of the town of Ohio in repairing the bridge, by rebuilding it; and, this being so, mandamus will lie. While it is the imperative duty of the commissioners of highways of the two towns to replace the bridge, they are necessarily invested with an incidental discretion as to the kind of new bridge to be built, but even this discretion, if abused or made to work injustice, can be controlled by mandamus. *Village of Glencoe v. People*,

78 Ill. 382; *Brokaw v. Commissioners of Highways*, 180 Ill. 482, 22 N. E. 596.

It was error to sustain the demurrer to the petition, and dismiss it out of court at the cost of the relator.

The judgments of the circuit and appellate courts are reversed. The cause is remanded to the circuit court, with directions to overrule the demurrer to the petition. Reversed and remanded.

(157 Ill. 605)

STREET et al. v. CHICAGO WHARFING & STORAGE CO.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

CONSTRUCTION OF CONTRACT—EQUITY—PLEADING—PRACTICE—APPEAL—REVERSAL.

1. Plaintiff agreed to lease to defendant certain premises at expiration of an existing lease. There were on the premises certain fixtures belonging to the tenant, which, under the lease, plaintiff was to buy at an appraised price. The agreement to lease provided that defendant should "be entitled to take" said fixtures at their appraised value, or to purchase them direct from the tenant, and that at the expiration of defendant's lease plaintiff should buy said fixtures from him. *Held*, that defendant was bound to purchase the fixtures, his only option being as to the mode of purchase.

2. Where a bill prays for reformation of a contract, for its specific performance, and for general relief, a decree enforcing specific performance without reforming the contract is supported by the bill.

3. In cases not wholly foreign to the jurisdiction of a court of chancery, a defendant who has answered the bill and submitted to a hearing without objection cannot object on appeal that the complainant has an adequate remedy at law.

4. A defendant who has introduced no evidence, but contented himself with cross-examining the complainant's witnesses and objecting to their testimony, and who has obtained a decree in his favor, which has been reversed on appeal, has no right on the remanding of the cause to introduce evidence in defense.

Appeal from appellate court, First district.

Bill by the Chicago Wharfing & Storage Company against Charles A. Street and Frederick A. Keep, copartners as Street, Chatfield & Co. Defendants obtained judgment, which was reversed by the appellate court. 54 Ill. App. 569. Defendants appeal. Affirmed.

The Chicago Wharfing & Storage Company, appellee herein, was the owner of certain dock property in Chicago, subject to a leasehold interest of Walter Shoemaker & Co.; such leasehold beginning May 1, 1887, and ending April 30, 1892. Shoemaker & Co. had placed on the property a large amount of planking for driveways and sorting platforms, and had erected fences, lumber sheds, and laid foundation timber for piling lumber. The lease to Shoemaker & Co. provided that in case the lease should not be renewed the lessor should at its expiration purchase the planking on the premises, and pay therefor the valuation made by three appraisers.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Street, Chatfield, & Co., the appellants, negotiated for a lease of the premises for a term beginning May 1, 1892, and their attention was called to the provision in the Shoemaker lease requiring the lessor to purchase the planking, and the lease was shown to them. The negotiations with Street, Chatfield & Co. were made on behalf of the company by Galloway, who is its treasurer, and on behalf of Street, Chatfield & Co. by Street. Galloway stated to Street the provisions of the Shoemaker lease; that Street or the company should take the planking at the expiration of that lease at an appraised value, at the same time saying that he (Galloway) would lease the property to appellants for \$5,400 a year providing they would take the planking as provided in the lease. Street, in answer to that proposition, said that he would like to negotiate with Shoemaker for the lumber shed, stable, fencing, and some other things that they had on the ground, which were not included in the arbitration agreement, and that while he (Street) was negotiating for these he might make an arrangement to purchase the planking. Galloway said he had no objections to his buying the planking by private trade; that "he could either buy it or take it at the appraised value." Street said he would take the premises on the terms named. They then put their agreement into writing. The agreement, as written, is substantially this: "Memorandum of agreement made the second day of February, 1892, between the Chicago Wharfing and Storage Company, a corporation of the one part, and Street, Chatfield & Co., of the other part, witnesseth: That the first party agrees to lease to the second party lots 29-38, both inclusive, in subblock 2 of block 18, Sheffield's addition to Chicago, now occupied by Walter Shoemaker & Co., from May 1, 1892, to April 30, 1897, for \$450 a month, to be paid monthly in advance, beginning May 1, 1892. First party agrees to provide an office. First party is to pay taxes on the ground, and second party on the improvements. In consideration of the undertaking by the first party the second party agrees to take a lease of said premises, and to pay the rent named, and to pay taxes. The party of the second part shall be entitled to take the planking now on said ground, belonging to Walter Shoemaker & Co., at the appraised value as provided for in the lease between James B. Galloway and Walter Shoemaker & Co., or to purchase said planking direct from Walter Shoemaker & Co., and at the expiration of the lease hereby agreed to be made the first party agrees to purchase the planking on said yard of Street, Chatfield & Co. at its then appraised value, to be appraised as follows: Each of the parties to said lease shall select one appraiser, and if these two cannot agree they shall select a third appraiser, and the majority of the three so chosen shall decide the value of said planking. First party

agrees to enforce the terms of lease with Shoemaker & Co. regarding the river channel." After this agreement was made, Street negotiated with Shoemaker & Co., and bought the lumber shed, fencing, and other property on the premises, but they could not agree on the price of the planking. Street then requested an immediate appraisal. Appraisers were appointed, but the one selected by Galloway declined to act, and Street then said he would himself get a man who would be acceptable, and who would make a good appraiser. Street informed Galloway of the time set for the appraisal, and requested him to be present. On April 7, 1892, Street introduced Galloway to Holtmeier, the appraiser selected by Street, and an appraisal was made the same day. The price placed on the planking was almost \$500 more than the amount for which it had been offered to Street by Shoemaker & Co. Galloway left while the appraisers were at work, but Street remained until the appraisal was made. The next day Street called on Galloway, and said the appraisal was too high, but he was willing to pay the amount for which it had been offered to him. Shoemaker & Co. refused the offer. Leases were drawn and tendered to Street, Chatfield & Co. in accordance with the agreement referred to, a provision being inserted that Street, Chatfield & Co. should pay the appraisal. They declined to sign the lease. On May 1, 1892, Street, Chatfield & Co. took possession of the property and the planking, and are using the same in their business. On May 2, 1892, they sent the complainant notice to remove the planking.

On May 13, 1892, appellee filed a bill against appellants for the specific performance of the contract. A demurrer was sustained to that bill, as was also a demurrer to an amended bill. Thereupon appellees, by leave of court, filed this their second amended bill, and prayed therein both for a reformation of the contract and for specific performance. There was then answer and replication, and the cause was referred to a master in chancery to take the evidence and report his conclusions thereon. The master reported the testimony and his conclusions. His ultimate conclusions were that it was the understanding of the parties to the agreement, prior to the time when the same was reduced to writing, that Street, Chatfield & Co. should either take the planking at the appraised value, or should purchase it from Shoemaker & Co. at private sale, but that it is not shown that, when the agreement was actually dictated by Galloway and written out, it was the intention of the parties to use any different language than was used in the agreement, and that Galloway thought that the words "be entitled to" meant, and all the time has insisted that they do mean, something different from what the court has already determined they do mean; that Street felt all the time, until advised to the contrary by his attorney, that he was obliged to do one of two things,—either

take the planking at its appraised value, or purchase it at private sale,—yet that this conclusion is not without doubt, and it is possible that he and Galloway may have understood the matter differently; that the evidence does not show any such mistake, or come within the rule governing the reformation of contracts. And the master recommended that a decree should be entered dismissing the second amended bill for want of equity. At the hearing the court refused to allow the exceptions to the master's report; and dismissed the second amended bill out of court for want of equity. Upon a writ of error sued out of the appellate court of the First district, the decree of the circuit court was reversed and the cause remanded, with directions to enter a decree directing Street, Chatfield & Co. to pay into court the appraised value of the planking as found by the appraisers, with interest thereon at 5 per cent. per annum from May 1, 1892, and to execute a lease of said premises in accordance with the instrument signed by the parties and bearing date February 2, 1892, the same to be prepared and executed by the Chicago Wharfing & Storage Company. The judgment and decree of the appellate court are brought here for review by this appeal.

S. M. Millard, for appellants. Adolph Traub, for appellee.

BAKER, J. (after stating the facts). As we understand the record, the original bill and the first amended bill are not now before us. Under a leave to amend, the complainant below struck out of the record the original and the first amended bills, with the exception of the exhibits, which were expressly retained and made parts of the second amended bill of complaint. Although the court had sustained demurrers to the original and first amended bills, yet it had not dismissed either of them, but had retained them for purposes of amendment; and the complainant had the right to dismiss them, not only because no cross bill had been filed, but for the purpose of substituting for them, with the leave of the court, its second amended bill. But we are unable to see that any of these things that we have mentioned materially affect the rights of the parties. By the second amended bill two objects are sought,—the reformation of the contract, and the specific performance of the contract. The appellate court held that the complainant is entitled to the last of these measures of relief, but that it was not necessary that there should be any reformation of the agreement signed by the parties. Assuming a proper case is made out for relief, there can be no sound objection to this view. The prayer is for both kinds of relief, and that includes each kind. And besides this the bill contains the general prayer for other and further relief, and that is comprehensive enough to include all the relief that the appellate court directed to be

given. Nor can the point now be made that appellee has an adequate remedy at law. Appellants answered the second amended bill and went to a hearing, and submitted the question of their rights to the decision of the chancellor. In cases that are not wholly foreign to the jurisdiction of a court of chancery, defendants cannot do this, and then, in the event the adjudications are adverse to their interests, claim that the complainants had adequate remedies in the courts of law.

The material question in the case is as to the interpretation to be put upon the contract. Are appellants bound to take the planking and pay its appraised value? Where the contract is in writing the writing itself is primarily to be considered in ascertaining the intention of the parties, and all its different provisions are to be read and construed together, so as, if possible, to make a sensible and consistent whole. It is apparent that from the stipulation that the party of the second part "shall be entitled to take the planking" "at the appraised value," "or to purchase said planking direct from Walter Shoemaker & Co.," taken alone, it is difficult, perhaps impossible, to deduce a conclusion that it was the intention to absolutely bind the party of the second part to take the planking in one way or the other. The words, in and of themselves, and separated from the context, seem to indicate an option or privilege given said second party to take the planking, if they saw fit so to do, and if they elected to take it then they should also have the right to either make a personal contract of purchase with Shoemaker & Co., or take it at its appraised value. But in the same sentence with said provision, and immediately following it, and separated from it only by a comma, is this further provision: "And at the expiration of the lease hereby agreed to be made the first party agrees to purchase the planking on said yard of Street, Chatfield & Co. at its then appraised value." How could appellee, at the expiration of the lease bargained for, purchase the planking from appellants, unless it be that the latter first got it from Shoemaker & Co. either at an agreed price or at the appraised value, ascertained in the manner pointed out in the then expiring lease to Shoemaker & Co.? The reasonable and necessary implication is that it was intended by both parties that appellants should at all events take the planking either in the one way or the other. This being so, it is evident that when, in their written contract, they used the words, "shall be entitled to take the planking at the appraised value, or to purchase said planking direct," by means of a bargain to be made with Shoemaker & Co., the only option or choice the parties were making provision for was simply and only an option or choice to appellants as to the mode by means of which they should acquire the property. It will not do to say that the pro-

vision for the purchase of the "planking on said yard" at the end of the term to be demised to appellants had reference to planking that might be purchased by them and placed on the yard during such term. That which is specified in this sentence of the memorandum of agreement, and which the parties state they were contracting about, was the "planking now on said ground, belonging to Walter Shoemaker & Co.; and they, a little further along in said sentence, speak of "said planking," and immediately add that at the expiration of the new lease agreed to be made the first party is "to purchase the planking on said yard at its then appraised value." It seems to us that it is quite plain that the planking that the parties had in their minds at the time, and that was the subject-matter of their contract, was the planking that they then spoke of as "now on said ground." The rule is that the intention of the parties must govern, but that intention is not to be sought merely in the apparent meaning of the language used, but that the meaning of the language may be enlarged or limited according to the true intent of the parties, as made manifest by the various provisions of the contract considered as a whole. *Robinson v. Stow*, 39 Ill. 568; *Chicago, M. & N. R. Co. v. National Elevator & Dock Co.*, 153 Ill. 70, 38 N. E. 915; *Bull v. City of Quincy*, 155 Ill. 566, 40 N. E. 1035. In *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877, we said that greater regard is to be had to the clear intent of a contract, when ascertained, than to any particular words which may have been used in the expression of that intent. In *Hesse v. Stevenson*, 3 Bos. & P. 574, the court used this language, which was quoted with approval by this court in *Robinson v. Stow*, supra. "However general the words of a covenant may be, standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words." In the case at bar the words "shall be entitled," found in the contract, are, as we think, to be limited in their operation to the matter of an election by appellants as to which of the two designated ways of acquiring the ownership of the planking on the yard they should adopt.

But if it should be regarded that the contract, in view of its phraseology and its various provisions, is ambiguous, and therefore open to extrinsic aid in the matter of its construction, there are various other rules of interpretation which, from the standpoint of the evidence dehors the written agreement itself, lead to the same conclusion that we have already reached, and make it reasonably certain. Some of them, which we regard as having good and sure foundations in the testimony contained in this record, we may mention: The court will, if necessary, put itself in the

place of the parties, and read the contract in the light of the circumstances surrounding them at the time it was made, and of the objects which they evidently had in view. So, also, the acts of the parties themselves, indicative of their construction placed upon it, may be resorted to for the purpose of determining the true meaning of the written agreement. And in this regard it makes no difference whether such acts are contemporaneous or subsequent. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206. Moreover, where the contract is in fact understood by one of the parties in a certain sense, and the other party knows that he so understands it, then the undertaking is to be taken in that sense, provided this can be done without making a new contract for the parties. *Wells v. Carpenter*, 65 Ill. 447. Here there can be no question whatever, under the evidence, but that appellants knew full well the intention and understanding of appellee, and the object it had in view at the time the memorandum of agreement was made. In fact, we even think that the master in chancery was justified by the evidence in the conclusion that he reached and reported to the court,—that Street himself thought that he was obliged to do one of two things, either take the planking at its appraised value, or purchase it at private sale, until, upon consulting an attorney, he was advised to the contrary. In respect to the obligation to pay *Walter Shoemaker & Co.* the value of the planking as found by the appraisal, the appellants, as between themselves and appellee, are, in the view of a court of equity, the principal debtors, and appellee their surety; and appellee therefore is entitled to maintain a bill to compel appellants to discharge their obligation to *Walter Shoemaker & Co.* *Moore v. Topliff*, 107 Ill. 241; *Coggeshall v. Ruggles*, 62 Ill. 401. The doctrine of estoppel seems, to some extent, to be relied on by appellants. In our opinion that doctrine has no place in this case, unless it be that it is applicable as against appellants themselves.

It is urged it was error in the appellate court to remand the cause with directions to enter a decree against them without giving them opportunity to introduce testimony and be heard in the circuit court. This claim is based on the fact that they brought forward no evidence, either before the master or at the hearing, but contented themselves with cross-examining the witnesses of appellee and objecting to its testimony. They had opportunity to produce such witnesses and such competent testimony as they desired. Not having availed themselves of this opportunity, it must be presumed that they either acquiesced in the statements made by the witnesses introduced by appellee, as true, or concluded that they could not successfully and truthfully contradict them, and therefore were willing to submit the cause for decision, relying upon the claim of the incompetency and insufficiency of the evidence of appellee to es-

tablish its cause. As they made their bed they must lie in it. Courts will not hear causes by piecemeal. Appellants have had their day in court. If the defense they made was unsuccessful, it was their misfortune, but the fact they made a bad and insufficient defense does not give them the right to have the cause remanded for the purpose of affording them an opportunity to hunt up a better defense. Sound public policy demands that there shall be an end to litigation. The judgment and order of the appellate court are affirmed. Affirmed.

(158 Ill. 453)

CHICAGO, P. & M. R. CO. v. GOFF.¹

(Supreme Court of Illinois. Nov. 4, 1895.)

NEW TRIAL—MOTION—EMINENT DOMAIN—EVIDENCE—INSTRUCTIONS.

1. Under Rev. St. 1893, c. 110, par. 57, § 56, which declares that a party wishing to move for a new trial "shall, before final judgment be entered, or during the term if it is entered, file points in writing, particularly specifying the grounds of such motion," such points in writing are in time if filed during the term at which judgment is entered, though after the motion for new trial has been argued and overruled.

2. A party who argues a motion for new trial before any points in writing have been filed thereby waives the filing of such points.

3. Where a railroad company seeks to condemn part of a 40-acre tract which is spoken of by the witnesses as the "farm," while the tract of land near by, but not adjoining, on which the owner lives, is spoken of as the "home farm," an instruction to the effect that if said owner's farm had been by the railroad cut off from the highway the jury should take that fact into consideration in estimating his damages, is not misleading, as tending to make them allow damages for the "home farm" being cut off from the highway.

4. Where the evidence clearly shows that the land alleged to have been damaged is a timbered tract, and the witnesses, in estimating its value, treat it as a piece of unfenced timber land producing no present income, it is harmless error to refuse to permit the railroad company to show on cross-examination of the owner that he derives no income from the land.

Appeal from Jefferson county court; William T. Pace, Judge.

Condemnation proceedings by the Chicago, Paducah & Memphis Railroad Company against David A. Goff. There was judgment condemning the land and awarding compensation. The railroad company appeals. Affirmed.

Norman H. Moss and C. H. Patton, for appellant. William H. Green, for appellee.

CARTER, J. This was a proceeding in the county court of Jefferson county under the eminent domain act, by the appellant company, for the condemnation of a strip of land 80 feet in width, and extending across the west side of a 40-acre tract owned by appellee. The petition seeks to have the compensation to be paid ascertained according to law.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Appellee filed a cross petition, claiming damages to his adjoining and contiguous land not taken. The jury returned a verdict of \$25 for the land taken, being 2½ acres, and \$100 damages to the land not taken, upon which the court rendered judgment.

By the record it appears that the written motion and point of appellant for a new trial were filed after the hearing thereof, and after the motion for a new trial was made and passed on by the court, but at the same term. Appellee (defendant below) moved to strike the written motion from the files, because the same was filed after the court had passed upon the motion for a new trial, and because the motion for a new trial made and overruled was only a verbal one, and the matter in the written motion had never been seen, read to, or passed upon by the court. This motion was overruled, and defendant excepted to the ruling of the court. It is urged by counsel for appellee that it is not a compliance with the provision of the statute to argue a motion for a new trial, and afterwards reduce the motion to writing, and file it as required by the statute; and that the motion for a new trial is not properly in the record, nor before this court; and that a compliance with the statute requires that a party wishing to move for a new trial must file the points in writing, particularly specifying the grounds of such motion, before it can be heard. This court held in *Railroad Co. v. McMath*, 91 Ill. 104, that it would be the correct and better practice to file the points in writing, and preserve them in the bill of exceptions; that the trial court may, under the statute, of its own motion, require to be filed the points in writing, giving the grounds for which a new trial is asked; and that the opposite party may by rule compel the same thing to be done, but that no good reason could be perceived why he might not, the court not objecting, waive them. And in that case, as in the one at bar, the motion for a new trial was argued without them, and was submitted to the court for a decision, and it was held to be too late to object for the first time in the appellate court, and that it would be unjust and unfair to permit defendant, when he could have had the written reasons for the motion before the argument by asking for them, to quietly lie by and argue the motion, and afterwards object. This court further said: "The court has, time and again, both under the present and prior statutes, impliedly held it would pass upon the evidence and action of the lower court in overruling the motion for a new trial, regardless whether it appeared from the bill of exceptions that the points in writing were filed or given to the court and counsel or not." The bill of exceptions filed herein shows that the petitioner made a motion for a new trial, that it was overruled by the court, and that petitioner then and there excepted to the decision of the court in overruling said motion; therefore this court can consider the ques-

tion of the sufficiency of the evidence to support the verdict. *Insurance Co. v. Peck*, 126 Ill. 493, 18 N. E. 752; *Railroad Co. v. O'Keefe*, 154 Ill. 508, 39 N. E. 606. The statute provides that: "If either party may wish to except to the verdict, or for other causes, to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, or during the term if it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court." Rev. St. 1898, c. 110, par. 57, § 56. The "points in writing" were filed during the term, and, as defendant below went to a hearing of his motion before they were filed, the court committed no error in refusing to strike them from the files.

An examination of the evidence preserved in the record shows considerable difference in the opinions of the witnesses as to the damages sustained by appellee, but we are unable to say that the evidence does not justify the verdict. Neither do we perceive any serious objections to the giving of appellee's instructions, as they could not have misled the jury. The third instruction for appellee is objected to because it stated that, if the jury believed from the evidence that the defendant's farm had been cut off from the highway, such inconvenience, or damage, if any, was a matter for the jury to take into consideration in estimating his damages, if any were proved. It is argued that, as there was evidence that the home farm of appellee was some distance from the 40-acre tract in question, and that the 40-acre tract was not a "farm," the instruction was calculated to mislead the jury by having them conclude that damages might result from his home farm being cut off from the highway. We do not think the jury would so understand the instruction. The 40-acre tract was spoken of in the testimony as the "farm," while the home place of defendant below was spoken of as the "home farm." There could have been no doubt in the minds of the jury which land was referred to by the word "farm" in the instruction. It was clear that it was the 40-acre tract in question. Other instructions are criticised, but we do not think they are open to the objections urged. Taking the instructions as a series, we think the jury were fairly instructed, and that the law was stated as favorably to appellant as it was entitled to have it stated.

Counsel for the petitioner sought to show on cross-examination of the defendant below, by certain questions put to him, that the land in question had no present productive value, and that he derived no income from it, but the court sustained the objections interposed to the questions, and refused to permit the witness to answer, and appellant insists that this ruling of the court was errone-

ous, and that the judgment should for this error be reversed. We agree with counsel that the proffered testimony would have been proper on cross-examination of the witness, as bearing upon the value of the land, and the damages the owner would sustain by the location of the railroad upon it, had it not otherwise appeared that the owner derived no income from it, but simply used it in obtaining his firewood. But, as the whole evidence showed that the land was a timbered tract, only a few acres of it cleared, and the witnesses, in fixing its value before and after the location of the road, treated it as a piece of unfenced, timbered land, producing no present income, we cannot see how appellant was prejudiced by this ruling of the trial court. Finding no substantial error, the judgment will be affirmed. Judgment affirmed.

(159 Ill. 38)

ESKER et al. v. HEFFERNAN.¹

(Supreme Court of Illinois. Nov. 4, 1895.)

EJECTMENT BY MORTGAGEE—ACKNOWLEDGMENT—
TAX TITLE—NOTICE OF REDEMPTION.

1. The mortgagee in a mortgage of the statutory form, in which the mortgagor "mortgages and warrants" the land, may maintain ejectment against third persons after condition broken and before foreclosure sale.

2. A deed conveying land in Illinois, and acknowledged in Indiana in 1858 before a recorder, is properly acknowledged, it being shown that at that time such recorders were authorized by the Indiana law to take acknowledgments.

3. Where the affidavit on which a tax deed is issued shows failure to comply with the statutory prerequisites, the defect cannot be corrected by extrinsic evidence.

4. A published notice of redemption from tax sale which misstates the section in which the land is situated is invalid.

Error to circuit court, Effingham county; Silas Z. Landes, Judge.

Ejectment by John Heffernan against Mary Esker and Frank Esker. Plaintiff obtained judgment. Defendants bring error. Affirmed.

An action of ejectment was brought at the October term, 1893, of the Effingham circuit court, by defendant in error against plaintiffs in error, to recover possession of the S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of section 19, township 7 N., range 7 E., third P. M. Heffernan sought to recover by virtue of a mortgage executed to him by one Foster, on which a decree of foreclosure had been rendered, and which decree at the time of the commencement of this action still remained unsatisfied. No sale had been made under the decree, and consequently no deed had been issued. The mortgage was of the statutory form of this state, and bore date June 1, 1884, and the decree of foreclosure thereon was rendered at October term, 1894, of the Effingham circuit court. It is conceded that defendant in error shows a connected chain of title in fee to this land in William Foster, the

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

mortgagor, unless there is a valid objection to an acknowledgment of a certain deed from John A. Armstrong and wife to Leonidas H. Carr, executed in the state of Indiana in 1858. Plaintiffs in error claimed title in themselves by virtue of a chain of title adverse to Foster, the mortgagor, and based on a tax deed dated August 2, 1887. The circuit court rendered judgment in ejectment against the defendants below. A new trial was granted under the statute, upon which a like judgment was rendered, which is now sought to be reversed by plaintiffs in error in this court.

Henry B. Kepley, for plaintiffs in error.
Gillmore & Gillmore, for defendant in error.

PHILLIPS, J. (after stating the facts). Two questions are presented on this record for the consideration of this court: First. Can a mortgagee, after condition broken, under our present statutory form of mortgage, maintain an action of ejectment against the mortgagor or third persons in possession before foreclosure and sale, but while the mortgage indebtedness remains unsatisfied? The second question raises the sufficiency or validity of the tax deed upon which the title of plaintiffs in error is based.

Under the common-law form of mortgage, a mortgagee, after forfeiture by reason of nonpayment, had sufficient title on which to maintain an action of ejectment against the mortgagor or other party in possession. *Delahay v. Clement*, 3 Scam. 200; *Kilgour v. Gockley*, 83 Ill. 109; *Finlon v. Clark*, 118 Ill. 32, 7 N. E. 475; *Tyler, Ej. p. 169 et seq.*; *Carroll v. Ballance*, 26 Ill. 9. The rule is well settled in this and other states, above stated, that the mortgagee, after condition broken, can maintain an action of ejectment without notice. The statutory form of mortgage, which contains the word "warrant," carries with it all covenants of title and is conveyance of the fee. *Elder v. Derby*, 98 Ill. 228. The mortgage in question, as disclosed by the record, is of the form prescribed in sections 9, 12, c. 30, Rev. St., and contains the covenant of warranty. It follows, therefore, that a mortgage of the statutory form, as above prescribed, does not differ, in the right of the mortgagee to maintain his action of ejectment, from the common-law form of mortgage. The states of New York and Wisconsin have mortgages similar in form to our present statutory form of mortgage, and it has been held in a number of cases cited from those states that no action of ejectment can be maintained by the mortgagee for a recovery of the mortgaged premises. The rule, however, in those states, is regulated, not by the common law, but entirely by statute. Statutes of both those states provide that the mortgagee is not entitled to possession of the mortgaged premises, and cannot maintain any action to recover possession, either before or after

condition broken; so that the cases cited from those states are not applicable to our own state, in which the common law, in the absence of any statute on the question, is still in force. Our present statutory form of mortgage, containing as it does the word "warrant," and carrying with it all covenants of title, does not materially differ from the common-law form of mortgage; and it follows, therefore, that the mortgagee may maintain an action of ejectment, after condition broken, against the mortgagor or any other person in possession of the mortgaged premises. An exception to this rule is that of a tenant in possession under a leasehold executed prior to the date of the mortgage, or other party whose title or possession may be superior.

This is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee simple. To do this he is bound to show in himself a fee-simple title at law, as distinguished from an equitable title. *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863. In the case above cited this court, in the opinion, said: "There is perhaps no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage the entire legal estate passed to the mortgagee, and, unless it was expressly provided that the mortgagor should retain possession until default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most states of the Union, including our own, in which the common-law system prevails." Under the rule of this court the mortgagee is held, as in England, in law, the owner of the fee, having the *jus in rem* as well as the *jus ad rem*. *Oldham v. Pfeiffer*, 84 Ill. 102; *Finlon v. Clark*, 118 Ill. 32, 7 N. E. 475; *Taylor v. Adams*, 115 Ill. 574, 4 N. E. 837. It is true that courts of equity from an early period have taken a different view of the matter. They have looked upon the forfeiture of an estate at law because of nonpayment on the day fixed the mortgage as in the nature of a penalty, and have given relief accordingly. This re-

rief was given by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so was barred by foreclosure, and this right was called "equity of redemption." Courts of equity have looked at the substance of the transaction, rather than its form, and have held that the mortgage was a mere security for the payment of a debt, and that the mortgagor was the real beneficial owner of the land, subject to a lien for the indebtedness, and have also held that the interest of the mortgagee was simply a lien upon the land rather than an estate in it. As we have seen, however, an action of ejectment being one at law and not in equity, naked legal rights, and not equitable rights, must prevail.

Objection is made to the acknowledgment of a certain deed in the chain of title of defendants in error, on the ground that the acknowledgment was taken in the state of Indiana, before an officer of that state known as a "recorder," in the year 1858. It appears from the statute of that state, in evidence in this record and properly attested, that at that time such officer was authorized to take acknowledgments of deeds in the same manner as other officers therein named; that the office of recorder was created by the constitution of the state of Indiana, and as such he was authorized to take acknowledgments of deeds in that state. This deed, having been acknowledged, therefore, in such conformity with the laws of the state of Indiana as would entitle it to be admitted for record in that state, was, under the statute of our state in force at that time, properly admitted for record here, and the acknowledgment is valid. It is conceded, if this acknowledgment was valid, defendant in error showed a connected chain of title in Foster, the mortgagor. Having found, therefore, this acknowledgment to be valid, and that defendant in error, as mortgagee, was entitled to maintain ejectment, it follows, therefore, he is entitled to recover, unless the defendants below, plaintiffs in error here, show a better title.

To defeat the title of defendant in error, and to show better title in themselves, plaintiffs in error relied upon a chain of title based upon a tax deed issued to Henry B. Kepley by the county clerk of Effingham county, of date of August 2, 1887. Objections were made to the introduction of this deed in evidence on the ground of the invalidity of the judgment for delinquent taxes, and also upon the insufficiency of the affidavit upon which the tax deed was based. An examination of the record discloses that the objections to the judgment are not well taken. A more serious difficulty, however, arises as to the affidavit presented to the county clerk, and upon which the tax deed was issued. It appears that, at the time of the sale for delinquent taxes, William Foster, the owner of the land in question, and the person in whose name the same was assessed, was a nonresident of the county. Section 216, c. 120, Starr & O. St.,

provides, among other things, as follows: "If no person is in possession or occupancy of such land or lot and the person in whose name the same was taxed or specially assessed upon diligent inquiry cannot be found in the county, * * * then such person or his assign shall publish such notice in some newspaper printed in such county, * * * which notice shall be inserted three times, the first time not more than five months and the last time not less than three months before the time of redemption shall expire. Provided however that if the owners of such land or lot, or the parties interested therein, can not be found in the county and the person in the actual occupancy is tenant to or is in possession under the owner or party interested therein, then service of such notice upon such tenant or occupant shall be deemed service upon the owner or party interested." The affidavit in the record in this case shows personal service upon one Dennis McMahon, the actual occupant and the only person in possession of the land, and also upon George Foster, agent of the owner, and also the nonresidence of William Foster, the owner and the person in whose name the land was assessed. An attempt was then made to secure service upon William Foster by publication in a newspaper, but this publication notice, as disclosed by the record, describes the land as located in section 1, instead of section 19, which would place this 40 acres five miles west and three miles south of the land which was actually sold under the judgment for delinquent taxes, and on which tax deed was sought to be procured. The affidavit does not state that Dennis McMahon or George Foster was tenant to or in possession under William Foster. An attempt was made to supply this discrepancy by oral proof upon the trial of the case. The title to be made under tax deed is one *stricti juris*, and it is not necessary to look further, where there has been a noncompliance with what the law makes a condition precedent to the right to a tax deed. It is not a matter of inquiry as to whether or not any person has been misled or injury has resulted. *Wisner v. Chamberlin*, 117 Ill. 568, 7 N. E. 68. "The execution of the deed rests entirely upon the sufficiency of the affidavit filed with the clerk, upon which it is issued. Parol evidence can not be introduced to supply defects or omissions in the affidavit. The statute only authorized a deed to be executed upon affidavit being filed which contains certain specified facts. If the affidavit does not contain the specified facts, the deed is not authorized, and is nugatory, regardless of what the real facts may be, and what may be proved." *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97. The same rule has been followed by this court in the case of *Hughes v. Carne*, 135 Ill. 519, 26 N. E. 517. The only apparent service, therefore, upon William Foster, the owner of the land and the person in whose name it was assessed, was the attempted service by publication, which described the land as in section

1, instead of section 19, and amounted to no such service as would authorize the issuing of a valid tax deed. Various other objections are urged to this tax deed, which it is not necessary to notice. The tax deed conveyed no title, and the chain of title of plaintiffs in error based on it was not such as would defeat the title of defendant in error. The judgment of the circuit court for defendant in error was proper, and it is therefore affirmed. Affirmed.

(158 Ill. 649)

APPLE v. BARCROFT.¹

(Supreme Court of Illinois. Nov. 4, 1895.)

ELECTION—AUSTRALIAN BALLOT LAW—CONTEST—EVIDENCE.

1. Under the statute requiring voters to mark a cross in the square opposite the name of the candidate of their choice, a ballot in which are marked in the square two lines which do not cross should not be counted.

2. Nor should a ballot be counted in which a cross is marked outside the square, and between the names of two candidates for the same office.

3. Nor should a ballot be counted that merely shows pencil erasures of all the names on one ticket.

4. Where the ballots are strung and sealed up, as required by statute, and preserved by the proper officer, the fact that he kept them in an unlocked bureau drawer does not render them incompetent evidence in an election contest, where the evidence shows that they had not been tampered with. *Kingery v. Berry*, 94 Ill. 513, distinguished.

Appeal from Bond county court; S. A. Phelps, Judge.

Proceedings by James B. Apple against John Barcroft to contest an election. Defendant obtained judgment. Contestant appeals. Reversed.

Northcott & Fritz, for appellant. William H. Dawdy, for appellee.

PER CURIAM. At the election in the town of Tamalco, in the county of Bond, for the election of township officers, held on the 3d day of April, 1894, the appellant and appellee were rival candidates for the office of commissioner of highways. It appears from the evidence that by the count and the result, as declared by the judges of election at the closing of the polls, appellant received 106 votes and appellee 107 votes, and appellee was declared duly elected. Appellant, by proper proceedings in the county court, contested the election, insisting that he, and not appellee, was elected to the office in question. Upon a recount of the ballots, and a hearing in the county court, it was decided by that court that appellant received 105 votes, and appellee 106 votes, and that appellee was elected, and entitled to hold said office. This appeal is prosecuted to reverse that judgment.

Eleven of the original ballots, numbered in the record from 1 to 11, inclusive, have been certified to this court for inspection.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Of these there are only five concerning which there is any dispute, it being conceded that the other six cannot be counted for either party, and that they were properly rejected by the county court. Of the five ballots in dispute, the court below counted two for appellee, numbered respectively 1 and 11, and one for appellant, numbered 10, and rejected the other two, numbered, respectively, 2 and 3. Ballot numbered 1, so counted for appellee, contains no cross in the appropriate place, opposite the name of appellee, or preceding the appellation or title of the party of which he was the candidate. There are two lines commencing in the circle, preceding said appellation or title, drawn with a lead pencil nearly perpendicularly through said circle, and through each of the squares opposite the names of the candidates. These lines were at some points coincident and at others separated. There was no cross, nor anything approaching one, in the circle, or in the square opposite appellee's name, as the statute required, to indicate an intention of the voter to vote for him, or any one else. The statute must be substantially complied with. To permit the voter to substitute some other method of his own of marking his ballot, to express his choice, for the one provided, would practically nullify the statute. It would not only lead to uncertainty in ascertaining the voter's intention, but would destroy the secrecy of the ballot, by means of distinguishing marks, by which the ballot of each voter could be identified. There was in this instance no such compliance with the statute by the voter as contemplated by its provisions, and the county court erred in counting this ballot for appellee. Ballot numbered 2 shows a cross, thus "X," not in the square or appropriate place opposite the name of appellant, but to the right of appellant's name, between such name and the square opposite the name of appellee. While there was some plausibility in the contention of appellant that the way in which this ballot was marked showed that it was the intention of the voter to vote for appellant, still, as was held in the case of *Parker v. Orr* (decided at the present term of this court) 41 N. E. 1002, it cannot be held a sufficient compliance with the statute. It is clear from the statute and the form of ballots prescribed that the appropriate place for the cross is in the circle or square preceding the title or name, and not some blank space discovered by the voter at the right of such title or name. As to the ballot in question, as the cross is between the names of appellant and appellee, being at the right of the former, and at the left of the latter, the only reason for supposing that the elector intended to vote for appellant, rather than for appellee, is that the cross is nearer appellant's than appellee's name. To hold such a ballot as one cast for either candidate would be mere guesswork. Ballot numbered 3 shows mere

pencil erasures of the name of appellant and all other names on the same ticket. No argument or authority is needed to show that the trial court ruled correctly in refusing to count this ballot for either party. As to ballots numbered 10 and 11, more difficulty is met with in determining whether or not they are in compliance with the statute. In each it appears that the voter attempted to make a cross in the circle at the head of the ticket, but with imperfect success. We are not, however, disposed to disturb the finding of the county court that they should be counted. But, as both are open to the same objection, and, if counted, one must be counted for appellant, and one for appellee, they are not important in the decision of the case.

It is perhaps unfortunate that the result of our determination is a tie, that appellant and appellee have received each 105 votes; but we are unable to come to any other conclusion. For a proper construction of the statute relative to the marking by the voter of his ballot, reference may be had to the case of *Parker v. Orr*, supra.

Appellee contends that the ballots should not be considered the best evidence in determining the result of the election, but that the result as declared and returned by the judges of the election should prevail, for the reason, as it is alleged, that the ballots had been exposed before the trial to intermeddling by unauthorized persons, and may have been tampered with. We cannot agree with appellee in this contention. The ballots were strung and sealed up, as required by the statute, and preserved by the town clerk. While the evidence showed that they were kept in an unlocked bureau drawer at his dwelling house, it also showed that the seal remained unbroken, and that they had not been tampered with. The case is very different from *Kingery v. Barry*, 94 Ill. 515, relied on by appellee.

We think the trial court erred in finding that appellee received one more vote at said election than appellant received, and that he was elected to, and entitled to hold, the office in question, and in not holding that the result of said election was a tie as to said office between appellant and appellee. The order and judgment of the county court is reversed, and the cause remanded. Judgment reversed.

(157 Ill. 659)

BEACH et al. v. PEOPLE ex rel. KERN,
County Collector.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

MUNICIPAL CORPORATIONS—ORDINANCE—LOCAL IMPROVEMENTS—JUDGE.

1. An ordinance providing for the laying of sewers in several streets is not void, as calling for a double improvement, where it is not shown

that the streets are so situated that the sewers could not constitute a single system. *City of Springfield v. Green*, 11 N. E. 261, 120 Ill. 269, followed.

2. An ordinance providing for a local improvement need not state that it is within the municipal limits. *Stanton v. City of Chicago* (Ill. Sup.) 39 N. E. 987, followed.

3. A county judge may hold county court in another county while the judge of the latter county is holding another branch of the same court. *Pike v. City of Chicago* (Ill. Sup.) 40 N. E. 567, followed.

4. Separate judgments may be entered confirming the same assessment as to different pieces of land. *Browning v. City of Chicago*, 40 N. E. 565, 155 Ill. 314, followed.

Appeal from Cook county court; Frank Scales, Judge.

Application by the people, on the relation of Charles Kern, county collector, for judgment for delinquent taxes. E. Kellogg Beach and others filed objections, which were overruled, and they appeal. Affirmed.

W. B. Keep and I. T. Greenacre, for appellants. J. D. Adair, for appellee.

BAILEY, J. This is an appeal from a judgment for the sale of lands of the several appellants, rendered by the county court of Cook county, in favor of the county collector, for the first and second delinquent installments of a special assessment by the city of Chicago, for a system of sewers in Wentworth avenue and other streets. The appellants interposed numerous objections to the entry of judgment, which were all overruled. It is conceded, as, of course, under the provisions of the statute, it must be, that, upon the application for judgment upon the assessment, no defense or objection could be made or heard which might have been interposed in the proceeding for the making of the assessment or the application for a confirmation thereof. But it is claimed, as held in *Scott v. People*, 142 Ill. 292, 33 N. E. 180, and other like cases that, if it is made to appear that the court confirming the assessment had no jurisdiction to enter such judgment, the judgment is not conclusive of the regularity of the assessment, but may, like any other judgment, be attacked collaterally by showing irregularities in the proceedings by which it was attempted to be levied. The objections filed in the present case, therefore, seek, among other things, to attack the jurisdiction of the court to render the judgment of confirmation. The facts are briefly these: The city of Chicago, on March 14, 1892, passed an ordinance for the construction of a system of sewers in Wentworth avenue and a number of other streets, and creating a district for that purpose, and also providing that the cost and expense may be defrayed by special assessment upon the property deemed to be benefited thereby. In pursuance of this ordinance, a petition was filed in the county court, and commissioners were appointed by the court to make the special assessment contemplated by the ordinance. The assessment roll

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

was returned to the county court April 28, 1892; and, a rule being entered fixing a time within which objections to the confirmation of the assessment might be filed, a large number of objections were filed on behalf of various property owners, including the appellants. On May 16, 1892, judgment of confirmation by default was entered against all the property as to which no objections had been filed. Afterwards separate trials were awarded to certain objectors. The cases of the remaining objectors were then classified into several classes, and a separate trial was had as to each class; and, as the result of each trial, a judgment of confirmation of the assessment as to the lands involved in such trial was entered. Thus, as it is claimed, at least six different judgments were entered, and the judgment order in the present proceeding recites as many as six different judgments of confirmation in the original assessment proceedings.

It is insisted, in the first place, that the ordinance upon which the assessment was based is void, and the whole proceeding, therefore, without jurisdiction, because the improvement provided for is a double improvement. The ordinance, it is true, provides for the laying of sewers in a considerable number of streets, but that of itself does not render the improvement double. In *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, the ordinance provided for paving a large number of streets in the city of Springfield, and it was held that the improvement was single. There is nothing in the record showing that the streets in which the sewers are to be laid are not situated in relation to each other in such way as to make the improvement single, and we cannot pronounce the ordinance void as a rule of law because it provides for laying sewers in various streets.

Another objection is that the ordinance failed to sufficiently state the location of the proposed improvement, so as to show that it was within the territorial limits and jurisdiction of the city of Chicago. This objection is settled and disposed of adversely to the contention of appellants by the case of *Stanton v. City of Chicago* (Ill. Sup.) 39 N. E. 987.

It is also contended that the judgment of confirmation is void, because it was entered before Judge Brown, the county judge of Du Page county, sitting as the judge of the county court of Cook county, while Judge Scales, the county judge of Cook county, was at the same time presiding in that court. This point, also, is settled adversely to the contention of the appellants by the decision in *Pike v. City of Chicago* (Ill. Sup.) 40 N. E. 567.

It is also objected that because there are several judgments of confirmation applicable, it is true, to different tracts of land, all the judgments subsequent to the first were rendered without authority of law

and are consequently void; and that, as the judgment of confirmation to the assessment against the lands of the appellants was rendered subsequent to one or more other judgments, the court was without jurisdiction to enter that particular judgment. The question of the power of the county court to enter more than one judgment of confirmation in assessment cases was considered in *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. 585, and the rule settled adversely to the present contention.

Some other points are made, which, as we understand the record, have either no foundation in fact, or are without substantial merits. Judgment of the county court will be affirmed. Judgment affirmed.

(158 Ill. 27)

**FERRIS et al. v. COMMERCIAL NAT.
BANK OF CHICAGO.¹**

(Supreme Court of Illinois. Oct. 11, 1895.)

BILL OF EXCEPTIONS—PRACTICE—ATTORNEYS—JUDICIAL NOTICE—AFFIDAVITS—FOREIGN NOTARY.

1. When a bill of exceptions is presented to the judge in due time, it may be signed and sealed by him after the time limited therefor *nunc pro tunc* as of the date of presentation, since a litigant should not be prejudiced by delay of the court.

2. Entering judgment on a verdict without formally overruling a pending motion to set aside the verdict is a mere informality, not assignable as error.

3. Courts will take judicial notice as to who are regularly licensed attorneys practicing at the bar of the state.

4. Where an attorney enters appearance for a defendant, the presumption is that he was authorized to do so.

5. Under Rev. St. 1893, c. 101, § 6, which declares that, when an oath is made out of the state, it may be administered by an officer authorized by the laws of the state in which it is so administered, and, if such officer have a seal, his certificate under his official seal shall be received as prima facie evidence of his authority, an affidavit sworn to before a foreign notary, who does not certify that he had authority to administer oaths, cannot be considered by a court. *Smith v. Lyons*, 80 Ill. 600, followed.

Error to appellate court, First district.

Assumpsit by the Commercial National Bank of Chicago against Luther L. Ferris and Joseph Lapham, copartners as L. L. Ferris & Co. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants bring error. Affirmed.

**J. A. Fullenwider, for plaintiffs in error.
Bulkley, Gray & More, for defendant in error.**

BAKER, J. A motion is made by defendant in error to strike the bill of exceptions from the record. It appears from a memorandum indorsed thereon by the trial judge that the bill of exceptions was presented to him on the 6th day of February, 1894, which was within the time limited therefor by the order of the court. The fact that the judge failed to

¹ Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

sign the same until the 23d day of February, and then signed and sealed it nunc pro tunc as of the 6th day of February, should not be permitted to work to the detriment of plaintiffs in error. The rule is that, where a party moves in apt time, he shall not be permitted to be injured by the delay or neglect of the court to act, but will be protected in his rights by a nunc pro tunc order, or otherwise. *Gray v. Brignerdello*, 1 Wall. 627.

This suit, which was upon a promissory note made by L. L. Ferris & Co., plaintiffs in error, was commenced in the circuit court of Cook county on the 12th day of January, 1894, and a declaration filed. On the same day, the appearance of the defendants, waiving service of process, and consenting to an immediate trial, was entered by Abbott & Baker, attorneys at law. The record shows that a jury was impaneled "to try the issues joined," and that there were verdict and judgment in favor of the plaintiff, and against the defendants. On January 13th, after verdict, but before judgment, a special appearance of the defendants was entered by Mr. James A. Fullenwider, who filed a motion to set aside the verdict. Without any express order overruling said motion, judgment was, on January 20th, entered upon the verdict nunc pro tunc as of January 12th; and on the same day a motion was made under the special appearance in the cause to vacate the judgment, and also a motion to continue the hearing of said motion to set aside the judgment, both of which were denied. Again, on January 27th, the defendants moved the court to set aside the order of January 20th, and renewed their motions, which had been on that day overruled, and, in support thereof, offered to read certain purported affidavits of the defendant Ferris and five other persons, taken in the dominion of Canada, and an affidavit of defendants' counsel Fullenwider, taken in this state; but the court refused to vacate its order of January 20th, and overruled the said motions. To all of which said rulings by the court the defendants excepted, and sought in the appellate court a reversal thereof; but the appellate court affirmed the judgment be-

low, and now by writ of error the record is brought here.

Plaintiffs in error contend that the trial court erred in rendering judgment pending, and without formally passing upon, their motion to set aside the verdict. This was a mere informality. The entry of judgment was in effect an overruling of the motion. *McIntyre v. People*, 38 Ill. 514; 12 Am. & Eng. Enc. Law, p. 1471, note 2, and authorities cited. We fail to discover any error in the rulings of the trial court. The material question raised by the various motions was whether or not Abbott & Baker were authorized to appear in behalf of the plaintiffs in error, and, unless the latter had shown an absence of authority in Abbott & Baker to so appear, they had no ground on which to stand; for the court will take notice that Abbott & Baker are regularly licensed attorneys at law practicing at the bar of this state. The presumption that the appearance entered by them was regular, and that they were authorized to act as they did, was not overcome by proof. *Ransom v. Jones*, 1 Scam. 291; *Leslie v. Fisher*, 62 Ill. 118; *Martin v. Judd*, 60 Ill. 78.

The purported affidavits taken in the dominion of Canada were void, and could not properly have been considered by the court. The notaries public before whom the papers were sworn to gave no certificates of their authority to administer oaths in the dominion of Canada. See Rev. St. c. 101, § 6, and *Smith v. Lyons*, 80 Ill. 600. The affidavit of James A. Fullenwider did not show a want of authority in Abbott & Baker to enter the appearance of plaintiffs in error. The statements contained therein touching this point were matters of which, in the nature of things, he could have had no personal knowledge. Statements of fact, and not simply of opinion or belief, could alone avail. Plaintiffs in error having thus failed to support their motions by proofs, there was therefore apparent to the trial court no reason why the said motions, or any of them, should be allowed. The judgment of the appellate court affirming the judgment of the circuit court is affirmed. Affirmed.



